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Comment

Transferring Development Rights: Purpose, Problems, and Prospects in New York

I. Introduction

Development is not always a good thing: imagine tearing down St. Patrick's Cathedral to build a Wal-Mart or building a new McDonald's next to Old Faithful in Yellowstone National Park. Unfortunately, the economic pressure to develop property often outweighs the economic value of maintaining that property in its present state.¹ When non-economic values like scenic beauty, architectural beauty or environmental sensitivity justify a ban on development, that ban may be effected through restrictive zoning.² But the owners of the restricted property suffer because they lose the development value of their prop-

1. "The stubborn reality underlying the landmarks dilemma is that landmark ownership in downtown areas of high land value is markedly less profitable than redevelopment of landmark sites." John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 575 (1972) [hereinafter *Chicago Plan*]. Farmland is under a similar strain. See John R. Nolon, *The Stable Door is Open: New York's Statutes to Protect Farmland*, 67 N.Y. ST. B.J. 36 (1995) [hereinafter *Stable Door*]. "As development pressures grow through the cumulative effect of land use approvals, farmers find that their property taxes increase, their operations become less profitable, and the opportunity and temptation to sell land to speculators increases." *Id.* at 37.

2. The United States Supreme Court first upheld the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Although landmark and environmental preservation were not issues in 1926, the Court realized that new considerations would arise as time passed, justifying new restrictions on land use. See *id.* "[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities." *Id.* at 386-87.

erty.³ Transfer of development rights [hereinafter TDR] severs the development value from the property and allows the owner to realize that value through more extensive development of other property.⁴ By lessening the economic impact of protectively zoning critical property, TDR is designed to minimize the objections to such zoning.⁵

Unfortunately, what works well in theory may stumble in practice. In reality, TDR programs create tremendous contro-

3. See MARTIN A. GARRET, JR., *LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS* 76 (1987). "[O]ther than in most agricultural and mining areas, the right to develop is probably the component of greatest value among the rights to ownership." *Id.* See also *Chicago Plan*, *supra* note 1, at 579-80. Professor Costonis noted the economic burdens that the owners of Chicago's Old Stock Exchange Building would have faced as the result of an historic landmark designation:

If the Exchange's owners had been forced to maintain the Exchange as a landmark, they would have suffered several economic disadvantages. They would have been prevented from redeveloping the site or capitalizing on the site's premium value for assemblage purposes. Designation might also have precluded the owners from internal modernization of the Exchange that would have increased its return by increasing its operating efficiency. They would also have been unable to obtain mortgage financing on terms competitive with those extended to the owners of properties unencumbered by landmark designation. Finally, profitable operation of the landmark might have been eventually endangered as the building continued to age and the net income from operation progressively declined.

Id.

4. See *infra* Part II for a discussion of how a TDR program functions.

5. See John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 *YALE L.J.* 75, 85-86 (1973) [hereinafter *Exploratory Essay*].

The basic cause of land use conflicts . . . is the destruction of the development potential and hence market value of affected sites or areas. The same site cannot support a landmark and a modern office tower, or a nature preserve and a polluting industrial plant. By assuming that the development potential of a site may be used *only on that site*, the property system makes an either/or choice inevitable: the landmark or the tower, the nature preserve or the plant Development rights transfer breaks the linkage between particular land and its development potential by permitting the transfer of that potential, or "development rights," to land where greater density will not be objectionable. In freeing the bottled-up development rights for use elsewhere, the technique avoids the either/or dilemma because it both protects the threatened resource and enables the owner of the restricted site to recoup the economic value represented by the site's frozen potential.

Id.

versy.⁶ Once affected parties get over the conceptual hurdle of divorcing the right to develop property from the property itself, the squabble begins over the practical implementation of such a program⁷ and the negative side effects that may result.⁸ The focus of this paper is to analyze the arguments for and against TDR and to predict the potential of TDR as a zoning tool in New York. Part II will explain the concept of TDR and how it evolved from basic zoning principles. Part III will examine the 1989 codification of TDR authority for municipalities in New

