New York City Zoning Resolution Section 12-10: A Third Phase in the Evolution of Airspace Law

Terence Kennedy

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj
Part of the Property Law and Real Estate Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/ulj/vol11/iss4/9
NEW YORK CITY ZONING RESOLUTION
SECTION 12-10: A THIRD PHASE IN
THE EVOLUTION OF AIRSPACE LAW

I. Introduction

New York City Zoning Resolution section 12-10\(^1\) limits the buildable floorspace that a structure may have\(^2\) and expresses this limitation in floor area ratios.\(^3\) Through a zoning lot merger, the floor area ratios of two or more zoning lots may be combined,\(^4\) thereby permitting a constructive physical transfer of airspace\(^5\) from one city lot\(^6\) to another. Using section 12-10 as a reference point, this Note will

---


3. Id. Floor area ratio (FAR) is the total floor area on a zoning lot, divided by the "lot area" of a zoning lot. Amended § 12-10, supra note 1, at 34. Thus, a building containing 20,000 square feet of floor area on a zoning lot of 10,000 square feet has a floor area ratio of 2.0. See id. "Lot area" is the area of a zoning lot. Id.

4. Newport Assocs., 30 N.Y.2d at 265, 283 N.E.2d at 601, 332 N.Y.S. at 618-19. The floor area ratio technique was incorporated into the zoning ordinance for low density residential districts of New York City as early as 1940, but was not extended to the city's commercial districts until 1961. Note, Development Rights Transfers in New York City, 82 YALE L.J. 338, 346 (1972). Simply put, a ratio is assigned to each district. If the ratio is five in a certain district then on a lot of 10,000 square feet a builder could only erect a structure containing 50,000 square feet of floorspace. Multiplying the ratio by the area of a particular lot yields the maximum permissible floorspace. Id. As a zoning tool, FAR prevents a builder from lowering the ceiling heights and sandwiching extra floors within the height limit in an attempt to circumvent the city's plan for density control. Marcus, Air Rights Transfer in New York City, 36 LAW & CONTEMP. PROBS. 372, 373 & n.1 (1970).

5. Airspace has been described as the space extending from the surface of the earth upward which either is occupied or utilized or is reasonably subject thereto or is otherwise required for the use and enjoyment of the surface land by the surface owners. Model Airspace Act § 2, reprinted in Wright, The Model Airspace Act; Old and New Law for Contemporary Land Use Problems, 1972 LAW & SOC. ORDER 529, 554 (1972). Airspace, then, is that space extending vertically upward from the surface boundaries of the landowner. Id. As in the Model Airspace Act, the use of "airspace" in this Note will not refer to the upper reaches of space occupied by aircraft. Id.

6. When applied to property in a city, a "lot" usually refers to that property which is bounded and described by the plat or survey of the city. Lehmann v. Revell, 354 Ill. 262, 277, 188 N.E. 531, 537 (1933); Greendale v. Suit, 163 Ind. 282, 284, 71 N.E. 658, 659 (1904); Adams v. Central City Brick & Block Co., 154 Mich. 448, 455, 117 N.W. 932, 935 (1908); Mawson-Peterson Lumber Co. v. Sprinkle, 59 Wyo. 334, 343, 140 P.2d 588, 591 (1943).
analyze the three major phases in the legal evolution of airspace. In its initial phase, airspace was considered to be a form of land inseparable from the soil owned by the surface landowner. Subsequently, the law permitted airspace to be severed from the soil, enabling the surface landowner to alienate the airspace while retaining title to the soil. However, the alienated airspace retained its physical location in space. The final phase, permitting the constructive transfer of airspace from one lot to another under the amended section 12-10, will be analyzed in light of the New York Court of Appeals' recent decision in MacMillan, Inc. v. CF Lex Associates.

The current section 12-10 requires the approval of certain “parties in interest” under section 12-10(d)(iv) before an airspace transfer can occur between two tracts of land with different owners. After a brief discussion of possible candidates within the category “parties in interest” under section 12-10(d)(iv), this Note concludes with an evaluation of the amended section 12-10 as a provision which (1) modern-

---

8. R. Wright, The Law of Airspace 224-26 (1968); see note 42 infra and accompanying text for a discussion of state statutes permitting the severance of airspace from the surface land.
9. Amended § 12-10, supra note 1, at 60.
12. Under the resolution a “party in interest” to the tract of land involved in the transaction gives such permission by executing and recording a written “declaration of restrictions.” Amended § 12-10, supra note 1, at 60-61 ¶ (d). The resolution provides that:

(iv) A “party in interest” in the portion of the tract of land covered by a Declaration shall include only (W) the fee owner or owners thereof, (X) the holder of any enforceable recorded interest in all or part thereof which would be superior to the Declaration and which could result in such holder obtaining possession of any portion of such tract of land, (Y) the holder of any enforceable recorded interest in all or part thereof which would be adversely affected by the Declaration, and (Z) the holder of any unrecorded interest in all or part thereof which would be superior to and adversely affected by the Declaration and which would be disclosed by a physical inspection of the portion of the tract of land covered by the Declaration.

