



1988

# The City of New York and the Transfer of Development Rights

Lawrence Evan Abuhoff  
*University of Pennsylvania*

Follow this and additional works at: [http://repository.upenn.edu/hp\\_theses](http://repository.upenn.edu/hp_theses)



Part of the [Historic Preservation and Conservation Commons](#)

---

Abuhoff, Lawrence Evan, "The City of New York and the Transfer of Development Rights" (1988). *Theses (Historic Preservation)*. 249.  
[http://repository.upenn.edu/hp\\_theses/249](http://repository.upenn.edu/hp_theses/249)

Copyright note: Penn School of Design permits distribution and display of this student work by University of Pennsylvania Libraries.

Suggested Citation:

Abuhoff, Lawrence Evan (1988). *The City of New York and the Transfer of Development Rights*. (Masters Thesis). University of Pennsylvania, Philadelphia, PA.

This paper is posted at ScholarlyCommons. [http://repository.upenn.edu/hp\\_theses/249](http://repository.upenn.edu/hp_theses/249)

For more information, please contact [libraryrepository@pobox.upenn.edu](mailto:libraryrepository@pobox.upenn.edu).

---

# The City of New York and the Transfer of Development Rights

**Disciplines**

Historic Preservation and Conservation

**Comments**

Copyright note: Penn School of Design permits distribution and display of this student work by University of Pennsylvania Libraries.

Suggested Citation:

Abuhoff, Lawrence Evan (1988). *The City of New York and the Transfer of Development Rights*. (Masters Thesis). University of Pennsylvania, Philadelphia, PA.

E

UNIVERSITY  
PENNSYLVANIA  
LIBRARIES







THE CITY OF NEW YORK AND THE TRANSFER OF  
DEVELOPMENT RIGHTS

LAWRENCE EVAN ABUHOFF

A THESIS

in

The Graduate Program in Historic Preservation

Presented to the Faculties of the University of Pennsylvania  
in Partial Fulfillment of the Requirements for the Degree of

MASTER OF SCIENCE

1988

*John C Keene*

John Keene, Professor, Department of City Planning, Advisor

*David G. De Long*

David G. De Long, Graduate Group Chairman and Reader

FINE ARTS /NA/02/1988/A165

UNIVERSITY  
OF  
PENNSYLVANIA  
LIBRARIES



TABLE OF CONTENTS

	Preface.....	1
I.	The Beginnings of Preservation	
	A. The Early Years.....	4
	B. Williamsburg.....	6
	C. Preservation in the 1960s.....	7
	D. Preservation in the 1970s.....	9
II.	Legal Aspects of Property, Preservation, and the Transfer of Development Rights	
	A. The Importance of Property.....	10
	B. The U.S. Constitution.....	11
	C. Zoning.....	12
	D. Village of Euclid v. Ambler Realty Co.....	13
	E. Preservation and the Law.....	14
	1. Gettysburg.....	14
	2. Berman v. Parker.....	15
	3. Penn Central Transportation Company v. New York City.....	16
III.	The Taking Issue	
	A. The Constitution and Taking.....	18
	B. The Classic Definition of a Taking.....	20
	C. The Taking Issue in the 1970s: A New Criterion.....	22
	D. The Taking Issue in the 1980s.....	26
	E. Compensation: The Payment for Police Powers...	30
	F. Compensation and the Transfer of Development Rights: The Penn Central Decision.....	32
	G. Fred F. French Investment Co. v. City of New York.....	34
IV.	Transfer of Development Rights	
	A. Transfer of Development Rights: A Planning Tool for Preservation.....	37
	B. The Zoned Lot Merger.....	37
	C. The Movement of Granted Air Rights.....	38
V.	The Chicago Plan	
	A. An Introduction.....	42
	B. The Chicago Plan and Planning.....	43
	C. Foundations for the Chicago Plan.....	44
	D. The Incentive Package.....	46
	E. The Preservation Restriction.....	46
	F. The Development Rights Transfer District.....	47
	G. The Municipal Development Rights Bank.....	48
VI.	The New York City Program	
	A. Introduction.....	51
	B. Amster Yard.....	53
	C. South Street Seaport District.....	54
	D. Tudor City.....	56
VII.	Economics	
	A. The Economics of Transfer of Development Rights.....	59
VIII.	Transfer Systems	
	A. Types of Systems.....	65
	B. Grand Central and the Question of Adjacency...	65



	C. The Broadway Theater District.....	69
IX.	The Issues of Transfer of Development	
	A. Are the Benefits of the Transfer Enjoyed by All?.....	75
	B. What is the Role of Transfer of Development Rights in Zoning and Planning?.....	79
	C. The Municipal Development Rights Bank.....	82
	D. Is the Transfer of Development Rights Compatible with the Aims of Preservation?.....	86
	E. Is the Transfer of Development Rights Compensation?.....	91
X.	New York City and the Transfer of Development Rights	
	A. Recommendations for Change.....	94
XI.	Conclusions.....	98
XII.	Appendices	
	Endnotes.....	115
	Bibliography.....	122



## Preface

Since the Supreme Court decision in the case of Penn Central Transportation Co. v. New York City, 438 U.S. 104, (1978), transfer of development rights has been utilized as a means of preservation. The problem facing many urban landmarks is that the economic pressures that control the beat of a city are usually geared for new construction. The new construction allows for the highest and best use of the property. Older buildings of historic significance are usually built at a density lower than that determined by the municipality for the particular site. As such, they are prime targets for demolition and redevelopment.

Transfer of development rights attempts to provide an economic solution for the burdens of landmark designation. It allows for the building to remain in private ownership by providing the owner with some sort of relief for his inability to redevelop the site for its highest and best use. By allowing the private sector to provide economic relief for the landmark owner, the municipality is saved from purchasing the sites it wishes to preserve.

The transfer of development rights involves many complex questions and issues as to its role in land use legislation, constitutional law, and historic preservation. This paper attempts to outline specific questions concerning their issues and their use. The purpose in writing this paper is to analyze a method of



historic preservation that thrusts what has become, over time, a municipal duty, preserving our architectural heritage, back into the realm of the private sector.

The paper starts with a summary of the historic preservation movement in the United States starting with the role of small, site-oriented groups. Particularly important events are earmarked, such as the restoration/recreation of Williamsburg and the preservation ethic that evolved from it, and the establishment of the National Trust. It continues with an analysis of the legal issues of property, land use, and preservation. Early cases such as Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); and Penn Central Transportation Co. v. New York City are cited. Recent Supreme Court decisions such as Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987); and Keystone Bituminous Coal Association v. DeBenedictis, 107 S. Ct. 1232 (1987); are utilized. The issue of transfer of development rights as compensation is addressed, again citing the Penn Central case, but also utilizing the Fred F. French Investment Co. v. City of New York, 385 N.Y.S.2nd 5 (1976) case and the recent Supreme Court decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987). The transfer of development rights is explained, followed by an analysis of John J. Costonis's Chicago Plan. The program in New York City is analyzed, reviewing three uses of the transfer of





development rights. The economics of transfer of development rights is explored. The three types of transfer of development rights systems are explained. Issues involved in the transfer of rights are explored and recommendations for changes in the New York program are outlined.

The above mentioned issues are addressed by an analysis of relevant writings regarding each particular issue. Contrasting opinions are presented and conclusions pertaining to the validity of each argument are presented. An examination of how these issues fit into both the Chicago Plan and the New York City program is presented.



## I. The Beginnings of Preservation

### A. The Early Years

Journals, diaries, paintings, sculpture, architecture: all of these things are records of man's achievements, his hopes, his dreams, and sometimes his failures. They all aid in our understanding of who we are as a nation and as a culture. They are all similar, save one: architecture. Architecture is around us every day. It does not have to be sought out or confined to a vault. We move freely in and around, enter and exit from buildings every day, more than likely with very little thought about the important role buildings play in our lives. Our built environment is taken for granted.

We have certainly come to a consensus that for many, architecture is taken for granted. Sadly this can be taken as a blanket statement. Buildings of architectural and cultural significance for the United States have been ignored for many years. All but the most sacred have been threatened with either significant alteration or demolition. It is believed that up to one third of the buildings on the Historic American Buildings Survey are now demolished. (1) The trend in American has been to change, to demolish; demolition was seen as a sign of progress. Happily not everyone felt this way. Historic preservationists in the United States have been fighting for almost 150 years to raise the conscience of a nation. It has been our goal to



save those few remnants of our past. Preservation in the United States started roughly and meekly as a band of women gathered together to save the home of George Washington. Today it is a multi-million dollar business (2) which employs hundreds of men and women in every state in diverse fields such as law, accounting, construction and academia.

The genesis of preservation is at once humble and noble. The goal was to preserve Mount Vernon, the Virginia home of George Washington. Guided by the determination of Ann Pamela Cunningham, the Mount Vernon Ladies Association was able to secure the title to the property before the outbreak of the Civil War. (3)

This early venture was the start of the preservation movement in the United States. From this we have the growth of groups such as the Society for the Preservation of New England Antiquities and the Thomas Jefferson Memorial Foundation. The Thomas Jefferson group ultimately achieved its objective to acquire title to Monticello. (4) Groups such as the Daughters of the American Revolution and the National Society of the Colonial Dames of the American Revolution emulated the activities of the Mount Vernon Ladies' Association. By the second decade of the twentieth century, both groups were active vocal advocates of the preservation of our architectural and historic heritage, aiding groups in their task to preserve structures throughout the United States. (5)



## B. Williamsburg

The 1930s and 1940s were dominated by the legacy of Williamsburg, Virginia. The Williamsburg restoration/recreation can be considered a revolution for the preservation movement. At no time before had any preservation or restoration project influenced both the preservation community and common citizens. Williamsburg was to shape the future of preservation even to this decade.

Briefly, Williamsburg was the fusion of two important elements: a clear vision and a bottomless source of funding. Williamsburg was well endowed on both accounts. The recreation of United States history, the attempt to bring to life the spirit of the past, (6) was the brainchild of Dr. William Archer Rutherford Goodwin. (7) By 1923, it is believed that Goodwin had fully formulated his dream of representing the entire lower peninsula of Virginia as the birth place of the United States, with Williamsburg, restored and rebuilt to reflect its eighteenth century grandeur, as its spirited center. (8) By 1926, John D. Rockefeller had become the backer for Goodwin's plans. (9) By the fall of 1927, the colonial restoration of Williamsburg had been widely reported in the newspaper and magazines. Clearly, the "idea of carrying a whole city back to its eighteenth century appearance caught the imagination of the nation." (10)





### C. Preservation in the 1960s

The Williamsburg philosophy was one of the most persistent preservation ethics of our time. Its effects reach into this decade. By the 1960s, the idea of preservation had become fairly widespread. The destruction of Pennsylvania Station, McKim, Mead, and White's 1913 masterpiece of the Beaux Arts, in 1961-2 was the last straw. Such a significant loss combined with the populism generated by Williamsburg, manifested itself in a federal presence in the preservation field. The 1960s gave us the National Historic Preservation Act in October of 1966, the National Environmental Policy Act of 1969 and entering the 1970s, Executive Order 11593 of 1971. "What was once termed the "Decade of Decision" (12) had become the "Decade of Progress" (13) Preservation had become national policy, an indication of its pervasiveness. But preservation had also become a planning process that would determine how our towns, cities and countryside would look. (14)

The change in preservation from a discipline that insulated buildings from the realities of the world to one that integrated the old with the new was a major step. No longer would the museum be the final destination for the preserved building. Our architectural heritage could be preserved while it still contributed to our world. Ideas such as adaptive use brought new uses into old buildings,



going so far as to alter the way americans perceive what is acceptable as a home. We now live in factories, dance to rock music in churches, view art in railroad stations. Along with new planning, one finds new sources of profits. While the Sixties may have been the decade of progress, the Seventies were the decade of the dollar.



#### D. Preservation in the 1970s

Preservation was an economic venture, promoted by the Tax Reform Act of 1976. The Act fostered preservation by the disallowal of deductions for the demolition of a building; allowing accelerated depreciation of renovations approved by the Secretary of the Interior, and permitting five year amortization of certain owner-incurred expenses.

(15) The Tax Reform Act was amended in 1980. The concept of economic incentive was ushered into our decade.

As can be seen by the above genealogy, what started as a move to 'museumize' some of our nation's historic structures has become much less specific and static. Preservation of buildings in the last quarter of the twentieth century effectively stems from two diverse sources: urban planning and economics. The issues inherent in these two disciplines are now issues for preservation: economic return, tax incentives, neighbourhood preservation, urban renewal, open space, density. Economics and urban planning combine to act as a form of preservation. The transfer of development rights, usually a tool for the land planner, is the key. Its dependence upon planning and economics allows for the continual presence of many historic buildings in one congested urban landscape.



II. Legal Aspects of Property, Preservation and the  
Transfer of Development Rights

A. The importance of property

Christopher Duerksen stated that there "are over 1,000 local preservation ordinances; every state has at least some preservation related laws; and there are more than a dozen federal statutes and literally hundreds of pages in the Code of Federal Regulations pertaining to preservation programs." (16) A program such as one that deals with the transfer of a historic landmark's unused development must comply with a statutes and court decisions involving the legal use of property and, by extension, landmark designation.

The basis of property law in the United States can be traced through its links with English Common Law to the Magna Carta. The Magna Carta was signed in 1215 by King John I. It guaranteed certain fundamental rights to his barons. One of those rights was the right to protect property and prevent its unlawful seizure by the government (i.e. the king) without some sort of payment for the loss to the owner.





## B. The U.S. Constitution

Early colonial law was for the most part heard in English courts so the English tradition of the sacred role of property was slowly embodied in the awakening American consciousness. After the colonies had won their independence, the men who fought so hard for freedom set about creating a government of laws, clearly defined yet flexible enough to grow and change with its citizenry. These men drew from the only source they truly knew--English common law. The protection of one's property was established in the Fifth Amendment of the United States Constitution:

"[No person shall] be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation." (17)

The first half of the amendment provides for the protection from unlawful seizure of property. Property can not be taken without some sort of judicial procedure to ensure the validity and legality of the claim. The second half provides for fair compensation. This right of property is protected against arbitrary state action in the Fourteenth Amendment, section 1:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the



United States: nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." (18)

Over the years, the Supreme Court of the United States and the lower federal and state courts have upheld the rights of private property. The Supreme Court's role as an interpreter of the Constitution has allowed for a less specific definition of the phrase "life, liberty, or property." (19) The Court has decided over the years what constitutes control of one's property.