6. For example, there was significant public debate and media attention surrounding the adoption of the Long Island Pine Barrens Comprehensive Management Plan which incorporated TDR as an effort to minimize the economic burden of property owners in the core area. See Rick Brand and Tom Morris, *Peace, Finally, in Bitter Battle*, *NEWSDAY* (Nassau, Suffolk), June 29, 1995, at A29 [hereinafter *Peace*]. Environmentalists, developers, municipal officials and property owners participated in numerous public hearings before the plan was adopted and delineation of the boundary lines for sending and receiving districts prompted hot debate. See *id.* "There were times when it was an absolute screamfest and people would stomp out of the room." Rick Brand, *Referendum Sought to Bar County Raids on Pine Barrens Funds*, *NEWSDAY* (Nassau, Suffolk), January 30, 1996, at A20 [hereinafter *Referendum*]. Controversy continues as environmentalists challenge Suffolk County's Republican-controlled legislature's attempts to use Pine Barrens funds to fill gaps in the county budget. See Peter Grant, *Dueling Developers Dispute Over Getting Control of 383 Madison*, *DAILY NEWS* (New York), January 24, 1996, at Business 45. In New York City, debate is heating up again over a possible TDR transaction that would make possible the development of 383 Madison Avenue. See *id.* The site was embroiled in a TDR controversy in the early 1980's when the city refused to allow a transfer of development rights to the site from Grand Central Station. Developers are trying again. See *id.* Township officials, environmentalists, and business leaders are using simulation software to guide their development plans. See Mary McGrath, *W. Milford Sees Future Via Computer; Software Helps Shape Plans for Development*, *THE RECORD* (Bergen), November 14, 1995. The program allows the user to model alternative development schemes for comparison. See *id.* The township's interest in protecting watershed lands while increasing its tax base has sparked interest there in TDR. See *id.*

7. See *infra* Part IV for suggestions on the requirements for a successful TDR program.

8. See Margaret Giordano, *Over-Stuffing the Envelope: The Problems with Creative Transfer of Development Rights*, 16 *FORDHAM URB. L.J.* 43, 66 (1987/1988).

The adverse social and aesthetic effects of these [creative TDR] transactions are numerous and irreparable. Increased development strains transportation, sewer, water, electric, police and fire services in areas unprepared for population increase. Increased bulk and tower coverage on city streets adds to congestion, loss of light and air and unanticipated blockage of view corridors. Architecturally, manipulation of the zoning rules can abruptly alter the character of neighborhoods.

Id.

York. Part IV will analyze the strengths and weaknesses of TDR and suggest the criteria necessary for a successful TDR program. In Part V, I conclude that due to inherent limitations, TDR will not have a broad and common application as a method of land use control, but that it will be employed only in limited situations where other zoning techniques are either ineffective or would bring about too harsh a result.

II. TDR And Its Evolution.

The ownership of property, in and of itself, is of little value to an individual. Instead, it is the owner's ability to put that property to a particular use that creates value in property.⁹ Different people favor different uses. To assure one's right to pursue a particular use, neighbors' rights must also be recognized. That is the *quid pro quo* of property ownership.

But problems arise when one's use interferes with a neighbor's use, or vice versa. So we accept a condition on our "right" to use our property: "*sic utere tuo ut alienum non laedas*"—use your property in such a manner as not to injure that of another. Initially, property owners relied on tort law to enforce this condition, but trespass and nuisance litigation are cumbersome and inefficient vehicles for controlling land use.¹⁰ They resolve specific disputes, typically arising from past conduct,¹¹ and they are ill-equipped for providing generic, prospective guidance to the public.¹² As a result, municipal bodies began passing re-

9. See *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 597, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 11 (1976). "It is recognized that the 'value' of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put." *Id.* See also Norman Marcus, *Mandatory Development Rights Transfer and the Takings Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77, 88 n.41 and accompanying text (1975).

10. See ROBERT R. WRIGHT & MORTON GITELMAN, *LAND USE CASES AND MATERIAL* 16-20 (4th ed. 1991).

11. See *id.*

12. See *id.* at 19. Although common law suits for trespass and nuisance do impact the manner in which property is used, the ability and authority of the judge in a civil suit are limited in scope. See *id.* The judge "may view himself . . . as the arbiter of a limited set of issues affecting only the narrowly defined rights of the litigants. In such a situation he may overlook ramifications which can extend beyond the channelized issues before him." *Id.*

strictive statutes proscribing certain uses in certain areas.¹³ This approach to controlling land use became more sophisticated with the advent of zoning.¹⁴ Zoning was designed to foster a more comprehensive planning agenda by addressing multiple uses and locations within a single ordinance.¹⁵ Each step in the evolution of land use regulation has recognized the finite nature of physical resources and the competing uses to which people put those resources. But each step in that evolution also has been limited by attitudes toward, and understanding of, the natural and social forces that impact land use.¹⁶ As our understanding becomes more sophisticated, we develop increasingly specialized tools for resolving particular land use problems. One such tool is a transfer of development rights program.