Id. The resolution also provides that when a zoning lot is comprised of two or more lots contiguous for a minimum of ten feet that are under single fee ownership, each party having an interest therein is a “party in interest.” Amended § 12-10, supra note 1, at 60 ¶ (e). For the purposes of that subdivision:

(ii) A “party in interest” in the tract of land shall include only (W) the fee owner thereof, (X) the holder of any enforceable recorded interest superior to that of the fee owner and which could result in such holder obtaining possession of all or substantially all of such tract of land, (Y) the holder of
izes our stationary concept of real property and (2) establishes airspace property interests as being necessarily linked to the equivalent property interest in the land below.

II. Zoning Resolution Section 12-10

In adopting section 12-10 the New York City Planning Commission (the Commission) has altered the traditional description of a city lot. Like a traditional lot, a zoning lot can be a lot of record. A zoning lot, however, "can also be a tract of land consisting of two or more" lots of record located within a single block. When such contiguous lots are treated as one zoning lot, a "zoning lot merger" occurs. The ability to perform a zoning lot merger profoundly affects the commercial development of the lot.
New York City Zoning Resolution section 12-10 also limits the buildable floorspace that a structure may have. These limitations are expressed in floor area ratios. A zoning lot merger permits the floor area ratio of two or more contiguous lots to be combined. Thus, where an existing building on one of the contiguous lots does not completely utilize the floor area ratio for that building, a zoning lot merger permits the developer of the contiguous lot to incorporate the unused airspace when computing the maximum floorspace for any building he proposes to construct on that lot. An example illustrates the point. If a particular lot is 10,000 square feet with a floor area ratio of ten, then a developer may erect a building containing 100,000 square feet. Suppose, however, that the developer erects a building utilizing only 50,000 square feet. If he “merges” this lot with a contiguous lot with the same square footage and floor area ratio, then the developer of the contiguous lot may erect a building of 150,000 square feet, utilizing both the square footage allotted to it under its own floor area ratio (100,000 square feet) and the unused square footage from the first lot (50,000 square feet). This shift of allocated floorspace constitutes a constructive physical transfer of the unused airspace from one lot to another. The transfer is effective as long as the building which is the recipient of the transfer remains standing.

III. The Development of Airspace Law
A. The First Phase: Butler and Early Airspace Ownership

Resolution section 12-10 involves the doctrine of air rights. The doctrine of air rights has its origin in Roman law. In the sixteenth
century, the doctrine was incorporated into the English common law where it was a source of controversy and confusion. It was subsequently adopted in America. Four hundred years later, in

"unit of real property created through the horizontal subdivision of real estate . . . the right to occupy the space . . . over . . . a designated tract of land." Comment, Conveyance and Taxation of Air Rights, 64 Colum. L. Rev. 338 (1964). The term "air rights" has been frequently used in a discussion or delineation of property rights in airspace. Wright, supra note 5, at 530. The courts have adopted this term when referring to a § 12-10 transfer. MacMillan, Inc. v. CF Lex Assoc., 56 N.Y.2d 386, 390, 437 N.E.2d 1134, 1136, 452 N.Y.S.2d 377, 379 (1982); Newport Assoc., 30 N.Y.2d at 268, 283 N.E.2d at 603, 332 N.Y.S.2d at 621, (Breitel J., concurring); Pith Equities, Inc. v. New York Theological Seminary, 39 A.D.2d 890, 891, 333 N.Y.S.2d 970, 971 (1st Dep't 1972); Fur-Lex Realty v. Lindsay, 81 Misc. 2d 904, 906, 367 N.Y.S.2d 388, 391 (Sup. Ct. N.Y. County 1975).

27. The popular theory is that we derive our concept of airspace ownership from the Roman law. See Klein, Cujus Est Solum Ejus Est . . . Quousque Tandem?, 26 J. of Air L. & Com. 237, 240 (1959); Cooper, Roman Law and the Maxim "cujus est solum" in International Air Law, 1 McGill L.J. 23, 27-28 (1952). There is considerable disagreement among the scholars regarding the extent of the Roman landowner's claim over the airspace above his land. See, Klein, supra, at 239-40. One writer believes that Roman law gave the landowner control of the air column above his property limited to low altitudes such as the height of buildings and trees. Id. Yet the same writer believes that the spirit of the law would extend the control to any altitude. Id. Another writer illustrates that while some scholars believe the Roman law to impart an exclusive right tantamount to ownership, others believe that the Roman landowner did not in any way own the airspace above his land. Cooper, supra, at 27, 28.

28. The concept of airspace ownership first reached common law in the form of a maxim, appended to a sixteenth century case. Bury v. Pope, 78 Eng. Rep. 375 (1587). The applicable part of the maxim reads "cujus est solum, ejus est . . . usque ad coelum . . .," id., which means "[h]e who has the soil has everything up to the sky." R. Wright, supra note 8, at 16. Baten's Case helped to further establish the principle in the maxim by incorporating it into its opinion. Baten's Case, 77 Eng. Rep. 810, 811-13 (1610) (nuisance would lie when rainwater fell from defendant's overhanging roof onto the roof of plaintiff). However, the doctrine received a severe setback two centuries later. Pickering v. Rudd, 171 Eng. Rep. 400, 401 (1815) (when the board nailed to one's house invades the airspace above the land of another, no trespass occurs). The doctrine of the maxim was resuscitated shortly thereafter. Corbett v. Hill, 22 L.T.R. (n.s.) 263, 264 (1870) (the owner of the soil owns the column of air above the soil as well). Nevertheless, there is still disagreement in England as to whether or not a surface owner actually owns the airspace above his land or merely possesses rights to use that airspace. R. Wright, supra note 8, at 29-30.

