

1988

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Recommended Citation

Margaret Giordano, *Over-Stuffing the Envelope: The Problems with Creative Transfer of Development Rights*, 16 Fordham Urb. L.J. 43 (1988).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol16/iss1/2>

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OVER-STUFFING THE ENVELOPE: THE PROBLEMS WITH CREATIVE TRANSFER OF DEVELOPMENT RIGHTS

I. Introduction

The zoning envelope is an imaginary three-dimensional mold which represents a building's maximum development potential.¹ Not every building in New York City, however, is the same height. Some structures fall well within the boundaries of the zoning envelope, while others burst through its confines.² The concept of transferable development rights (TDR) permits manipulation of the zoning envelope.³

TDR represents a variety of transactions in which the owner of a small building or landmark severs, sells and transfers his unused development rights to another parcel of land.⁴ The New York City

1. See E. BASSET, ZONING 23-24 (1940) [hereinafter BASSET]; Allen, *The Envelope Stuffers*, MANHATTAN, INC., Aug. 1986, at 23 [hereinafter Allen].

2. See *supra* note 1.

3. See *id.*

4. See generally Basile, *A View from Here; Transferable Development Rights*, ENVTL. COMMENT, Apr. 1978, at 9; Bellandi, *Transfer of Development Rights*, 5 COMP. URB. RES. 85 (1978); Costonis, *Development Rights Transfer: Description and Perspectives for a Critique*, 34 URB. LAND 5 (1975); Costonis, *Space Adrift: A Synopsis*, 34 URB. LAND 16 (1975); Scardino, *Trading Air to Build Towers*, N.Y. Times, Feb. 21, 1986, at D1, col. 2 [hereinafter Scardino]; Dunlap, *City's Plan to Sell Air Rights at Landmarks Draws Critics*, N.Y. Times, Aug. 26, 1984, at 51, col. 1 [hereinafter Dunlap]. Specifically, the transfer of development rights (TDR) takes place within a zoning lot. The concept of a zoning lot, however, has continuously expanded over the years. Traditionally, a zoning lot consisted of a tract of land, either subdivided or containing two or more lots held in single fee or lease ownership. See N.Y. CITY ZONING RES. § 12-10(a)-(c) (1961). Thus, a transfer of air rights could take place only between adjacent properties held in common ownership. See *infra* notes 41-63 and accompanying text. An amendment to the zoning resolution enlarged the definition of a zoning lot to include contiguous separately-owned parcels, provided that the owners recorded a declaration of single lot ownership. N.Y. CITY ZONING RES. § 12-10 (1977), reprinted in Report on the Modifications to the Definition of Zoning Lot, [1977] N.Y. CITY PLANNING COMM'N REP. N-760226-ZRY, at 3 [hereinafter REP. N-760226-ZRY]. Consequently, TDR can take place between two adjacent separately-owned parcels within a single zoning lot. See *infra* notes 64-78 and accompanying text. Landmark buildings are a special case. A 1968 amendment to the zoning resolution expanded the concept of adjacent

Zoning Resolution permits non-landmark buildings to transfer development rights to adjacent, contiguous sites.⁵ Landmarks have the flexibility to transfer development rights across a street or intersection.⁶ The transfer of development rights within the scope of New York City's zoning laws has multiple benefits. The transferor site can economically realize its development potential without actually renovating or rebuilding.⁷ The owner of the receiving parcel can build a structure that exceeds the zoning resolution's height and density regulations.⁸ Most importantly, since TDR within the guidelines of the zoning resolution permits the redistribution of development rights rather than the relocation of these rights to other areas of the city,⁹ developers benefit from the transaction without sacrificing the urban planning objectives behind zoning laws.¹⁰ The urban planning objectives which have formed the basis of New York City's zoning laws since 1916¹¹ include population density control,¹² preservation of light and air on city blocks¹³ and preservation of the architectural character of neighborhoods.¹⁴

Private developers and not-for-profit institutions¹⁵ are presently engaging in innovative transactions that are pushing TDR to new

lot to include lots across the street or intersection from a landmark. N.Y. CITY ZONING RES. § 74-79 (1968), reprinted in Report on Transfer of Development Rights from Landmark Sites, [1968] N.Y. CITY PLANNING COMM'N REP. CP-20253, at 301 [hereinafter REP. CP-20253]. Thus, a landmark can transfer unused development rights to a non-contiguous receiving lot with more flexibility than an ordinary building. See *infra* notes 79-107 and accompanying text.

5. N.Y. CITY ZONING RES. § 12-10 (1986); see *infra* notes 108-22 and accompanying text.

6. N.Y. CITY ZONING RES. § 74-79 (1986); see *infra* notes 79-107 and accompanying text.

7. Allen, *supra* note 1, at 23; Dunlap, *supra* note 4, at 51, col. 1; Scardino, *supra* note 4, at D3, col. 1.

8. See *supra* note 7.

9. REP. N-760226-ZRY, *supra* note 4, at 1-3; see *infra* notes 118-21, 201 and accompanying text.

10. See *infra* notes 205-19 and accompanying text.

11. The 1916 zoning ordinance was intended to protect public health and safety and to assure adequate light and air. See Evans, *New York City Zoning: A Comparison of 1916 and 1961 Ordinances* 7 (1980) (unpublished thesis) (available at Avery Library of Columbia University) [hereinafter Evans]; see also ZONING HANDBOOK: A GUIDE TO THE NEW YORK CITY ZONING RESOLUTION 7 (1980) [hereinafter 1980 HANDBOOK].

12. G. FORD, BUILDING ZONES: A HANDBOOK OF RESTRICTIONS ON THE HEIGHT, AREA AND USE OF BUILDINGS, WITH ESPECIAL REFERENCE TO NEW YORK CITY 1 (1917) [hereinafter FORD].

13. *Id.*

14. See Allen, *supra* note 1, at 24; Dunlap, *supra* note 4, at 51, col. 1; Scardino, *supra* note 4, at D1, col. 1; *infra* notes 211-13 and accompanying text.

15. Not-for-profit institutions include private and municipal performing arts

extremes.¹⁶ Economic and development pressures¹⁷ have forced these cultural¹⁸ and religious¹⁹ institutions, as well as the City of New York,²⁰ to consider financing their particular services through the transfer of unused development rights.²¹ Projects involving Grand Central Terminal,²² South Street Seaport²³ and Old Slip²⁴ exemplify exceptions that the Board of Estimate has created to its own zoning laws for the benefit of not-for-profit organizations.²⁵ In 1969, for example, the Board of Estimate amended the zoning resolution to permit Grand Central Terminal to transfer its unused development

centers, museums and a variety of religious and non-religious landmark buildings. See Blum, *Museums Turning to Air Rights for Revenues*, N.Y. Times, Jan. 7, 1983, at A1, col. 2 [hereinafter Blum]; see also Freilberg, *City Center's Blockbusting Performance*, METROPOLIS, at 11 (June 1985); *Landmarking Enhances Ministries*, METROPOLIS, at 10 (June 1985); Gargan, *Planning Agency Backs Firehouse Air-Rights Sale*, N.Y. Times, Mar. 19, 1981, at B3, col. 2 [hereinafter Gargan].

16. See Allen, *supra* note 1, at 23-24; Dunlap, *supra* note 4, at 51, col. 1; Scardino, *supra* note 4, at D1, col. 1. Typically, in TDR transactions between not-for-profit institutions and developers, a private developer offers an institution a large amount of money and perhaps an annual operating subsidy, or even additional facilities in a newly constructed building in return for the transfer of the organization's unused development rights, which exist because the organization's building contains less bulk than is allowable under current zoning. See, e.g., Report on Permit Application to Transfer Development Rights to 30 Old Slip, [1984] N.Y. CITY PLANNING COMM'N REP. C-841070-ZSM, at 13-14 [hereinafter REP. C-841070-ZSM]; see *infra* notes 180-203 and accompanying text. The developer can transfer this additional developable floor area to a building being constructed on an adjacent or nearby site. The result is a larger, more valuable building which is now permitted to exceed the maximum bulk for its particular site by the amount of air rights transferred from the not-for-profit organization's building. See *supra* note 8.

17. See Blum, *supra* note 15, at 1, col. 2; Winkleman, *Non-profits: At What Price Survival?* METROPOLIS, at 18 (Dec. 1981) [hereinafter Winkleman].

18. The Museum of Modern Art in New York City considered air rights transfer because it would provide the museum with the resources to build its new wing. Blum, *supra* note 15, at 1, cols. 1-2.

19. Religious landmarks have sold their air rights for various economic reasons. St. Bartholomew's church on Park Avenue, in New York City, recognized that the sale of air rights "amounts to a permanent endowment" enabling the church to increase its services to the poor. Goldberger, *Who Owns Landmarks?*, PRESERVATION NEWS, Mar. 1984, at 1, col. 2. The officials of St. Paul's and St. Andrew's churches hope that proceeds from a development rights sale will keep these structures standing. See Winkleman, *supra* note 17, at 19.