### C. Zoning

The decisions made by the Court that control or limit the use of property by an individual have been for our purposes in the realms of zoning, land control and preservation. The first comprehensive zoning ordinance was enacted in the City of New York in 1916 in response to the completion of the Equitable Building in Wall Street. The building rose over twenty stories, covering its entire lot. The shadows produced by the building, some casting entire streets in a mid-day darkness, alarmed people so much that the City passed a zoning resolution which called for setbacks in a building's facade at prescribed heights. This zoning resolution produced the wonderful jazz-age



buildings that for which New York is famous. The single most important decision on the question of zoning is embodied in the case, Village of Euclid v. Ambler Realty Company. (20) This was the Supreme Court's first decision on the constitutionality of zoning legislation and restrictions.

D. Village of Euclid v. Ambler Realty Co.

The Supreme Court first considered the constitutionality of zoning restrictions in this case. At issue was whether or not the village of Euclid's zoning ordinance could prohibit the Ambler Realty Company from using property for commercial purposes which the village had zoned for residential use. (21) Ambler Realty believed that such a restriction was an overextension of the state's police powers. The Court upheld the ordinance. It found that the restrictions related to the general welfare of its citizens and therefore upheld the ordinance as a valid use of police powers. (22) The Court stated that by excluding commercial buildings from a residential area, the legislature promoted the health of children, increased fire safety, and facilitated the enforcement of traffic and general welfare regulations. The Court noted that although the general public interest may at times outweigh a municipality's interest in promoting police power objectives through zoning regulation, this concern was compelling in



E. Preservation and the Law:

Historic preservation may seem to have been accepted by the public, but it has been challenged in the courts. Seen as an overextension of government's powers by many developers, cases have been brought before the Supreme Court of the United States. The Court has heard cases which deal with the preservation of site and of buildings. These sites and buildings span in importance from the national to the local. Three cases seem to have best defined historic landmarking. These cases are United States v. Gettysburg Electric Railway Company, 160 U.S. 668 (1896), (24); Berman v. Parker, 348 U.S. 26 (1954), (25); and Penn Central Transportation Company v. New York City (26).

1. United States v. Gettysburg Electric  
Railway Co.

The first case, United States v. Gettysburg, established the precedent that condemnation by the government could be used for preservation purposes, specifically at important historic sites. (40) The Court wrote:

The battle of Gettysburg was one of the greatest battles of the world...such a use seems necessarily not





only a public use, but one so closely connected with the welfare of the republic itself as to be within the the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country." (28)

This case extended the powers of the United States government to condemn for preservation purposes. Historic sites before this time were saved only by the intervention of private groups such as the Mount Vernon Ladies' Association. Following this case, the government began a program of acquiring sites, mostly natural sites, to begin the National Parks Service.

## 2. Berman v. Parker

The second case is Berman v. Parker. The Supreme Court's decision, although the case actually involved condemnation under urban renewal statutes, strongly supported land use controls based upon aesthetic considerations. (29) The decision was unanimous. The opinion stated:

It is within the power of the legislative to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled." (30)



Berman v. Parker influenced many local governments to enact preservation ordinances in the 1960s. (31) Before this time, zoning and land use controls were geared towards the preservation of open space, light, and air. The idea of a pleasant built environment had never been considered, due to the subjective nature of the terms aesthetic and beautiful. This case supports design control regulations.

3. Penn Central Transportation Co. v. New York City

The third case, Penn Central Transportation Company v. New York City, amplified the Court's ruling in Berman v. Parker. The Court wrote:

[T]his Court has recognized, in a number of settings, that the States and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." (32)

The Court cited Berman as precedent. This case also involves such legal dilemmas found in preservation such as the issues of the unlawful taking of property and just compensation. The Court settled the taking issue with the following:

"It is, of course, true that the landmarks law has more severe impact on some landowners than on others,



but that in itself does not mean that the law effects a 'taking'. Legislation designed to promote the general welfare commonly burdens some more than others." (33)

In terms of compensation, the Court found that the Terminal's unused development right may not have provided a suitable return had a taking occurred. However, the rights afforded were valuable. The rights lessened whatever financial burdens the designation had imposed on the Terminal and were taken into account in considering the impact of the regulation. (34)



### III. The Taking Issue

#### A. The Constitution and Taking

The issue of "taking" property is grounded in the Fifth and Fourteenth Amendments of the United States Constitution, but how has it been interpreted by the Supreme Court? The idea of landmarking and preservation and taking of property has debated in the Courts. For every taking there must be compensation. The sale and transfer of the development rights is one solution. An examination of the legal concept of taking, as defined by the Court, must start with Pennsylvania Coal Company v. Mahon . (35) Two recent decisions by the Court are then examined: Keystone Bituminous Coal Association v. DeBenedictus (36) and Nollan v. California Coastal Commission. (37) These two cases further the definition of what exactly is a taking. The taking of property calls for the payment of compensation to the owner. Two Supreme Court cases illustrate the Court's stance on compensation. The Penn Central decision allows for the transfer of development rights to serve as a means of offsetting the financial burden caused by designation. In the Fred F. French Investment Co. v. City of New York (38) case, the New York State Court of Appeals found that when a taking has occurred, the transfer of development rights does not offset the impact of the legislation and the legitimacy of the objective. The Court's recent First English Evangelical Luthern Church of Glendale v. County of





Los Angeles (39) determines what is adequate compensation when a legislative taking had occurred.

A taking of property occurs when the court finds that regulation is overly burdensome in its restriction of use without proper compensation in violation of the fifth and Fourteenth amendments to the Constitution. (40) The starting point of any analysis of the Taking issue is the decision by the Supreme Court in Pennsylvania Coal Company v. Mahon decided in 1922. When a landowner contends that the Fifth Amendment has been violated due to legislative action, landmarking for example, one or more of the following restrictions can apply. First an owner's future development options can be limited; second, development can be made less financially attractive, lowering the value of the site.; third, designation can restrict the owner's vested rights; and fourthly, the owner can have a duty placed upon him that requires him to maintain a structure in a particular fashion and ultimately cost. (41)



## B. The Classical Definition of a Taking

The Pennsylvania Coal Company was a mining company which operated in the state of Pennsylvania. The coal company had purchased large tracts of land to insure future availability of areas in which to mine. To reduce the cost acquisition, the Coal Company sold the surface rights to Mahon's predecessor in title in 1878. The Company reserved the right to remove all the coal underneath the site. The contract that existed between the Company and the owners stipulated that at some time in the future subsidence of the surface would occur due to the mining operations. The Mahons wished to "prevent the Pennsylvania Coal Company from mining under their property in such a way as to remove the supports and cause a subsidence of the surface and of their home." (42) The Mahons claimed that the Kohler Act passed by the State of Pennsylvania on May 27, 1921 had taken away the Coal Company's rights to mine below their home and the Company's freedom from damage claims. (43)

The Kohler Act was an attempt by the State to protect the homes of its residents in areas of mining activity. The act forbade the mining of coal in an area that was used as a residence or mining within 150 feet of an improved property. (44) The statute superseded existing rights. The Pennsylvania Coal Company claimed that the State had, through the Kohler act, illegally taken their property.

The question for Chief Justice Holmes was whether or



not the Kohler Act was an overextension of the State's police powers. (45) First, he needed to determine what was the property interest of the Coal Company. Second, how wide was the threat claimed by the Mahons. Justice Holmes identified the property interest involved as the right to mine coal. The Kohler Act destroyed that property interest by making it impracticable to mine. He wrote, "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think we are warranted in assuming that the statute does." (46)

Justice Holmes determined that the threat to the general public was non-existent in this case and the Kohler Act was an over compensation for an action that affected one family. The property interest of the Company was destroyed; it was not a partial diminution in value. Holmes further stated that he found the State as well as the Mahons short-sited to buy only a partial interest in their property. He wrote, "the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." (47) Holmes concluded, "We are in danger of forgetting that a



strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (48)

### C. The Taking Issue in the 1970s: A New Criterion

Pennsylvania Coal Co. v. Mahon set the standard for the next fifty years of Supreme Court decisions. The limits of government action were firmly stated. In the realm of preservation, this limit was realized. When legal process began for Penn Central, surely the New York preservationists knew that the legal future of historic preservation hung in the balance. In 1978, when the Supreme Court delivered its opinion, it heralded in a new definition of taking that has made historic preservation, and ultimately the transfer of development rights, a viable feature in American life.

Judge Brennan identified four distinct steps necessary to determine if a taking had occurred. First, is the interest at issue sufficiently bound up with a reasonable expectation of the claimant to constitute property for Fifth Amendment purposes. Next, the property interest involved must be identified. Third, analyze the character of the legislative action. Finally, the nature and the extent of the interference must be examined. Judge Brennan reached the following conclusions. The air rights of the Terminal were property for Fifth Amendment purposes. Penn Central had a full fee interest in the site, not just in one





segment. The landmark law was part of a comprehensive plan. The legislative action did not interfere with Grand Central's action as a train station. It is these several aspects of the case that ultimately differentiate the Penn Central case from Pennsylvania Coal.

Brennan first addresses a central issue of taking jurisprudence that was a key argument in Pennsylvania Coal: the characterization of the property interest that is alleged to have been taken. Holmes recognizes coal as a "valuable estate" (49) and separate from the the surface estate. He also stated that it was the owner's of the surface estate obligation to secure all estates, thus furthering the argument that land is divisible into estates or layers. (50) Brennan's refutation is as follows: "°Taking ' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has affected a taking, this court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole..." (51)

In the Penn Central case, the air rights were seen as part of the Terminal's property interest. Because the were segments of the property were one and not seperate, action to one particular segment of the site, such as the air above the Terminal, can not be analysed in isolation. In



Pennsylvania Coal, the right to mine coal was the property interest. The Kohler Act, by not allowing for mining to occur at a particular site, destroyed that property interest. He wrote concerning the government's action: "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simple untenable." (52)

The third step of Brennan's analysis was determining the character of the government's action. The Penn Central Company claimed that the landmarking of its Terminal was an undue burden, singling out the company from the rest of the property owners. Brennan found "no merit" (53) in this claim. He stated that the New York preservation program "embodies a comprehensive plan to preserve structures of historic or aesthetic interest." (54) It is the presence of this plan which distinguishes such legislation from discriminatory spot zoning. (55)

Brennan continued to analyse the nature of the designation. He introduced the concept of impact: "It is, of course, true that the Landmarks Law has a more severe impact on some landowners than others, but that in itself does not mean that the law effects a taking. Legislation designed to promote the general welfare commonly burdens some more than others." (56) Penn Central was not uniquely burdened; other properties had been designated in New York. Brennan concluded: "Unless we are to reject the



judgement of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole-which we are unwilling to do-we cannot conclude that the owners of the Terminal have in no sense been benefitted by the Landmarks Law." (57)

Finally, Brennan stated that the Landmarks Law in no way "impaired the present use of the Terminal." (58) The property interest was not taken for a city purpose such as in *Fred F. French*. The effect of the Landmarks Law is to simply "prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion." (59)



#### D. The Taking Issue in the 1980s

"...65 years later , we address a different set of particular facts involving the Pennsylvania Legislature's 1966 conclusion that the Commonwealth's existing mine subsidence legislation had failed to protect the public interest in safety, land conservation, preservation of affected municipalities' tax bases and land development in the commonwealth." (60) So started Justice Stevens in his opinion of the Court in Keystone Bituminous Coal Association v. DeBenedictis. We are again in Pennsylvania and the issue in question is land subsidence resulting from mining coal. The Court affirmed two lower court decisions which stated that the layers of land at issue in this case, surface, support, and mineral, cannot be examined as separate independent layers, but must be viewed as a segment of a larger intertwined "bundle of rights that invariably includes either the surface estate or the mineral estate." (61) Penn Central is cited as precedent. While the Court recognized similarities, they also noted that "the similarities are far less significant than the differences and that Pennsylvania Coal does not control this case." (62)

Initially, it appears that Keystone continues the legal standards established by the Penn Central decision. And indeed it does. The changes that are to be of key significance are found in the dissent written by Chief





Justice Rehnquist. It is true that the dissenting opinion does not alter judicial policy. Instead, one must view it as a guide to determine the prevailing flow of judicial thought.

Nollan v. California Coastal Commission displays the more conservative agenda of the Rehnquist Court. The clock appears to have been turned back on the constitutional issue of property and taking. The case as it appeared before the U.S. Supreme Court involved an easement across the beachfront property of James and Marilyn Nollan. The property had a small bungalow on it that the Nollans rented out to summer vacationers. The bungalow eventually fell into disrepair. The Nollans wished to demolish the bungalow and replace it with a cottage three times as large. By demolishing the bungalow, they took up their long term option on the property and finally obtained ownership in fee. They requested a coastal development permit from the California Coastal Commission. The Commission is charged with the protection of the California coastline and reviews all applications for development along the coast. They wished to replace the bungalow with a three bedroom house in keeping with the character of the neighbourhood's existing development. The Commission's staff recommended "that the permit [to build] be granted subject to the condition that they allow the public an easement to pass across a portion of their property." (63) This would allow for easier access by the public to two



public beaches. The Nollans protested such an imposition. The issue in this case is the question: should the state have to pay the Nollans for the public use of their land as a link between two beaches. The Commission stated that the increased bulk of the Nollan's new home "would increase the blockage of the view of the ocean...contributing to the development of a "°wall of residential structures' that would prevent the public from [realizing that there is a stretch of coastline] that they have every right to visit." (64) Private use of the shore would increase (65) as well as "cumulatively burden the public's ability to traverse to and along the shorefront." (66)

The fact that some aspect of private property was taken for public use, in the eyes of the Court, constituted a taking. The California Coastal Commission would have been within its limits to attach conditions to its permit if it furthered the goals of the body. The condition for the prohibition must advance some need outlined by the governing body. But the Court stated, "[t]he evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." (67) The Court was able to check legislative land use control. The Court's evaluation of the situation concludes as follows: "The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may



be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use, but an out and out plan of extortion. " (68)



## E. Compensation: The Payment for Police Powers

The Fifth Amendment of the United States Constitution protects the property rights of its citizens. If property is taken, the Constitution states that compensation must be paid to the owner of the property. This protection of one's rights stems back to the Middle Ages. The government's ability to take property and compensate the owner through eminent domain.

Compensation consists of paying the owner the fair market value for his land. This is determined through appraisal techniques: recent sales of similar sites, damages to the owner, etc. The recent Supreme Court decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, held that when a court has determined that a particular regulation was so restrictive that it constituted a 'taking', the government must pay the property owner just compensation even if property interest was only 'taken' temporarily. Stating the opinion of the Court, Chief Justice Rehnquist wrote: "in this case the California Court of Appeals held that a landowner who claims that his property has been 'taken' by a land use regulation constitutes a 'taking' of his property. We disagree, and conclude that in these circumstances the Fifth and Fourteenth amendments to the United States Constitution would require compensation for that period." (69) The Chief Justice went to great lengths to state that there is





little difference between a permanent taking and one that is temporary. Citing previous government practice, such as paying for the use of land during the Second World War, he wrote: "These cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are no different in kind from permanent takings, for which the Constitution clearly requires compensation." (70)

Government is required to pay for use of the land during this period just as an individual would pay rent on an apartment. To void the legislation would not be "a sufficient remedy to meet the demands of the Just Compensation Clause." (71) This would make the taking temporary and, as mentioned above, still one which requires some sort of remuneration. Quoting Chief Justice Holmes in Pennsylvania Coal, Rehnquist concluded, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (72)

Full compensation will now play an important role. Simple payment for property is not enough, interest is required. In cities such as New Orleans or Charleston which have the oldest preservation ordinances in the nation, a suit for damages, accumulated over time, could destroy the city financially.