13. The court in *Bush v. Seabury*, 8 Johns. 418 (1811), upheld a Poughkeepsie ordinance which forbade the sale of meat outside of the public market. *See id.* at 420. "The fixing the place and times at which markets shall be held and kept open, and the prohibition to sell at other places and times, is among the most ordinary regulations of a city or town police, and would naturally be included in the general power to pass laws relative to the public markets." *Id.* As early as 1665 the Duke of York's Laws for the Government of the Colony of New York included a prohibition against burial of the dead on private property. *See* James B. Lyon, COLONIAL LAWS OF NEW YORK, Vol. I (Albany, State Printer 1894) Every parish was to designate a cemetery and burial outside of a cemetery was unlawful. The concern was to prevent the surreptitious internment of poor souls having met an untimely end at the hands of the landowner. *See id.*

14. *See* N.Y. ZONING RES. (1916). New York is credited with passing the first comprehensive zoning ordinance in 1916. *See id.* That ordinance was upheld by the Court of Appeals in *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920). The United States Supreme Court upheld zoning in *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926).

15. *See* David E. Mills, *Is Zoning a Negative-Sum Game?*, LAND ECONOMICS, Feb. 2, 1989, at 1. "When the U.S. Supreme Court ruled zoning to be constitutional in 1926 it viewed zoning regulations as extensions of nuisance law In those days, zoning was vaunted as a technical tool used . . . to implement scientific comprehensive land-use plans." *Id.*

16. *See* Robert Crespi, *Land Use Law in New York State: Playing "Hide & SEQRA" with the Elusive Comprehensive Plan*, 11 PACE ENVTL. L. REV. 835, 844 (1994).

The original purpose of zoning . . . was to protect property values by dividing the entire municipality into districts and regulating the uses permitted within them. The purpose and use of zoning has expanded to such areas as providing for the social welfare, environmental protection and aesthetic values. Modern zoning techniques, radically different from traditional "Euclidian" zoning, have evolved which attempt to overcome the faults of this rigid process.

Id.

Property ownership has been described as a "bundle of rights."¹⁷ Although the definitive description of property rights may be elusive, the most frequently acknowledged elements that make up this bundle include the right to possess, the right to exclude others, and the right to develop or dispose of the property as the owner sees fit.¹⁸ Each of these rights may be limited in favor of some public purpose, and they are regarded as distinct and separable for regulatory purposes.¹⁹

Transfer of Development Rights programs are regulatory tools designed to facilitate land use planning. Individual property owners tend to develop their property as self-interest dictates.²⁰ However, many uses are incompatible with each

17. See GARRET, *supra* note 3, at 76.

The legal concept underlying TDR is that title to real estate is not a unitary or monolithic right (cite omitted). Instead, it is a right that may be compared to a bundle of individual rights, each of which may be separated from the others and transferred to someone else, thus leaving the original owner with all other rights of ownership. There is nothing new in this concept . . . we have long separated such components of title as mineral rights and mortgage liens. One of the components of this bundle of rights could, therefore, be the right to develop the land.

Id.

18. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 485 U.S. 419, 435 (1982).

19. See Marcus, *supra* note 9, at 102-04.

To the layman . . . it may seem strange to speak of a parcel of land not as a holistic thing, but as the generator of discrete and separate interests in property It is a reflection of the legal conception of property not as "things," but as the sum of the interests that the law recognizes and protects—a "bundle of rights." . . .

....

. . . It is clear that "property," when considered in connection with the "taking" question, is not congruent with property in its most expansive jurisprudential definition. If it were congruent, every governmental interference with property rights would constitute a taking under the fifth amendment.

Id.

20. See Peter Q. Eschweiler, *In Accordance with a Comprehensive Plan, The Need for Planning Consistency in New York State*, 10 PACE ENVTL. L. REV. 603, 616 (1993).

Citizens rely on private developers to provide them with most of their housing, utilities, transportation systems, communications, recreation, and other facilities, all at some degree of profit to the developers for their entrepreneurial efforts. Since they are motivated by profit, developers often seek to maximize that profit and, in the eyes of many, developers left to their own devices will maximize their gain to the expense of the community.

Id.

other,²¹ and therefore the concept of zoning evolved to separate them. Zoning typically involves both use²² and dimension²³ restrictions. Unfortunately, many of the zoning ordinances that exist today are a product of Franklin Roosevelt's era, and they are limited in both purpose and practice to an antiquated concept of land use planning.²⁴ Since the inception of zoning, land use regulators have devised several concepts to inject flexibility into the zoning process.²⁵ This flexibility is required to accom-

21. An adult bookstore and a house of worship make incongruous neighbors. Municipalities may restrict the location of adult oriented bookstores and theaters so that they are geographically isolated from churches, schools, and residential areas. See *Young v. American Mini Theaters*, 427 U.S. 50 (1976) (zoning conflict between adult motion picture theatre and residential area inhabitants). Even illegal conduct may be subjected to zoning as in the case of "drug-free zones" around schools. See 21 U.S.C. § 860 (1986) (amended 1994).