20. New York City's sale of unused development rights over a midtown firehouse on the West Side represented a way of generating additional revenues for the city. See Gargan, *supra* note 15, at 3, col. 2.

21. See generally Blum, *supra* note 15, at 1, col. 2; Winkleman, *supra* note 17, at 18.

22. See *infra* notes 127-60 and accompanying text.

23. See *infra* notes 161-68 and accompanying text.

24. See *infra* notes 180-204 and accompanying text.

25. Allen, *supra* note 1, at 23.

rights to previously impermissible distances.²⁶ In order to revitalize the South Street Seaport area, the City Planning Commission created a special district of transferor lots and receiving lots and permitted the transfer of air rights between the two directly or through an intervening "air rights bank."²⁷ Most recently, the City Planning Commission approved a plan to merge a landmark, a firehouse and a portion of Old Slip Street to form a "landmark zoning lot" in order to increase the amount of available development rights for transfer.²⁸

Perhaps the most important benefit of creative TDR transactions²⁹ is the survival of cultural institutions through the generation of revenues.³⁰ The price of survival, however, may be increased bulk on city blocks, loss of light and air on the streets, congestion in the subways and a strain on neighborhood services.³¹

This Note will explore whether these innovative TDR transactions involving not-for-profit organizations have stretched the zoning laws and set precedents that thwart traditional urban planning objectives.³² First, the Note will examine the evolution of TDR in New York City from the inception of the concept in the 1916 Zoning Ordinance to the current definition in the New York City Zoning Resolution. Second, this Note will discuss the radical applications of TDR in connection with Grand Central Terminal, South Street Seaport and Old Slip. Finally, the Note will evaluate creative applications of TDR in light of urban planning goals and propose a literal interpretation of the existing zoning resolution to protect these goals.

II. The Evolution of TDR

The evolution of the concept of TDR corresponds with the patterns of urban growth and the increasing sophistication of real estate

26. See *infra* notes 127-60 and accompanying text.

27. See *infra* notes 161-79 and accompanying text.

28. See *infra* notes 180-204 and accompanying text.

29. The City Planning Commission articulated some of these benefits: "[t]he owner of a designated landmark building can realize an economic gain by selling his unbuilt, but allowable development rights; the buyer of these rights, in return, can acquire additional floor area he would otherwise not have; the neighborhood, meanwhile can retain an essential amenity, a revitalized landmark." REP. CP-20253, *supra* note 4, at 303.

30. Mayor Koch maintains that the survival of our cultural institutions is "extremely important to the future of this city Culture is one of the main reasons so many tourists come here and one of the reasons so many companies stay," Blum, *supra* note 15, at 1, col. 2 (quoting Mayor Edward Koch).

31. FORD, *supra* note 12, at 1; see *infra* notes 205-19 and accompanying text.

32. Allen, *supra* note 1, at 23-24; Dunlap, *supra* note 4, at 51, col. 1.

development deals that New York City has experienced since the inception of city zoning regulations. The historical evolution of the concept of TDR spans a sixty year period from 1916 to 1977.³³ The 1916 Zoning Ordinance allowed adjacent lots to combine their air rights to erect a tower exceeding height regulations.³⁴ This merger of rights provides an early example of TDR. In 1961, the City Planning Commission reorganized the zoning law and introduced the concept that every building lot had a maximum development potential.³⁵ This concept supported the idea that a building underutilizing its development potential could sell and transfer the excess air rights.³⁶ The 1961 Zoning Resolution also permitted TDR between a parcel held by a long-term lease contiguous to a parcel commonly owned in fee.³⁷ The City Planning Commission helped relieve landmarked buildings of some of the constraints of landmark status designation in the 1968 amendment to the zoning resolution.³⁸ The amendment permitted landmarks to transfer their unused air rights across a street or intersection.³⁹ In the 1977 Zoning Resolution, the City Planning Commission amended the definition of zoning lot ownership to provide for TDR between two contiguous, separately owned parcels as long as a recorded declaration of merger was filed.⁴⁰

A. The 1916 Zoning Ordinance

Prior to 1916, New York City had no laws limiting the height of buildings.⁴¹ The city, however, recognized the need for zoning to control population density, building size and land use.⁴² In 1916, the Board of Estimate enacted the city's first building zone reso-

33. See *infra* notes 41-122 and accompanying text.

34. See *infra* notes 41-56 and accompanying text.

35. See *infra* notes 61-67 and accompanying text.

36. See *id.*

37. See *infra* notes 68-72 and accompanying text.

38. See *infra* notes 79-107 and accompanying text.

39. See *id.*

40. See *infra* notes 108-22 and accompanying text.

41. Some cities did have some form of building height regulation by 1916. See BASSETT, *supra* note 1, at 22-24 (Boston, Los Angeles). In New York City, however, "[a] building could legally rise to any height whatever, assume any form, be put to any use, and cover 100 percent of the lot from the ground to the sky." Many builders erected structures that covered the entire lot space and had the same floor area on the top floors as at the base. It is easy to see how overdevelopment of this sort "made dark canyons of" Wall Street's narrow passages. *Id.*

42. *Id.* at 23; 1980 HANDBOOK, *supra* note 11, at 7.

lution,⁴³ based on studies made by appointed commissions.⁴⁴ The first commission, the Commission on the Height, Size and Arrangement of Buildings, studied methods of land use controls and building height regulation.⁴⁵ The final report of the second zoning commission, the Commission on Building Districts and Restrictions, appointed to formulate building restrictions and organize the districts,⁴⁶ became the 1916 Zoning Ordinance.⁴⁷ The 1916 Resolution sought to maintain property values⁴⁸ and preserve light and air on city streets⁴⁹ through height,⁵⁰ area⁵¹ and public use regulations.⁵²

43. See FORD, *supra* note 12, at 1; see also Evans, *supra* note 11, at 10. Originally, New York City relied on the concept of eminent domain to legitimize its zoning proposal. BASSET, *supra* note 1, at 26. Ultimately, the zoning resolution was enacted and its constitutionality upheld under a declaration of the state's police power. *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920) (new zoning ordinance adopted by Board of Estimate held lawful exercise of police power that did not encumber real property); see also *Village of Euclid v. Amber Realty, Co.*, 272 U.S. 365, 395 (1920) (zoning ordinances are valid exercise of police power for municipalities, provided regulations are reasonable and not arbitrary); E. BASSET, *ATTITUDES OF COURTS TOWARDS ZONING* 3 (1923).

The rationale behind this choice was two-fold. First, the purpose of the ordinance was to protect the health, safety and general welfare of New York citizens. Second, an effective zoning plan would never be implemented by an exercise of eminent domain. Under the theory of eminent domain, a municipality must compensate an owner for confiscated property. The city anticipated that this would result in a laborious and expensive proceeding for almost every land parcel. Under the police power, a municipality need not compensate an owner for property taken or limitations imposed on its use. *Id.*; FORD, *supra* note 12, at 28; see also F. WILLIAMS, *THE LAW OF CITY PLANNING* 11-19 (1922).

44. See Evans, *supra* note 11, at 7, 10.

45. See BASSET, *supra* note 1, at 20; FORD, *supra* note 12, at 1; Evans, *supra* note 11, at 7, 10.

46. Evans, *supra* note 11, at 10.

47. See BASSET, *supra* note 1, at 20-21; Evans, *supra* note 11, at 7, 10.

48. FORD, *supra* note 12, at 1.

49. See BASSET, *supra* note 1, at 20, 23; FORD, *supra* note 12, at 1; Evans, *supra* note 11, at 19; see also COMMISSION ON BUILDING DISTRICTS, *FINAL REPORT* 35-36 (1916) [hereinafter *FINAL REPORT*].

50. Height regulations were based on adjacent street width calculations. See *FINAL REPORT*, *supra* note 49, at 321; see also N.Y. CITY ZONING RES. § 8 (1916), reprinted in *FINAL REPORT*, *supra* note 49, at 236. See generally G. FORD, *BUILDING, HEIGHT, BULK AND FORM* 63-65 (1916).

51. The zoning resolution provided for five classes of area districts, distinctive in their varying regulations as to depths of yards and other open spaces. See FORD, *supra* note 12, at 4, 5; *FINAL REPORT*, *supra* note 49, at 38; see also N.Y. CITY ZONING RES. § 10 (1916), reprinted in *FINAL REPORT*, *supra* note 49, at 238.

52. The Commission provided for four classes of use districts: residential, business, unrestricted and undetermined. See FORD, *supra* note 12, at 14; *FINAL REPORT*, *supra* note 49, at 15; see also N.Y. CITY ZONING RES. § 2 (1916), reprinted in *FINAL REPORT*, *supra* note 49, at 233.