## F. Compensation and the Transfer of Development

### Rights: The Penn Central Decision

Since the 1960s, there had always been a question as to whether or not designation under a landmarks law, local or otherwise was an over extension of a governing body's police powers. If so, compensation was necessary. This question had been answered in numerous Supreme Court decisions that have already been mentioned. The question before the Supreme Court in the Penn Central Transportation Company v. New York City (73) was twofold. The Court pondered the question whether a city may use historic designation as a means of preservation "without effecting a 'taking'." (74) The second question was one of compensation: was it necessary and did it "mitigate whatever financial burdens appellants have incurred." (75)

The Court decided that designation was not a taking in this case. But the Court saw fit to extend its powers of judicial review and state that the Terminal's air rights were valuable. (76) Since the air rights were valuable, the Court concluded that "while these rights may well not have constituted 'just compensation', if a 'taking' had occurred, the rights nevertheless mitigated whatever financial burdens the law has imposed on the appellants..." (77) The Court stated that regardless of their value at this time, they are indeed a valuable commodity. In 1978,



due to the rather soft office market in New York City, undoubtedly the value of the Terminal's air rights was not readily discernible. In the boom market of 1984, most certainly the the rights could easily be sold. The Terminal became its own development rights bank, holding onto its rights and selling as the market demand was realized. The Court took a long-term view of the development rights, realizing that their value at some point would more than compensate the owners.



G. Fred F. French Investment Co. v. City of New York

The case of Fred F. French Investment Company v. City of New York was heard in the Court of Appeals of the State of New York (the State's highest court). The City had through legislative process determined that two private parks in New York City's Tudor City apartment complex should be zoned for park use only. The City reacted to the Company's plan to build a skyscraper on the site and the appeals for assistance from the complex's residents. The Fred F. French Company held only a security interest in the properties; it was not the owner. The Fred F. French Investment Company sued the City for an illegal taking of the property by the City's legislative action. The City stated that if a taking had occurred, the investment company would be compensated by the parks' development rights which the City allowed to be transferred to an undesignated site between Sixtieth and Thirty-eighth Streets and Third and Eighth Avenues. The investment company reiterated that the development rights were at best a high risk venture and at worst, worthless. The Court stated at the onset of its decision that the "value of property is not concrete or tangible attribute but abstraction derived from economic uses to which property maybe put; thus development rights are essential component of value of underlying property, because they constitute some of the economic uses to which property may be put; such development uses may not be





disregarded in determining whether a zoning ordinance has destroyed economic value of underlying property." (78) In principle, the Court of Appeals recognized the potential value of a site's development rights. (79) But while acknowledging the value of the air rights, the Court conceded that development rights were of an "uncertain" (80) market value. The parks' air rights transformed into "floating development rights, utterly unsalable until they could be attached to some accommodating real property, available by happenstance of prior ownership or by grant, purchase, or devise, and subject to the contingent approvals of administrative agencies. In such case, development rights...float in a limbo until restored to reality by reattachment to tangible real property...[I]t is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action." (81) The Court noted that the problem with this above arrangement is that "it fails to assure preservation of the very real economic value of the development rights as they existed when still attached to the underlying property." (82) The intangible nature of



the development rights lead to the Court's decision. A body such as a development rights bank would have instantly insured compensation for the property of the rights under the State's power of eminent domain. (83)

The transfer of development rights will be compensation in the future as long as real estate is considered as such. As determined in Fred French, the development rights of site do have a value attached to the site. When they are removed from the site, they lose their value. The Court held that the extent to which an ordinance renders a property unprofitable will determine whether a 'taking' has occurred. The Court will also look at how the ordinance protects the public, what the goals of the ordinance were, and how they were achieved. By zoning the parks so no development could take place, the City completely destroyed the economic value of the site. Once it has been determined that a 'taking' has occurred, it must be decided if compensation has been paid. The use of transfer of development rights are uncertain; compensation must be fair market value—a fixed price. To allow something as uncertain as the transfer of development rights to serve as compensation is to allow for no compensation or below fair market value compensation to be paid.



#### IV. Transfer of Development Rights

##### A. Transfer of Development Rights: Preservation Planning

Transfer of development rights is a concept developed to account for the disparity between the zoned density for a particular site and the actual density occupied by the historic structure. It is the transfer of the unused yet allowable development density from one site to another.

(84) The unused yet allowable rights above the landmark are sold to the owner of an adjacent site or when applicable, to the owner of a non-adjacent receiving site. These rights are sold on the open market as land would be sold. The purchaser of the rights is permitted to increase either height, density, or occupancy levels. (85) In some cities, such as New York, part of the profits of the sale are put aside to pay for the support and maintenance of the historic building.

##### B. The Zoned Lot Merger

The development rights that a building has are granted by a districting scheme that affects all real property in the City. (86) The development rights are not transferable except in certain instances. Primarily, there are two ways of transferring development rights. The first is the zoned



lot merger. It is the simplest example of the transfer of development rights system. (87) It consists of a group of underdeveloped lots that are joined together or combined in order to obtain a greater amount of allowable development.

(88) If some of the lots are built upon, as is the case with historic buildings, and the floor area ratio is below the prescribed amount, the city permits the additional construction on any part of the composite site. The proposed building with the existing structure is not to exceed the granted floor to area ratio. (89) Laws regarding lot mergers were developed in 1961 and 1977.

(90) Such notable examples of this kind of transfer are the Helmsley Palace Hotel which used the rights of the Villard Houses, Citibank's Wall Street office which used the rights of the New York City National Bank at 55 Wall Street, the tower behind the Racquet and Tennis Club at 370 Park Avenue, and Academy House behind the Academy of Music in Philadelphia. Proposed zone lot mergers in the recent past have been announced for the Metropolitan Club on Fifth Avenue at Fifty ninth Street and the old New York Cancer Hospital at 103rd Street and Central Park West.

#### C. The movement of granted air rights

Transfer of development rights across lots, a relatively new concept dating from the late 1960s, has appeared quite strongly in the New York preservation





scene. In a city like New York where every available bit of land in the mid-town business district is precious, there is a great deal of pressure on the area's landmarks. The lots must be in common ownership in fee or bound together through a long term lease.

The City established a new type of development control in the late 1970s. The unused development potential of a historically designated lot could be transferred to a non contiguous lot. This was done to allow for a high level of light and air over the landmark. (91) In 1968, amendments to the New York Zoning Resolution permitted the Planning Commission to authorize transferrance to specific adjacent lots. The resolution stated that the air rights maybe transferred to a contiguous lot, to one across the street from the landmark, or diagonally across an intersection. The maximum FAR overage on the transfer site was not to exceed 20 percent. The amount of transferable floor area is derived by subtracting the existing floor area of the landmark building from the allowable area. The transferred floor area is irrevocably subtracted from the site and a plan for the preservation and maintenance of the landmark must be submitted to the City Planning Commission. (92) This was amended in 1969 to allow for the a chain of ownership. A chain was determined to be a group of properties owned out-right by a single individual. The properties could qualify as a chain of ownership if the owner of one property secured a legal agreement with the



owners between his site and and the landmark site. The agreement must be long term. When a specific area needs protection, it is within the powers of the City to create special preservation and receiving zones for the rights. (93)

The transfer of development rights system is viewed by many as a friend to the beleaguered urban landmark. Transfers do not add to the bulk of the city such would be the case zoning bonuses. John J. Costonis wrote in his work, Space Adrift, that the transfer of development rights maintains the status quo by the creation of a transfer of development rights receiving zone superimposed upon the existing business district. (94) Costonis wrote, "Cities adopting the version of the Chicago Plan under which transfer districts encompass areas of landmark concentration merely redistribute the density that has already been authorized for these areas by the zoning code; they do not create additional density as in the the case of zoning bonuses." (95)

There have been some rather noticeable instances of transferred development rights. Amster Yard involves the a transfer of unused development rights that were granted for a historic block of rowhouses with a central court. The transfer was delayed for six years when the New York office market became soft. Grand Central Terminal and the South Street Seaport District are two other examples of transferred development potential. A more recent one is



the recommendation for the creation of a special Broadway Theater District similar to the Seaport District in its employment of transfer of development rights. (96)

The transfer of the development rights of historic structures has been used to protect some rather important structures and areas of New York City. But is it a friendly means of preservation or does it create chaos? Most certainly, the movement of development rights could cause an urban planning nightmare. As Norman Marcus wrote in his summation of transferring air rights and the City plan, " A well understood plan at the outset avoids the unpredictable dealing of discretionary TDR wild cards down the road." (97) Compared with the zoned lot merger, the transfer of landmark development rights allows for a sounder movement of the City's bulk because of its many safety features. In order for both the City's historic past and its livable present to be preserved, the landmark transfer must be made more attractive than the zoned lot merger. The landmark transfer is futile in the absence of a sound plan and fixed municipal control.



## V. The Chicago Plan

### A. An Introduction

The Chicago Plan is the brainchild of John J. Costonis in his book, Space Adrift: Landmark Preservation and the Marketplace. Space Adrift and its Chicago Plan was Costonis's attempt to reverse the trend of destruction that afflicts our nation's "urban centrally located building in private ownership..." (98) A central feature of the Plan is its utilization of transfer of development rights as a means of preserving landmarks of the Chicago School of Architecture. The development rights are moved or transferred to another site, allowing the owner of the receiving site to build a taller than zoned structure. The payment to the owner of the landmark for his development rights is supposed to relieve some of the economic pressures on him to demolish his low-level landmark and replace it with a taller, more profitable structure. (99)

The Chicago Plan attempts to avoid some of the constitutional issues already mentioned. Notably, the Chicago Plan squarely addresses the question of adequate compensation for the landmark owner. In the Fred F. French case, one saw that the development rights were only as valuable as the market and only if immediately attached to another receiving site. Costonis has anticipated this dilemma by his insistence on a municipal development rights





bank to absorb the rights as they appear on the market. This will be explained in further detail.

From a density perspective, Costonis defends his plan against critics who would state that the transfer of development rights increases density. Costonis states that, compared to zoning bonuses which add density to the urban scene, transfer of development rights does not add to the city's density. Bonus space, wrote Costonis, is added "ex nihilo by the city...bonus programs inject new increments of density into the community." (100) Transfer of development rights on the other hand, "do not create new space, they merely redistribute space that has already been authorized." (101)

## B. The Chicago Plan and Planning

One problem with the Chicago Plan is its reliance on the municipality's planning office. The city must be willing to do a great deal of homework in order for the Plan to be fully effective. (102) What influenced the Supreme Court's decision in the Penn Central case was its belief that the New York Landmarks Preservation Commission based its decisions on a well thought out plan. (103) This protected the Commission from charges of reverse spot zoning. Costonis points out two specific reasons why planning is of such importance for the Chicago Plan: first, transfer of development rights, as well as incentive



programs are part of an overall scheme. The incentive program must augment, not hinder, the goals of the municipality as set forth in its municipal plan. (104) Secondly, an incentive program that allows for either zoning bonuses or development rights transfers must be "sensitively correlated with the prescribed amenity's capacity to offset the building's greater bulk. [With] development rights transfers, the redistribution of the low density use's excess rights must not occur at the cost of disrupting either the area's public services or its dimensional scale." (105)

### C. The Foundation of the Chicago Plan

The Chicago Plan, with its techniques of transferred rights, uses four points inherent in today's landmark problems as a foundation. First, many landmarks are of a lower density than allowed by current zoning. (106) Second, most landmarks are capable of returning a profit to their owners. Their problem is one of the "disproportionate value of their sites in relation to the landmark buildings." (107) Third, these landmarks are usually to be found in the compact, high density business sectors of our cities. (108) And finally, public facilities and services are most often plentiful in these areas, allowing for more people to be absorbed with a greater efficiency. (109)



These four characteristics form the foundation of a preservation plan with which the city can employ development rights transfers. They are the point of departure. (110) A city council can slowly build its transfer plan into its existing code, adding the necessary ground work for a full implementation of the plan. The goals of a transfer program should be to preserve the historic landmark, cause a minimum of disruption on the cityscape, keep the structure on the city's tax rolls, minimize acquisition in fee of buildings and retain the buildings original use when it is economically feasible for such a continued use. These four elements of the Chicago Plan are the incentive package, the development rights transfer district, the preservation restriction, and the development rights bank.



#### D. The Incentive Package

The incentive program begins with a landmark commission appraisal of the economic consequences of its designation of a property. Once this is determined, the commission will formulate a financial package that includes a real estate tax reduction, in accordance with most existing state laws, and an authorization to transfer the landmark's unused development rights. (111) Subsidies to cover losses may come in the form of additional development rights from the municipal development rights bank. The city would either calculate the value of a site's air rights on a case-by-case basis or periodically update an index of the value of the development rights at stated increments for all parcels in the rights transfer district. (112) Costonis states that the tax reduction would make the incentive package most attractive because "tax savings will have a dramatic impact upon the profitability of landmark buildings." (113)

#### E. The Preservation Restriction

The preservation restriction is to insure that the owners of the landmark will continue to preserve the source of those rights. The preservation restriction allows the owner to qualify for various tax benefits. (114) The city can not acquire all of its historic buildings, but it is, of





course, committed to their preservation. To establish a type of covenant that runs with the land will insure its continued integrity . The preservation restriction should include the legal authority upon which the restriction is based; restriction on use; covenants forbidding demolition or alteration; restoration requirements and maintenance obligations; remedies for failure to return a reasonable profit; and duration of the restriction. (115) Each of these conditions will vary according to each municipalities laws and degree of preservation standards.

#### F. The Development Rights Transfer District

The third component of the Chicago Plan is the development rights transfer district. The rights, as mentioned earlier must be part of a well considered plan. The transfer of development rights district must fit into this plan. There are two techniques for determining where the receiving district is to be located. The district can either be founded in conjunction with the area with the highest concentration of landmarks or independent of this core area.

The first type of district is best illustrated by the recently proposed Special Theater District in New York. (116) The receiving district for the rights in the Theater District overlap the Core Theater District. The receiving zone umbrellas the preservation zone. Instead of having



the transferred rights move solely to an adjacent site, they can be moved freely throughout the district. But it must be remembered, the public facilities and services must be able to support the increased bulk and usage. (117)

Allowing for a freer movement of air rights prevents buildings of undimensional scale being placed at the end of, for example, a block of row houses.

