# DEVELOPMENT RIGHTS TRANSFER AND LANDMARKS PRESERVATION—PROVIDING A SENSE OF ORIENTATION

FREDERICK M. BAKER*

> Congress finds and declares . . . that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.[1]
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> The peculiarity of American institutions is, the fact that they have been compelled to adapt themselves to the changes of an expanding people—to the changes involved in crossing a continent, in winning a wilderness, and in developing at each area of this progress out of the primitive economic and political conditions of the frontier into the complexity of city life.[2]

## INTRODUCTION

Two events occurred in 1893 that marked a turning point in the American experience. The Columbian Exposition in Chicago, with its massive monuments to the Gilded Age, was an express declaration that Americans had accomplished all that Europe could boast.[3] The same year, Frederick Jackson Turner presented "The Significance of the American Frontier in American History" in an address to the American Historical Society.[4] From the 1890 census statement that the

* B.A., University of Michigan, 1971; J.D., Washington University, 1975.

1. Act of Aug. 21, 1935, 16 U.S.C. § 470(b) (1970).

2. F. TURNER, THE FRONTIER IN AMERICAN HISTORY 2 (1920) [hereinafter cited as TURNER]. The Turner thesis concerning the role of the frontier in American history has been succeeded by theories that reject the search for a single and unique "American spirit." *See, e.g.*, G. TAYLOR, THE TURNER THESIS (1949). Nevertheless, the process of continual social ferment that formed the core of Turner's thesis remains a constant in the American experience. As Turner himself observed, "each age studies its history anew and with interests determined by the spirit of the time." TURNER, *supra*, at 323.

3. For an additional perspective on the statement to the world intended by the organizers of the Columbian Exposition see Zoll, *Superville—New York—Aspects of Very High Bulk*, 14 MASS. REV. 447, 450-56 (1973) [hereinafter cited as *Superville*].

4. TURNER, *supra* note 2, at 1 n.1.

frontier no longer existed, Turner concluded that the historic crucible of American democracy had disappeared with it.[5] The role of the frontier would now be filled by America's emerging cities: "With the loss of the frontier, the ability to start again was also lost; Turner saw in the primitive society of the frontier a tempering force of self-reliance, individualism and democratization. The loss of the frontier would turn this force onto the cities."[6]

As Turner related the significance of the frontier to historians gathered at the site of the Europe-aping Columbian Exposition, the finishing touches were being applied to the Old Stock Exchange, a building representative of what is now referred to as the Chicago School of Architecture.[7] A movement had arisen from the ashes of the 1871 Chicago fire introducing "epochal changes" in architecture, culminating in the modern skyscraper.[8]

Meanwhile, parallel developments were occurring in New York City that would "transform lower Manhattan from a horizontal to a vertical city in less than two generations."[9] The Equitable Building, constructed in 1870, the first to incorporate an elevator in its design, rose to a mere seven stories.[10] In 1915 its 42-story successor was com-

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5. *Id.* at 1-38, *passim.*

6. *Superville, supra* note 3, at 453-54: "When the frontier no longer existed, the energies and confidence that had accomplished its closing were turned to the development of American cities." *Id.* at 452.

7. J. COSTONIS, SPACE ADRIFT xv (1974) [hereinafter cited as SPACE ADRIFT]:

> The Exchange, an 1893 gem of Louis Sullivan and Dankmar Adler, ranks with the most innovative buildings of the Chicago School of Architecture. In line with the other works of the school, this fragile business palace redefined centuries-long premises of architectural design and established the baseline for modern architectural forms, the most distinctive of which is the urban skyscraper.

*Id.* The Exchange was demolished in 1972 to make way for a "commonplace forty-five-story office building." *Id.*

8. *Id.* at 109. The Chicago School's liberation of American urban architecture would have been impossible without the development of steel skeleton construction and the elevator. Buildings were no longer limited in height by the thickness required of masonry walls and the physical fitness of tenants. *See* Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338, 341 (1972) [hereinafter cited as *Development Rights Transfer*].

9. *Development Rights Transfer, supra* note 8, at 341.

10. *Id.*

pleted on the same site.[11] The skyscraper was on the ascendant[12] and its coming signalled a new era in land use regulation.[13] Alarmed by the potential threat to the public safety and welfare posed by the construction of enormous office buildings in the congested city center, in 1916 New York City enacted its first zoning ordinance, designed to establish a "zoning envelope" for each site by placing height, setback and area limitations on building size.[14] Although such regulations established absolute limits on building height and configuration, they controlled neither population density nor the relation between available access, services and building size.[15] These factors were controlled only indirectly by the regulations' bulk limitations.[16] The initial ordinance was merely a zoning response to a nuisance problem.

A decade later the Supreme Court sustained a zoning ordinance designed to establish a comprehensive plan for locating and controlling the physical development of the community.[17] Prior to 1926 land

11. *Id.* at 338. The second Equitable Building rose 42 stories and cut off the sunlight from the fronts of buildings of up to 21 stories. Upon proving loss of rents due to light and air reduction caused by the Equitable Building, most surrounding owners obtained reduced tax assessments. *Id.* at 338 n.1, *quoting* S. TOLL, ZONED AMERICAN 71 (1969).

12. *Harper's Weekly* proclaimed "the age of skyscrapers" in 1894 when the cross atop Trinity Church lost its title as the highest point in New York. *Development Rights Transfer, supra* note 8, at 341 n.23.

13. The history of [the first Equitable Building] and its successor on the site brackets the beginning and end of the skyscraper's pre-zoning era. By disclosing the possibility of elevators in office buildings, the first Equitable Building started the breakout from the traditional five-story maximum. The following Equitable Building carried the development of the skyscraper to such intolerable extremes that, beyond any other structure, it may be isolated as the one building which was a final cause of zoning law.

*Id.* at 341 n.22, *quoting* S. TOLL, ZONED AMERICAN 48 (1969).

14. *Development Rights Transfer, supra* note 8, at 342-43. Height control regulations of this type had been held constitutional in Welch v. Swasey, 214 U.S. 91 (1909).

15. One hundred thousand people entered the second Equitable Building daily and 13,000 worked in its 1.25 million square feet of rentable office space. *Development Rights Transfer, supra* note 8, at 338 n.1. If New York City were developed to the densities permitted under the 1916 ordinance, "its residential districts alone would house seventy-seven million people; the commercial districts would embrace a working population of three hundred and forty-four million." *Id.* at 345.

16. *Id.* at 343.

17. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

use law consisted merely of the law of private and public nuisance,[18] as evidenced by the early New York City zoning ordinance. The Court in *Village of Euclid v. Ambler Realty Co.*[19] recognized expanded municipal authority to implement a master plan for physical development through zoning regulations enacted pursuant to the police power.[20] State planning enabling legislation,[21] however, contained directives to the municipalities that embodied the basic conflict between efficient resource utilization on the one hand, and equitable allocation of rights between the public and private sectors on the other.[22] The ultimate resolution of the conflict was left to the municipalities, a task for which they were ill-equipped.

Unfortunately, the passing of the City Beautiful movement, which had sought to control urban development,[23] roughly coincided with the first assertions of comprehensive public control over private development decisions. Once freed from the City Beautiful movement's tempering influence, the cities abdicated resolution of the equity-efficiency dichotomy in favor of market forces,[24] with results predict-

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18. *See* Freilich, *Awakening the Sleeping Giant: New Trends and Developments in Environmental and Land-Use Controls*, in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 1 (1974).

19. 272 U.S. 365 (1926).

20. Although later legislation extended the planning function to counties, it was always assumed that the municipality would be the arena for the planning process. D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 524 (2d ed. 1971).

21. The Standard Planning Enabling Act became the basic pattern for the state enabling legislation. *See* ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928), *quoted in* D. MANDELKER, *supra* note 20, at 524.

22. "The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality . . . which will . . . best promote health, safety, morals, order, convenience, prosperity and general welfare, as well as efficiency and economy of development . . . ." ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT § 7 (1928).

23. The term "City Beautiful" first appeared in the preface to C. ROBINSON, MODERN CIVIC ART, OR THE CITY MADE BEAUTIFUL (1903), and represented goals of "urban hygiene," achieved by combining utility with beauty in public works and curbing the unbridled development of large buildings. *Superville*, *supra* note 3, at 451, 458.