This provision imposed limitations on a building's height based on varying multiples of adjacent street width.⁵³ The law, however, permitted towers to exceed all height and setback limitations provided that they did not occupy more than twenty-five percent of the area of the lot at their base.⁵⁴ An air rights transfer under the 1916 Zoning Ordinance was an agreement by a developer to combine the unused air rights from a contiguous lot⁵⁵ to create a sufficiently large lot which could comfortably support a tower.⁵⁶

B. TDR Meets FAR: The 1961 Zoning Resolution

In the late 1950's, it became clear that the 1916 Zoning Ordinance was obsolete.⁵⁷ Overbuilding continued in New York City's already congested areas while other sections remained underdeveloped.⁵⁸ As a result, in 1961, the Vorhees Zoning Study, a major research project commissioned to investigate the shortcomings of the 1916 Ordinance, proposed a new resolution.⁵⁹ The 1961 Zoning Resolution introduced

53. See FINAL REPORT, *supra* note 49, at 32; see also N.Y. CITY ZONING RES. § 8 (1916), reprinted in FINAL REPORT, *supra* note 49, at 236.

One scholar elaborated on these limitations:

The ordinance contained five classes of height districts which limited the height of a building at the street line to a varying multiple of the street width upon which the building fronted. The five districts were 1 times, 1 1/4 times, 1 1/2 times, 2 times, and 2 1/2 times street width. Streets which were less than 50 feet wide were considered 50 feet wide and streets which were more than 100 feet wide were considered 100 feet wide. At intersections, the height of the wider street governed building development for 100 feet back onto the narrower street, or in the case of a single corner building, 150 feet back.

Evans, *supra* note 11, at 12.

54. N.Y. CITY ZONING RES. § 9(d) (1916), reprinted in FINAL REPORT, *supra* note 49, at 237.

55. Under New York Department of Buildings guidelines, a "lot" was deemed to be any number of contiguous parcels held in common ownership or separate ownership if one of the parcels profited from the adjoining parcel's air rights through sale, lease or other conveyance. Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOKLYN L. REV. 867, 871-72 [hereinafter Marcus]; see also N.Y. CITY ZONING RES. § 9(d) (1916) (accompanying drawings), reprinted in FORD, *supra* note 12, at 6.

56. Marcus, *supra* note 55, at 873; see FINAL REPORT, *supra* note 49, at 262-64; see also N.Y. CITY ZONING RES. § 9(d) commentary at 6 (1916), reprinted in FORD, *supra* note 12, at 6.

57. VOORHEES, WALKER, SMITH & SMITH, ZONING NEW YORK CITY: A PROPOSAL FOR A ZONING RESOLUTION FOR THE CITY OF NEW YORK vi (1958) [hereinafter VOORHEES & WALKER].

58. *Id.*

59. *Id.*; see also Evans, *supra* note 11, at 41.

two important concepts: (1) floor area ratio (FAR);⁶⁰ and (2) long-term lease zoning lot ownership.⁶¹

Development rights have been expressed in terms of FAR⁶² since 1961.⁶³ FAR is the principal control on the physical volume of a building.⁶⁴ The underlying concept behind FAR is that each building lot in the city has a maximum amount of volume and usable floor area which can be built upon.⁶⁵ The City Planning Commission designates each zoning lot an FAR number ranging from .5 to 15.⁶⁶ The buildable floor area of any building is the product of the lot's gross square footage multiplied by its FAR number.⁶⁷ For example, on a 100' by 100' lot with FAR 10, a developer could construct a building with a maximum of 100,000 gross square feet. This concept—that every building lot has a maximum development potential—predated the TDR concept that a site which did not utilize all of its air rights could transfer that excess to another parcel.

In 1961, the Board of Estimate expanded the definition of zoning lot⁶⁸ ownerships to permit the holder of a long-term lease on the

60. See *infra* notes 62-67 and accompanying text.

61. See *infra* notes 68-78 and accompanying text.

62. Floor area ratio controls the physical volume of a building and represents the relationship between the floor area of a building and the area of the lot on which it stands. ZONING HANDBOOK: A GUIDE TO THE NEW YORK CITY ZONING RESOLUTION 16 (1961) [hereinafter 1961 HANDBOOK]. “ ‘Floor area’ is the sum of the gross areas of the several floors of a building . . . measured from the exterior faces of exterior walls or from center lines of walls separating two buildings” and “ ‘[f]loor area ratio’ (FAR) is the total floor area on a zoning lot, divided by the lot area of that zoning lot.” N.Y. CITY ZONING RES. § 12-10 (1961); see also *Newport Assoc., Inc. v. Solow*, 30 N.Y.2d 263, 265, 283 N.E.2d 600, 601, 332 N.Y.S.2d 617, 618 (1972), *cert. denied*, 410 U.S. 931 (1973). For example, a building containing 20,000 square feet of floor area on a zoning lot of 10,000 square feet has an FAR of 2.0.

63. Evans, *supra* note 11, at 45.

64. 1961 HANDBOOK, *supra* note 62, at 16.

65. VOORHEES & WALKER, *supra* note 57, at 49.

66. The lowest FAR in any district is .5 FAR. A building with .5 FAR can contain floor space only equal to one-half the area of the lot on which it stands. See 1961 HANDBOOK, *supra* note 62, at 9.

The highest FAR for high density office districts is 15. This FAR, however, may increase if the developer takes advantage of bonuses. See *id.*; *infra* notes 193-94 and accompanying text.

67. See 1980 HANDBOOK, *supra* note 11, at 9.

68. The definition of zoning lot currently provides that two or more adjacent parcels can form a single zoning lot if they are commonly owned. REP. N-760226-ZRY, *supra* note 4, at 1. A zoning lot under the 1961 zoning resolution was defined as either:

[1] A tract of land, either unsubdivided or consisting of two or more contiguous lots of record, located within a single block, which, on the

zoning lot to exercise control over the parcels in the lot.⁶⁹ Many developers took advantage of this new definition by obtaining leases on many parcels contiguous to the one that they held in fee ownership.⁷⁰ In this way, they were able to build maximum bulk structures on the land they held in fee, while using the available FAR parcels they controlled by a long-term lease.⁷¹ The two main advantages for the developer were: (1) he could obtain large amounts of extra floor area without the large capital outlay required to purchase the adjacent sites; and (2) he could deduct air rights lease payments from his taxes as ordinary business expenses.⁷² Costly legal problems,⁷³ however, accompanied the termination⁷⁴ of these development rights leases.⁷⁵ Courts had to determine the rights of the original lessee and the fee owner of the formerly leased property.⁷⁶ The City

effective date of this resolution or any applicable subsequent amendment thereto, was in single ownership, or [2] A tract of land, located within a single block which at the time of filing for a building permit . . . is designated by its owner or developer as a tract all of which is to be used, developed, or built upon as a unit under single ownership.

N.Y. CITY ZONING RES. § 12-10 (1961) (emphasis omitted).

69. Compare Proposed Comprehensive Amendment to the N.Y. City Zoning Res. § 12-10 (Aug. 18, 1960) (in which new addition to definition appears) with Proposed Comprehensive Amendment to the N.Y. City Zoning Res. § 12-10 (Mar. 2, 1960) (to which new definition has not yet been added). The 1961 amendment to the zoning resolution incorporated into the definition of "zoning lot" the provision that "ownership of a zoning lot shall be deemed to include a lease of not less than 50 years duration, with an option to renew such lease so as to provide a total lease of not less than 75 years duration." N.Y. CITY ZONING RES. § 12-10 (1961) (emphasis omitted).

70. See, e.g., REP. N-760226-ZRY, *supra* note 4, at 2. In *Newport*, the defendant owned two contiguous parcels in fee and leased plaintiff's contiguous parcel for a term greater than 70 years. The defendant, in constructing a 45-story office building on its fee property, was able to incorporate more floor area by transferring development rights from the leased parcel. See *Newport*, 30 N.Y.2d at 265, 283 N.E.2d at 601, 332 N.Y.S.2d at 618-19.

71. See, e.g., *Newport*, 30 N.Y.2d at 265, 283 N.E.2d at 601, 332 N.Y.S.2d at 619. The amendment permitted the defendant to use the excess air space on the leased property in assessing maximum floor space for the building constructed on the fee property because the fee property was contiguous to the lease-held property. See *id.*

72. R. PELLICCIOTTI, *THE EVOLUTION AND INNOVATIVE UTILIZATION OF TRANSFERABLE DEVELOPMENT RIGHTS IN MANHATTAN* 6 (1986).

73. REP. N-760226-ZRY, *supra* note 4, at 1-2.

74. These leases, private agreements between the concerned parties, could be terminated by a breach or bankruptcy of the lessee at any time. *Id.*

75. *Id.* at 1. A party could terminate "if the lessee failed to pay the required rent or if the holder of a mortgage on the leased parcel that was superior to the development rights lease foreclosed on the lessor." Marcus, *supra* note 55, at 874.