The second type of district is where the air rights are transferred away from the core area. This is best illustrated by the Georgetown Waterfront Historic District in Washington D.C. (118) Simply, the development rights from the waterfront were transferred to a specific zone that encompassed lots which bordered the route of Washington's new Metro system. It was anticipated that the advent of the subway would warrant greater density allotments. (119) The density along the proposed route was not increased. Already determined rights from the waterfront district were made available to be transferred from the point of origin to the new subway corridor. This use of transfer of development rights made up for the discrepancy between available rights found along the subway route and needed rights along the route.

#### G. The Municipal Development Rights Bank

The final feature of the Chicago Plan is the municipal development rights bank. The municipal development rights



bank has already been mentioned in relation to the Fred F. French Investment Company case. With a bank ready and able to buy the rights, they no longer would have been speculative. The landmark owner would always have a place to sell his development rights. The bank would derive its supply of development rights from three sources. The first source is from landmarks in immediate danger of demolition. The city would first give the owner of the property an option to sell the rights to either the bank or on the open market. If the owner refused, the city could use its power of eminent domain to acquire the building's development rights in fee and pay the owner compensation for his loss. (120)

The second group of landmarks is also in private ownership. These development rights would be transferred to the bank by donations. There would be specific tax advantages to donating the rights compared with selling them to the bank. (121) These benefits would have to be written into the municipal tax code if there was no provision for this sort of donation.

Municipally owned landmarks are the third source of development rights. Since many distinguished buildings are publicly owned, this could be a considerable source of income for the development rights bank. By transferring these rights to the bank, the "city can enroll an otherwise dormant municipal resource in the service of a worthy public purpose." (122)



These are the basic components of the Chicago Plan. Most municipal programs that contain a development rights transfer technique have followed, at least in part, the Chicago Plan. New York City's transfer of development rights program is one of the more fully developed rights programs in the country. It, however, does have its differences with the Chicago Plan.





## VII. The New York City Program

### A. Introduction

The New York City statute was amended in 1968 to allow for the transfer of development rights. It authorized the Planning Commission to oversee the transfer of rights from a landmark to a specific adjacent lot. The adjacent lot was defined as either contiguous, across a street or across an intersection. (123) In 1969, the term adjacent site was redefined to include linked tracts of land that could conceivably span more than one street. The new definition permitted "an air rights transfer to any lot in a chain of common ownership, as long as the first link in the chain is across the street from or contiguous to a landmark site."

(124) Increases in bulk were not to exceed 20 percent of the unused rights. The transfer could be made to one or several adjacent sites.

The new building was required to meet specific standards of design. The new building had to be compatible in scale to the landmark. The owner of the landmark must use part of his profits from the sale of the air rights to create a trust fund for the maintenance of the landmark. The specific maintenance program was to be worked out by the Landmarks Preservation Commission on a case-by-case basis.

(125)

In the 1970s, the transfer of development rights



program's guidelines were relaxed to allow for three things. The first was the right to utilize a structure's full development potential. Full transfer of unused development rights could now be transferred to a single site in a high density, commercial district. The second was the initiation of the area wide plan for transferring and receiving development rights. (126) This is similar to Costonis's development rights transfer zone. The third was the separate creation of a receiving zone such as one would find employed at the South Street Seaport District. Here, the development rights zone and the commercial zone do not overlap due to the special, historic nature of the Seaport. To retain its character fully, it was insured that the development zone with its increased bulk would be away from the historic area so as not to destroy its character and scale. The South Street Seaport is only one of New York's areas that has used the transfer of development rights to insure its financial security and retain its historic character.

The fundamental difference between the transfer of development rights program as it evolved in the 1970s and the zoned lot merger technique, its chief rival, is the presence of a specific preservation component in the transfer program. The zoned lot merger can occur for any structure, at any contiguous lot. The zoned lot merger does not entail the movement of rights across lots of different ownership. It is simply the combination of a lot,



in this instance a landmark lot, with an adjoining lot. The zoning potential of the site is newly determined to incorporate the increased size of the lot minus the existing bulk of the building that is retained.

#### B. Amster Yard

Amster Yard, a small residential enclave on the eastern side of Manhattan's mid-town was one of the first projects to utilize the 1968 resolution. The site is an ensemble of privately owned nineteenth century residences and commercial structures with a communal garden in the interior of the block. Amster Yard is east of Third Avenue between Forty-ninth and Fiftieth Streets. The owner of the landmarked property offered for sale his unused air rights to an adjacent parcel on Third Avenue where an office tower was planned. (127) The air rights sold for \$494,731. \$100,000 of this amount was eventually set aside to be used as a trust fund for the maintenance of the site. (128) The five trustees of the fund were chosen from the significant players in the transfer group. Sadly, this original plan failed due to the failure of the New York office space market in the mid 1970s.

The Amster Yard plan was revived in a somewhat different form in the early 1980s. A restrictive declaration was signed instead of forming a new trust fund. The declaration was in favour of the



New York Landmarks Conservancy. The owner received \$35,000 for immediate repairs and maintenance and covenanted to provide regular maintenance for the structure and be subject to periodic inspections of the landmark. The Conservancy was granted the power to compel that work be done. They were allowed to enter into a contractual agreement with a contractor if the organization felt that necessary work was not being done to the Yard. (129) The owner of Amster Yard did not receive any additional compensation for the sale of the air rights.

As can be seen, the transfer of Amster Yard's development rights could be completed despite New York's soft office market. Fred F. French is an example of another attempted transfer in a soft, unsure market. These two cases illustrate the two sets of events that can occur when the market for new construction is weak and an attempt is made to transfer development rights. The owner of the air rights needs a buyer for his rights. Amster Yard had found a buyer for its rights: the sale was made. The loser was the developer, not the landmark owner. If the Fred F. French organization had been able to find an immediate buyer for its rights, the case would not have occurred.

### C. South Street Seaport District

The South Street Seaport District is an enclave south of the Brooklyn Bridge in Manhattan, consisting mostly of





two hundred year old buildings. It is the last waterfront area in Manhattan representative of New York's maritime prowess during the eighteenth and nineteenth centuries. The district surrounds the Fulton Fish Market. The area is unquestionably historic, but it was also clearly an uneconomic use of land in an area that was experiencing an economic boom in land prices.

The South Street Seaport District is significant for two reasons. The first is that the preservation area and the redevelopment area are drawn so as to not overlap as one discovers with the Mid-town Theater District recently proposed. This prevents these diminutive historic buildings from becoming overwhelmed by modern behemoths. The second significance is the introduction of private-sector commercial banks to act as the transfer of development rights bank instead of the City fulfilling that role. At the outset of the venture, it was decided that multiple transfers would be allowed. This meant that the owner of the historic properties were allowed to convey his development rights to either the bank or directly into the market-sector receiving lot. (130) The banks released their mortgages on the properties, thus enabling the owners to "convey their development rights and secure investment" (131) for the maintenance or rehabilitation of their landmarks. The middleman was the consortium of banks that initially released their mortgages. These banks served as the repository for the preservation area's development



rights. As warranted, they would move rights to predetermined receiving sites in the redevelopment district. This predesignation of development parcels circumvents the problem of floating rights. The presence of a rights bank insures the immediate purchase of the rights. The rights are now marketable and the variable of speculation and undetermined risk are removed, thus preventing a reoccurrence of a Fred French problem. As an added benefit, the transfer rights were not used for increases in height, but increased the permissible amount of tower coverage of a specific lot. This allowed for the retention of the area height as zoned, resulting in some degree of height compatibility for the area. (132)

In one example, 300,000 square feet of air rights were purchased from the development rights bank. Tower coverage restrictions were waived. The sale generated \$1,500,000, a figure below the area's square footage rate for land. The proceeds of the sale were used to balance the books on the forgiven mortgage debt. Other buildings in the area purchased 142,868 square feet and 275,000 square feet from the development rights bank. In 1984, there was still over a half of a million square feet left in the development rights bank. (133)

#### D. Tudor City

The failure of New York's transfer of development



rights program is best illustrated by its Tudor City proposal. This proposal was the impetus for the Fred F. French case. Tudor City is a group of apartment houses that surround two small open parks. The site is located on Forty-second Street between First and Second Avenues. The Tudor City proposal was an attempt by the City to move development rights from the small parks which the residents of the complex lobbied to save from development to a location in the central mid-town area. The City of New York, in response to the lobbying efforts of the residents, created a Special Parks District, zoning the park sites to a level of zero density. As mentioned earlier in the evaluation of the case, the Courts found that to create such a zone for the parks was an overextension of the City's police powers. The transferred rights were deemed to be of an uncertain value and, therefore, not adequate compensation for the density mandate by the City.

The City, in its desire to preserve much needed green space and answer to its constituents wishes, created a floating zone transfer of development rights system for the owner of the Tudor City air rights. (134) Unlike Amster Yard or South Street Seaport with their predetermined sites, the Tudor City owners were told by the City that they own these air rights. However, they must not only find a purchaser for the rights, but the site for them as well. This was certainly the cause for the failure of the City to win its suit. Whether the rights originate from an



adjacent site or from a predetermined preservation zone, the rights must be able to withstand the market into which they are thrust. To allow for the transfer of development rights to an adjacent site partly shields the municipality from judicial challenge due to the fact that the rights will be transferred when the non-landmark site is ready for development. When there is a specific zone or group of sites designated to receive the rights, the question of where the rights are to go is answered. However, as mentioned in conjunction with the Fred F. French case, the only sure way that transfer of development rights will work in such a situation as with Tudor City is for there to be a development rights bank.





## VII. Economics

### A. The Economics of Transfer of Development Rights

The transfer of development rights is above all an economic program. Its goal is to make urban landmarks profitable. The example in Space Adrift uses four landmarks in Chicago's Loop to formulate a methodology for computing the cost per square foot for development rights. (135) Those examples are as good as any to illustrate a formulative process for determining costs. The costs of the development rights will vary from site to site. As an example, the development rights sold to the Philip Morris Corporation for their world headquarters sold for twice the market rate for land in the vicinity; at Amster Yard, the rights sold for a bit below market rates.

New construction which involves transferred development rights must still be guided by a developer's desire to maintain a low level of costs and a high level of profit. The new building must have a square footage of at least 28,000 per floor for a satisfactory return. As much square footage as possible should be accommodated on the lower floors, primarily the first, second and third floors. The shape of the new building should approximate a square as closely possible to allow for an efficient use of space and to allow for the greatest amount of rental space.. (136) A cost increase of 8 percent per floor over the cost per



square foot for the construction of those floors is assumed as the cost growth rate. (137) This is according to the Marshall Valuation Service. The cost of construction increases as a building becomes taller due to increase in time, labour, and construction costs. We will assume a construction cost figure of \$50 per square foot for the first through the third floors. This figure is not derived from any actual figure used in New York's real estate market. A recent New York Times article regarding the proposed Theater District placed the value of land at \$40 /square foot. With construction costs for the first three floors, one can assume that the cost will be greater than the the price of acquisition due to other factors which must be taken into account.

Certain assumptions are made at the outset. Each floor has an area of 30,000 square feet. The construction cost for the first three floors is \$50 per square foot. This is the starting point.

1) total square footage-floors 1,2,3

$$30,000 \times 3 = 90,000 \text{ sq ft}$$

2) total construction cost for floors 1,2,3

$$\$50 \text{ per sq ft} \times 90,000 \text{ sq ft} = \$4,500,000$$

The as-of-right height for the site is 20 stories. The cost growth for the next 17 stories must be determined. First must be determined the total square footage for the rest of the building.



3) total square footage-floors 4-20

$$30,000 \times 17 = 510,000 \text{ sq ft}$$

4) total construction cost for floors 4-20 with cost growth of 8% per floor carried to the 17th power

$$510,000 \times \$50 \times (1.08)^{17} = \$94,350,460$$

The cost per square foot for the twenty story building is determined by dividing the total cost of construction by the square footage of the building.

5) cost per square foot. The total construction cost for the building is divided by the the total square footage.

$$\$98,850,460 / (90,000 + 510,000) = \$164.75\text{psf}$$

total cost equals the addition of the figures in steps 2 and 4

The developer of the site agrees to purchase an additional five floors worth of development rights to increase the height of his building and obtain more valuable rental space. The market rate for land in the neighbourhood averages to \$20 per square foot. The negotiated price for the development rights is \$18 per square foot.

6) total square footage for the additional five



floors.

$$30,000 \times 5 = 150,000$$

The additional air rights will increase the amount of square footage in the building by 150,000. The acquisition cost for the rights is this amount times the cost per square foot for those rights.

7) acquisition cost

$$\$18 \times 150,000 = \$2,700,000$$

The total cost for the construction of this building with an additional five stories is determined by using the initial figure for the construction of the first three stories, \$50 per square foot. However, this time the height of the building is twenty five stories, not twenty. The base figure of 4.5 million dollars is not changed. The costs for floors 4-25 are determined.

8) total square footage of floors 4-25

$$22 \times 30,000 = 660,000 \text{ sq ft}$$

The next step is to determine a construction cost per square foot which encompasses the additional five floors.

9) construction cost for floors 4-25. The figure is carried out to the 22nd power.

$$660,000 \times \$50 \times (1.08)^{22} = \$179,405,833$$

In step 9, it was determined what the cost of





construction cost of the the first three stories of \$4.7 million will be added to this figure to determine a final construction cost.

10) Total cost of construction

$$\$4,500,000 + \$179,410,000 = \$183,910,000$$

Added to this figure is the cost of acquiring the additional air rights

11)  $\$183,910,000 + \$2,700,000 = \$186,610,000$

The cost per square foot for the twenty five story building is dtermined by dividing the figure derived in step 11 by the total square footage of the building.

12) cost per square foot

$$\$186,610,000/750,000 = \$248.80\text{psf}$$

The cost of the building with the development rights is of course higher than the cost for the twenty story building; the cost of acquisition must be figured in the final cost. By subtracting the cost per square foot for the as-of-right building from the cost per square of the building with the development rights, one can determine the cost per square foot for the additional floor space. The additional floor space cost an additional \$84 per square foot.

While it may seem that the cost of preservation and transfer of development rights makes such a program



unattractive, one must remember that certain factors are present that will mitigate such losses. First of all, there is the fact that office space on higher floors command higher rates. Part of the acquisition cost can be recovered there. Secondly, new construction in the central area of mid-town will be able to sell at going market rate or higher as the building is new and it is creating new and needed space in the area. The rental rate for the building depends on maintenance costs, rate of recapture of the investment, market rate, and other factors. A complete study of the relationship between development rights, rental rates, and recapture is to be found in chapter four of Space Adrift. (138)



## VIII. Transfer Systems

### A. Types of systems

As we have seen, three types of transfer systems exist for development rights and are utilized in New York.: the adjacent lot; the receiving zone, both the overlapping and the separate zones; and the unlimited free zone. The free zone is discredited and ill-advised for use as part of a transfer program due to its inability to withstand constitutional challenge at this time under existing conditions. Its future is uncertain and with preservation and the transfer of development rights facing risks both in the courts and the varied market place, its use is not feasible. The remaining two systems are the most likely to succeed. Both are currently in the New York press as the City attempts to preserve two of its famous resources: Grand Central Terminal and the Broadway Theater.