29. The doctrine received a more consistent reception in America than it had in England. Kent adopted the principle wholeheartedly, asserting that land "has an indefinite extent, upwards as well as downwards . . .." 3 J. Kent, Commentaries on American Law 509 (11th ed. 1867). Cf. Lyman v. Hale, 11 Conn. 177, 184 (1836) (recognizing that branches overhanging another's land would constitute a nuisance since land comprehends everything in a direct line over it); Hannabalson v. Sessions, 116 Iowa 457, 90 N.W. 93 (1902) (trespass committed by stretching arm across a boundary); Smith v. Smith, 110 Mass. 302, 303-04 (1872) (barn eaves which project over another's land constitute a trespass). The integration of the maxim's concept did not vary substantially from state to state. See R. Wright, supra note 8, at 38.
1906, the doctrine was adopted in New York in Butler v. Frontier Telephone Co. In that case, the New York Court of Appeals unequivocally asserted that “space above land is real estate the same as the land itself.” It further emphasized that airspace as land is inseparable from the soil. The court concluded, moreover, that the owner of the surface land is the owner of the airspace above it and that he enjoys the right to the exclusive possession of the airspace as a part of his land.

In United States v. Causby, the United States Supreme Court determined that airplane flights over private land constituted a taking of property in violation of the fifth amendment if they interfered

---

30. 186 N.Y. 486, 79 N.E. 716 (1906) (action of ejectment will lie where the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by defendant over plaintiff's premises).
31. Id. at 491, 79 N.E. at 718.
32. Id.
33. Id. While the court suggested that the upward exent of this ownership was not limitless, it noted that there was no limitation within the bounds of any structure that had been erected by man. Id. Nebraska followed Butler by declaring that ejectment would be the proper remedy where the eaves of a house projected over plaintiff's land. Otherwise the encroachment would ripen into adverse possession. McDivitt v. Bronson, 101 Neb. 437, 438, 163 N.W. 761, 762 (1917). However, McDivitt did not repeat the Butler declaration, 186 N.Y. at 891, 79 N.E. at 718, that airspace is real property the same as surface land itself.

In other jurisdictions intrusions into the airspace of a landowner did not warrant an action for ejectment. See Norwalk Heating & Lighting Co. v. Vernam, 75 Conn. 662, 55 A. 168 (1903) (the projection of a structure over the land of another which does not touch the land is not an ouster of possession); Beck v. Ashland Cigar & Tobacco Co., 146 Wisc. 324, 130 N.W. 464 (1911) (where landowner is undisturbed in the possession of his land, remedy for encroachment is in trespass and not in ejectment). Ejectment will not lie for anything upon which entry cannot be made or of which the sheriff cannot deliver execution. Village of Lee v. Harris, 206 Ill. 428, 434, 69 N.E. 230, 231-32 (1903); Hancock v. Mac Avoy, 151 Pa. 469, 25 A. 47, 48 (1892). Wright suggests that the failure of the courts to grant ejectment when airspace was intruded upon stemmed from the belief that airspace is incapable of possession. R. Wright, supra note 8, at 53. One authority strenuously took this position at the time. Comment, Insurance Policies-Implied Waiver of Conditions, 16 Yale L.J. 273, 276 (1906-07). The significance of Butler is that it departed from this line of thinking. The decision was never modified.

34. 328 U.S. 256 (1946) (flights of air craft over private land which are so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land are as much an appropriation of the use of the land as more conventional entry upon it and thus constitute a violation of the fifth amendment).
35. The fifth amendment of the United States Constitution provides: “nor shall any person ... be deprived of ... property without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. A “taking” of property refers to the government's power of eminent domain. J. Nowak, R. Rotunda & J. Young, Constitutional Law 437 (1978). The United States may “take” property pursuant to its power of eminent domain either by inverse condemnation or by instituting condemnation proceedings. Best v. Humboldt
with the landowner's use and enjoyment of the surface land. Subsequently, in Griggs v. Allegheny County, the Court declared that a taking could occur even if flights passed over space which Congress had defined as navigable. These decisions are significant because they establish that even our highest court recognizes airspace ownership, which is at the heart of the Butler decision.

B. The Second Phase: Severance of Aerial Land from Terrestrial Land

Contemporaneously with Butler's declaration that airspace is a form of land inseparable from the soil, airspace in New York was...
being horizontally separated from the surface land, permitting it to be sold or leased apart from the surface land.\textsuperscript{40} Since then many landowners have sold or leased the airspace above their land.\textsuperscript{41} Moreover, states have enacted statutes covering such conveyances.\textsuperscript{42} Recently,