24. Professor Costonis explains the demolition of precious landmarks in market terms:

> The demise of so many cherished buildings is a peculiarly American phenomenon. In part it reflects the national penchant for identifying change with progress won at the cost of destroying the nation's links with its past.

ably favoring the economic interests of city landowners. Effective regulation of downtown development through zoning controls would have conflicted with the landowner's traditionally recognized interest in maximizing the profitable development of his land.[25] Thus center-city landowners built higher and bigger.[26] Moreover, it was in the city's self-interest to allow such development. Buildings of vast bulk increase the city's prestige[27] and the opportunities for office employment in an increasingly white-collar world, as well as providing increased sources of property tax revenue.

The failure of traditional zoning to effectively control intensive development in the central business districts has become starkly evident in the last decade.[28] Zoning provided no means of preserving amenities.[29] Older, more gracious structures were demolished to make way for functional buildings designed to utilize completely all available space—a response necessary to counter the staggering costs of land, construction, financing and property taxes.[30] In short, "the

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More fundamentally, however, it is the product of a system that vests the initiative for most urban development decisions in private property owners, whose choices, predictably enough, are shaped by the necessities of the real estate market.

Costonis, *The Chicago Plan: Incentive Zoning and Preservation of Urban Landmarks*, 85 HARV. L. REV. 574-75 (1972) [hereinafter cited as *Chicago Plan*].

25. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. BLACKSTONE, COMMENTARIES *2.

26. Our cities have grown so fast and land prices increased so rapidly that fairly new buildings are often destroyed to exploit the land more intensively. SPACE ADRIFT, *supra* note 7, at 7-9, *quoting* Nelson, *Appraisal of Air Rights*, 23 APPRAISAL J. 495 (1955).

27. *See Superville*, *supra* note 3, at 465.

28. *See* Comment, *Bonus or Incentive Zoning—Legal Implications*, 21 SYRACUSE L. REV. 895 (1970) [hereinafter cited as *Bonus or Incentive Zoning*]. For example, "the failure of land use control law can be seen . . . in the sterile, monolithic office buildings in which hundreds of people work and through which hundreds more pass daily and in which no provisions have been made for parking spaces, food service, public rest rooms, public telephones, or simply a place to sit down." *Id. See also* SPACE ADRIFT, *supra* note 7, at 86.

29. "Amenity, says Sir William Helford, includes 'a whole catalogue of values.' It includes the beauty that an artist sees and an architect designs for; it is the pleasant and familiar scene that history has evolved; in certain circumstances it is even utility—the right thing in the right place." Tyrwhitt, Book Review, 24 J. AM. INST. PLANNERS 61 (1963).

30. *See* Carmicheal, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35, 39 (1974).

towering domiciles of . . . office operations are massive traffic generators and sidewalk killers. An evening stroll past a block-long blank facade quickens the pace but not the pulse."[31]

This Note examines development rights transfer, a concept that has recently emerged in response to the problem of preserving urban amenities.[32] Development rights transfer promises to end traditional zoning's inability to preserve landmarks and provide open space. The two present principal transfer systems, the plan now in effect in New York and the proposed Chicago Plan, are designed to preserve urban landmarks, perhaps the most immediately endangered species of urban amenity. Conventional methods for withdrawing historical landmarks and open space from the land development market are surveyed for two reasons. First, the inadequacies of present methods to preserve historic landmarks, and the open space amenity they frequently provide, accent the peculiar adaptability of development rights transfer to that problem. Secondly, it is submitted that, as a product of the evolutionary process by which American cities have attempted to adapt to their own growth, development rights transfer represents a logical extension of current practices. Because of its profound implications for present property and zoning concepts, development rights transfer illustrates the continuing impact of the creative ferment that Turner predicted would occur in the nation's second frontier—the cities.[33]

## I. The Quest for Urban Amenity Through Incentive Zoning

To combat the spreading desolation of urban centers and return to them some semblance of the human scale, cities have intervened in downtown economics to encourage development decisions that market

31. McCue, *Chicago Ponders a People Plan*, St. Louis Post-Dispatch, June 16, 1974, at 5C, col. 2. *See also* Carmicheal, *supra* note 30.

32. Although this Note is confined to development rights transfer as a method for landmark preservation, the concept is a highly adaptable tool for preservation of open space and other endangered resources as well. *See generally* Space Adrift, *supra* note 7, at 173-75; Carmicheal, *supra* note 30; Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 Yale L.J. 75, 91-95 (1973); City & County of Honolulu, Bill No. 101 (1974) (on file with the *Urban Law Annual*); The Open Space Preservation Act, Fourth Draft, May 2, 1973 (a comprehensive development rights transfer system for preservation of farmland, woodland and open space in densely populated New Jersey prepared by B. Budd Chavooshian, Land Use Specialist and Program Advisor for Resource Management at Rutgers University and slated for introduction before the New Jersey Senate and General Assembly).

33. *See* text at note 6 *supra*.

realities would not otherwise permit.[34] The methods devised to accomplish this end are collectively called "incentive zoning."[35] "Incentive zoning is a plan whereby, in return for including certain features or amenities in his building, a developer is allowed to design his building *in a manner not otherwise permitted by the zoning ordinance.*"[36] The most familiar example of incentive zoning is the zoning bonus, which permits a developer to increase density in return for specified amenities. The value of the bonus equals or slightly exceeds the cost to the developer of providing the amenity.[37] The potential distortion of the city's zoning plan caused by the bonus

34. SPACE ADRIFT, *supra* note 7, at 30; *Bonus or Incentive Zoning, supra* note 28, at 895.

35. Incentive zoning includes bonus zoning, air rights transfer, and development rights transfer. Although closely related, and thus often confused, the latter two are distinguishable: "[Air rights] are a property interest in a three-dimensional location in space. Development rights, on the other hand, are simply a governmental license to build a defined amount of floor area as measured by the amount of lot area that has been constructively 'transferred' to the project site." *Chicago Plan, supra* note 24, at 592 n.58. For a discussion of air rights transfers in connection with the New York transfer system see text at note 55 *infra*. For a review of incentive zoning techniques see Freilich, *Development Timing, Moratoria, and Controlling Growth*, in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 147, 183-91 (1974).

36. *Bonus or Incentive Zoning, supra* note 28, at 896 (emphasis added). Although such programs differ widely, they are all based on a trade between the city and the developer. In exchange for a relaxation of the city's bulk zoning restrictions, the developer must either provide a public amenity or make a cash payment to finance the city's purchase of a public improvement. *Chicago Plan, supra* note 24, at 576.

37. SPACE ADRIFT, *supra* note 7, at 30. Such amenities may include plazas, arcades or subway concourses. *Id.* San Francisco has established a special district in the downtown area in which a builder receives a larger floor area ratio upon donation of an amenity. A donated amenity would include access to rapid transit, proximity to a rapid transit station, parking, multiple building entrances, sidewalk widening, a mid-block walkway from one street to another, a public plaza, building tower setback, or an observation deck atop the building. Maximum use of such bonuses can more than double the allowable floor area ratio, but the usual increase is much smaller. *Bonus or Incentive Zoning, supra* note 28, at 896.

New York has not adopted a single comprehensive downtown incentive zoning plan, opting instead to use specific incentive plans that apply to relatively small geographical areas. One such plan has been devised for the theater district. To prevent more lucrative office building development from displacing the theaters, developers who incorporate legitimate theaters in their buildings are permitted as much as a 20% increase in floor area ratio. The presence of other amenities, such as restaurants, is also taken into consideration in awarding the bonuses. *Id.* at 896-97.

system is rationalized on the theory that additional open space amenity at the street level allows the city to "digest" additional vertical density.[38] In fact, evidence exists that the proliferation of generous zoning bonuses has compounded the problems of congestion and excess bulk that they were intended to remedy without providing a *useful* amenity in return.[39] The Chicago zoning bonus scheme is illustrative of the extremes to which zoning bonuses can be carried:

> The bonuses . . . permit the owner of a full-block site, for example, to construct a 140-story building containing six million square feet of floor area, almost three times the space found in New York's 102-story Empire State building. So generous are the bonuses, in fact, that projects on sites of a half-block or more, such as the 110-story Sears building . . . do not exhaust their permitted zoning envelopes. *The flight path regulations of the Civil Aeronautics Board . . . fix the height and bulk of such projects, not Chicago's zoning.*[40]

Because cities are resigned to virtually unrestricted development of the revenue-generating central business districts,[41] the zoning bonus system, originally conceived to extract some concession from builders in the form of amenity, has become notorious. One New York developer exclaimed: "There's no such thing as zoning, there's only deals."[42]

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38. SPACE ADRIFT, *supra* note 7, at 31. The same rationale does not apply to non-open space amenities such as theaters, since such amenities actually increase congestion. For a discussion of the legal implications of this inconsistency see *Bonus or Incentive Zoning*, *supra* note 28, at 898.