76. The issue was whether the owner of the improved parcel, after termination

Planning Commission had to take away the ability of the lessee to transfer development rights from the leased parcel without notice to the fee owner of that parcel.⁷⁷ In order to resolve these issues, the New York City Board of Estimate amended the zoning resolution's definition of a zoning lot in 1977.⁷⁸

C. Landmark Relief: The 1968 Amendment

In 1968, the New York City Planning Commission amended its TDR regulations,⁷⁹ to provide economic relief⁸⁰ for registered landmark⁸¹

of the lease on the contiguous lot, was "entitled to maintain and occupy all of his built space, notwithstanding that a portion of his original zoning lot had been lost, his remaining lot was now overbuilt, and his building now non-complying." Marcus, *supra* note 55, at 874.

It was both legally and literally unclear whether the fee owner of the formally leased property (*i.e.*, mortgagee or lienor) had any development potential left to his parcel. Legally, the issue was whether the fee owner could now build upon the formerly leased parcel despite the transfer of unused development rights to the contiguous lot. *See id.* As a practical matter, the fee owner of the formerly leased property was often unaware of the transfer of his unused development rights. Under leasehold agreements "unused development rights [could] be shifted . . . from one parcel to another without notice to any interested party" despite the fact that the rights of these fee owners were superior. REP. N-760226-ZRY, *supra* note 4, at 2. This inequity, in particular, prompted the 1977 amendment to the zoning resolution's definition of zoning lot. *Id.*

The *Newport* decision seemed to resolve the legal issue. The court held that the owner of leased property did pass to the lessee the right to utilize unused air rights connected with the parcel. 30 N.Y.2d at 268, 283 N.E.2d at 602, 332 N.Y.S.2d at 620-21. The issue was finally resolved when the New York Court of Appeals affirmed the decision of the First Department of the Appellate Division that "once . . . one of the contending parties utilized the air rights over the leased property the other contending party was shorn of all such rights. In short, the laurel wreath went to the one first to exercise the right." 873 Third Avenue Corp. v. Kenvic Assocs., 109 A.D.2d 489, 492, 492 N.Y.S.2d 727, 730 (1st Dep't 1985), *aff'd*, 67 N.Y.2d 767, 491 N.E.2d 679, 500 N.Y.S.2d 506 (1986).

77. New York City recognized the importance of binding all parties in interest to the TDR arrangement to prevent the possibility of overbuilding. REP. N-760226-ZRY, *supra* note 4, at 2.

78. *Id.* at 1.

79. *See* REP. CP-20253, *supra* note 4, at 301.

80. The City Planning Commission articulated two purposes for amending the TDR regulations: to help maintain landmark buildings and to provide economic relief to the landmark owners by permitting the transfer of development rights from a landmark site to a contiguous lot or a lot across the street or intersection. *See id.* at 302-03.

81. The term "landmark" encompasses "[a]ny improvement, any part of which is thirty years or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as a landmark." NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-302(n) (1986); *see* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 110 n.9 (1978); Goldin, *Policy on Landmarks*

buildings.⁸² The constraints⁸³ of landmark status designation,⁸⁴ imposed by the 1965 Landmarks Preservation Law,⁸⁵ created severe financial hardships for city landmarks.⁸⁶ The controversy⁸⁷ over whether the Penn Central Transportation Co. could redevelop the Grand Central Terminal, played a major role in liberalizing the zoning resolution to compensate⁸⁸ for these prohibitions.

Must Be Reassessed, N.Y. Times, Mar. 23, 1982, § 8, at 10, col. 1 [hereinafter Goldin].

82. REP. CP-20253, *supra* note 4, at 301. The new landmark amendment to the zoning resolution permitted landmarks to transfer development rights to an adjacent lot, provided that the adjacent lot utilized these rights to build a structure in architectural harmony with the landmark building. See N.Y. CITY ZONING RES. §§ 74-79 (1968), reprinted in REP. CP-20253, *supra* note 4, at 301. More importantly, the amendment expanded the term "adjacent lot" to mean a lot "contiguous to the lot occupied by the landmark building or one which is across a street and opposite to the lot occupied by the landmark building, or, in the case of a corner lot, one which fronts on the same street intersection as the lot occupied by the landmark building." *Id.* (emphasis omitted).

83. The restrictions landmark designation imposes on a landmark owner include a duty to maintain exterior fixtures of the building in good repair and to secure approval from the City Planning Commission to alter these features. *Penn Central*, 438 U.S. at 111-12; see also NEW YORK, N.Y., ADMIN. CODE ch. 3, §§ 25-306 to 25-311 (1986); Goldin, *supra* note 81, at 1, col. 1. The purpose of these limitations is to balance "the public interest in the maintenance of the structure and the landowner's interest in use of the property." *Penn Central*, 438 U.S. at 112.

84. The Landmarks Preservation Commission has primary responsibility for administering the Landmarks Preservation Law. See *Penn Central*, 438 U.S. at 110. The responsibility of the Commission in designating landmark status is to identify properties and areas that have special historical or aesthetic value in satisfaction of the Landmarks Preservation Law's criteria. NEW YORK, N.Y., ADMIN. CODE ch. 3, §§ 25-302(n), 25-303 (1986), construed in *Penn Central*, 438 U.S. at 110.

85. The enactment of the Landmarks Preservation Law stemmed from the realization that New York City's endurance as both a tourist center and financial capital rested on the preservation of its landmarks through "comprehensive measures to safeguard desirable features" of the buildings and surrounding areas. *Penn Central*, 438 U.S. at 109; see also NEW YORK, N.Y., ADMIN. CODE ch. 3, § 25-301 (1986).

86. See Winkleman, *supra* note 17, at 18.

87. In the *Penn Central* decision, Penn Central Transportation Co. challenged the constitutionality of the Landmarks Preservation Law and its prohibition on a landmark's reconstruction and development. The Landmark Preservation Commission had designated Grand Central Terminal a landmark in 1967. 438 U.S. at 115. Penn Central hoped to increase its income through the construction of a multistory office tower above the terminal. *Id.* at 116-17. The Supreme Court held that an application of the Landmarks Preservation Law did not constitute the taking of property without just compensation or due process of law in violation of the fifth and fourteenth amendments. *Id.* at 119.

88. The purpose of liberalizing the conditions under which landmarks could transfer their development rights was "to ensure that the Landmarks Law would

The amendment expanded the concept of "adjacent lot" beyond contiguous parcels⁸⁹ to include lots across the street or intersections from the landmark.⁹⁰ The rationale of this provision was to increase the air rights transfer options⁹¹ of landmarks generally located in areas of dense development.⁹²

The City Planning Commission incorporated several limitations into the amendment to compensate for the broadened definition of "adjacent lot."⁹³ The receiving lot could not receive more than a twenty percent floor area increase⁹⁴ as a result of the transfer.⁹⁵ In addition, the landmark owner could not sell the same portion of his unused floor area more than once.⁹⁶ The City Planning Com-

not unduly restrict the development options of the owners of Grand Central Terminal" as well as other landmark owners. *Id.* at 114; REP. CP-20253, *supra* note 4, at 303.

89. For a pre-1961 definition of "zoning lot," see *supra* note 55 and accompanying text.

90. The 1968 amendment to the zoning resolution expanded the term "adjacent lot" to mean (1) a lot contiguous to the landmark building; (2) a lot across a street and opposite to the landmark building; or (3) in the case of a corner lot, a lot that "fronts on the same street intersection as the lot occupied by the landmark building." N.Y. CITY ZONING RES. § 74-79 (1968), *reprinted in* REP. CP-20253, *supra* note 4, at 301 (emphasis omitted).

91. See *supra* note 88 and accompanying text; see also REP. CP-20253, *supra* note 4, at 303.

92. REP. CP-20253, *supra* note 4, at 302-03. The City Planning Commission understood the delicate balance of factors:

[A] number of the [c]ity's designated landmarks are located on lots where the zoning resolution would permit much larger buildings to be constructed. Such zoning quite properly reflects the fact that these particular lots are located in part of New York where intensive development is not only generally appropriate but also economically desirable. The City Planning Commission [also] realistically faced the fact that quite a few of the landmarks most valuable to preserve for aesthetic and historic reasons are also located on lots whose economic potential greatly exceeds their present use.

Id.; see also Allen, *supra* note 1, at 23.