\textsuperscript{40} For a general discussion of the events which gave rise to the severance of airspace from the land beneath it, see R. Wright, supra note 8, at 223-37 (discussing the leasing of airspace above railroads at the turn of the century). At that time, Grand Central Station was in great need of an expanded facility to accommodate its ever-increasing traffic of trains. \textit{Id.} at 224. An arrangement was entered into wherein the airspace above a certain level of the ground was leased to developers. Beneath that airspace the railroad was able to construct an expanded two-level terminal yard. By the time the new station opened, buildings had already been erected in the airspace above it. \textit{Id.} at 224-25 (quoting Schmidt, \textit{Public Utility Air Rights}, 54 A.B.A. Rep. 839, 841 (1929)). The transaction did not result in litigation on the subject of air rights. R. Wright, supra note 8, at 225. A railroad case arose later, however, which readily accepted a lease of airspace. Phoenix Ins. Co. of Hartford v. New York & Harlem R.R. Co., 59 F.2d 962, 964 (2d Cir.), \textit{cert. denied}, 287 U.S. 645 (1932) (railroad has the power to lease supersurface space not needed for railroad purposes as long as it does not interfere with or cause injury to the estate in reversion). Similar leasing arrangements occurred in Chicago in the late 1920's. R. Wright, supra note 8, at 229. In 1927 Illinois passed a statute which permits a railroad, union depot or terminal company to sell or lease the airspace above the ground upon the approval of the Illinois Commerce Commission. \textit{Ill. Ann. Stat.} ch. 114, § 174a (1954 & Supp. 1981). The Illinois court permits railroads to show the use to which such portion of its airspace could have been put but for condemnation under eminent domain. City of Chicago v. Sexton, 408 Ill. 351, 357, 97 N.E.2d 287, 290 (1951).

\textsuperscript{41} Today many of Manhattan's buildings are built in airspace. See R. Wright, \textit{supra} note 8, at 261-63. While appearing to rest on the earth's surface, they actually terminate at a point above the ground and are supported by hidden piers and columns. Wright, \textit{supra} note 5, at 540-41. Other cities (e.g., Chicago, Washington, D.C., Los Angeles, Detroit, Milwaukee, New Orleans, Dallas, Houston, Philadelphia, Cleveland) have joined New York in recognizing and permitting the conveyance of airspace apart from the land. R. Wright, \textit{supra} note 8, at 263-67.

\textsuperscript{42} See, e.g., \textit{Ark. Stat. Ann.} § 76-137 (1981) (airspace over state highways, county roads, streets of cities or towns may be leased to owners of private properties); \textit{Cal. Sts. & Hy. Code} § 104.12 (West Supp. 1982) (permitting the Department of Public Works to lease areas above or below state highways for any term not to exceed 99 years subject to such restrictions as the department deems necessary and to deposit the revenue from such leases in the State Highway Account); \textit{Colo. Rev. Stat.} § 38-32-101 (1982) (providing for the creation of estates, rights, and interests in areas above the ground in persons or corporations other than the owners of the land); \textit{Conn. Gen. Stat. Ann.} § 10-290d (West 1977) (permitting a municipality, with the approval of the state board of education, to convey an interest in the airspace over land used for school purposes to a private developer for residential or non-residential use or to a public non-municipal or quasi-municipal corporation); \textit{id.} § 12-64 (West 1972 & Supp. 1972-1981) (leased airspace may be assessed and taxed apart from the land); \textit{id.} § 13a-80a (West Supp. 1982) (allowing the commissioner of transportation to sell, lease, or convey any interest the state may have in the airspace above or below a state highway); \textit{Ga. Code Ann.} § 32-6-117 (1982) (air rights over proposed and existing limited access highways may be leased for development); \textit{La. Rev. Stat. Ann.} § 48.381 (West 1965 & Supp. 1983) (granting the issuance of permits for the construction of buildings over highways); \textit{Mass. Ann. Laws} ch. 40,
the Oklahoma legislature, in enacting the Oklahoma Airspace Act,\(^43\) has declared that airspace is real property. Under the Act all rules governing real property are applicable to airspace.\(^44\) However, despite extension of the \textit{Butler} doctrine that airspace was a form of land...
inseparable from the soil, none of these provisions allows airspace to be constructively transferred from one physical location to another.

C. The Third Phase: Constructive Transfer of Airspace

1. A New Concept of Real Property

It has been suggested that the modern essence of real property is its potential for profitable use rather than its physical location in space. Thus, if real property could be shifted from one location to another profitably, its essence would not be violated. Section 12-10 has enabled such an event to occur. The authorities generally refer to the transactions which occur under section 12-10 and its counterpart, sections 74-79 to 74-793, as an air right or development right.

45. Marcus, supra note 13, at 88. Mr. Marcus, General Counsel to the New York City Planning Commission points out that location in space as the essence of real property is based on three grounds: (1) that land is valued for the quality of its surface, (2) that land is the principal source of wealth and stability, (3) that title to land is based on seisen. Id. at 86-89. Marcus argues that the first of these is a remnant of medieval society, the second is no longer a foregone conclusion, and the third is a ceremonious institution long since abandoned in the law. Id.

46. The only conflict would be with the deep-seated feeling that real property is more than profit-generating property and that its essence is indeed its location in space. Id. at 103.


48. New York City Zoning Resolution §§ 74-79 to 74-793 (1968). The ordinance gives the owners of landmark sites additional opportunities to constructively transfer airspace to contiguous lots. Moreover, landmarks can transfer airspace to parcels across streets and street intersections or to lots "across the street and opposite to another lot or lots which, except for the intervention of streets or street intersections, form a series extending to the lot occupied by the landmark building" when all lots are in common ownership. Id. See Marcus, supra note 4, at 374-75.