39. "[T]he Loop has gone somewhat plaza-happy. Chicago's zoning bonus . . . has caused buildings to grow tall and plazas to sprawl. Chicago seems to keep asking itself to believe that it is a city of perpetual spring, when actually its summers are shriveling and its winters ferocious. In the spring and fall it rains quite a lot . . . ." McCue, *Chicago Ponders a People Plan*, *supra* note 31, at 5C, col. 5.

40. Costonis, *Formula Found to Preserve the Past*, 38 PLANNING 307, 308 (1972) (emphasis added). For a comprehensive review of the operation of Chicago's zoning bonus system see SPACE ADRIFT, *supra* note 7, at 83-88.

41. Chicago's comprehensive plan frankly acknowledges this dependence:

> The central business district is unique in the system of business areas for more than its size. It is Chicago's most important single asset. The combination of major stores, cultural institutions, commercial recreation activities, and a diversity of offices in a compact area provides a special attraction to additional developments which otherwise might not locate in the Chicago area. The city will strengthen the Central Business District by programs and policies that will retain its present compact form, improve its accessibility, and facilitate movement within the district.

*Superville*, *supra* note 3, at 497 (quoting from the Chicago comprehensive plan).

42. *Id.*

The desperate plight of the urban historic landmark can be understood only when approached within the zoning context outlined above. Because the typical landmark building makes only partial use of the floor area allotted to its site, it often cannot compete for survival in an overheated real estate market.[43] Intense development pressure means higher land values that present an irresistible economic temptation to owners of small parcels.[44] Because zoning bonuses can be efficiently exploited only on large parcels,[45] developers hasten to assemble a number of smaller parcels to realize the greatest possible advantage from the system. The result, given existing market conditions, is inevitable: demolition of what remains of our architectural heritage[46] to make room for functionally efficient, uniformly drab monoliths. The irony of bonus zoning is that, in attempting to provide one type of amenity, the system actually encourages the destruction of another, the urban landmark.[47] One commentator observes: "Incentive zoning is America's new City Beautiful movement. The governing image supplied once by the Columbian Exposition's collaboration is now supplied in the built form of the slab—the American puritanical. It is the Chicago School's pre-1893 utilitarian style raised to the status of a classic."[48] Thus the Chicago School's architectural revolution has come full circle; it has become the old order, to be displaced by its own progeny.[49]

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43. Landmark buildings may also be physically obsolete as a result of poor maintenance and functionally obsolete because they incorporate outmoded design techniques and mechanical systems. SPACE ADRIFT, *supra* note 7, at 10.

44. *Id.* at 10, 87.

45. *Id.* at 84. The basic floor area ratio permitted by the zoning ordinance can be increased by the multiple permitted times the area of open space amenity provided at ground level. Thus, a developer with a 50,000 square foot site zoned to a floor area ratio of 10 can, by providing a plaza of 25,000 square feet, add 250,000 square feet of floor area to the 500,000 square feet permitted as of right, thereby obtaining a 50% increase in floor area. *Id.* at 83.

46. A substantial portion of the buildings listed in the Historic American Buildings Survey carried out by the federal government in 1933 have been demolished. *See* SPACE ADRIFT, *supra* note 7, at 4 ("over a third of the 16,000 structures listed"); *Chicago Plan*, *supra* note 24, at 574 ("over fifty percent of the 12,000 buildings listed"); Costonis, *supra* note 40, at 307 ("[m]ore than half of the 12,000 buildings listed"). Included in the toll are numerous treasures of the Chicago School. *See* SPACE ADRIFT, *supra* note 7, at 11.

47. SPACE ADRIFT, *supra* note 7, at 10.

48. *Superville*, *supra* note 3, at 460-61.

49. This displacement comports with Turner's thesis; the city is America's second frontier:

American social development has been continually beginning over again on

## II. The Urban Landmark's Plight Under Existing Legislation

De Tocqueville remarked that "[d]emocratic nations . . . cultivate the arts that serve to render life easy in preference to those whose object is to adorn it. They will habitually prefer the useful to the beautiful, and they will require that the beautiful should be useful."[50] This pithy observation explains why architectural landmarks are an endangered species. Nevertheless, with the increasing concern for their natural and human environment,[51] Americans are beginning to understand that utility may be realized in both material and spiritual terms. This new awareness has stimulated efforts to preserve the nation's historical and cultural heritage.[52]

Conventional landmark preservation provisions often fail in their goal, however, because they seek to impose the costs of preservation upon the landmark owner or upon the city. Professor John J. Costonis, co-author of the Chicago Plan, analyzes their failure as stemming from the typical preservation scheme's division of the preservation cycle into two stages.[53] First, the municipal government, acting under the police power, designates the building a landmark and requires its owner to submit any alteration or demolition plans to the landmarks commission for approval. If a landmark owner submits such a plan and the commission rejects it, the commission has a grace period during which it may seek a compromise with the landmark owner. If no compromise can be reached, the preservation cycle moves to its second stage. The commission recommends that the legislative body proceed to acquire or condemn the building. The

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the frontier. . . .

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As successive terminal moraines result from successive glaciations, so each frontier leaves its traces behind it. . . . And to study this advance . . . and the political, economic, and social results of it, is to study the really American part of our history.

TURNER, *supra* note 2, at 2-4.

50. A. DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 48 (H. Reeve transl., P. Bradley ed. 1960).

51. *See* SPACE ADRIFT, *supra* note 7, at 167.

52. *Id.* at 3. Although hundreds of municipal, state and federal preservation laws have been adopted, they are typically inadequate. Nevertheless, they suggest that strong sentiment exists to counter the "potent opposition of special-interest groups who have little sympathy for preservation." *Id.* For a review of federal, state and local efforts, and related problems see 36 LAW & CONTEMP. PROB. 311-444 (1971). SPACE ADRIFT, *supra* note 7, at 19-27, also contains a concise survey of the legislative response to the challenge of historic preservation with citations to the literature in the field.

53. *See* SPACE ADRIFT, *supra* note 7, at 27; *Chicago Plan*, *supra* note 24, at 580-84.

entire cost of preservation is thus shifted from the landowner to the public.[54] Yet the financially pressed municipality is usually unable, and therefore unwilling, to bear the costs of acquiring and maintaining the landmark, thus leaving the owner free to demolish or alter the building. As a result, despite the limited effectiveness of private preservation efforts,[55] landmarks continue to disappear at an alarming rate.[56] Existing landmarks legislation provides merely a "plaque on the door"[57] because it does not realistically address the problem of who should pay for historic preservation.[58]

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54. This analysis is somewhat simplified. For a more detailed discussion of variant solutions that take account of the degree of economic hardship imposed upon the landmark owner, thus allowing the commission to persist in its denial of permission to alter or demolish the building in certain cases see *Chicago Plan*, *supra* note 24, at 581 nn.29 & 30.

55. The credit for most preservation in the United States goes to the private sector, not the government. SPACE ADRIFT, *supra* note 7, at 3.

56. *See Id.* at 10, 87.

57. New York City's landmark preservation program is a notable exception to the general ineffectiveness of such programs. Of the 285 structures in New York that had been formally designated landmarks by mid-1969, only one, the Jerome Mansion, could not be saved from demolition. *Development Rights Transfer*, *supra* note 8, at 351; *see* Gilbert, *Saving Landmarks—The Transfer of Development Rights*, 22 HISTORIC PRESERVATION, No. 3 at 13, 14 (1970) (noting that over 325 individual landmarks and 5000 buildings in historic districts are under the Planning Commission's jurisdiction). The program has succeeded without resort to the tax relief incentives available under the New York preservation laws. *Development Rights Transfer*, *supra* note 8, at 351. The program's success is due to the power given to the Landmark Preservation Commission to refuse permission to alter or demolish any designated landmark so long as the owner is receiving a "fair return" from his landmark. "The statute defines this reasonable return as a net annual return of six percent of the assessed valuation of the building and its site." *Id.* at 350. This impressive record suggests that existing approaches to landmark preservation can be modified to cope more effectively with the threat to existing landmarks capable of achieving a modest return. This is true even when such landmarks are located in the city's center, where development pressures are greatest, since the majority of the 285 designated landmarks are located in Manhattan. *Id.* at 351 n.74. The limits of such a program are implicit in the reasonable return requirement, however, which would leave unprotected those landmarks incapable of generating a sufficient return. The power to grant property tax relief to such buildings would doubtless bring many of them within such a program, but cities are reluctant to reduce their own revenues by affording such tax reductions. *See* SPACE ADRIFT, *supra* note 7, at 23. Moreover, real estate interests and landmark owners who oppose initial designation represent a potent political force that municipal administrations are reluctant to confront. *Id.* at 11; *see* Davidson, *Saving All Structures of Landmark Quality*, N.Y. Times, July 8, 1974, at 29, col. 3.