93. REP. CP-20253, *supra* note 4, at 302-03.

94. *Id.* The City Planning Commission limited the amount of air rights transferable to any one zoning lot contiguous to the landmark to encourage architecture that would "relate to and enrich the area surrounding the [c]ity's landmarks," and "to insure that no single zoning lot [would] become burdened with an excessive concentration of bulk." *Id.*

95. *Id.* at 302. The resolution provided that a receiving lot could not obtain air rights from a landmark that would cause it to "exceed the basic maximum allowable floor area by more than 20 per cent." N.Y. CITY ZONING RES. § 74-792 (1968), *reprinted in* REP. CP-20253, *supra* note 4, at 302 (emphasis omitted).

96. REP. CP-20253, *supra* note 4, at 303. Although a landmark owner could not sell the same portion of these excess air rights more than once, he could sell separate portions "of his unused floor area to several adjacent owners." *Id.*

mission reserved the right to approve any development-rights transactions⁹⁷ under the amendments in order to protect the surrounding area from overdevelopment.⁹⁸

The air rights transfer variation permitted by the amendment affords a number of parties multiple benefits.⁹⁹ For example, the landmark owner is able to realize the potential development value of his landmark.¹⁰⁰ The air rights purchaser receives additional floor area he would not otherwise have.¹⁰¹ The city receives tax revenues from what was originally untaxable¹⁰² and most importantly, the public is able to continue to enjoy historic buildings and sites.¹⁰³

The flexibility that the 1968 amendment provides in transferring air rights, however, may result in a sacrifice of traditional urban planning objectives.¹⁰⁴ The amendment allows an increase in the bulk of a new development beyond that permitted by the original zoning laws.¹⁰⁵ Overdevelopment can result in an increase in population density and use of neighborhood resources.¹⁰⁶ Thus, "[t]he financial short-term advantage may very well prove a . . . long-term disadvantage."¹⁰⁷

97. *Id.* In order for the City Planning Commission to approve a landmark's transfer of air rights it had to make one of two findings:

(a) [T]hat the permitted transfer of floor area or minor variations in the front, height and setback regulations [would] not unduly increase the bulk of any new development, density of population or intensity of use in any block, to the detriment of the occupants of buildings on the block or nearby blocks, and (b) that the program for continuing maintenance [would] result in the preservation of the landmark.

N.Y. CITY ZONING RES. § 74-792 (1968), reprinted in REP. CP-20253, *supra* note 4, at 302 (emphasis omitted). The City Planning Commission also had to assess the "relationship between the landmark building and any new buildings" regarding material design, scale and height in order to protect the architectural character of the surrounding area. *Id.*; see also Report on the Transfer of Development Rights from Landmark Sites, [1969] N.Y. CITY PLANNING COMM'N REP. CP-20938, at 875, 877 (emphasis omitted) [hereinafter REP. CP-20938].

98. REP. CP-20253, *supra* note 4, at 303.

99. *Id.*

100. *Id.*; see also REP. CP-20938, *supra* note 97, at 877.

101. REP. CP-20253, *supra* note 4, at 303.

102. See *id.*

103. See *id.*

104. See *supra* notes 9, 11 and accompanying text.

105. Report on the Transfer of Development Rights from Landmarks, [1970] N.Y. CITY PLANNING COMM'N REP. CP-21166, at 350, 353 (dissenting report of Commissioner Beverly Moss Spatt) [hereinafter REP. CP-21166].

106. See *id.* (dissenting report of Commissioner Beverly Moss Spatt).

107. See *id.* (dissenting report of Commissioner Beverly Moss Spatt).

D. TDR and the As-Of-Right Zoning Lot Merger: The 1977 Amendment

The 1977 amendment¹⁰⁸ to the zoning lot definition eliminated the requirement that a zoning lot be held in single ownership.¹⁰⁹ The effect of this amendment was the removal of the concept of combining contiguous lots through long-term lease ownership¹¹⁰ for the purpose of floor area ratio expansion.¹¹¹ The new ownership arrangement permitted the creation of a single zoning lot by merging from adjacent, separately owned parcels¹¹² as long as all parties in interest¹¹³ filed¹¹⁴ and recorded¹¹⁵ a declaration of merged single lot status.¹¹⁶

108. The 1977 amended definition of zoning lot provides:

[A zoning lot is a] tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block, which at the time of filing for a building permit (or, if no building permit is required, at the time of filing for a certificate of occupancy) is under single fee ownership and with respect to which each party having any interest therein is a party in interest.

N.Y. CITY ZONING RES. § 12-10(c) (1977), *reprinted in* REP. N-760226-ZRY, *supra* note 4, at 4 (emphasis omitted).

109. REP. N-760226-ZRY, *supra* note 4, at 2.

110. *Id.*

111. *Newport Assoc., Inc. v. Solow*, 30 N.Y.2d 263, 264, 283 N.E.2d 600, 600, 332 N.Y.S.2d 617, 618 (1972), *cert. denied*, 410 U.S. 931 (1973).

112. REP. N-760226-ZRY, *supra* note 4, at 2.

113. A party in interest as defined by the amendment includes (1) the fee owner; (2) the holder of an enforceable recorded interest superior to the fee owner; (3) the holder of an enforceable recorded interest in the tract of land adversely affected by the development; (4) the holder of an unrecorded interest in land superior to or adversely affected by the development. *Id.* at 4; *see* N.Y. CITY ZONING RES. § 12-10(c)(ii) (1977), *reprinted in* REP. N-760226-ZRY, *supra* note 4, at 4. For a discussion of parties in interest, *see MacMillan, Inc. v. CF Lex Assoc.*, 56 N.Y.2d 386, 391, 437 N.E.2d 1134, 1136, 452 N.Y.S.2d 377, 379 (1982) (space tenant not a party in interest whose consent is required for zoning lot merger).

114. The declaration must be filed in the office of the City Registrar or County Clerk. *See* REP. N-760226-ZRY, *supra* note 4, at 2; *see also* N.Y. CITY ZONING RES. § 12-10(d) (1977), *reprinted in* REP. N-760226-ZRY, *supra* note 4, at 4.

115. REP. N-760226-ZRY, *supra* note 4, at 2.

The declaration would declare the several parcels to be one zoning lot, and this zoning lot would remain integrated, notwithstanding any party's breach of a provision of the declaration or any agreement ancillary thereto, until such time as the zoning lot is subdivided in accordance with existing zoning lot subdivision rules. These rules preclude any subdivision's creating non-compliance with any applicable provisions of the zoning. The recorded declaration will put all persons on notice that the several parcels in question have been constituted as one zoning lot. . . .

Id. at 3; *see* N.Y. CITY ZONING RES. § 12-10(d) (1977), *reprinted in* REP. N-760226-ZRY, *supra* note 4, at 4.

116. REP. N-760226-ZRY, *supra* note 4, at 2-3.

The amendment represents the city's "interest in avoiding overbuilding."¹¹⁷ Under the new zoning lot definition, parcels within the newly merged zoning lot can transfer underutilized FAR to receiving parcels within that same zoning lot regardless of lot ownership.¹¹⁸ As such, only the distribution of FAR changes, not the total amount of development potential.¹¹⁹ Consequently, a parcel that receives air rights from another parcel within the zoning lot in order to exceed the allowable FAR compensates for the below maximum FAR densities on the other zoning lot parcels.¹²⁰ The planning rationale behind this system is that because the zoning lot merger redistributes rather than relocates total bulk on any given block, the same number of people interact within the block.¹²¹ This concern for population control protects neighborhood resources and services from exhaustion.¹²²

III. Radical Applications of TDR

Despite the limitations on the scope of TDR provided by the 1968 and 1977 amendments,¹²³ the City Planning Commission has permitted creative interpretations of the zoning resolution for the benefit of not-for-profit institutions. A 1969 amendment to the zoning resolution in response to the Grand Central Terminal dilemma, for example, increased the transfer distance of excess landmark development rights.¹²⁴ The City Planning Commission also expanded the way in which TDR may be utilized by creating an area-wide TDR transfer district to implement the South Street Seaport renewal program.¹²⁵ Most recently, the City Planning Commission authorized an unorthodox diagonal transfer of development rights from a city owned non-landmark building.¹²⁶

A. The Grand Central Drama: Air Rights Leaping

The 1968 liberalization of TDR regulations¹²⁷ proved to be of little use in the case of Grand Central Terminal.¹²⁸ A monument to French Beaux-Arts architecture and transportation tech-

117. *Id.* at 3.

118. *Id.* at 2.

119. *See id.* at 1-3.

120. *See id.*

121. *See id.*

122. *See id.*

123. *See supra* notes 79-122 and accompanying text.

124. *See infra* notes 127-60 and accompanying text.

125. *See infra* notes 161-79 and accompanying text.

126. *See infra* notes 180-204 and accompanying text.

127. *See supra* notes 79-107 and accompanying text.