A landmark transfer requires a three-step procedure: (1) the owner of the landmark must obtain permission from the Landmark Commission who determines whether a transfer is compatible with the landmark; (2) the City Planning Commission studies the effects a transfer would have on the occupants of buildings in the vicinity of the transferee lot and whether or not the landmark owner will preserve the landmark; and (3) the Board of Estimate is the final arbiter, granting or denying permission. Costonis, supra note 26, at 585-86. Nevertheless, the airspace transfers in §§ 74-79 are conceptually the same. See Note, supra note 4, at 348-49.

49. Development rights have been described as "planning shorthand for the amount of floor area that may be developed on a given lot," note, supra note 4, at 338, and as "unused development potential," Marcus, supra note 4, at 375, or simply as "development potential," id. at 377-78. Development rights and air rights are terms which are used interchangeably in the context of transfers. See, e.g., id. at 372-78.
transfer.\textsuperscript{50} Beneath this nebulous terminology,\textsuperscript{51} however, airspace itself is being transferred.

2. \textit{Unamended 12-10: Disregard of Butler and the Landowner’s Exclusive Ownership of Airspace}

The original section 12-10\textsuperscript{52} permitted a zoning lot merger only if the contiguous lots were in single ownership.\textsuperscript{53} Ownership of a zoning lot was statutorily defined to include a lease of not less than fifty years duration with an option to renew such lease so as to provide for a total lease of not less than seventy-five years duration.\textsuperscript{54} In \textit{Newport Associates v. Solow},\textsuperscript{55} a fee owner claimed that the transfer of airspace above his land by such a lessee diminished the value of his reversionary interest.\textsuperscript{56} Interpreting the resolution literally, the court of appeals


\textsuperscript{51} One court has characterized development rights as disembodied abstractions of man’s ingenuity. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 598, 350 N.E.2d 381, 388, 385 N.Y.S.2d 5, 11 (1976), \textit{aff’d}, 438 U.S. 104 (1978). In essence, the area is being constructively transferred from one site to another. Note, \textit{supra} note 4, at 338. The transaction, then, is a spatial transfer. See Marcus, \textit{supra} note 13, at 103; City of New York Dep’t of City Planning, Midtown Development Project Draft Report 52 (1980) (illustration of zoning lot merger).

\textsuperscript{52} New York City Zoning Resolution art. 1, ch. 2, § 12-10 (1961) (amended 1977) [hereinafter cited as § 12-10 unamended].

\textsuperscript{53} \textit{Id.} See CPC Doc., \textit{supra} note 18, at 1.

\textsuperscript{54} Section 12-10 unamended, \textit{supra} note 52.


\textsuperscript{56} \textit{Id.} at 265-66, 283 N.E.2d at 601, 332 N.Y.S.2d at 619. In that case the lessee had exercised his status as an owner and transacted an air rights transfer without the permission of the land owner. \textit{Id.} at 266, 283 N.E.2d at 600, 332 N.Y.S.2d at 617.
held that absent a provision in the lease to the contrary, the defendant had the power to utilize the air rights above the plaintiff's property.\textsuperscript{57} Hence, a constructive transfer of airspace from one lot to another was facilitated. Consequently, the unamended section 12-10 as interpreted by the court in \textit{Newport Associates} conflicted with \textit{Butler}'s holding that a surface landowner is the sole owner of the superadjacent air-space,\textsuperscript{58} since under \textit{Newport Associates}, a lessee of the surface could also own the airspace.\textsuperscript{59}

\section{The Amendment of Section 12-10 and Provision for “Parties in Interest”}

The real estate community was displeased with the result in \textit{Newport Associates}.\textsuperscript{60} In response, the Commission eliminated the provision that permitted a lessee of fifty years with an option for a total of not less than seventy-five years to qualify as an owner of a zoning lot.\textsuperscript{61} At the same time the Commission realized that certain parties held property interests in airspace\textsuperscript{62} equivalent to those held in the land\textsuperscript{63} which deserved protection.\textsuperscript{64} In order to protect these property rights, the Commission amended section 12-10,\textsuperscript{65} requiring a declaration of single zoning lot status to be executed by all “parties in interest” whenever air rights are transferred under the Resolution to a parcel other than one owned by the feeowner of the transferor parcel.\textsuperscript{66}