58. "Legitimately concerned with the cultural significance of landmark destruction, [preservationists] have tended to skip over what is, after all, the key question for preservation—who should pay?" SPACE ADRIFT, *supra* note 7, at xv-xvi.

## III. Development Rights Transfer

### A. *The New York Plan*

Air rights transfer, long permitted by New York's zoning law,[59] suggested a possible solution to the landmarks dilemma. The technique permitted the transfer of unused air rights between contiguous building sites held in common ownership.[60] Instead of demolishing the landmark to realize the increased value of its site, the owner of a landmark building could simply transfer his unused rights to an adjacent site.[61] The landmark was only indirectly protected, however, since the owner remained free to demolish it and erect a new building so long as the new building did not exceed the allowable floor area remaining on the site.[62] In addition, the technique was inflexible because of the contiguous ownership requirement.[63]

To remedy these deficiencies and encourage landmark preservation, New York amended its Zoning Resolution in 1968 to permit transfers to lots across a street or intersection from the landmark.[64] Finally, the Planning Commission was directed to condition approval of the transfer upon finding that it "will not unduly increase the bulk of any new development, density of population or intensity of use in any block," and that a "program for continuing maintenance will result in the preservation of the landmark."[65] In 1969 the Zoning Res-

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59. Marcus, *Air Rights Transfers in New York City*, 36 Law & Contemp. Prob. 372, 373 (1971) [hereinafter cited as *Air Rights Transfers*]. The technique has been available since the passage of New York's 1961 Zoning Resolution. *See Development Rights Transfer, supra* note 8, at 351.

60. *Air Rights Transfers, supra* note 59, at 373. The common ownership requirement could be circumvented by obtaining a lease on an adjacent underdeveloped parcel of sufficient duration to constitute ownership within the meaning of the 1961 Zoning Resolution. *See Development Rights Transfer, supra* note 8, at 348.

61. *See* Gilbert, *supra* note 57, at 13.

62. *See Chicago Plan, supra* note 24, at 588 n.50.

63. Additional obstacles confronted the landmark owner: "[The contiguous ownership requirement] meant that no merger would be possible where (1) all the sites contiguous to a landmark were already fully developed, (2) the neighboring buildings were themselves landmarks, or (3) the planners had elected to preserve a state of 'underdevelopment' in the immediate vicinity of the landmark . . . ." *Development Rights Transfer, supra* note 8, at 351.

64. *Id.* The "zoning lot" includes the project site plus any other contiguous parcel located within the same city block owned by the developer. *Id.* at 348 n.57.

65. *Id.* at 352, *quoting* New York, N.Y., Zoning Res. art VII, ch. 4, §§ 74-79 (1971).

olution was further amended to permit transfers across more than one street. This was accomplished by defining adjacent sites to include "a lot . . . which is across a street and opposite to another lot or lots which except for the intervention of streets or street intersections form a series extending to the lot occupied by the landmark building. All such lots shall be in the same ownership."[66]

As amended, the New York Zoning Resolution provides for a limited form of true development rights transfer.[67] No one has yet taken advantage of the opportunity to transfer development rights under the plan,[68] however, and several features of the scheme will probably limit its future use in the landmark preservation context.[69] Nonetheless, the New York development rights transfer plan implicitly recognizes the premises upon which such a program must rest, premises at variance with traditional Anglo-American property concepts.

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66. *Development Rights Transfer, supra* note 8, at 356, *quoting* NEW YORK, N.Y., ZONING RES. art. VII, ch. 4, §§ 74-79 (1971).

67. *See* note 35 *supra.*

68. One developer attempted to take advantage of the 1968 amendment with a proposal that called for the erection of two towers over Grand Central Station. The towers would use the unused air rights of the terminal, which has a floor area ratio of 1.5, in a district whose maximum is 18. The proposed towers were of such enormous dimensions that the Planning Commission dismissed it as an "aesthetic joke." SPACE ADRIFT, *supra* note 7, at 37.

The 1969 amendment was announced the same day that the developer filed suit against the city. The amendment would allow Grand Central's excess development rights to be distributed among the extensive Penn Central holdings around the station, an area aptly known as "Grand Central City." For the complete account see *Development Rights Transfer, supra* note 8, at 353-58. For an artist's conception of the proposed development see SPACE ADRIFT, *supra* note 7, at 37.

One proposal to transfer the development rights from a 19th century series of residences and small commercial structures built around an interior garden, known as Amster Yard, was almost consummated but "has yet to be put into operation due to the lull in the office building market in New York." *Air Rights Transfers, supra* note 59, at 376.

69. Professor Costonis cites five principal drawbacks of the New York development rights transfer scheme. First, the plan provides no rational incentive structure to induce owners to preserve their landmarks; by limiting development rights transfer to adjacent lots, the program imposes severe restraints upon the potential market for these rights. The plan is useful only when a developer owns a lot located across a street or an intersection from a landmark owner or owns a series of lots that connect with the landmark lot. *Chicago Plan, supra* note 24, at 586-87. Secondly, the maze of discretionary approval procedures and vague aesthetic criteria do not encourage landmark owner participation. Also, transfer permits are issued only *after* formal designation, thus putting many landmark-quality buildings beyond the reach of the program. *Id.* at 587. Thirdly, the plan relies on voluntary owner participation. *Id.* at 588. Fourthly, no adequate assurances

### B. *The Chicago Plan*

Traditional property law views one's rights in land as dependent upon the particular "estate" or ownership interest that one holds in it. Subject only to the limitations inherent in his estate and the rights of his neighbors, the owner of land is free to do with it as he will.[70] Zoning, to the extent that it modifies the property owner's freedom, clearly conflicts with the concept of private property. In fact, the development potential of urban land is derived less from rights inherent in ownership than from the zoning rules imposed by government.[71] The notion that truly private property can exist in a downtown area becomes anomalous when one considers that the value of downtown land is largely a product of public investment.[72] A reevaluation of seven centuries of property law[73] demonstrates that

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exist that the landmark will be adequately preserved. *Id.* (This criticism does not appear altogether warranted. *See* text at notes 61-62 *supra* and the description of the unique trust fund and voluntary preservation agreement worked out for Amster Yard described in *Air Rights Transfers, supra* note 59, at 376.) Lastly, the adjacency requirement produces unsound urban design consequences tending to concentrate bulk within the limited transfer area, thus leading to congestion and the dwarfing of the landmark itself. *Chicago Plan, supra* note 24, at 589. This weakness also helps justify the plan, however, since the adjacency requirement also permits the use of a "digestion" rationale to justify the program. *See* text at note 38 *supra.*

With regard to Professor Costonis' first objection to the New York plan, that it only allows transfers between contiguous lots, one commentator criticizes his reading of the statute: "Costonis seems to have missed the point that transfer over a *greatly enlarged area*—the keystone of his own Chicago Plan—was possible in New York more than two years before his own rights transfer proposal." *Development Rights Transfer, supra* note 8, at 356 n.103 (emphasis added). The author fails to acknowledge, however, that transfer over a "greatly enlarged area" is only possible in the unique circumstances of the "Grand Central City" situation because of the statute's requirement that all intervening lots be in common ownership. *See id.* at 353-56. The extent to which transfer over a greatly enlarged area is possible under the New York scheme is hardly comparable to that permitted under the Chicago Plan because of New York City's common ownership requirement.

70. "Land hath also in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum* [whose is the soil, his it is up to the sky], is the maxim of the law . . . ." 2 W. BLACKSTONE, COMMENTARIES *18. *See also* note 25 *supra.*

71. *See* SPACE ADRIFT, *supra* note 7, at 34.

72. The value of downtown parcels is largely a product of government investment in subways, streets, sanitation, police forces, and various other municipal services and facilities. *Id.*

73. For a summary of the evolution of the law of property takings and regulation see F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 51-138 (1973).