128. Goldin, *supra* note 81, at 1, col. 1. Air rights transfer has done "little to

nology,¹²⁹ the terminal was suffering from the decline of the railroads in the early 1960's.¹³⁰ The terminal's owner, the Penn Central Transportation Co.,¹³¹ was experiencing economic difficulties¹³² and was looking for a way to convert the building's unused development rights¹³³ into an income producing asset.¹³⁴

Grand Central, built long before the development of the concept of FAR,¹³⁵ exhausted only 1.5 of the available 18 FAR on the site in 1967.¹³⁶ In January of 1968, Penn Central negotiated an air rights lease with UGP Properties, Inc. of Great Britain for the two million square feet of available FAR space.¹³⁷ The agreement provided for the construction of a multistory skyscraper¹³⁸ above the terminal's main waiting room.¹³⁹ Since the terminal had received landmark status the previous year,¹⁴⁰ Penn Central had to apply to the City

aid the landmark building, and it allows an overloading of development on another site." *Id.* at 1, col. 2.

129. *Penn Central*, 438 U.S. at 115.

130. GRAND CENTRAL TERMINAL: CITY WITHIN THE CITY 136-39 (D. Nevins ed. 1982).

131. *Penn Central*, 438 U.S. at 115.

132. *Id.* at 120; *Penn Central Transp. Co. v. New York City*, 42 N.Y.2d 324, 333, 366 N.E.2d 1271, 1276, 397 N.Y.S.2d 914, 919 (1977), *aff'd*, 438 U.S. 104 (1977).

133. Grand Central Terminal had 16.5 FAR available to transfer in 1967. See Richards, *Transferable Development Rights: Corrective, Catastrophe, or Curiosity?*, 31 REAL EST. L.J. 26, 32 (1983) [hereinafter Richards].

134. See generally *Penn Central*, 438 U.S. at 116-18. In 1968, Penn Central Transportation Co. contracted with UGP Properties to "construct a multistory office building above the terminal" in order to increase its income. *Id.* at 116.

135. Grand Central Terminal opened in 1913, three years before New York City enacted its first zoning laws and almost 50 years before the utilization of the FAR concept. See *supra* notes 32-41 and accompanying text.

136. Richards, *supra* note 133, at 32.

137. *Penn Central*, 438 U.S. at 116. The terms of the contract for the office building construction provided that UGP would pay Penn Central Transportation Co. \$1 million annually thereafter. "The rentals would be offset in part by a loss of some \$700,000 to \$1 million in net rentals presently received from concessionaires displaced by the new building." *Id.*

138. Marcel Breuer designed two separate plans for the office building that satisfied the provisions of the zoning resolution. *Id.* at 116. The "Breuer I" design called for the office building to be "cantilevered above the existing facade" of the terminal and perched on its roof. The "Breuer II Revised" design proposed a tearing down of part of the terminal and stripping features from the facade. See *id.* at 116-17.

139. *Id.* at 116-17.

140. *Id.* at 115-16. On September 21, 1967, the Board of Estimate confirmed the Landmarks Preservation Commission's designation of the terminal, "a 'landmark' and designated the 'city tax block' it occupies, a 'landmark site.'" *Id.*

Planning Commission for construction permission.¹⁴¹ The Commission denied Penn Central's application¹⁴² because the proposed structure was not architecturally sympathetic to the landmark.¹⁴³ Moreover, the railroad could not sell a significant portion of the air rights because all potential receiving lots under the 1968 amendments¹⁴⁴ were already fully developed.¹⁴⁵ The railroad found itself in a difficult position. It could not develop the unused development rights on its terminal site, and it could not transfer these rights to an "adjacent lot."

On October 7, 1969, the city amended the 1968 TDR regulations in response to Grand Central's predicament.¹⁴⁶ The 1969 amendment instituted two changes in the previous law. First, the City Planning Commission expanded the concept of "adjacent site"¹⁴⁷ to include a recipient lot located at previously impermissible distances from the transferor site.¹⁴⁸ Under this new definition, an "adjacent site" could be at the end of a chain of lots held in common ownership extending from the transferor site, provided the first parcel was contiguous to or across the street from the transferor site.¹⁴⁹ Thus, various properties owned by Penn Central, such as the Barkley, Biltmore and Commodore hotels, would be eligible recipients of the

141. *Id.*

142. *Id.* at 117.

143. *Id.* The Landmarks Preservation Commission stated that "to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke." *Id.* at 117-18.

144. Those lots contiguous to the terminal or across the street or intersection were the only potential receiving lots under the 1968 amendments. *See* REP. CP-20253, *supra* note 4, at 301-02; *see also supra* notes 79-107 and accompanying text.

145. Marcus, *supra* note 55, at 885.

146. *See* REP. CP-20938, *supra* note 97, at 877; *see also Penn Central*, 438 U.S. at 114.

147. An "adjacent site" at this time represented a lot contiguous to the landmark building or a lot across the street or intersection opposite the landmark building. N.Y. CITY ZONING RES. § 74-79 (1968), *reprinted in* REP. CP-20253, *supra* note 4, at 301; *see supra* note 90 and accompanying text.

148. REP. CP-20938, *supra* note 97, at 877. The amended definition of "adjacent site" included a lot "contiguous or one which is across a 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." N.Y. CITY ZONING RES. § 74-79 (1969), *reprinted in* REP. CP-20938, *supra* note 97, at 875 (emphasis added). Under this chain of ownership concept, "[t]heoretically, the air rights from a landmark could be sold several blocks away." Gottlieb, *A Zoning Fight Again Imperils Grand Central*, N.Y. Times, Oct. 14, 1986, at B8, col. 4.

149. REP. CP-20938, *supra* note 97, at 877; *see also Penn Central*, 438 U.S. at 114.

terminal's development rights despite the fact that they were blocks away.¹⁵⁰

Second, the 1969 amendments abandoned the restriction that had limited the air rights transfer to a twenty percent increase¹⁵¹ on the transferee lot.¹⁵² Instead, the landmark was permitted to transfer all of its unused development potential to one receiving lot.¹⁵³

The first recipient of Grand Central's unused development rights was Philip Morris, Co.¹⁵⁴ In 1978, Philip Morris purchased 75,000 square feet¹⁵⁵ of unused development rights from Grand Central Terminal to construct an office building¹⁵⁶ across the street from the landmark.¹⁵⁷

In retrospect, the case is an illustration of spot-zoning,¹⁵⁸ an illegal provision enacted solely for the benefit of one landowner, that is not in accord with any well-considered plan.¹⁵⁹ Moreover, to permit a single recipient lot in an already overdeveloped section of Manhattan to receive an extensive amount of air rights undermines sound urban planning concerns.¹⁶⁰

B. South Street Seaport: Area-Wide TDR and Air Rights Banking

With Grand Central Terminal as precedent, the New York City Planning Commission recognized the increased mobility of TDR as

150. *Penn Central*, 438 U.S. at 115.

151. See *supra* note 95 and accompanying text.

152. Compare N.Y. CITY ZONING RES. § 74-792 (1968), reprinted in REP. CP-20253, *supra* note 4, at 302 (20% limitation) with N.Y. CITY ZONING RES. § 74-792 (1970), reprinted in REP. CP-21166, *supra* note 105, at 352 (20% limitation omitted).

153. See *supra* note 152.

154. Report on the Transfer of Development Rights from Grand Central Terminal to 120 Park Avenue, [1979] N.Y. CITY PLANNING COMM'N REP. C-780404-ZSM, at 1.

155. *Id.*

156. Philip Morris intended the building to be its world corporate headquarters. The building contained "448,000 square feet of floor area and cost approximately \$50 million" to build. This total included 137,000 square feet for "additional floor area than [that which] is allowed as-of-right in a C5-3 zoning district," 75,000 square feet of which was obtained from the Grand Central transfer. *Id.*

157. The Philip Morris building is "located across the street from Grand Central Terminal on the west side of Park Avenue between East 41st and 42nd Streets." *Id.* Ironically, the Philip Morris site was a legal transferee site even prior to the 1969 amendment. See Marcus, *supra* note 55, at 887.

158. 1980 HANDBOOK, *supra* note 11, at 12.