\begin{thebibliography}{9}
\item 57. \textit{Id.} at 267, 283 N.E.2d at 602, 332 N.Y.S.2d at 620.
\item 58. \textit{Butler} stated that the land owner possessed the airspace exclusively. 186 N.Y. at 491, 79 N.E. at 718 (1906).
\item 59. As Judge Breitel pointed out in his concurring opinion, either the land owner or the long term lessee could have acted to the exclusion of the other. It all depended on who acted first. See \textit{Newport Assocs.}, 30 N.Y.2d at 268, 283 N.E.2d at 603, 332 N.Y.S.2d at 621 (Breitel, J., concurring). Thus, the landowner's right to the airspace was not totally destroyed. In the absence of exercising his right, however, he would probably have to reserve in the lease all claims to airspace. \textit{Id.} at 268-69, 283 N.E.2d at 603, 332 N.Y.S.2d at 621. In any event, this effectively eliminated the landowner's \textit{Butler} claim to exclusive possession.
\item 60. One authority noted that the decision was a shock to the real estate community. Rifkin, \textit{TDR's are a Growth Industry in Regulation of Land Use}, N.Y.L.J., Nov. 18, 1981, at 34, col. 1.
\item 61. CPC Doc., \textit{supra} note 18, at 2.
\item 62. \textit{Id.}
\item 63. The Commission gave two examples, mortgagees and lienors. \textit{Id.}
\item 64. \textit{Id.} at 3.
\item 65. Amended § 12-10, \textit{supra} note 1.
\item 66. CPC Doc., \textit{supra} note 18, at 2. The declaration is made in a written Declaration of Restrictions covering the whole tract of land or in separate written Declarations of Restrictions which cover parts of the tract of the land and which in the aggregate cover the entire tract of land. Each “party in interest” executes a declara-
In such a case the resolution provides:

(iv) A "party in interest" in the portion of the tract of land covered by a Declaration shall include only (W) the fee owner or owners thereof, (X) the holder of any enforceable recorded interest in all or part thereof which would be superior to the Declaration and which could result in such holder obtaining possession of any portion of such tract of land, (Y) the holder of any enforceable recorded interest in all or part thereof which would be adversely affected by the Declaration, and (Z) the holder of any unrecorded interest in all or part thereof which would be superior to and adversely affected by the Declaration and which would be disclosed by a physical inspection of the portion of the tract of land covered by the Declaration.67

The first "party in interest" whose permission would be required for an air rights transfer to occur is a fee owner. Thus, the Commission vindicated Butler's holding that the landowner likewise owns the superadjacent airspace.68 But the Commission provided that there could be other "parties in interest"69 enjoying a property interest in the airspace as well.70 Identification of these parties in interest is difficult since they are described rather than identified in the Resolution.71 The recent New York Court of Appeals decision in MacMillan v. CF Lex Associates,72 however, has provided a framework to make these identifications.

4. MacMillan: The Return to Butler

In MacMillan v. Cadillac Fairview Corp.,73 a long term lessee of a building claimed that he was a "party in interest" under the resolution, excepting those who waive their right to make such a declaration in a written instrument executed by such party in recordable form and recorded at or prior to the recording of the declaration. Each declaration and waiver of right to execute a declaration must be recorded in the Conveyances Section of the Office of the City Register or, if applicable, the County Clerk's Office of the county in which such tract of land is located, against each lot of record constituting a portion of the land covered by the declaration. Amended § 12-10, supra note 1, at 60.

67. Amended § 12-10, supra note 1, at 61.

68. That is, at least now airspace could not be "constructively" transferred away from the landowner's lot without his permission.

69. Amended § 12-10, supra note 1, at 61 ¶ (d)(iv).

70. They would enjoy a property interest in the airspace to the extent that they, too, could prevent constructive transfer of airspace.

71. Amended § 12-10, supra note 1, at 61 ¶ (d)(iv).


tion. The lessee occupied the entire rentable area of the building above the ground floor and ninety-five percent of the usable area as a whole.  

The appellate division determined that the lessee could be a party in interest under subsection (d)(iv)(x) or (y) of the resolution. The court placed particular emphasis on the fact that the lessee would be adversely affected by an interference with light and air and by the congestive effect on community services if a transfer occurred. It found support for its conclusion in the statement of legislative intent. Although the court limited its holding to the facts of the case, using the same rationale, a tenant of far less area plausibly could argue that he is a “party in interest.” Moreover, the decision departs from Butler’s principle that rights to airspace are derived from rights in the ground. The decision indicated that even though section 12-10 had been amended to correct the result achieved in Newport, the influence of Newport remained.

The court of appeals reversed, holding that the statute required that any “party in interest” had to have an interest in the tract of land itself and that the term “tract of land” referred only to the surface land and not to the buildings thereon. The Court re-established the Butler principle which declared that rights to airspace are incident to or

74. Id. at 16, 448 N.Y.S.2d at 669.
75. Id. at 19, 448 N.Y.S.2d at 671.
76. Id. at 19, 448 N.Y.S.2d at 670. 12-10 ¶ (d)(iv)(Y) states that the holder of any enforceable recorded interest in all or part of the tract of land which would be adversely affected by the declaration is a “party in interest.” Amended § 12-10, supra note 1, at 61.
78. Id. The court isolated one of 11 enumerated general purposes from New York City Zoning Resolution art. 3, ch. 1, § 31-00 (g) (1977), which stressed the Commission’s concern that the bulk of buildings in relation to the land around them and to one another should be limited.
80. Since, under Newport Assocs., a long term lessee who did not have an interest in the surface land would have been able to effect a transfer, and under MacMillan v. Cadillac Fairview Corp. a long term lessee without an interest in the surface land would be able to prevent a transfer.
81. The term “tract of land” was not defined in the resolution. Using Webster’s Third International Dictionary to derive the meaning of the words “tract” and “land”, the court noted that neither alone nor in combination do the words “tract” and “land” connote, in a lexicographic sense, buildings or improvements. MacMillan, 56 N.Y.2d at 391, 392, 437 N.E.2d at 1137, 452 N.Y.S.2d at 380.
82. Id. at 389, 393, 437 N.E.2d at 1135, 1137, 452 N.Y.S.2d at 378, 380 (citing Butler, 186 N.Y. 486, 79 N.E. 716 (1906)).
associated with ownership of the surface property and not with ownership of structures thereon.\textsuperscript{83}