### B. Grand Central and the question of adjacency

The transfer of development rights from Grand Central has been a source of much publicity and confusion for more than a decade. One of the first buyers of the Grand Central air rights was Philip Morris Corporation, Inc. Philip Morris entered into negotiations with the Terminal when it was decided that it was to build its new world



headquarters across the street from the Terminal at Forty second Street and Park Avenue. Philip Morris needed additional height and tower coverage to make its 200,000 square foot lot more economically feasible. (139) Philip Morris acquired the equivalent of three more stories in height from the Terminal at a price that was twice the current rate for land in that area. (140) The New York City transfer of development rights program allows for a receiving site to increase its coverage by 20 percent. The City relaxed this provision that dates from 1968 to permit the transfer of all of the development potential to a single site in a high density commercial district without regard to the 20 percent limit. This was done in 1975 in response to requests by Penn Central. (141)

Recently, a proposed transfer of rights from Grand Central has been in the newspapers. Grand Central has agreed to sell its air rights to a site at 383 Madison Avenue--a site which lies three blocks away from the Terminal. What makes the transfer controversial is not only the number of rights that were transferred to one site, but the basis of the railroad's claim that the sites are adjacent.

The proposition for 383 Madison involves the construction of a building that is 74 stories tall north of the Terminal. The tower's developer, First Boston Corporation, proposed to use 800,000 square feet of the Terminal's air rights. The site is within the high density





mid-town commercial area. The allowable bulk of the site is a mere 600,000 square feet. The additional air rights would more than double the bulk allowed on the site. This proposal involves a complicated set of legal, planning, and landmark issues. (142)

As mentioned earlier, the transfer of development rights program in New York allows for the transfer to adjacent lots, across streets or diagonally across intersections. Development rights can also be moved through a chain of ownership to a distant yet adjacent by virtue of the chain of ownership site. (143) Penn Central, it is claimed by the First Boston Corporation's lawyer Edward N. Costikyan, may have sold its surface rights, but "it retained 'subsurface' ownership rights to the land underneath them, much of which includes the railroad tracks". (144) The idea of separate estates of land is not new. Again one can see that the question of surface and sub-surface rights has yet to resolved. Similar to the claim made in Pennsylvania Coal, Penn Central claims that it has not sold its sub-surface rights and thus claim that it is this underground chain of ownership that allows for the transfer to the distant yet adjacent site. According to their claim, it is only at the Grand Central site that their ownership extends both up to the stars and down to the center of the earth. Ownership of the sub-surface tracks creates a horizontal chain of title. If one can imagine a rectangular piece of wood with another piece of wood placed



perpendicularly above it. The vertical piece of wood would represent the landmark site that is Grand Central Terminal. The horizontal piece of wood represents the sub-surface rights of the Terminal that are the rights of the railroad tracks. The surface rights above the tracks were sold off when the tracks were covered. If the argument is upheld in court, it is believed that the railroad could "argue for a chain that follows its tracks out of town". (145)

As a planning issue, it has rather severe repercussions. This would be the largest sale air rights to take place. Such a large sale for this particular site would create an increase in density that is, in the words of the New York Times, "a mistake, a massive mistake." (146) The area is now one of New York's most congested. The City made a sound planning decision when it determined that the site was to be zoned for 600,000 square feet. To more than double the size of the building on the site would be planning madness. The Times mentioned salient points: "Even with tunnels to Grand Central, its workers and visitors would further pack already crowded sidewalks; deliveries would further pack already crowded streets, and the whole would pile new weight on the growing mid-town crush." (147)

For landmarks, the outcome of 383 Madison could mean disaster. One of the central results of the Supreme Court's Penn Central decision was its recognition of the



potential of selling the landmark's unused air rights as a means of compensation. If a taking had occurred, the value of the air rights might have been viewed as an adequate form of compensation. The Supreme Court stated that the Terminal's air rights helped to mitigate any financial burden imposed on the owners due to designation. This is based on the assumption that the rights can be sold. If the City Council does not allow the rights to be sold, they are in essence, rebutting the claim that the rights have a value. If they are worthless, then perhaps a taking had occurred. This could make the extent of the legislative imposition so great that the court could claim that to designate a landmark is an over-extension of police powers. The New York Times wrote aptly when it cited the potential threat to the Terminal: "If its owners are unable to apply their air rights on one of the other sites, the Terminal's landmark status would be imperiled." (148)

Rising behind Mercury, one could again see a Breueresque project atop Grand Central Terminal.

An application for the transfer was made to the City Planning Department in August 1986. This was followed by a preliminary draft environmental impact statement in October 1986. A revised draft was submitted in November of 1987. The Planning Department never certified the developer's application as complete for public land-use review. Early this year the developer went to court to force the issue.

(149)



Last month, the State Supreme Court ordered the City to act on certification within 30 days, after the developer submits specific information on air quality and traffic impact. The City is appealing the decision. (150)

### C. The Broadway Theater District

The New York Theater has been for many years the crown jewel of the theatrical world. To be "on Broadway" was indeed an honour and to "play the Palace" meant that one was at the apex of his career. But since the early to mid seventies, the New York theater on Broadway has declined. many theaters remain empty: still more have been demolished or are used for non-legitimate theater. Following the demolition of the Morosco Helen Hayes Theaters, a group of concerned actors and citizens, along with the City's blessings, founded the Theater Advisory Council.

The Theater Advisory Council created a report entitled To Preserve the Broadway Theater. (151) The report focused on a specific area of theaters that are located in what has been designated by the Council as the Core Theater District. Amongst its recommendations for the Core Theater District are landmarking by the Landmarks Preservation Commission, preservation covenants, and historic districting. It outlines criteria for evaluation of economic hardship and restrictions in scale and use. A central feature of the report is its recommendation that the





transfer of development rights tool as a means of preservation. The Report follows standard City policy on the transferrance of rights: across streets and intersections, chain of ownership, etc. (152) The report also allows for certain zoning bonuses and development benefits. These include "waiver of height and setback zoning rules." (153) The neighbourhood west of Broadway is of a generally small scale. There is an attempt to retain not only the scale of the surrounding neighbourhood by placing it outside the receiving zone, but to protect it further by the creation of a suggested Broadway Theater Historic District. The receiving zone for the Core District's air rights is concentrated between Sixth and Eighth Avenues and along Forty second Street. (154) However, the area is sure to be placed under shadow as the larger buildings, the result of transferred rights and bonuses, spring up along the fringe of the area. Also, there is no component in the Report to prevent the usual increase in rents that accompanies historic districting. The neighbourhood not only is home to many New Yorkers, but is also a place of business for many of the support services for the theater trade. While the theaters are justly slated for preservation and there is some realization that the neighbourhood's scale is to be retained, there is no attempt to retain the character of the area.

Transfer of development rights must be part of a well-considered plan in order for it to be accepted by the



public, developers, sellers of air rights and the courts. Without such a plan, the repercussions to the surrounding area could be disastrous. Admittedly, this is a projection of the future, but as development spreads through the area, the fringe area west of Eighth Avenue to the river will most certainly be affected. Integrated with the Theater plan must be a larger preservation plan for the area which would attempt to protect the scale and the theatrical support industries such as lighting shops, scenery studios, actors' workshops, and theatrical bookshops which contribute significantly to the theatrical character of Broadway.

The Theater Advisory Council's recommended transfer of development rights program is as follows. The Council extended to theater owners the right to move unused development rights to a receiving zone which overlaps the Core Theater District. The transfers would occur on the condition that the theater owner/renter into a covenant with the City. (155) The covenant would run with the deed of the theater. The covenant, as stated in the Report, "would bind the theater owner and his successors not to demolish the theater and to use [the theater] as a legitimate theater." (156) Appropriate short term provisions would be allowed for non-theater uses during so-called dark periods. The owner of the theater would be required to pay over a portion of his receipts from the sale of the air rights to the New York City Theater Trust. The Theater Trust is a recommendation of the Report. Theater owner



Robert Nederlander has stated that the cost to run a theater is \$250,000 a year. This sum, according to Nederlander is "insufficient to induce owners to forgo the sole potential of a non-economic property for a non-theater use." (157)

Nederlander's prediction is illustrated by the following example, also found in The New York Times. Under a scheme called the Theater Retention Bonus, the owner of a development site within the theater district, but outside the core, could increase the size of the new building by one FAR through payment to the owner of a theater site. For example, on a 30,000 square foot avenue site, the developer is allowed to build a 450,000 square foot building. With additional square footage from the transferred rights, the total square footage for the site would be 480,000 square feet. The price per square foot for the additional 30,000 square feet is assumed at \$40 a square foot: the average price of land in the area. The sale price would be \$1.2 million. The Times assumes a return of 8 percent with the money. The return would be \$96,000 a year with a return calculated to be somewhat lower, possibly \$57,000, after taxes. (158)

The sale of the rights through the Theater Retention scheme would not prohibit the theater owner from selling his rights to a neighbouring building plot. This, however, is not a practical option for many mid-block theater owners. The use of the bonus would obligate the theater owner to sign the above mentioned covenant. Gerald Schoenfeld of



the Shubert Organization stated that the covenant was too "hefty" to assume for an increase of one FAR. (159)

The problem with the retention bonus is that the available development rights in the core area is estimated to be approximately three million square feet. The purchase of one FAR is too small a figure to compensate the owners of these unused rights. To use up that much under the bonus plan would require 150 sites of 20,000 square feet. It is not known if that many sites of that size exist in the transfer receiving zone. The plan as it now exists does not show any relationship to the facts. The theater owners do not care for the plan because they feel that the return is too little to support the operation of a theater. The City did not thoroughly do its planning homework to determine if their increases were feasible given the area. The transfer of the theaters' development rights are viewed by Nederlander and the Times as the sole form of return for the theaters. The City views the transfer of development rights as a panacea for the theaters' problems. The transfer of development rights should be but one part of a plan to aid in the revitalization of the Broadway stage. As it appears today, the plan will be utilized by a limited number of theater owners.





## IX. The Issues of Transfer of Development Rights

A. Are the benefits of the transfer enjoyed equally by all?

Many issues surround the question of transfer of development rights. Regardless of the system employed (adjacency, receiving zone, or free zone) questions arise as to whether transfer of development rights is the correct option to choose. When planners or preservationists decide to utilize a transfer program, it must be the best choice according to the given situation. The planning results could affect future generations. But at the time of the transfer, the question exists: does everyone benefit from the transfer? The removal of air rights in one area surely affects the receivers due to the receivers' loss of light and air and strain upon existing services. In the case of an adjacent transfer, the parties subject to the results are the same: the benefits of the transfer are readily accessible to those affected by the transfer at the outset. Benefits such as the retention of scale and light and air are just to name a few. In the case of the receiving zone system, if the receiving zone is in close proximity to the preservation zone, again one can readily discern that both parties are beneficiaries to the transfer's best results. However, if the receiving zone is some distance away or the system in place is of the free zone type, the benefits for those encumbered by the



increased bulk are not as clearly defined.

For example, the City Of New York may decide that it is in its best interest to preserve important midtown landmarks. The City decides that it will create a special Fifth Avenue Landmarks Preservation zone, restricting the amount of density which would be allowed in the area. As a means of compensation, the City approves a transfer of development rights program. However, the receiving zone for the rights is the Upper West Side, an area experiencing a boom in residential real estate. On the surface it seems that the City has made a good decision: the landmarks are saved, the developers are compensated, and the people yearning to live on the Upper West Side are happy. But the result of such a system creates such towers as Television City. Do the residents of the neighbourhood derive any benefit from the transfer? They lose precious light and air, their support services are strained, and mass transit, slowly recovering on the Upper West Side, is pushed to its limit. The benefits for the residents of the area are few while those in midtown are great: less congestion, light, air, aesthetic environment. While it is true that the argument could be made that the preservation zone is readily acceptable, there are other possible examples where this is not the case. A true-life example occurred when the City proposed that in order to alleviate the congestion and high-level density of the Wall Street area, air rights for the Customs House could be transferred across New York Bay



and to the Staten Island greenbelt. The benefits for the residents of Staten Island are far less clear than the earlier example.

In order for a transfer of development rights program to survive public challenge, the public must first see that it is beneficial to them. Costonis states in Space Adrift that the public is behind the preservation movement. (160) I must agree. The preservation movement in the United States has grown immensely in the past decade. People across the nation are no longer blindly accepting change, as the challenge over the Columbus Circle site in New York attests. The ideas of scale and human environment are important to the man on the street. To allow a transfer program to spawn a building such as Columbus Center is to doom it to failure. Preservation in the United States came from the action of its citizens; they should all benefit from it.

The South Street Seaport District has most certainly allowed for the benefits of density transfers to be enjoyed by all. The movement of the development rights to the immediate south along Water Street has created a park of light and air that is heavily used by tourists. (161) South Street Seaport is an oasis in the desert that is lower Manhattan. Sadly, the historic buildings that now provide so many with open space in an area with a serious dirth of any kind of open, light space would not have survived and the area would have been further packed with nothing but



banal, characterless plazas such as one finds along Sixth Avenue that only benefit the developer with increased height for more return on his investment. For proof of the benefits of this successful transfer program, one must visit the Seaport on a warm spring day.





B. What is the role of transfer of development rights in zoning and planning?

A concern of important dimensions is the role of transfer of development rights in regards to municipalities' rights to set zoning limitations. Zoning is the one, if not the major, tool available to a municipality to carry out its goal of providing a safe and healthy environment for its citizenry. Part of this healthy environment is the ability for light and air to penetrate down to the streets. Transfer of development rights adds density to areas that have already been zoned by the municipality to an acceptable height. To add to that height, in some instances, would create intolerable conditions of stale air and darkness at midday.

The transfer of development rights program is to be viewed as part of existing zoning, not as a separate unit. In order for this to occur, a municipality that is considering a transfer program must have a workable municipal plan. Without a plan, the results could be an over extension of services, poor utilization of existing conditions or services, economic displacement for the residents, and the possible destruction of the municipality's tax base. The municipality must do its planning homework.

The implementation of a transfer of development rights program requires long term planning for the municipality.



The municipality must be able to target areas for growth or recognize growth in particular areas at its incipient stage. In other words, the municipality must recognize that a particular area is under-zoned for the development pressures placed upon it. It is legally unwise for a municipality to down zone a potential growth area because, if there is a municipal bank, the municipality is open to charges of forcing developers to buy air rights that were once available without charge..