159. Richards, *supra* note 133, at 34.

160. *Id.*

an important urban planning tool to preserve and revitalize the entire landmark district¹⁶¹ of South Street Seaport.¹⁶² Located south of the Brooklyn Bridge on the East River waterfront,¹⁶³ the old seaport was a nineteenth-century center of culture and maritime trade.¹⁶⁴ Time and neglect, however, had left the seaport's Schermerhorn Row landmark buildings¹⁶⁵ in severe disrepair.¹⁶⁶

Motivated by the desire to revitalize this historic reservoir¹⁶⁷ and to profit from the development of valuable land adjacent to the burgeoning financial district,¹⁶⁸ the City Planning Commission embarked on a renewal plan for the entire area.¹⁶⁹ The city created the special South Street Seaport District,¹⁷⁰ consisting of transferor lots and receiving lots, to preserve the historic structures along Schermerhorn Row while allowing for new commercial development

161. One proposal to preserve landmark sites through a specific area-wide plan is John Costonis' "Chicago Plan." See, e.g., Costonis, *The Chicago Plan*, 85 HARV. L. REV. 574 (1972); see also Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 86 (1973). The proposal calls for the creation of a "landmark development rights transfer district" which encompasses a concentration of city landmarks. *Id.* Landmark owners could sell unused development rights to owners of non-landmark buildings within the prescribed district. *Id.* Landmark owners could also opt for a cash award from the city for their excess air rights instead of transferring them. *Id.* at 87. The city would create a "development rights bank" as a pool for the unused air rights of these recalcitrant landmark owners. *Id.* The city could sell these pooled rights to other non-landmark owners. *Id.* The "Chicago Plan" provided incentive for the establishment of the South Street Seaport renewal plan.

162. For a discussion of the creation of the Special South Street Seaport District, see Report on Amendment to Permit Increase in the South Street Seaport District, [1981] N.Y. CITY PLANNING COMM'N REP. N-810597-ZRM [hereinafter REP. N-810597-ZRM]; Report on an Amendment to the Brooklyn Bridge Southeast Urban Renewal Plan, [1980] N.Y. CITY PLANNING COMM'N REP. C-800251-HUM [hereinafter REP. C-800251-HUM]; Report on the Amended Urban Renewal Plan for the Brooklyn Bridge Southeast Urban Renewal Area, [1972] N.Y. CITY PLANNING COMM'N REP. CP-21962 [hereinafter REP. CP-21962]; Report Relating to the Establishment of a Special South Street Seaport District, [1972] N.Y. CITY PLANNING COMM'N REP. CP-21975 [hereinafter REP. CP-21975]. See also N.Y. CITY ZONING REP. §§ 89-00 to 89-07 (1972) (amended by § 88-00 to -08 (1986)).

163. REP. CP-21962, *supra* note 162, at 1.

164. REP. C-800251-HUM, *supra* note 162, at 10.

165. The seaport's Schermerhorn Row buildings are several small scale nineteenth-century georgian row houses located on the "Schermerhorn Row Block . . . bounded by Fulton and South Street, Burling Slip and Water Street." *Id.* at 2.

166. REP. CP-21962, *supra* note 162, at 2.

167. REP. C-800251-HUM, *supra* note 162, at 10.

168. REP. CP-21962, *supra* note 162, at 4.

169. See *supra* note 162 and accompanying text.

170. N.Y. CITY ZONING RES. §§ 12-10, 89-00 (1972), reprinted in REP. CP-21975, *supra* note 162, at 3 (§ 89-00 amended by N.Y. CITY ZONING RES. § 88-00 (1986)).

in the whole seaport area.¹⁷¹ The sites upon which the historic buildings rested were deemed "granting lots."¹⁷² These "granting lots" could transfer their unused development rights to predesignated¹⁷³ building sites on which the city would permit commercial development.¹⁷⁴ These designated sites were termed "receiving lots."¹⁷⁵

The transfer of excess development rights could take place in two distinct ways.¹⁷⁶ In a simple transaction, the owner of an historic property site sells unused air rights directly to a "receiving lot" owner.¹⁷⁷ In a complex arrangement, the landmark owner transfers excess development rights from his "granting lot" to an intermediary, who then sells the rights on the owner's behalf to a "receiving lot."¹⁷⁸ In the South Street Seaport development, for example, a consortium of commercial banks that held the mortgages on seaport buildings acted as the intermediary for many of these TDR transactions.¹⁷⁹

171. REP. CP-21962, *supra* note 162, at 4, 5. The 1982 zoning resolution provides that the purpose of the establishment of the South Street Seaport District is to preserve the Schermerhorn Row landmark buildings through "the transfer and disposition of development rights from designated granting lots in the seaport area to [s]outh [s]treet commercial development." N.Y. CITY ZONING RES. § 89-00(d) (1972), *reprinted in* REP. CP-21975, *supra* note 162, at 3-4 (*amended by* N.Y. CITY ZONING RES. § 88-00(d) (1986)) (emphasis omitted).

172. N.Y. CITY ZONING RES. § 89-02 (1972), *reprinted in* REP. CP-21975, *supra* note 162, at 4-5 (*amended by* N.Y. CITY ZONING RES. § 88-02 (1986)). The zoning resolution defines "granting lot" as "[a] zoning lot and closed or discontinued portion of streets or air space over streets . . . from which development rights may be transferred." *Id.*

173. REP. CP-21962, *supra* note 162, at 4, 5.

174. N.Y. CITY ZONING RES. § 89-04 (1972), *reprinted in* REP. CP-21975, *supra* note 162, at 5 (*amended by* N.Y. CITY ZONING RES. § 88-04 (1986)).

175. A "receiving lot" is defined by the zoning resolution as a pre-identified zoning lot "to which development rights may be added." N.Y. CITY ZONING RES. § 89-02 (1972), *reprinted in* REP. CP-21975, *supra* note 162, at 5 (*amended by* N.Y. CITY ZONING RES. § 88-02 (1986)).

176. *See* N.Y. CITY ZONING RES. § 89-04 (1972), *reprinted in* REP. CP-21975, *supra* note 162, at 5 (*amended by* N.Y. CITY ZONING RES. § 88-04 (1986)).

177. N.Y. CITY ZONING RES. § 89-04(i) (1972), *reprinted in* REP. CP-21975, *supra* note 162, at 5 (*amended by* N.Y. CITY ZONING RES. § 88-04(i) (1986)). The resolution provides that "development rights from each of the granting lots may be conveyed, or otherwise disposed of . . . directly to a receiving lot." *Id.*

178. N.Y. CITY ZONING RES. § 89-04(ii) (1972), *reprinted in* REP. CP-21975, *supra* note 162, at 5 (*amended by* N.Y. CITY ZONING RES. § 88-04(ii) (1986)). TDR transfer in the South Street Seaport District may also be accomplished by conveyance from the granting lot "to a person for subsequent disposition to a receiving lot." *Id.*

179. Marcus, *supra* note 55, at 891.

C. Old Slip: Bending the Rules

The Old Slip transaction involved a tremendously complex TDR project in which the development rights from a city-owned landmark and a municipal firehouse were transferred through¹⁸⁰ an innovative zoning lot merger to construct an office tower at 30 Old Slip Street in lower Manhattan.¹⁸¹ The plan included such exotic transactions as the demapping¹⁸² of a city street, the cross-street diagonal transfer of air-rights from a non-landmark site and the construction of a new municipal fire station within a new commercial office building.¹⁸³

The development site at 30 Old Slip contained 30,883 square feet and allowed for a tower of 633,435 square feet at FAR 15.¹⁸⁴ Financial Square,¹⁸⁵ the building developed at the site, however, occupies approximately 877,000 square feet.¹⁸⁶ In order to achieve this additional bulk, which amounts to FAR 20.78¹⁸⁷ for the entire site, the City Planning Commission enlarged the original development lot to form a new "landmark zoning lot."¹⁸⁸

180. This transaction marked the first time that New York City disposed of air rights over its own properties. See Scardino, *supra* note 4, at D3, col. 3.

181. See generally REP. C-841070-ZSM, *supra* note 16. The site at 30 Old Slip Street housed the United States Assay Office. Developer Howard Ronson paid over \$27 million for the property in 1983. This figure represents the "highest price a U.S. government building ever fetched at auction and twice what some bidders had expected." Allen, *supra* note 1, at 23.

182. Demapping a street is a "bit of zoning hocus pocus, [which] doesn't necessarily eliminate streets . . . [but] . . . erases them from city documents." Allen, *supra* note 1, at 26. The demapping of Old Slip entails the "elimination, discontinuance and closing of a portion of Old Slip (approximately 31' x 88' or 2,764 square feet) located between . . . the site of the existing Firehouse . . . [and] . . . the site of the former First Precinct Police Station." REP. C-841070-ZSM, *supra* note 16, at 11. By demapping Old Slip, the portion of the street between the landmark and the firehouse became part of the whole site. The merger of these three areas expanded the development potential of the transferor site, thus increasing the amount of available unused development rights to transfer.

183. See REP. C-841070-ZSM, *supra* note 16, at 1.

184. *Id.* at 2.

185. Howard Ronson is a British developer "best known for constructing office towers with medium-size floors in Manhattan's financial district." Financial Square is the name of the building Ronson is currently developing at 30 Old Slip Street. See generally Allen, *supra* note 1, at 23.

186. This figure represents "less than Ronson had hoped for but still more than 25 percent above what the block's zoning would normally allow." *Id.*; REP. C-841070-ZSM, *supra* note 16, at 2, 3 (chart).