The decision that "parties in interest" who are not fee owners also must have an interest in the land itself is an extrapolation from and complement to \textit{Butler}. \textit{Butler} determined that airspace is land. Like the more traditional surface land, there is at all times an owner of the airspace.\textsuperscript{84} Ownership of surface land is not necessarily absolute,\textsuperscript{85} but subject to the rights of those who possess a lesser yet recognized property interest in the airspace.\textsuperscript{86} Similarly, ownership of airspace can be limited by the rights of those who possess a corresponding lesser but recognized property interest in the airspace.

\textit{Butler} identified the owner of the airspace by merely looking downward to the owner of the surface land below. By analogy, the court's reading of section 12-10 in \textit{MacMillan} identifies those parties who possess other recognized property interests in the airspace by similarly looking downward to those who possess other recognized property interests in the surface land below. Consequently, the \textit{MacMillan} decision not only represents a vindication of \textit{Butler}, it represents a sophistication of the concepts which \textit{Butler} stands for.

\section*{IV. Parties in Interest}

The amended section 12-10 as interpreted by the \textit{MacMillan} decision provides guidelines for identifying "parties in interest" under subdivision (d) of the resolution.

Remaindermen and reversionary interests,\textsuperscript{87} for example, would qualify under subparagraph (x) as long as their interest had been

\begin{itemize}
\item \textsuperscript{83} Id. at 391, 437 N.E.2d at 1137, 452 N.Y.S.2d at 380.
\item \textsuperscript{84} With few exceptions everything that exists, whether physically tangible or not, can be subjected to the ownership of man. W. Robinson, \textit{Elementary Law} § 38 (1882).
\item \textsuperscript{85} An owner of property may part with many of the powers, privileges, rights, and immunities that constitute the complete property. 1 \textit{Restatement of Property} § 10 comment c (1936).
\item \textsuperscript{86} For example, the owner of property may mortgage it or have it subjected to a mechanic's lien. Id. A mortgage represents a security for a loan, and is executed and delivered by a borrower, subsequently being recorded as a lien on his real estate. It secures either (1) "money lent at the time" (2) "money to be advanced" or (3) "money already owing." 3 D. Harvey & E. Biskind, \textit{Harvey's Law of Real Property and Title Closing} § 830 (1982). A lien is "a claim which one person has upon the property of another as security for some debt or charge," tying that property to the satisfaction of the debt or claim. United States v. 1364.76875 Wine Gallons, 60 F. Supp. 389, 392 (E.D. Mo. 1945).
\item \textsuperscript{87} A remainder is a future estate voluntarily created in a person other than the creator, whereas a reversion is created by operation of law and is an interest in an estate that reverts to a grantor or his heirs after another estate has terminated with no residue remaining. D. Harvey & E. Biskind, \textit{supra} note 86, at 117. See N.Y. Est.
recorded prior to the making of declarations of interest, since holding such interest could result in the holder obtaining possession of such tract of land. A mortgagee or lessee who possesses an option to buy would likewise fall under this provision as long as it had complied with the applicable recording statute prior to the declarations, since they, too, by virtue of their interest could obtain possession of the tract of land. The holder of the mortgage, a remainderman, a reversioner and a ground lessee, could likewise argue that they would be adversely affected as contemplated under subsection (y). A lien-holder with a recorded interest could make a similar argument. However, since the resolution does not define the term “adversely affected” and the term was not construed in MacMillan, the courts will be the final arbiter of what interests are capable of being “adversely affected.” Subsection (z) applies to unrecorded interests and it exacts the strictest criteria. Not only must the interest be prior to and adversely affected, the adverse effect must be disclosed by a physical inspection of the portion of the tract of land covered by the Declaration. This added element, “disclosure by physical inspection,” was

Powers & Trusts Law §§ 6-4.3 to 6-4.4 (McKinney 1967 & Supp. 1982-1983). A future estate is “an estate limited to commence in possession at a future time, either without the intervention of a precedent estate or on the determination by lapse of time or otherwise, of a precedent estate created at the same time. Id. § 6-4.2.

88. The recording must occur prior to the declaration. Section 12-10, supra note 1, at 61 ¶ (iv)(x).

89. This section of the resolution merely requires that the party could obtain possession of a portion of the tract of land as opposed to necessarily obtaining possession. Amended § 12-10, supra note 1, at 61 ¶ (iv)(x).

90. A mortgagee on income producing property usually enjoys the express right of entering into possession of the property in the event of a default. D. Harvey & E. Biskind, supra note 84, at § 897. Upon exercising his option to buy the land a lessee would also come into possession, and ownership connotes the right to possession, present and future. 1 H. Tiffany & B. Jones, The Law of Real Property § 2 (3d ed. 1939).