> [u]rban space should no longer be regarded simply as "private" property, to be used as the developer's own sweet will dictates. Rather, it has become in part *a public asset which cities may properly allocate through incentive zoning to achieve community goals* that have consistently been frustrated under outdated but deeply engrained property and land use concepts.[74]

Heretofore, the development potential of a parcel of land could be used only on that parcel. Given the notion that the excess development potential of one parcel can be transferred to adjacent parcels under different ownership, as New York City has done,[75] the next logical step is to sever such rights altogether and "cast them adrift," to be distributed over the cityscape as the needs of both the community and the market dictate. This is the goal envisioned by the Chicago Plan for landmarks preservation.[76]

The Chicago Plan would be implemented by initially designating a "development rights transfer district" embracing the area or areas where downtown landmarks are concentrated.[77] Landmark designation

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74. SPACE ADRIFT, *supra* note 7, at 35 (emphasis added). While *The Taking Issue*, *supra* note 73, interprets the public interest in certain private property as a license to severely restrict that property's value through stringent regulation, Professor Costonis relies on it to justify severing that value and transferring it elsewhere, compensating the owner for his loss.

75. *See* text at notes 59-69 *supra*.

76. The Chicago "Plan" is actually a cluster of variations on the general plan outlined in the text. To avoid confusion, any comments directed to these variations will be identified. The outline of the Chicago Plan and the premises upon which it is based is adapted from SPACE ADRIFT, *supra* note 7, at 28-64, and from *Chicago Plan*, *supra* note 24, at 589-634. The reader should consult those sources for a more complete discussion. For additional, more general references see Costonis, *The Costs of Preservation*, 140 ARCHITECTURAL FORUM 61 (Jan. 1974); Costonis, *Whichever Way You Slice It, DRT Is Here To Stay*, 40 PLANNING 10 (July 1974); Costonis, *supra* note 32; Costonis, *supra* note 40, Legner, *Putting Landmarks on a Firmer Footing*, 140 ARCHITECTURAL FORUM 56 (July 1974); Morris, *"Zoning Imagination"—Dimensional Zoning*, 46 ST. JOHN'S L. REV. 679 (1972); Pedowitz, *Transfer of Air Rights and Development Rights*, 9 REAL PROP. PROB. & TR. J. 183 (1974); Shlaes, *The Economics of Development Rights Transfers*, 42 APPRAISAL J. 526 (1974); Shlaes, *Who Pays for Transfer of Development Rights?*, 40 PLANNING 7 (July 1974).

77. *See* SPACE ADRIFT, *supra* note 7, at 40; *Chicago Plan*, *supra* note 24, at 590. A variation of the plan calls for designation of a transfer district or districts outside the landmarks area. *See* SPACE ADRIFT, *supra* note 7, at 50-52. This variation would allow transfer of development rights when further density within the landmark district is not desirable due to either the inadequacy of existing public facilities or the special character of the area. *Id.* Because an independent transfer district's zoning would have to be adjusted deliberately downward to bolster the market for development rights, this alternative poses substantial due

would entitle the owner to transfer his excess development rights to other lots within the transfer district and to receive a property tax reduction proportionate to the decrease in the landmark site's value.[78]

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process and fiscal zoning questions. For Professor Costonis' responses to these anticipated arguments see *id.* at 161-66; *Chicago Plan, supra* note 24, at 620-32.

Two problems with independent districting merit consideration. The first would arise when all the available development rights had been sold or when the maximum amount allotted to a given independent transfer district had been exhausted. Professor Krasnowiecki points out that "there [is] a sense running through standard zoning that you cannot establish regulations for an area that would allow one landowner to deprive the other of a pro-rata share of permissible development." Krasnowiecki, *Legal Aspects of Planned Unit Development in Theory and in Practice*, in FRONTIERS OF PLANNED UNIT DEVELOPMENT 99, 104 (R. Burchell ed. 1973). In DeMaria v. Enfield Planning & Zoning Comm'n, 159 Conn. 534, 271 A.2d 105 (1970), however, the town had limited to 375 the number of apartment units that could be constructed in certain residential districts. Three developers submitted applications for units totalling 486 and the town denied a permit to the second developer on aesthetic grounds. On appeal the Supreme Court of Connecticut held that the aesthetic reasons given by the town for denial of the second developer's application were insufficient and ordered his application approved. The court went on to point out that its decision annulled the third developer's approval. "As a consequence, the action of the commission in allotting 112 apartment unit[s] . . . [to the third developer] cannot . . . be sustained, *in view of the regulation which limits the apartment units in that neighborhood to a total of 375.*" *Id.* at 543, 271 A.2d at 109 (emphasis added). The *DeMaria* court did not consider whether such a quota was itself sustainable. Nevertheless, the court's implicit assumption that the quota was valid suggests that an analogous limit on the amount of development rights available in the transfer district might be acceptable to the courts. In Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971), on the other hand, the township conceded the invalidity of an ordinance provision allowing the construction of only 200 multi-family units annually. *Id.* at 17, 283 A.2d at 356.

The second problem posed by independent districting involves the potential for urban design distortion in designating a transfer district within which zoning is adjusted downwards and developers are required to buy additional development rights. Although Professor Costonis concedes that the practicability of this approach hinges upon the presence of a lively market within the transfer district for such rights, he does not explain why a developer would not seek to build as near the transfer district as possible under more generous zoning (or using standard amendment procedures) and thereby avoid purchasing development rights within the transfer district. Although the unwitting dislocation of the natural patterns of development that prompted selection of the transfer district in the first place might concededly be avoided by strict controls on development outside the transfer district, to date zoning has not been so precisely administered. Moreover, power to avoid channeling development away from the transfer district ends at the municipality's jurisdictional lines. It might be that the costs of supporting landmark preservation would tip the balance in a developer's locational decision-making, thus aggravating the flight from the cities.

78. SPACE ADRIFT, *supra* note 7, at 40.

In return for these benefits the landmark owner would be required to convey a "preservation restriction" to the city forbidding redevelopment of the site and obligating present and future owners to maintain the building properly.[79] Finally, to prevent design abuses at the transferee sites, ceilings would be placed on the amount of gross bulk increases that would be allowed.[80]

An interesting component of the Chicago Plan is the strong arm feature that would allow the city to acquire a preservation restriction through condemnation should the landmark owner reject the transfer-tax incentive package.[81] While the condemnation feature eliminates the need for the voluntary cooperation by the landmark owner that renders the New York program[82] ineffective, it also introduces a complicated administrative element into the Plan, the "development rights bank."[83]

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79. The elements of preservation restrictions should include: (1) the legal authority upon which its acquisition is based; (2) restrictions on use, demolition or material alteration; (3) restoration requirements, if any, and maintenance obligations; (4) remedies; and (5) duration. *Id.* at 44. Professor Costonis mentions three principal objections to the restrictions. First, the injustice to the landowner of taking a less-than-fee interest in the property, thus leaving him with all the responsibilities and few of the privileges of ownership. Secondly, the novelty of the preservation restriction makes it uncertain whether authority, either common law or statutory, exists for the condemnation of such interests. Lastly, whether the rights acquired by the city under the preservation restriction would be sufficiently defined to be capable of enforcement and whether they would be enforceable against subsequent owners. *Id.* at 44, 45, 48, 150-57; *Chicago Plan, supra* note 24, at 611-20.

A serious problem arises when the building is so unsound that maintenance requirements are unreasonably onerous, or when the building owner refuses to cooperate in a program of maintenance subsidy funded by the development rights bank, or to purchase outright in fee. SPACE ADRIFT, *supra* note 7, at 42, 44. Both of these options present difficulties of their own. *See* note 84 *infra*. The Chicago Plan relies heavily on the package of property and income tax incentives, combined with the compensation provided from the proceeds of the development rights transfer, to ensure owner cooperation. *See* SPACE ADRIFT, *supra* note 7, at 42-44; *Chicago Plan, supra* note 24, at 591-93. Professor Costonis presents persuasive arguments that landmarks under adaptive re-use will be economically viable, even attractive, for investors. *See* SPACE ADRIFT, *supra* note 7, at 65-79. The question remains, however, whether a building owner will cooperate in a maintenance program. *See* Morton, *Preservation Features: Demolition by Neglect*, 22 HISTORIC PRESERVATION, no. 4, at 2 (1970): "Except for natural disasters, . . . the destruction of America's heritage is basically man-made, *by both overt and covert acts*." *Id.* (emphasis added).