One area that seems to have been able to combine a transfer of development rights program with incipient real estate growth is Georgetown area in Washington D.C. The Georgetown proposal involved the preservation of the area's riverfront. The plan for Georgetown recognized the construction of the Washington, D.C. Metro. The City Council realized that density increases would be necessary as businesses relocated along the new service corridor. Instead of increasing the allowable density along the Metro Line, the unused yet allowable development rights from the riverfront were earmarked for transfer to the receiving zone along the path of the subway.

The long term view employed in Georgetown allowed for the implementation of a transfer of development rights program. When density increases were realized to be an imminent necessity, existing zoning densities were found verses the creation of new density allocations. The creation of new density would have solved one problem, but



would have done nothing to protect the historic waterfront and the overall amount of density in Georgetown would have increased, destroying an aspect of its character. The various elements of a municipal plan must work in concert. With the implementation of the transfer of development rights program and the utilization of these rights, Washington, D.C., has satisfied its need for density while also fulfilling its goals for preservation.

Transfer of development rights must fit into the existing plan or the plan must be altered to coordinate the actions of its elements. The increased density can be incorporated into the cityscape if the plan provides for these increases. Cities regularly grant variances for building height and bulk, often without clear integration with the existing municipal plan. Transfer of development rights, by their very nature, need to be planned. Since they move development rights, transferred rights are a more controlled form of zoning enhancement. There are many levels of control that the transfer of development rights must pass before their eventual implementation. Also, transfer of development rights, if the system allows, moves bulk to predetermined sites, again controlling growth in a designated area. The transfer of development rights does not undercut existing zoning. They are a method of controlled updating and amending of the existing municipal code.



### C. The municipal development rights bank

Throughout the analysis, one can see the role the development rights bank plays: the South Street Seaport and Fred F. French are two such examples. The municipal bank, either through its absence or presence, must be a significant feature of a transfer of development rights program. First, we must address the question of the bank's structure: is the bank municipal or part of the private sector? Costonis identifies three sources for air rights to supply the bank. The rights are obtained from both the public and private sectors and in some instances, utilize the municipalities legislative abilities. If we are to follow Costonis's method of air rights retention, (162) the third means, acquiring air rights from municipally owned properties, creates a conflict of interest. A municipality creates zoning. If the development rights transfer statute is in the municipal plan, a direct conflict of intent is the result. To be succinct, the body that creates the the unused air rights, takes them back to fund the municipal bank. In theory, if the bank came up short, the city could rezone its municipal properties to unobtainable, unrealistic heights to create a large cushion for the bank. The program as it exists with the South Street Seaport District seems best suited to avoid changes of conflict of interest. The reader may remember that in the South Street Seaport District, the development rights bank was made up of





a consortium of banks that formerly held mortgages on the historic properties. By removing the City from the role of municipal development rights banker, the potential for conflict and municipal corruption is greatly reduced.

The absence of a development rights bank destroyed the City's ability to preserve the Tudor City parks in the Fred F. French case. To reiterate, it was the lack of tangible value for the development rights that caused the failure of the transfer. In order for the landmark owner to receive adequate compensation, they must be able to sell their rights at market or near market value. This market price is not necessarily set by the free market. This implies that the market will at some time purchase the rights. The role of the development rights bank is to set a fair market price for these rights, but the bank must also serve as a repository for as-of-yet unsold rights.

The first feature of the development rights bank is its role as a price setter for the rights. Its second role is as a repository. As seen with the South Street Seaport District, a consortium of private banks released their mortgages on the historic properties. In return, they served as the development rights bank and as the rights were sold, a portion of their cost was used to settle the forgiven debt. The rights were sold to various designated sites in the receiving zone. The rights were sold as needed in the market place. Until the time of the purchase, the rights remained in a file drawer.



Commercial banks by their very nature base their loans and investments on longterm ventures. They can afford to wait for their return over a longer period of time than a municipality. The banks' risks are well-planned and predetermined to the best of their abilities. Their rate of return on investment, such as from loans, is somewhat secure and constant, depending on the bank. Also, the banks' assets are quite substantial. A municipality, however, is usually not as structured as a bank and does not plan financially far advance. This is due to the public and political needs that are absent from a private bank. The fact there are political and public pressures that exist in government is all the more reason for the development rights bank to remain out of public ownership. The development rights bank requires firm, political commitment. It is not to be used as a tool for bargaining. Such an existence would make it a considerable option for developers in search of increased density or bulk. Also, the bank would not be subject to political graft. This would be source of public lack of confidence in the bank and the city's preservation plan as well. Finally, the money realized from the sale of development rights should be used for the landmarks plan. This may include, paying off debts on landmarks, funds for restoration, buying or condemning rights for the bank, paying for preservation easements. There are further elements of the preservation/development rights program that



would need funding as well. The bank is not to be seen as a source for the municipality as a whole. It is not to pay for the firemen or mass transit. By creating a privately run development right bank, we sever some aspects of the preservation program from the city, freeing up precious municipal resources for other city services.



D. Is the Transfer of Development Rights Compatible  
with the Aims of Preservation?

What most certainly deserves the closest scrutiny is the use of transferred development rights as a means of preservation. On the surface, it seems that transferred development rights are successful: twelve landmark structures have been saved by this planning method. But is the result of the transfer of development rights beneficial for preservation?

The transfer of development rights means that when the transfer is to an adjacent site, a building of small scale is sometimes overwhelmed by a neighbour not of zoned size, but larger. In mid-town Manhattan, one can find landmark structures of heights under eight stories tall side-by-side with skyscrapers of heights 30-40 stories tall. Part of the preservation of a landmark is the preservation of its scale. While landmarking does not extend to its non-designated neighbours, when a neighbourhood's scale can be controlled in an area of high landmark concentration, the idea of increasing bulk at an adjacent site destroys not only the scale of the landmark, but the area scale as well. Scale is best preserved. When a municipality utilizes a receiving zone system such as the Theater District, density is moved away from the Core Preservation zone. (163) The key is to target areas within the zone that are sensitive to the disruption of scale. (164) Again, a municipality's





general plan must be thorough. If the increase in bulk which is the result of a transfer are not to cause a planning disaster, the municipality must be able to determine how much increase it will allow. New York has chosen 20 percent coverage on the receiving site in a non-commercial district. This figure is in conjunction with their ultimate height and bulk limitations. In Georgetown, the municipal government could determine its desired pattern of development and height and bulk limitations. If it was desired, it could raise the existing zoning to get to its base height; the transfer rights would raise the building heights to their acceptable limits. (165)

The preservation of the cityscape is a broader issue. Increases in bulk and height are not trivial, nor are they minor. (166) Each increase in height deprives the city's residents of light and air. A long term view of the increases must be considered. While one or two increases are probably harmless in the broad view, the problem is when the plan is in place for a long period of time and many transfers have occurred. The net result is a cluster of tall buildings placing the smaller landmarks in shadow. South Street Seaport District, for all of its high qualities, does suffer from this problem. The problem of dark and long shadows can remain at its present level if the surrounding area remains at either its present height or the height as zoned is not changed. The cumulative affect of



the increased buildings to the south and the already built to zoned height buildings to the west make the district darker as the day progresses. In the eyes of most critics, the benefits of preserving the district hopefully outweigh the losses. The structures are preserved, but they do suffer to some extent from their preservation.

An issue embodied in the above paragraph and necessary to consider is the longterm affect of the transfer of development rights. In the short term, transferred development right provide a necessary infusion of cash for the landmark. Repairs on the landmark can progress. The landmark can be rehabilitated and modernized in order for it to reach its highest level of efficiency. In the long term, transfer of development rights is questionable. Transfer of development rights is a means of obtaining economic stability for an urban landmark. But what is unfeasible about the transfer of development rights is that their return is unstable and an unsure form of compensation and therein lies part of their danger when counted upon to offset financial burden. As a form of payment or compensation, transferred rights are granted at the time of sale. It is the responsibility of the seller of the rights to find a means of steady income from the sale. Part of the proceeds could be returned to the building to prolong its economic life, but the return of investment on a landmark will never be the same as the return on the redeveloped site. The assumption must be made that those



who own landmark properties are not in the high scale, fast paced real estate market with the likes of Donald Trump. If the building is properly maintained, enjoys a level of occupancy that is sufficient for the owner to meet his operating costs and realize a profit, and lower taxes due to its loss of air rights, the owner can expect to enjoy a return of 7 to 8 percent return on equity. (167) Added to the return in interest from the profits of the sale, placed in a bank at a rate of 8 percent, the return on equity for the owner of the site is approximately 15 percent. This is higher than the return on many new buildings. What makes the transfer of the rights questionable is that not all of the income is derived from the site: interest rates rise and fall. The owner of the landmark building must double his source of profit, thus doubling his risk. The sale of the air rights may not return enough to allow for sufficient return of equity to cover the operating expenses of the building. Insurance rates for older buildings are higher than those for new buildings. (168)

Adaptive use of the older building may allow for a greater return. When the older building is part of a new structure that is adjacent to the site, it can be assumed that some profits from the new structure will help offset the higher operating costs of the older structure. However, when the rights are transferred to a site that is in a receiving zone and not part of the original site, the chances for some sort of economic link between the new and



the old are unlikely. At South Street Seaport, the entire preservation zone can be seen as a singular entity and the receiving zone as another, adjacent entity. In affect, the system in place at the Seaport is similar to rather large adjacent lots. Owners in the District would not relay information about their returns, citing confidentiality.





## E. Is the Transfer of Development Rights Compensation

The concept of compensation is central to the issue of transfer of development rights. Before the 1978 Supreme Court decision in Penn Central, transfer of development rights, it appears, were not considered as a means of compensation on a national level. The threat of legislative taking had been challenged in the courts, but solutions involving transferring rights or even less sophisticated means of land control were usually not discussed. The Supreme Court determined that transferable development rights were a valuable asset, mitigated any financial loss for the Terminal, and countered the extent of the legislative action. (166)

Before the courts can begin to determine if the transfer of development rights serves as compensation, it must determine if a taking has occurred. In Penn Central, we see that the Court determined that a taking had not occurred, therefore the air rights could be used to help determine the severity of the government's action. The Court stated plainly that the rights may not have fulfilled their definition of compensation if a taking had occurred. While stating that the rights had a value, for Fifth Amendment purposes, that value may not have been enough. The theoretical value of the rights is unchallenged. It is their actual market value that is disputable. Similar to



land, the value of development rights fluctuates with the market. But the difference is in the fact that the development rights are not tangible and subject to more than just the economic whims of the market. If the market is down, their value is not to be realized at all. What one purchases with development rights is potential.

In Fred F. French, the question of the transfer of development rights is answered. The question is: Does the transfer of development rights serve as a means of compensation that satisfy the conditions of the Fifth Amendment? In Fred F. French, the Court of Appeals found the fact that the TDRs were not linked to specific receiving parcels rendered them so abstract and uncertain that they could not be treated as just compensation. The development rights of the parks were valuable, but not adequate to compensate for the complete loss of the property's profitability. Their lack of adequacy was due in part to the action. But also, the unpredictable value of the rights, as mentioned above, fails to allow the rights to serve as a source of compensation.

A transfer of development rights program with some sort of development rights bank would validate any compensation option. The seller of the rights would be guaranteed some sort of tangible return. He would have the option of an immediate sale on the market at a negotiated price or sale to the bank at a predetermined, yet competitive, price. The bank price would reflect the surety of the deal while



the market price would reflect the risks of the market place.

A central feature of the New York program is the establishment of a trust fund for the maintenance of the landmark. This is figured into the cost of the development rights. The trust fund, as seen with the Theater report, can be created to do more than just fund maintenance.



## X. New York City and the Transfer of Development Rights

### A. Recommendations for change

New York has a transfer program that is active, working at South Street Seaport, Amster Yard, the old First Precinct Police Station and most recently the Theater District. Each of these examples has merits, but it must be remembered that when the program fails, chances are that the landmark will be demolished or severely altered. The New York Program, while retaining important features, needs to change to make the transfer of development rights the best possible means of saving landmarks while allowing for growth. The following recommendations are made to improve the program and preserve the City's landmarks. The city must first make development rights transfers more competitive with zoned lot mergers. Second, it must become flexible in adjacency requirements. Third, it must write legislation which would enable it to create a development rights bank.

Transferring development rights is less popular than zoning bonuses or the zoned lot merger. If the City is committed to preservation, it must make transfer of development rights more competitive. In a tight area such as Wall Street or central midtown, transfer of development rights will probably be effective. Zoning bonuses do not work well on lots less than a quarter of a block in size. Transfer of development rights could be the answer if the allow for increases in lot coverage. Transferred





development rights are more profitable to a developer than a zoning bonus as long as the development rights can be utilized to regularize the shape of the building for greater efficiency. (167) The transfer of development rights has been used for additional lot coverage at South Street Seaport. The higher a building is, the more floor space that must be turned over for mechanical use. (170) The increase in the coverage allows for more rentable space in buildings built upon narrow lots that would normally require them to step back and thus diminish floor size. Handled with care and in concert with a well developed plan, the bulk increases will not impact as severely on the cityscape.

The idea of adjacency as embodied in the New York program appears to be an invitation to planning excesses. Buildings of small scale can be overwhelmed by adjacent tall skyscrapers. To transfer the rights away from the site can permit the building to be viewed in an uncluttered environment. The scale of not only the building but of the immediate vicinity can be saved as well. While this is not an aspect of a landmark that can be controlled, the City can do its role by limiting the amount of air rights that can be transferred to an adjacent site regardless of the use of the building. By allowing for transfer to occur only at adjacent sites, the City has made the rights more difficult to sell by limiting the options afforded to the landmark



owner. By allowing for the transfer of the rights through a district, the owner has that many more purchasers for his right accessible to him.

A municipality can employ both options: a receiving zone and an adjacent site. Development rights transfers to adjacent sites should be limited to a certain percentage of the rights allowable for the adjacent site. Currently, the New York City program allows for the receiving site to increase coverage by 20 percent in non-commercial low density areas. This should be an across-the-board limitation for all adjacent sites. An adjacent site commercial or non-commercial, high or low density can be designated to receive either part or all of the 20 percent allotment of the unused rights that is allowed to be transferred to adjacent sites. If any remains of the 20 percent, it can be transferred to other adjacent sites. The remaining 80 percent of the rights can either stay with the building and remain unused, be sold to a site away from the landmark lot, or be sold to the development rights bank. To prevent abuse, the 80 percent transfer to non-adjacent lots should be flexible. All or part of the 80 percent can be transferred to a high density commercial district and in a low density, non-commercial district the greatest coverage increase would be 20 percent per lot.