91. The Commission, in indicating that a mortgagee would be a “party in interest,” referred to a mortgagee’s unwillingness to have his security diminished. CPC Doc., supra note 18, at 2. A remainderman or reversioner could similarly argue that an air rights transfer would adversely affect their estate by reducing its value. In a ground lease, a lessor conveys land to a lessee who undertakes to develop the property through new construction or substantial improvements. Hecht, Variable Rental Provisions in Long Term Ground Leases, 72 Colum. L. Rev. 625, 626 (1972). The lessor receives a stipulated annual rent and the lessee’s rental costs are tax deductible. The size and scope of the construction significantly affects the measure of the lessee’s return. Id. at 636. If the airspace were transferred, the lessee’s construction would be limited. This, in turn, would affect the measure of his return. Arguably, this would amount to an adverse effect.

92. See note 86 supra for definition of a lien.

93. Amended § 12-10, supra note 1, at 61 ¶ (iv)(z).
also not defined in the resolution. Therefore, identification of those who would fit this category would be highly speculative.94

V. Conclusion

Butler declared that airspace is land inseparable from the soil, which is owned by the subadjacent landowner. Just as a tract of surface land may be separated into two tracts, permitting one tract to be conveyed while the other is retained, airspace may be separated from the land beneath it, permitting its separate conveyance. The Oklahoma Airspace Act attempts to perfect the status of airspace as

94. One authority, however, has suggested that at the very least a holder of a visible physical prescriptive easement in the parcel to be improved would be a “party in interest” under the resolution. Rifkin, supra note 60, at 34, col. 2. A prescriptive easement is one which comes into being when a party adversely, openly and notoriously, continuously and uninterruptedly uses the land of another for a statutory period of time. Beutler v. Maynard, 80 A.D.2d 982, 983, 437 N.Y.S.2d 463, 465 (4th Dep't 1981). If it can be shown that the use is open and notorious, continued and uninterrupted for the required time, it is presumed adverse. Id., 437 N.Y.S.2d at 465 (prescriptive use not established since plaintiff failed to establish that he had used cabin continuously).

In the final analysis, now that it has been determined that the rights in airspace are derived from rights in the surface, the openness of these categories is probably better suited to the purpose of protecting all property interests in the airspace than outright identification would have been since it prevents the exclusion by oversight of parties whose interests would be undeniable if they could be foreseen, while still permitting the court to apply the equivalent terrestrial interest to airspace. In contrast to “parties in interest” under ¶ (d) of amended § 12-10 is the term “parties in interest” under ¶ (c). The differences between the two uses of the term in the resolution can be observed by comparing the different provisions covering the term “zoning lot.” Paragraph (a) of the amended § 12-10 covers the situation of an existing zoning lot of record. Paragraph (b) covers those tracts of land which are in single ownership so that every interest in the complete tract is in the hands of the owner. Amended § 12-10, supra note 1, at 60 ¶ (a) & (b). Neither situation involves “parties in interest.” Paragraphs (c) & (d) cover the remaining situations. Under ¶ (c) the tracts of land are merely under single fee ownership with respect to which there are “parties in interest” whose interest is in all or substantially all of the complete tract. Id. at 60-61 ¶ (c), (c)(ii). Since a party in interest under this subsection has an interest in both the granting and the receiving lot, the transfer of the air rights from one parcel to another does not result in a reduction of his interest therein. No declaration is required under this subsection. Id. at 60 ¶ (c). In contrast to ¶ (c), ¶ (d) covers situations where the “party in interest” has an interest in one parcel or the other. Amended § 12-10, supra note 1, at 61 ¶ (d)(iv). See Marcus, The New Zoning Lot Definition, 6 REAL ESTATE L.J. 336, 338 (1978); Letter from John C. Nelson, Chairman, Committee on Real Property Assoc. of the Bar of the City of New York to New York City Planning Commission 5 (October 14, 1976).

Since a “party in interest” who did not have an interest in the receiving lot would suffer a diminution to his interest by an air rights transfer, he is required to make a declaration before such a transfer can be effective. CPC Doc., supra note 18, at 2-3.
Traditionally, land has been considered stationary property. Under section 12-10, airspace can be constructively transferred from one parcel to another. At the same time, however, the amended section 12-10 as interpreted by MacMillan ensures that a surface landowner retains his claim to the airspace, a claim which had been jeopardized by Newport under the unamended section 12-10. Moreover, section 12-10 and MacMillan have refined the Butler concept. Butler looked to the landowner to identify the owner of the superadjacent airspace. Section 12-10 and MacMillan look to those with lesser but recognized interests in the land to identify those who have the corresponding interests in the airspace for purposes of the statute. This in turn has provided a proper and predictable framework for identifying who "parties in interest" are under the resolution. Thus two significant events have occurred. The law of real property has been liberated by airspace in the sense that real property's physical location in space is no longer its essence. At the same time, airspace has been made to conform to the traditions of real property in the sense that airspace is subject to property interest in the same manner as its terrestrial parent.

In conclusion, although section 12-10 seemingly represents a radical departure from traditional real property law, MacMillan illustrates that section 12-10 is actually the best tradition of the law since it both releases society from principles which are archaic and reasserts the commitment of society to principles which are timeless.

Terence Kennedy

95. The Oklahoma Airspace Act is a virtual reproduction of The Model Airspace Act. See note 44 supra.