80. SPACE ADRIFT, *supra* note 7, at 40.

81. *Id.*

82. *See Chicago Plan, supra* note 24, at 588.

83. SPACE ADRIFT, *supra* note 7, at 52, 105.

The development rights bank is necessary to fund acquisition costs and program administration expenses,[84] and would in turn be funded by the sale to developers of development rights acquired by it from three sources: development rights acquired by purchase or condemnation of privately owned landmarks; development rights transferred from municipally owned landmarks; and donations of development rights by owners of landmarks in private hands.[85] The latter two sources are essential to the success of the bank. They would provide the cushion necessary to absorb the program's administrative costs and any deficit that might result from the sale of rights condemned or acquired from the privately owned landmarks.[86]

The creation of a development rights bank would thus ease the "police power-eminent domain deadlock"[87] that presently frustrates landmark preservation efforts. The bank concept imposes the cost of

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84. *Id.* at 40, 52-54. Such expenses would include the cost of appraisal of development rights, administering the development rights bank and transfers, preservation restriction supervision and enforcement over an indefinite time span, and, in some cases, ongoing subsidies for those landmarks unable to operate at a fair return even given the reduced property taxes included in the incentive package. *Id.* at 54, 105-06.

In his discussion of the economic aspects of the plan Professor Costonis inadequately addresses the potential drain on the bank's resources posed by such subsidies extending over indefinite periods of time. He asserts that "[f]or the foreseeable future, it is reasonable to expect that landmarks will remain competitive in the marketplace," basing that supposition on a study of four Chicago landmarks. *Id.* at 78. Yet only two of these buildings operated economically. Professor Costonis' solution for the unprofitable buildings is for their owners to "spend some of the funds provided by the property tax reduction for renovation, thereby increasing their buildings' appeal to potential tenants and increasing existing occupancy levels." *Id.* In light of the decreased marketability of the landmarks caused by the annihilation of all speculative value in them, and considering that "[t]he profit-motivated investor will look elsewhere," there appears room for serious doubt that the plan could save landmarks other than those that are already capable of generating adequate returns on investment. *Id.* Thus, absent subsidies to ensure the landmark's physical survival, the Plan would have to fall back on the very options it was designed to avoid: acquisition in fee by the municipality or reliance on private preservation efforts. Yet Professor Costonis proposes acquisition of such marginal buildings in "exceptional cases." *See id.* at 44, 79.

85. *Id.* at 52. Professor Costonis has designed an incentive package to induce private donors to contribute development rights to the bank. In addition to real estate tax relief, such a donation would entitle the donor to a charitable income tax deduction. *See Chicago Plan, supra* note 24, at 593 nn.65 & 66. *See also* SPACE ADRIFT, *supra* note 7, at 191-93 (app. III).

86. SPACE ADRIFT, *supra* note 7, at 52.

87. *See* text at notes 53-56 *supra.*

acquiring preservation restrictions from landmark owners upon developers who purchase the development rights. Thus the bank shifts the cost of preservation from the private sector to the market sector responsible for the development pressure that endangers urban landmarks. In addition, the bank provides the means to compensate the landmark owner for economic losses resulting from landmark designation and the extinction of his speculative development rights.[88] The Plan thus allows the public to recover some of the increment in value added to downtown property by public investment, in the form of landmark preservation and maintenance, while at the same time preventing the wipeouts that ordinarily befall the landmark owner under

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88. Under one alternative version of the Plan a heavily-capitalized development rights bank would not be required. Instead, the commission would

> prepare and periodically update an index of the value of a stated increment of development rights *for all parcels within the development rights transfer district.* With each sale of development rights by the landmark owner, *a sum representing their total dollar equivalent will be debited on the basis of the figure indicated for the site to which the rights are actually transferred.*

SPACE ADRIFT, *supra* note 7, at 42 (emphasis added). Thus as a landmark owner sold off his development rights his "account" would be debited in an amount equalling the dollar value of the rights sold determined in relation to their value *at the transferee site.* Apart from the enormous administrative burden and the attendant costs of preparing and periodically updating an index of the value of the development rights for all parcels within the development rights transfer district, query whether this alternative might pose just compensation objections when the landmark owner's rights have been condemned. Not only would the compensation not be immediately forthcoming, but it would be in the form of development rights for which a market may or may not exist. "While the constitutions of the states do not ordinarily prescribe the medium by which compensation shall be paid, that the compensation must be in money is a qualification that has been read into the [just compensation clause] by all the courts in which the question has arisen." 3 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 8.2 (J. Sackman ed. 1974).

Another problem, equally disturbing, is one that Professor Costonis does not address. As he acknowledges, "[t]he value of the landmark's development rights may be greater or lesser at the landmark site than at the transferee site or sites." SPACE ADRIFT, *supra* note 7, at 42. If this is the case, it is difficult to see how a landmark owner could be fully compensated by the sale of the landmark's development rights when the rights are worth less at the transferee site than at the landmark site. The only way to provide full compensation in that case would be to authorize sale of more rights than were acquired, hoping that on the average the value of all rights sold would equal the value of all those acquired. Should this assumption prove false, it would cut to the heart of the plan's asserted advantage over bonus zoning, that rather than creating density *ex nihilo,* it merely *redistributes* density already authorized under existing zoning. *Compare id. supra* note 7, at 34, *with id.* at 48, 49, 50, 128.

For a discussion of a related problem with private trading in a development rights market see note 105 *infra.*

preservation programs carried out solely under the police power. In addition, a carefully conceived program of development rights transfer "provides a tool that the city can use to channel density selectively to predetermined locations . . . ."[89]

Despite its numerous advantages,[90] the Plan presents some significant difficulties. An obvious objection is that, by permitting landowners to purchase additional density, the Plan undercuts the validity of the zoning code's density requirements.[91] Professor Costonis responds to this argument by analogizing development rights transfer to density zoning techniques[92] such as cluster development[93] and planned unit development,[94] which permit greater density than existing zoning allows. He posits that the objection proceeds from two faulty assumptions; that each zoning lot has a single proper bulk level and that density must be distributed on a lot by lot basis:[95]

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89. SPACE ADRIFT, *supra* note 7, at 136.

90. *See* text at notes 77-89 *supra.*

91. Such increases appear to negate the reasonableness of either the zoning code's density requirements or the increases themselves. If the density limits are sound, relaxing them would invite congestion, facility and service overloads, and buildings out of scale with their neighbors. If, on the other hand, the code's density limits are too strict, the allowances should be uniformly liberalized throughout the transfer district. To selectively relax existing density limits "creates the impression of sacrificing sensible planning at the altar of fiscal opportunism." SPACE ADRIFT, *supra* note 7, at 130.

92. Density zoning discards the notion that density must be apportioned on a lot-by-lot basis. Instead, a maximum amount of density is prescribed for an area as a whole, giving developers the option of concentrating or dispersing the bulk in accordance with flexible design criteria set forth in the ordinance. *See id.* at 128.

93. Cluster zoning permits the developer to trade an amenity dedicated to community use, such as a park or schoolground, for the right to build the same number of units he could have built on the entire tract. *Id. See generally* R. BURCHELL, PLANNED UNIT DEVELOPMENT—NEW COMMUNITIES AMERICAN STYLE (1972); Elliot & Marcus, *From Euclid to Ramapo: New Directions in Land Development Controls,* 1 HOFSTRA L. REV. 56, 72, 85 (1973) (discussing both planned unit development and development rights transfer); Sternlieb, Burchell & Hughes, *Planned Unit Development: Environmental Suboptimization,* 1 ENVIRONMENTAL AFFAIRS 694 (1972); Report of Subcomm. of Comm. on Public Regulation of Land Use, *Planned Unit Developments and Floating Zones,* 7 REAL PROP. PROB. & TR. J. 61 (1972).

94. Planned unit development ordinances permit modifications in lot size within the project area, and they relax building type and use restrictions. SPACE ADRIFT, *supra* note 7, at 128.

95. *Id.* at 127, 132.