The development rights bank is the third feature necessary for the full use of development rights transfers in New York. The South Street Seaport district used a



private development rights bank and the program has been successful in saving landmarks in the District. The bank would buy and sell rights, regulate prices, and importantly, preserve landmarks through condemnation of landmark rights. Condemnation could be made through the city acting either on behalf of the bank or independent of it. The development rights bank as observed earlier would be best served in private hands. However, the potential for conflict lies in the fact that municipal rights and duties will be handed over to a private body. A system such as one finds at South Street is fine, but for the City to create a bank each time it is needed when lend an air of temporariness and instability to the bank. The features that made the bank so attractive and plausible in the private sector must be utilized in the public sector bank. The risks of municipal impropriety and corruption are present and it will be up to the development community to watchdog this political unit that is in place to work with them.



## XI. Conclusion

The transfer of development rights is a tool that enables urban landmarks to become economically competitive. However, the concept of the transfer of development rights has many challenges and hurdles that it must surmount in order for any program of this kind to be successful. The municipality that wishes to employ such a system must insure that it is prepared both from a legal and planning perspective. Without this preparatory work, the municipality's transfer program and the landmarks it intends to preserve are endangered.

The preservation movement in the United States has gone from private, special interest oriented groups to public policy and, with the transfer of development rights, back to the private realm. The transfer of development rights is a way to shift the responsibility of landmark retention from the municipal to the private. Landmarks are saved by private investment.

Our legal system is based upon a heritage which spans over half a millenium. Property is one of the more important aspects of our legal system. Laws have been written to protect our lives, freedom, and our property; this means our land rights as well as our material goods. The protection of this right is embodied in the Fifth and Fourteenth Amendments of the United States Constitution. However, limitations of the use of property in defence of





the common good or what has been called the general welfare, began with the first zoning ordinance in 1916. The City of New York passed this ordinance that restricted the height and bulk of new construction. The right of a municipality to legislate land use controls was upheld in the United States Supreme Court's decision in Village of Euclid v. Ambler Realty Co.

The preservation of our built environment began in earnest in the late 1960s. Legislation such as the National Historic Preservation Act was able to become a reality due to Supreme Court decisions such as United States v. Gettysburg Electric Railway Co. and Berman v. Parker. While not directly dealing with historic preservation, these decisions have been applied to preservation cases to foster a preservation ethic. In 1978, the Supreme Court's Penn Central decision formulated a procedure to determine the extent of legislative taking. This decision, while specifically dealing with the use of land and the right of a municipality to legislate land use controls, has greatly advanced the legal cause of historic preservation.

A central feature to the legislation of land use is the 'taking': the taking of property is the overextension of a legislation. When the courts have determined that regulation is so extensive as to destroy a property owner's use of his property, a taking has occurred. The taking of property requires compensation to the owner.

Pennsylvania Coal Co. v. Mahon is the classic definition of a legislative taking. It determined the



extent to which the Kohler Act destroyed the Company's ability to mine coal profitably. Also determined was the extent to which the general public was affected by the subsidence of the surface.

The Penn Central Transportation Co. v. New York City decision in 1978 re-evaluated the Pennsylvania Coal doctrine. In a four step procedure, Justice Brennan refuted the claims of legislative taking asserted by the railroad. His procedure influenced judicial determination in similar circumstances. The four steps are determination of the legitimacy of the property claim, Fifth Amendment application, evaluation of the legislation, and lastly, determine the extent of the legislative action upon the property and diminution in value and balance the the objectives of the legislation and the result to determine if a taking had occurred.

In the past year, two cases have come before the Supreme Court that have dealt with the issue of taking: Keystone Bituminous Coal Association v. DeBenedictus and Nollan v. California Coastal Commission. These cases have utilized the procedure of weighing affect of legislation on the property owner verses the needs of the general public and how well the legislation in question fulfills that need. In Keystone Bituminous Coal, the court reaffirmed its stance of viewing different layers of property as an ensemble and not as individual parts of an owner's site. In Nollan, the court continued the practice of determining



the extent of a legislative action on the property owner and its ability to serve the public.

Once the court determines that a taking has occurred, compensation must be paid to the owner. This is to be the fair market value for the property. In Penn Central, the Supreme Court determined that a taking had not occurred and the presence of the Terminal's valuable air rights mitigated any financial burden placed upon the railroad by landmark designation. The Supreme court stated clearly that had they determined that a taking had occurred, the air rights alone may not have been adequate compensation. This was a theoretical determination. In the New York State Court of Appeals case, Fred F. French Investment Co. v. City of New York, the Court determined that a taking had occurred. The air rights that the City allowed to be transferred to the midtown business district were valuable, but they did not equally compensate the owner for the extent to which his land was taken. The Court also stated that had there been a guarantee of their sale, a similar conclusion may not have been reached. The transfer of development rights program as it exists in New York City does not a permanent transfer of development rights bank and will surely see a repeat of the Fred F. French case in similar circumstances. The Penn Central decision should be regarded as further warning that, legally, the use of the transfer of development rights as a source of compensation is a risky project.

The Chicago Plan was developed by John J. Costonis.



It is his attempt to synthesize a complete transfer of development rights program for the city of Chicago. The plan could be utilized in any urban center. The Plan attempts to make urban landmarks economically competitive with the zoned potential for the site. Costonis attempts to reconcile the Plan and its transfer of development rights mechanism with existing zoning and land use practices. Practices such as zoning bonuses and lot mergers are discussed in relation to transfers. The use of the transfer of development rights is seen as a sounder means of zoning augmentation: the net increase in urban density is zero as bulk and density are not added to the existing regulation, but moved from one site to another within the existing zoning fabric.

The Chicago Plan consists of four elements: the incentive package, the preservation restriction, the development rights transfer district, and the municipal development rights bank. The incentive package determines the economic needs and value of the site as a result of designation. The preservation restriction provides for the continued existence of the site from which the air rights came. The development rights transfer district is the area designated by the municipality to receive the transferred rights. The municipal development rights bank is the municipal agency that stores, sells, and determines the price for development rights. These four elements work in concert, creating a system which in theory successfully





transfers development rights. They keep the system from being abused or from density increases being haphazardly granted.

The transfer of development rights program in New York City contains some of these elements in varying degrees according to the situation. The sites reviewed were Amster Yard, South Street Seaport District and Tudor City. Amster Yard was one of the first transfer to take place in the City. The rights were transferred to an adjacent site. There was not a development rights transfer district for Amster Yard. The buildings of Amster Yard were saved, but in conclusion, it appears that in terms of scale and preservation of light and air, Amster Yard fails. The buildings are overwhelmed by its larger neighbour. South Street Seaport District is the closest to the Chicago Plan with a transfer district, preservation restriction and a development rights bank. South Street also is the most successful of the three. The buildings are preserved as is the general scale of the neighbourhood. Though the area tends to be dark towards mid-day, the general character of the area is preserved. The area's benefits are shared by not only those who work in the area, but tourists from throughout the world. The development rights bank is private, allowing the City to be freed from the worries of long-term outlay of cash. The banks that held mortgages on the historic buildings were repayed from proceeds of the rights sales. Tudor City shows how the City attempted to



preserve open space by offering a development rights transfer to an owner. The owner refused and the City lost its case in Court. The City's development rights transfer program as it exists on paper does not work. It is only when the program is tailored to a particular situation, using the existing code as a firm foundation, as at South Street Seaport that one finds a truly successful program.

Economically, the transfer of development rights is an additional cost to an owner. The transfer of development rights cost an additional \$84 per square foot in one example. But in comparison to zoned lot mergers and zoning bonuses, the transfer of rights is competitive. With the zoned lot merger, one has the acquisition of the additional landmark site to consider, plus full restoration and renovation costs of the landmark if it is to be part of the new project. If there are buildings to be demolished, this is an additional cost. Also, the cost of this demolition is not deductible from the cost of the project. With the zoning bonus, rental space is lost at the expense of providing open public space. This ultimately raises the cost per square foot as well.

Three types of transfer systems exist: the adjacent, the receiving, and the free. The adjacent system is when the rights are transferred to a site adjacent to the landmark site. This system can result in buildings which overwhelm their smaller, landmark neighbours. The program currently allows for the full transfer of a building's



development rights in a high density commercial district. At a site such as Grand Central, the Terminal could be dominated by a neighbour that uses all of its development rights. The receiving zone system is either where the receiving zone overlaps the area of landmark concentration or is removed from the core area. The overlap system has the potential for abuse similar to the adjacency system, unless some prohibition about adjacent transfers is specified. The removed receiving zone with predetermined sites within the zone seems to work best, satisfying the needs of develop to increase zoning while keeping those increases away from the area wished to be preserved. Amenities such as low-scale, light, air, and sufficient use of services are the result. The free zone is a receiving zone with no specific site designated for the reception of transferred rights. This system seems the least successful, as it was one of the factors in the Fred F. French decision. If there exists a development rights bank, the free zone would be a more successful system legally, but from a planning perspective, the municipality would be neglecting its responsibility to provide a decent environment for its inhabitants. The result of increasing bulk is not acceptable everywhere.

Many issues arise from a transfer of development rights program. The first issue is whether or not the benefits of the transfer such as retention of light and air and scale are enjoyed by all. If the receiving zone for the



transferred rights is too far from the source of the rights, a court could determine that the benefits are for only a few. To prevent such a charge, a municipality must insure that the program protects the rights and welfare of all its citizens.

The second issue is: does transfer of development rights work with planning and zoning? The transfer of development rights must work with existing zoning and plans. The role of a transfer program is to protect landmarks while enhancing the effectiveness of the code. Neither the existing code or the transfer program are to work against each other.

The third issue is whether or not a development rights bank is necessary. The result of Fred F. French illustrates that the presence of such a bank will enhance the preservation objectives of a municipality. The existence of a development rights bank at South Street allowed for both the banks and the preservationists to be happy, allowing each group to get what it wanted from the program. The developer in the receiving zone were also able to obtain valuable rights from the bank which allowed them to build more efficient and thus more profitable buildings on their sites.

Transfer of development rights and its compatibility with preservation is the fourth issue. While the transfer of development rights does allow for the economic survival of urban landmarks, it does have a detrimental affect





on smaller landmarks. Areas affected are the relationship of the landmark to its neighbours, the preservation of the cityscape, and the preservation of the buildings use.

The final issue is whether or not the transfer of development rights provides adequate compensation for an owner if a taking has occurred. Reviewing both Fred F. French and Penn Central, one can see that the transfer of development rights is a risky prospect as compensation. If a development rights bank is created, the rights may be adequate, but this has yet to be determined. Under the decision of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, the Court held that if there is a taking, compensation must be paid. Some sort of additional monies will be needed to pay for the long term effects of the taking. If there is a development rights bank, additional rights may be added to a site for sale, but either from this source or from cash sources, the municipality would suffer financially.

Three things are recommended for the New York City transfer of development rights program in order for it to work more effectively. The City must make the transfer of development rights more competitive with the zoned lot merger. The transfer of development rights should be designated to be used for increases in lot coverage. The City also must be more flexible in its adjacency requirements. The City must determine what is adjacent and what is not and



move towards either an area wide or block wide transfer scheme. Also requirements how much air rights may be transferred to an adjacent site must be reconsidered. Thirdly, the City must considered creating a development rights bank that would effectively preserve its landmarks.

At this time, the transfer of development rights program in New York is at a crucial point. The program has success and failures in its past. It is time for the City to plan for the future. The transfer of development rights can work to bring about a change in the way our old buildings are seen. The landmark building can finally make an attempt to stand on its own, not only within the realm of architectural significance and planning, but in the market place as well.

In conclusion, there are certain evaluations that can be derived from this analysis. The transfer of development rights will not always further the goals of preservation, it is not a long-term solution to the greater problem of preservation of a structure and its use, preservation of individual sites to create light and air parks is detrimental to broader preservation goals, and as a means of solving legal problems, the transfer of development rights is a risky utilization.]

One must realize when they enter the field of preservation that there will always be those who are opposed to the ideals and goals of preservation. The reasons are sometimes economic, but they are usually of a broader issue



regarding the use of one's home and the sanctity of that home. These are concepts from the constitution. Economic assistance such as the ability to transfer one's air rights are attractive to these individuals. One such example is the theater owners in New York's mid-town. Over twenty theaters were designated landmarks last year. With that designation came the right to transfer the theaters' unused rights to sites within a special mid-town zoning district. Owners of the theaters such as the Shubert and Nederlander organizations have fought the designations from the start, citing both constitutional and economic reasons. The owners have recently filed suit in a New York court to overturn their designations, stating that the designations are an economic burden. They can no longer alter the interiors to suit the needs of a given production because the bureaucratic process increases the turnover time for a theater, the necessary replacement cost for features removed to accommodate a production are too expensive, and the development rights do not provide adequate relief for the theaters because it does not meet the costs of running a theater profitably.

As can be seen, the owners are not going to utilize their right of transferability. They are simply opposed to the idea of designation and the transfer of their rights does not alter their way of thinking. Since the designation of the theaters, at least three projects in various stages of development have utilized rights from the



theaters. Certainly the designations and zoning incentives from the city have unleashed a flurry of building activity along Broadway. However, regardless of this boom and the apparent willingness of developers to utilize those rights for taller and bulkier buildings, the theater owners want their designations revoked. Try as we may in the preservation field, we must realize that the transfer of development rights will not appeal to everyone and they are not a panacea for all of our preservation woes.

Individual transfers such as those that do and will occur in the special theater district do not provide a long term solution for preservation of our historic structures. This is especially true when there is some restrictive use as to the future employment of the site. This only serves to exerscerbate the problem of saving the landmark and can be viewed as a significant factor in the eventual decline of the structure.

The problem that exists in the theater district is one of unprofitability. The City has determined that various theaters are worth saving in the mid-town west area. These theaters have valuable air rights. The air rights are to be sold and the theater and its owner will receive a quick injection of cash. On the surface it may appear that the theater is saved. However, what is to happen the next time a theater is in financial trouble? I do not see how the transfer of development rights component used in the theater district will provide for the long term survival of those





buildings. The presence of a trust fund is encouraging, but if the financial troubles of the theater industry continue at their present level, it is difficult to understand how the fund will be able to rescue all of the theaters. The singular use of the transfer of development rights is no longer an option.

The use of air rights transfers in the theater district is a political tool utilized by the current mayoral administration to placate a segment of its constituency. When the financial problems of the theaters becomes insurmountable as they surely will, the Koch administration will be long gone. The Koch administration has not analyzed the underlying causes for the degeneration of the theater in New York. While the changes in use, character, and demographics of mid-town west are surely a factor, one must also acknowledge that it now costs between \$40 and \$50 to see a show on Broadway. The developer is the sole enemy of the theater. The actors who so vocally fought for designation after the destruction of the Helen Hayes and Morosco theaters failed to recognize the causes for the destruction that exist within their community. Union wages, unnecessary production staff, high salaries for feature performers have all contributed to the demise of the theater. Very few theater-goers seem to be surprised when told of a production cost in excess of one million dollars. The prohibitive rates demanded by Actors Equity have condemned the Lyceum Theater to continued darkness as the Vivian Beaumont Theater-in-Exile program seems unlikely to be realized. (171)



The preservation community sadly followed the administration in its praises of an evaluation that did not explore all the pertinent facts. The Theater Advisory Council's report on the theaters does not question itself, the theater community. It is time for the theater community to examine itself and not potentially destroy a preservation/planning tool that has had such successes as the South Street Seaport.