187. REP. C-841070-ZSM, *supra* note 16, at 3.

188. *Id.* at 11. This "landmark zoning lot" of 11,346 square feet is comprised of 5,255 square feet attributable to the landmark police station, "3,327 square feet attributable to the zoning lot of the Firehouse" and "2,764 square feet attributable to the area of the demapped portion of Old Slip." *Id.*

The city created this "landmark zoning lot" through a merger of the original lot containing the landmarked First Precinct Police Station; another lot containing a firehouse for Hook & Ladder Co. No. 15;¹⁸⁹ and the intervening portion of Old Slip, which required the submission and approval of a formal demapping¹⁹⁰ application.¹⁹¹

The City Planning Commission approved a transfer for only 135,273 square feet of the 204,223 square feet available from the "landmark zoning lot" representing an additional 3.2 FAR.¹⁹² The developer thus could not exploit the full complement because he had already received an additional 108,943 square feet of 2.53 FAR for agreeing to an extensive public amenity program.¹⁹³ The key component in this amenity package called for the creation of a landscaped, public piazza¹⁹⁴ directly west of the landmark on the site where the firehouse was situated.¹⁹⁵

The City Planning Commission concluded that this park would improve visibility for the landmark police station and enhance the congested area by providing usable open space.¹⁹⁶ In consideration of the transfer of development rights, the city acquired a lease on

189. *Id.* Both of these lots, as well as "the bed of the street, are in [c]ity ownership." *Id.*

190. Old Slip consists of "two narrow, parallel streets that are linked in the middle—like the letter *H*—to define two tiny lots." Allen, *supra* note 1, at 25. This intervening link constitutes the subject of the demapping application. *Id.* at 26. For an explanation of demapping, see *supra* note 182 and accompanying text.

191. REP. C-841070-ZSM, *supra* note 16, at 1. Many interesting benefits accompany the decision to demap Old Slip. By allowing the firehouse parcel to be considered part of the overall landmark lot, the city circumvented the problem of transferring air rights diagonally across a street, which is not permitted for a non-landmark building. In addition, those air rights attributable to the firehouse experience an effective upgrade from FAR 15 for normal buildings to 18 for landmarks. This upgrade significantly increases the amount of bulk available for transfer. In the case of the demapped street portion, the city is essentially creating a very valuable package of air rights at 18 FAR from nothing because the air above the streets is not deemed to have any development potential.

192. *Id.* at 12. The developer, Howard Ronson, paid "\$2.9 million outright plus \$3.1 million in other costs" for the air rights. Allen, *supra* note 1, at 27.

193. REP. C-841070-ZSM, *supra* note 16, at 1, 2, 4 (chart); Allen, *supra* note 1, at 27. A developer is awarded extra development rights if he agrees to build aesthetic, recreational or service facilities for public use. *See id.* These provisions are called bonusable amenities. *See id.* Ronson's public amenity program requires that he build a public piazza and a new firehouse. *Id.*

194. REP. C-841070-ZSM, *supra* note 16, at 13. Other bonusable amenities Ronson agreed to include were the widening of sidewalks and the creation of a public arcade in the new building. *See id.* at 14.

195. *Id.* The plan calls for the demolition of the firehouse at its present site and the redevelopment of a new facility at the development site. *See id.*

196. *Id.*

a new firehouse of 13,500 square feet to be built on the ground floor and mezzanine of the South Street side of the new building.¹⁹⁷ The fire department enthusiastically supported the plan.¹⁹⁸ Acquisition of a new modern facility to increase fire protection for the changing needs of Lower Manhattan had been the department's top priority for several years.¹⁹⁹

Critics of the Old Slip transaction have charged the city with using sleight of hand to assemble development rights that would not have existed under normal circumstances.²⁰⁰ Since the firehouse is not a landmark, a diagonal transfer across the Front Street intersection would not normally be permitted.²⁰¹ The owners of 77 Water Street claimed that the demapping of Old Slip Street would cause increased vehicular congestion in the financial district²⁰² and that Financial Square, once developed, would block almost entirely their building's view of the East River.²⁰³ The most important concern, however, was that this transaction would set precedent for future TDR projects of this kind.²⁰⁴

IV. Recommendations

The above examples²⁰⁵ demonstrate the tremendous extent to which the concept of TDR has developed in the last three decades. The realization of creative interpretations of the New York City Zoning Resolutions tests the outer limits of the law and sets precedents for

197. *Id.* at 13. The development site will lease the new station to the city for a 50-year period with two 25-year renewal options for \$10 per year. *Id.* The "facility will be provided without the expenditure" of city funds for construction, fixtures or maintenance. *Id.* Upon occupancy of the new station, Ronson will demolish the old firehouse at his own expense and begin construction of the outdoor plaza. *Id.*

198. *Id.*

199. *Id.*

200. Dunlap, *supra* note 4, at 51, col. 1.

201. *Id.*

202. See REP. C-841070-ZSM, *supra* note 16, at 8; Allen, *supra* note 1, at 23, 29.

203. REP. C-841070-ZSM, *supra* note 16, at 3, 10.

204. See Dunlap, *supra* note 4, at 51, col. 1. Under the 1969 zoning resolution amendment, a landmark could transfer air rights to an adjacent site at the end of a chain of lots held in common ownership. See *supra* note 134 and accompanying text. Because the city "owns more landmarks than any other single landlord" in the city, taking the transaction to the ultimate extension, the city could "check-board [the air rights of] this landmark all the way to the West Side." *Id.* at 51, cols. 1-2.

205. See *supra* notes 127-204 and accompanying text.

future imaginative transactions.²⁰⁶ The long-range ramifications of these transactions, such as the breakdown of traditional urban planning objectives behind the zoning laws,²⁰⁷ however, make the short-range financial objectives appear irresponsible.²⁰⁸

The adverse social and aesthetic effects of these transactions are numerous and irreparable. Increase development strains transportation, sewer, water, electric, police and fire services in areas unprepared for population increase.²⁰⁹ Increased bulk and tower coverage on city streets adds to congestion, loss of light and air and unanticipated blockage of view corridors.²¹⁰ Architecturally, manipulation of the zoning rules can abruptly alter the character of neighborhoods.²¹¹ A landmark is not enhanced by adjacent construction of enormous towers blocking light and air²¹² leaving some blocks to "end up looking like Mutt and Jeff."²¹³

The underlying assumption of the original zoning laws was the expectation that structures such as landmarks, schools and public buildings would not be exploited to their fullest development potential.²¹⁴ In view of this intent, the City Planning Commission and the Board of Estimate must place stronger controls on inventive TDR transactions. The City Planning Commission, New York City, not-for-profit institutions and private developers alike should conform to the provisions of the 1968 and 1977 amendments²¹⁵ which provide flexibility of application and allow for confined redistribution of bulk rather than relocation to an unprepared area.²¹⁶ The City Planning Commission must give greater deference to section 74-792 of the zoning resolution, which requires the evaluation of "the relationship between the landmark building" and new developments to safeguard "adverse effects on the character of the surrounding

206. See Allen, *supra* note 1, at 23-29; Dunlap, *supra* note 4, at 51, col. 1; Scardino, *supra* note 4, at D3, col. 1.

207. See *supra* notes 11-14 and accompanying text.

208. Dunlap, *supra* note 4, at 51, col. 1.

209. City Planning Commission Report C-841070-ZSM enumerates several ways in which areas are adversely affected by elaborate TDR transactions. REP. C-841070-ZSM, *supra* note 16, at 4-9.

210. *Id.*; see *supra* notes 11-14 and accompanying text.

211. See Allen, *supra* note 1, at 24.

212. *Id.*

213. See Allen, *supra* note 1, at 24; Dunlap, *supra* note 4, at 51, col. 1; Scardino, *supra* note 4, at D1, cols. 3, 5.

214. *Supra* note 213.

215. See *supra* notes 79-122 and accompanying text.

216. See *supra* notes 118-21 and accompanying text.

area.”²¹⁷ Finally, in addition to a general limitation on creative TDR techniques, the City Planning Commission must limit the ability of a landmark to “checkerboard”²¹⁸ air rights throughout a chain of lots held in common ownership.²¹⁹

V. Conclusion

Private developers and not-for-profit institutions have stretched the concept of TDR and set transaction precedents that may undermine the urban planning objectives of New York City’s zoning laws. To prevent this occurrence, the provisions of the 1968 and 1977 zoning amendments must be strictly construed. If the City Planning Commission follows its own zoning laws, which allow TDR to act in harmony with urban planning considerations, Manhattan can simultaneously retain its characterization as the “vertical city” and preserve its cultural institutions and landmarks.

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217. N.Y. CITY ZONING RES. § 74-792 (1986); *see also supra* note 97 and accompanying text.

218. Dunlap, *supra* note 4, at 51, cols. 1-2; *see supra* note 204 and accompanying text.

219. *See supra* notes 148-50 and accompanying text.