> The truth of the matter is that these numbers are little more than pragmatic approximations of densities that, it is hoped, will further a variety of urban design and growth objectives.
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> . . . .
>
> Translating these goals into numbers partakes more of art than science.[96]

Professor Costonis concludes that sufficient flexibility exists within the "interstices" of the basic zoning code to accommodate the bulk modifications contemplated by the Plan.[97] In addition, by limiting the number of landmark designations it makes, the city can ensure that the transfer district's capacity to absorb excess development rights will not be exceeded.[98] Professor Costonis emphasizes[99] that because it is "an instance of density zoning, the Plan does not *increase* the total density authorized within the transfer district by existing zoning. It merely shifts density from underutilized landmark lots to appropriate transferee sites."[100] While theoretically true, this rationale overlooks the fact that the landmark's unused rights do not add to the district's congestion and demand for services until they are actually transferred.[101]

Anticipating the argument that development rights transfer will simply aggravate existing congestion in the center city, Professor Costonis relies upon "the willingness [and ability] of the city to do the kind of planning homework that is all too rare at the municipal level today."[102] A carefully designed transfer plan would avoid design abuses by strictly limiting the amount of density transferable to a given site and by withdrawing sensitive or overdeveloped

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96. *Id.* at 132.

97. *Id.*

98. *Id.* at 136.

99. *E.g.*, *id.* at 34, 48, 49, 50, 128.

100. *Id.* at 136.

101. *See Development Rights Transfer*, *supra* note 8, at 339. Professor Costonis does not advocate automatic transferability of development rights from landmarks immediately upon designation. He prefers a two-tiered approach, withholding transfer authorization while the landmark is capable of producing a "reasonable return" in its landmark status. SPACE ADRIFT, *supra* note 7, at 58; *see* note 57 *supra*. Despite the obvious advantage of decreased transfers under this approach, Professor Costonis concludes that "[p]olitical realities in some cities would . . . make its adoption unthinkable at the present time." SPACE ADRIFT, *supra* note 7, at 59.

102. SPACE ADRIFT, *supra* note 7, at 39.

areas from eligibility.[103] Additional reliance is placed upon a built-in system of safeguards that would protect the Plan from administrative abuse or incompetence.[104]

Unfortunately, however, such a program is ripe for administrative abuse. Because the Plan is practically self-executing once implemented, there is little control over individual transfers.[105] The Plan relies upon administrative integrity to prevent design abuses. However praiseworthy such optimism might be, there is no reason to expect abuses to disappear under the Chicago Plan.[106] The possibility of administrative abuse is present in all spheres of governmental activity, however, and should not be determinative in passing on the Plan's feasibility. If a city is willing to commit itself to an

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103. *Id.* at 137.

104. These safeguards include a requirement that a competent appraisal be conducted to determine the amount of floor area necessary to compensate the landmark owner and a requirement that developers purchase the floor area at the going market rate. Appraisal and sale procedures would be open to public and judicial scrutiny in addition to state and federal review if public funds had assisted in preservation. *Id.* at 133.

An accurate appraisal of development rights presents a separate problem: "Of necessity, we expose [ordinary] condemnees to . . . estimates when what is taken from them is well defined. To expose them to estimates addressed to the valuation of [developmental] interests themselves vague would be more than our constitution should be willing to support." Krasnowiecki & Strong, *Compensable Regulations for Open Space: A Means of Controlling Growth*, 24 J. AM. INST. PLANNERS 87, 90 (1963). The uncertainty inherent in evaluating development rights might well result in greatly inflated jury awards, as has been the English experience. *Id.* at 91. A related question concerns the timing of the appraisal and the award of compensation, namely, would the plan take account of future upzoning of downtown areas where landmark parcels are located?

A lack of adequate appraisal safeguards could have dire implications for the economics of the Chicago Plan. For an explanation of Professor Costonis' formula for determining the value of the preservation restriction see SPACE ADRIFT, *supra* note 7, at 65-80; Costonis, *The Costs of Preservation*, *supra* note 76, at 61. The Department of the Interior was satisfied with these valuation methods, and has approved the establishment of a National Cultural Park as a demonstration for the Chicago Plan. The program is currently in limbo, however, because approval was contingent upon Chicago's adoption of the plan. Indications are that Chicago will not approve the plan. *See* Shlaes, *Who Pays for Transfer of Development Rights?*, 40 PLANNING 7, 8 (July 1974).

105. It is conceivable that speculators might corner the private market for development rights. Although this would undoubtedly benefit the development rights bank, it could lead to highly inflated prices for additional development rights, and, in effect, lead to their being sold twice.

106. This is a point that Professor Costonis candidly concedes. SPACE ADRIFT, *supra* note 7, at 133.

effective preservation scheme, there is as much reason to believe that it would protect that objective as that it would not.

A practical objection to the Chicago Plan's feasibility is posed by the existence of already generous zoning and bonus density allotments permitted as of right.[107] In most cases, existing zoning is sufficient to accommodate potential growth without the introduction of a development rights transfer system. Since the success of the Chicago Plan admittedly depends upon the existence of a market for the development rights,[108] it is questionable whether the Plan could cope with the competition of "free" and generous zoning bonuses.

The response to the market problem lies in a subtle feature of the Plan. Because the Chicago Plan transfers not simply unbuilt *floor area* but the unused development potential of the landmark *site* itself, a developer would be allowed marginal increases in site coverage at the transferee site.[109] The developer could thus achieve economies not possible under the bonus zoning system, which merely allows greater *height,* and may actually reduce permissible tower site coverage by the amount of the open space amenity required in return for the bonus.[110] Thus instead of building *additional* floors the developer can build *larger* floors. Building costs soar as a building's height and perimeter increase.[111] Since larger floors permit a higher ratio of rentable floor area to service, utility, access and other nonrentable area, the purchase of development rights may be more attractive to a developer than existing zoning bonuses that may actually decrease building efficiency and increase building costs.[112]

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107. *See* text at note 40 *supra.*

108. SPACE ADRIFT, *supra* note 7, at 94. This dependence upon a market for development rights led one author to conclude that a development rights transfer scheme would be unworkable as a solution to the problem of preserving Honolulu's Chinatown. A second factor was the inability of the transfer district to absorb the massive amounts of development rights allotted to the Chinatown area. *See* D. Fine, Historic Preservation in Honolulu's Chinatown: A Preliminary Study, III-20, Sept. 1974 (unpublished manuscript prepared for Aotani & Hartwell Associates, Inc., Honolulu, Hawaii, on file with the *Urban Law Annual*). The second factor highlights the limited application of the Chicago Plan and the need to bolster the market for development rights by exercising a high degree of selectivity in designating landmarks, since the unused development rights of a relatively few buildings would soon flood the market.

109. SPACE ADRIFT, *supra* note 7, at 95.

110. *Id.* at 95-97.

111. *Id.*

112. *Id.* at 95-102.

Even assuming that an active market will exist for development rights, the market advantage obtained by permitting greater tower site coverage implies a trade-off in urban design. Although the increased density permitted might be offset by the open space[113] and amenity provided by the landmark, it is difficult to justify the density increase under the digestion rationale when the landmark and the transferee site are physically distant.[114] Unless strict limitations on such increases in site coverage are included in the transfer plan, design abuses that will aggravate the congestion and aridity of urban core areas are certain to result.

Professor Costonis is skeptical of the notion that market forces can produce sound private land use decisions under existing land use regimes.[115] For a Plan that purports to displace market forces as the arbiter of land use decisions, the Chicago Plan is alarmingly dependent upon market forces.[116] Indeed, market forces determine not only whether the development rights transferred will be saleable but also dictate the price that they will command.[117] The syllogism employed to skirt this basic problem—that since development pressure endangers landmarks in the first instance, if the pressure that creates a market for development rights is absent, landmarks will not be in danger[118]—seems of dubious validity. Landmarks in New York, the city with the most effective landmark preservation program in the nation, continue to be imperiled despite reduced demand in the office space market there.[119] The no-loss analysis simply will not withstand close examination:

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113. Because landmarks typically underutilize their site's development potential, they constitute "light and air parks sprinkled throughout the central business district like so many 'raisins' in the pudding." *Id.* at 64.

114. *See Air Rights Transfers, supra* note 59, at 378; *Development Rights Transfer, supra* note 8, at 368; text at note 36 *supra.*

115. "Substituting the marketplace for government as the arbiter of private land-use decisions . . . assumes a faith in the capacity of the marketplace to protect the public interest in environmental and land-use affairs that boggles the mind of this disbeliever." Costonis, CXXVI Development Rights Transfer: Descriptions and Perspectives for a Critique, 1, tape 575, ASPO Bettman Symposium Lecture (1974) (tape transcript on file with the *Urban Law Annual*).

116. *See* SPACE ADRIFT, *supra* note 7, at 65-80.

117. *Id.*

118. *Id.*

119. *See Air Rights Transfers, supra* note 59, at 376; *Development Rights Transfer, supra* note 8, at 368 n.155.