The idea that the transfer of development rights creates light and air parks over individual landmarks in congested urban centers is false. In actuality, the ability of the landmark to successfully be part of the streetscape is destroyed. This is not to mean that we are to sacrifice our low-scale landmarks. However, in the future it may be beneficial to create zones of hard and soft preservation. By integrating a system of development rights transfers in to the idea of hard and soft zones of preservation, development next to not only landmarks but whole historic districts can be controlled to protect broader, more liveable areas of light and air. This does not exist in the present. The transfer of development rights program in New York can generally be viewed as a failure in this respect, placing such elegant buildings as the First Precinct Police Station in a forest of behemoths. And such historic districts as Brooklyn Heights find their very borders victim of tall building encroachment.

A new threat exists along the waterfront of the City. The Hudson River waterfront is experiencing development pressures as the success of the New Jersey Gold Coast and Battery Park City



has developers and municipalities re-evaluating the potential of these long forgotten areas. Historic districts which border the waterfront such as Greenwich Village and Soho run the risk of being hidden behind a wall of buildings built at as-of right zoning, augmented by bonuses. To surround historic districts with areas of softer preservation restrictions would prevent such an occurrence. These soft areas are to be receiving zones for the landmark's or district's development rights. The closer to the site in question, the less development rights allowed to be received on that site. The City would be able to control the amount of development that would occur in these high growth rate areas. Instead of creating mediocre shafts of light that isolate a landmark or hemming in a district by tall buildings, broader areas of light and air can be realized. Landmarks and districts can be integrated into the existing streetscape and cityscape and vice versa. The present practice of historic districts being encapsulated by tall neighbours creates a sense of disruptive shock as one enters the preservation zone. This is then followed by a sense of appreciation for the qualities of the district. While this practice distinctly sets the area apart as someplace special, it is detrimental to the city as a whole. The city is to be viewed as a fabric, say a quilt. Each square has its own distinct pattern yet it is clear that it is part of a greater entity. The transfer of development rights, moving rights from hard preservation zones to soft preservation zones, would allow the City to control the impact development has on historic districts and their adjoining



communities. The City would ensure that there is sufficient open space and building setbacks for not only the landmarks and districts to retain open, airy qualities, but the City as a whole as well.

The ability to transfer development rights is a power that can be used to create an urban environment for all. It can be used to preserve our past while aiding in the construction of our future. Many in the preservation field are short-sighted, seeing the immediate preservation of a landmark or a district as the goal and the ability of that landmark or of that area to survive in to the next five or ten years from now is either forgotten or never considered. The use of a transfer option within a preservation area and in conjunction with other planning efforts and ideas will allow an area to not only survive in perpetuity, but to continue giving something back to the community and the city at large.





## ENDNOTES

1. John J. Costonis, Space Adrift: Landmark Preservation and the Marketplace. (Chicago: University of Illinois Press, 1973), p. 7
2. Penn Central Transportation Co. v. New York City, 438 U.S. 104, (1978), p. 110
3. Charles Hosmer, Preservation Comes of Age Vol. 1: From Williamsburg to the National Trust 1926-1949 (Charlottesville: University of Virginia Press, 1981), p. 184
4. Ibid., p. 185
5. Ibid., p. 189
6. Ibid., p. 11
7. Ibid., p. 11
8. Ibid., p. 12
9. Ibid., p. 18
10. Ibid., p. 28
11. National Trust for Historic Preservation, With Heritage So Rich (Washington, D.C.: The Preservation Press, 1983), p. 13
12. Ibid., p. 12
13. Ibid., p. 13
14. Ibid., p. 11
15. Raynor M. Warner, Sibyl McCormal Groff, Ranne P. Warner, New Profits From Old Buildings: Private Enterprises Approach to Making Preservation Pay (New York: McGraw Hill Book Company, 1978), p. 13
16. Christopher Duerksen, ed. A Handbook on Historic Preservation Law (Washington, D.C.: The Conservation Foundation and The National Center for Preservation Law, 1983), p. vii
17. Colliers Encyclopedia, 1982 ed., s.v. Constitution of the United States
18. Ibid., p. 240



19. Ibid., p. 241
20. David B. Fein, "Historic Districts: Preserving City Neighbourhoods for the Privileged" New York University Law Review 60:64 (April 1985)  
p. 67
21. Ibid., p. 67
22. Ibid., p. 67
23. Ibid., p. 67
24. United States v. Gettysburg Electric Railway Co., 160 U.S. 668 (1896)
25. Berman v. Parker 348 U.S. 26 (1954)
26. Penn Central Transportation Co.
27. Fein, p. 73
28. United States v. Gettysburg, 160 U.S. at pp. 681-82
29. Fein, p. 74
30. Fein, p. 74
31. Fein, p. 74
32. Penn Central, p. 129
33. Ibid., p. 133
34. Ibid., p. 137
35. Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922)
36. Keystone Bituminous Coal Association v. DeBenedictis, 107 S. Ct. 1232 (1987)
37. Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987)
38. Fred F. French Investment Co. v. City of New York, 39 NY 2d 587 p. 5
39. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles 107 S. Ct. 2378 (1987)
40. Duerksen, p. 351
41. Duerksen, p. 351



42. Pennsylvania Coal, p. 324
43. Ibid., p. 324
44. Ibid., p. 325
45. Ibid., p. 325
46. Ibid., p. 325
47. Ibid., p. 326
48. Ibid., p. 326
49. Ibid., p. 325
50. Ibid., p. 326
51. Penn Central, p. 130-31
52. Ibid., p. 130
53. Ibid., p. 131
54. Ibid., p. 132
55. Ibid., p. 132
56. Ibid., p. 133
57. Ibid., p. 134-35
58. Pennsylvania Coal, p. 135
59. Ibid., p. 135
60. Keystone, p. 1232
61. Ibid., p. 1235
62. Ibid., p. 1236
63. Nollan, p. 3141
64. Ibid., p. 3142
65. Ibid., p. 3147
66. Ibid., p. 3144
67. Ibid., p. 3146
68. Ibid., p. 3147



69. First English, p. 2378
70. Ibid., p. 2384
71. Ibid., p. 2384
72. Ibid., p. 2385
73. Penn Central, 438 U.S. 104 (1978)
74. Penn Central, p. 107
75. Ibid., p. 106
76. Ibid., p. 137
77. Ibid., p. 137
78. Fred French, p. 6
79. Ibid., p. 11
80. Ibid., p. 7
81. Ibid., p. 11
82. Ibid., p. 12
83. Ibid., p. 12
84. Raynor M. Warner, p. 15
85. Ibid., p.15
86. Norman Marcus, "Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan." Brooklyn Law Review 50, (Summer 1984): 868
87. Ibid., p. 870
88. Ibid., p. 870
89. Ibid., p. 871
90. Ibid., p. 871
91. Ibid., p. 879
92. Ibid., p. 879
93. Ibid., p. 884
94. Costonis, Space Adrift. p. 128





95. Ibid., p. 128
96. New York City Planning Com'm, Report of the Theater Advisory Council (1984), p. 18
97. Norman Marcus, "Air Rights in New York." p. 911
98. Space Adrift, p. 28
99. Ibid., p. 33
100. Ibid., p. 34
101. Ibid., p. 34
102. Ibid., p. 39
103. Penn Central, p. 105
104. Space Adrift, p. 39
105. Ibid., p. 39
106. Ibid., p. 39
107. Ibid., p. 39
108. Ibid., p. 39
109. Ibid., p. 40
110. Ibid., p. 40
111. Ibid., p. 42
112. Ibid., p. 42
113. Ibid., p. 43
114. Ibid., p. 44
115. Ibid., p. 44
116. Alan S. Oser, "An Incentive For Preservation." The New York Times, 14 February 1988, sec. R, p. 7,
117. Space Adrift, p. 49
118. Ibid., p. 50
119. Ibid., p. 50
120. Ibid., p. 52



121. Ibid., p. 52
122. Ibid., p. 52
123. Norman Marcus, p. 871
124. Ibid., p. 884-85
125. Space Adrift, p. 54
126. Norman Marcus, p. 890
127. Ibid., p. 881
128. Space Adrift, p. 131
129. Norman Marcus, p. 882
130. Ibid., p. 891
131. Ibid., p. 891
132. Space Adrift, p. 5
133. Norman Marcus, p. 887
134. Ibid., p. 891
135. Space Adrift ch3
136. Ibid., p. 97
137. Ibid., p. 95
138. Ibid., chap 4.
139. Norman Marcus, p. 887
140. Ibid., p. 890
141. Norman Marcus, p. 886
142. Martin Gottlieb, "Plan for Tower Uses Air Rights of Rail Station," The New York Times, 17 September 1986, sec. B, p. 1, 4
143. Ibid., p. 1
144. Ibid., p. 4
145. Ibid., p. 4
146. Editorial, "383 Madison is the Wrong Address," The New York Times, 22 September 1986, sec. A, p. 24



147. Ibid., p. 24
148. Ibid., p. 24
149. Alan S. Oser, "Air Rights in Search of a Place to Alight." The New York Times, 12 June 1988, sec. R, p. 9
150. Ibid., p. 9
151. Report of the Theater Advisory Council
152. Theater Advisory Report, p. 13
153. Ibid., p. 13
154. Ibid., p. 18
155. Ibid., p. 18
156. Ibid., p. 18
157. "Incentive for Preservation," p. 7
158. Ibid., p. 7
159. Ibid., p. 7
160. Space Adrift, p. 5
161. Norman Marcus, p. 887
162. Space Adrift, p. XX
163. Norman Marcus, p. XX
164. Space Adrift, p. 52
165. "Incentive for Preservation," p. 7
166. Space Adrift, p. 139
167. Ibid., p. 50
168. Ibid., p. 105
169. Ibid., p. 139
170. Ibid., p. 69
171. Leslie Bennetts. "Beaumont Plans Season in a Broadway Theater," The New York Times, 2 July 1988, p. 24



## BIBLIOGRAPHY

### BOOKS

1. Costonis, John J. Space Adrift: Landmark Preservation and the Marketplace. Chicago: University of Illinois Press, 1974
2. Cox, Archibald. The Court and the Constitution. Boston: Houghton Mifflin Company, 1987
3. Duerksen, Christopher J., ed. A Handbook on Historic Preservation Law. Washington, D.C.: The Conservation Foundation and The National Center for Preservation Law, 1983
4. Hosmer, Charles B. Preservation Comes of Age Vol. 1: From Williamsburg to the National Trust 1926-1949. Charlottesville: University of Virginia Press, 1981
5. National Trust for Historic Preservation. With Heritage So Rich. Washington, D.C.: The Preservation Press 1983
6. Sirmans, C.F. Real Estate Finance. New York: McGraw Hill Book Company, 1985
7. Warner, Raynor M., Sibyl McCormal Groff, Ranne P. Warner New Profits From Old Buildings: Private Enterprises Approach to Making Preservation Pay. New York: McGraw Hill Book Company, 1978

### REPORTS

1. Midtown Development Review. By Sylvia Deutsch, Director. New York City: Department of City Planning, 1987
2. New York Landmarks Conservancy "Landmarks Air Rights Study." New York City, 1982
3. Report of the Theater Advisory Council to the Planning Commission of the City of New York on Theater Preservation. By Orville H. Schell, Chairman. New York City, New York: Department of City Planning, 1984
4. Plans, Programs and Policies 1980-1985. By Herbert Sturz, Chairman. New York City: Department of City Planning, 1985





## ARTICLES

1. Colliers Encyclopedia, 1982 ed. S.v. "Constitution of the United States."
2. The Guardian, 12 March 1988
3. Kowaloff, Steven D. "The Virtues of NYCZR." Real Estate Weekly 27 May 1985: 21, 26
4. The New York Times, 17 September 1986; 22 September 1986; 22 November 1987; 14 February 1988; 12 June 1988; 2 July 1988
5. Schnidman, Frank. "Selling Air Rights Over Public Property." Urban Land (November 1981): 3-9

## LEGAL JOURNALS

1. Benbow, Terence H. and Eugene G. McGuire, "Zoning and Police Power Measures for Historic Preservation: Properties of Nonprofit and Public Benefit Corporations" Pace Law Review 1 (1981): 635-646
2. Costonis, John J., "Development Rights Transfer: An Exploratory Essay." The Yale Law Journal 83 (1973): 75-128
3. "Development Rights Transfer in New York City." The Yale Law Journal 82 (1972): 338-372
4. Fein, David B. "Historic Districts: Preserving City Neighborhoods for the Privileged." New York University Law Review 60:64 (April 1985) 64-103
5. Marcus, Norman. "Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan." Brooklyn Law Review 50 (Summer 1984): 867-911
6. "The Police Power, Eminent Domain, and the Preservation of Historic Property." Columbia Law Review 63 (1963): 708-732
7. Turvey, Samuel A., "Beyond the Taking Issue: Emerging Procedural Due Process Issues in Local Landmark Preservation Programs." Fordham Urban Law Journal 10 (1982): 441-467

## COURT CITATIONS

1. Berman v. Parker 348 U.S. 26 (1954)



2. First English Evangelical Lutheran Church of Glendale  
v. County of Los Angeles 107 S. Ct. 2378 (1987)
3. Fred F. French Investment Company, Inc. v. City of  
New York 385 N.Y.S.2d 5 (1976)
4. Keystone Bituminous Coal Association v. DeBenedictus  
107 S. Ct. 1232 (1987)
5. Nollan v. California Coastal Commission 107 S. Ct. 3141  
(1987)
6. Penn Central Transportation Co. v. New York City, 438  
U.S. 104, (1978)
7. Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922)
8. United States v. Gettysburg Electric Railway Co., 160  
U.S. 668 (1896)
9. Village of Euclid v. Ambler Realty Co. 272 U.S. 365  
(1926)



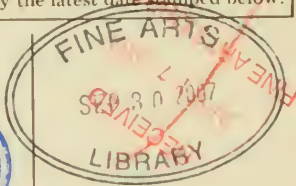


Anne & Jerome Fisher

FINE ARTS LIBRARY

University of Pennsylvania

Please return this book as soon as you have finished with it. It must be returned by the latest date stamped below.



FINE ARTS LIBRARY  
FURNESS BLDG.

MAR 16 1989

UNIV. OF PENNA.

3 1198 04977 2622



N/1198/04977/2622X

3 1198 04977 2622



N/1198/04977/2622X