> Downtown development is usually not intensive enough to provide a ready market for development rights. Most downtown areas now contain substantial amounts of vacant land and large-scale land assembly, while expensive, is still possible without recourse to the purchase of development rights. *Most older cities are also undergoing decentralization of commercial and industrial facilities.* Even those with a healthy downtown area are "overbuilt" in today's real estate market. More than half of the 57 million square feet of office space built in New York City in the last five years is still unoccupied.[120]

Market forces are difficult to predict even in the absence of direct governmental intervention.[121] Actions consciously intended to influence market decisions create uncertainties, such as the effect of imposing preservation costs on developers with which cities may be unwilling or unable to cope. While such an imposition is rational in that developers act out the market pressures that endanger landmarks, cities may prove unwilling to risk diversion of economic development from their jurisdictions by assessing preservation costs to these developers.[122]

Finally, with regard to the legal issues posed,[123] the Plan must rely heavily on a warm reception by a sympathetic judiciary.[124] Although

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120. D. Fine, *supra* note 108, at III-20 (emphasis added).

121. Markets are not perfectly competitive nor does perfect foresight reside in them. Prices reflect expectations that may be false; there is nothing about the market mechanism that transcends the fallibility of human opinions regarding the future. *See* Hammond, *Convention and Limitation in Benefit-Cost Analysis*, 6 NATURAL RESOURCES J. 195, 205-06 (1966).

122. Chicago has, for the time being, rejected the Chicago Plan. *See* note 104 *supra*. Since Chicago's stated policy is to encourage compact development of its central business district (*see* note 41 *supra*) it is entirely plausible that such considerations may have played a part in that decision. On the other hand, the treatment accorded the Chicago Plan by Chicago officials has been characterized by "notorious posterior dragging. A kind of neanderthal negativism has marked statements of [a Daley] administration spokesman." Huxtable, *A Plan for Chicago*, N.Y. Times, Apr. 15, 1973, § 2, at 23, col. 3.

123. For a complete discussion of these see SPACE ADRIFT, *supra* note 7, at 145-66; *Chicago Plan*, *supra* note 24, at 602-31.

124. The American judiciary has traditionally shown great deference to legislative measures challenged on substantive due process grounds, striking down only those measures without a rational basis. SPACE ADRIFT, *supra* note 7, at 161. Reliance on judicial receptivity is not confined to challenges based on substantive due process. *See id.* at 147, 150, 156, 163, 165. Perhaps the best example of this judicial attitude is Justice Douglas' memorable dictum: "The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to

there are indications that a well conceived development rights transfer plan would be so received,[125] the only decided case even remotely in point, *Fred R. French Investing Co. v. City of New York*,[126] indicates that there is a limit to judicial tolerance. The City had attempted to zone two Manhattan sites as public parks, compensating the owner by allowing him to sell the sites' development rights to a designated area elsewhere within the borough. The court found the attempt to treat such a development rights transfer as compensation offensive to the constitutional requirement of just compensation.[127] Although ultimately decided on procedural grounds,[128] the case indicates a judicial unwillingness to tolerate the ad hoc carpentry attempted by the City, whatever the "laudatory aspects of any project designed for the public good"[129] may be.

## CONCLUSION

The Chicago Plan for landmark preservation will probably not be implemented fully in the near future because its complexity and problems exceed anything yet attempted in the historic preservation field.[130]

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determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Berman v. Parker, 348 U.S. 26, 33 (1954). *See also* Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 89 (1948) (Rutledge, J., dissenting).

125. SPACE ADRIFT, *supra* note 7, at 161.

126. 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. 1973). For further commentary see Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Park*, 24 BUFFALO L. REV. 77 (1974).

127. 77 Misc. 2d 199, ....., 352 N.Y.S.2d 762, 766.

128. *Id.* at ....., 352 N.Y.S.2d at 767. The City failed to follow the hearing procedures of the zoning law in effecting the transfer.

129. *Id.* at ....., 352 N.Y.S.2d at 766. Professor Costonis points out that under the Chicago Plan no such hostility is to be anticipated, since "the risk of nonmarketability of development rights will fall on public authorities, not on the owner of ecologically sensitive land. The latter . . . will be compensated under traditional eminent domain procedures." Costonis, *supra* note 115, at 4 n.7, tape 579.

130. Already signs exist of progress toward complete implementation. Illinois has enacted comprehensive enabling legislation that authorizes municipalities to adopt development rights transfer plans. ILL. REV. STAT. ch. 24, §§ 11-48.2-1 to 2-7 (Smith-Hurd 1971). More recently, a bill containing the basic elements of a development rights transfer plan for historic preservation, including an optional development rights bank, was introduced in the Hawaii House of Representatives. Hawaii H.B. No. 130, 8th Leg., Jan. 28, 1975 (on file with the *Urban Law Annual*). The bill has twenty-six sponsors.

At this writing the chief obstacles to full implementation of such plans are found

Because they alter so many established zoning and property concepts, development rights transfer programs will more likely evolve incrementally, permitting gradual accommodation and adjustment between the transfer concept and the present system. Indeed, the promise of the Chicago Plan will best be fulfilled if its ideas are carefully tested and modified until they are acceptable to the public and private sectors whose cooperation and commitment will be essential to the Plan's success. As Professor Costonis notes:

> [T]he full-fledged Chicago Plan is unlikely to be adopted in Chicago. The city simply does not want a comprehensive landmark program that works because its relations with the development sector and its commitment to monumentalism (*e.g.*, [the] John Hancock, Standard Oil [and] Sears buildings) rule out any program that hinders large-scale land assembly.[131]

Chicago's recent adoption of an amendment to its planned unit development ordinance[132] is evidence that cities are more likely to proceed gradually. The amendment "does nothing less than award the developer bonus space for not destroying a landmark," which Professor Costonis terms a "modified TDR approach."[133] Cities like New York and Chicago have accepted the basic notion that the development potential of a site can be severed and transferred elsewhere. It is only a question of time and experience before they will have the confidence to take the next step and cast those rights adrift.

It is as easy to say that development rights transfer will not work as it was to say that man could not fly, simply because it has not yet been done. Indeed some say that it could not and should not be done.[134] Nonetheless, despite numerous well-intentioned efforts to

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at the municipal level, which has the most potent political and market pressures. The chances for effective implementation of a comprehensive development rights transfer plan are best, however, in a small, self-contained island environment such as Hawaii. Not only is development pressure intensive, but so little land area exists that the risk is minimal for diverting development outside the counties' jurisdictions by imposing the costs of preservation on developers. Hopefully, Hawaii's modest plan will provide a showcase for the transfer concept that will persuade other states and localities to follow its example.

131. Letter from Professor John J. Costonis to Frederick M. Baker, Oct. 29, 1974 (on file with the *Urban Law Annual*).

132. Shlaes, *supra* note 104, at 8.

133. Letter, *supra* note 131.

134. Professor Costonis is fond of reproducing the comments of opponents of development rights transfer. *See, e.g.*, Costonis, *Whichever Way You Slice It,*

save our historic landmarks under existing preservation regimes, they are rapidly disappearing.[135] Without attempting to minimize the substantial obstacles in the way of effective implementation of a coherent transfer program, it might be noted that comprehensive zoning was itself considered a pernicious device. The need for a plan that considers the costs of preservation becomes apparent once it is recognized that the problem of landmark preservation is essentially economic. More significant, however, is the human cost of landmark annihilation. Landmarks are vestiges of the past that embody the history and culture of an America that no longer exists. If Americans are to grow as a people they must understand their background. It is unacceptable that our destiny as a people should include the sense of rootlessness exacerbated by the loss of our landmark buildings.

In closing his address to the American Historical Society in 1893, Frederick Jackson Turner observed that "he would be a rash prophet who should assert that the expansive character of American life has now entirely ceased."[136] He would also be a rash prophet who should assert that development rights transfer has no future in the preservation of America's past.

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*DRT Is Here To Stay*, 40 PLANNING 10 (July 1974) (" 'a gimmick' that 'can only lead to an unplanned future—to chaos;' a 'pernicious device' deserving of 'censure rather than praise' ").

135. For illustrations depicting what remains—and what has been lost—see SPACE ADRIFT, *supra* note 7, *passim*; *Superville*, *supra* note 3, at 517 ("A Century's History of the Tall Building"); note 46 *supra*.

136. TURNER, *supra* note 2, at 37.