22. Use restrictions may classify certain zones as residential, commercial or industrial.

23. Dimension restrictions may include setback requirements and limits on the height of buildings and density permitted on the property. Density is regulated through the use of "floor area ratios [FAR]." See Giordano, *supra* note 8, at 50 n.62. FAR is a formula that relates the maximum floor space allowable for a building to the area of the lot on which it is built. See *id.* at 50. For example, a FAR of 5:1 would allow a building with 50,000 square feet of floor space to be built on a 10,000 square foot lot. See *id.* at 50 n.62.

24. See *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 374, 285 N.E.2d 291, 299, 334 N.Y.S.2d 138, 148-49 (1972). Particular criticism has been leveled at the traditional attitude towards zoning as a function of local government:

Undoubtedly, current zoning enabling legislation is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government—that the public interest of the State is exhausted once its political subdivisions have been delegated the authority to zone. While such jurisdictional allocations may well have been consistent with formerly prevailing conditions and assumptions, questions of broader public interest have commonly been ignored. Experience . . . has pointed to serious defects and community autonomy in land use controls has come under increasing attack . . . because of its pronounced insularism and its correlative role in producing distortions in metropolitan growth patterns, and perhaps more importantly, in crippling efforts toward regional and State-wide problem solving

Id. (citations omitted).

25. See Stanley D. Abrams, *Flexible Zoning Techniques to Meet State and Local Growth Policies*, LAND USE INST.: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION, C930 ALI-ABA 537 (1994). For example, cluster developments allow:

residential dwellings of an attached or detached nature . . . in groups or clustered on individual lots smaller than minimum standard size, at a density in excess of that normally permitted in the zoning district, thus permit-

ting flexibility of lot and street layout to preserve open spaces and natural topographic or other sensitive features. The concept is also adaptable to commercial and industrial forms of development.

Id. at 540. Planned Unit Development (PUD) is another flexible zoning alternative:

Fast-developing jurisdictions that are targets for intensive, large area mixed use projects often find themselves unable to cope with the proper evaluation and implementation of such developments with traditional zones and procedures. These projects require specialized zones containing zoning requirements which integrate the master plan process, development plan approvals, and staging or timing of development.

These zones should establish procedures and standards for the implementation of master plan land use recommendations for comprehensively planned multi-use projects. The objective of the zone should be to provide a more flexible approach to the comprehensive design and implementation of such intensive centers. Thus, the filing of a complete development plan with the application for this zone is required.

Id. at 543-44. Special techniques are available to foster specific social objectives such as low-income housing:

The moderate price dwelling unit ordinance [MPDU] . . . has the goal of providing low and moderate cost housing. The MPDU Ordinance is applied exclusively to new residential development, and by legislative enactment requires developers/builders of projects over a set size to construct a certain percentage of the total number of units in the housing or apartment project as moderate cost dwelling units. These MPDUs must be offered either for sale or rent, based on prices adjusted annually by the local government, which rely on federal HUD standards. Safeguards are provided in the regulations to ensure that upon resale or re-rental, the price remains within a moderate cost category.

The incentive to the developer to comply and quid-pro-quo to avoid a "takings" challenge, is a "density bonus" offered for constructing MPDUs. Currently, under the program's operation in Montgomery County, Maryland, except in a few limited zoning categories, at least 12.5% of all units in developments proposing fifty (50) units/lots or more must be MPDUs. A developer constructing 12.6% to 15% of all units as MPDUs will, according to a sliding scale, receive a minimum of a 1% to a maximum of a 22% density bonus for additional market rate units. Thus, if the developer of a 100-unit subdivision were to provide 15% of the total number of units as MPDUs, he could construct 122 dwelling units, of which 19 units would be MPDUs.

Id. at 548-49. Sometimes, the zoning approval process itself is the obstacle that new techniques are designed to clear:

Local jurisdictions often compete with one another to attract economic development for a variety of reasons. Whether the basis for such competition is an increased tax base and revenue, additional employment opportunities for its citizens, or to improve the quality of life or image of the community, a major inducement is the speed and degree of cooperation which can be anticipated from local officials in the approval and permitting process. One method to accomplish these goals is the implementation of a system which will "fast track" selected developments.

moderate changes in land use priorities.²⁶

Transfer of Development Rights is a direct response to changing priorities. There are three concerns that have been primarily responsible for the development of TDR.²⁷ First, many historical landmarks do not fully utilize the density allocation permitted by zoning.²⁸ As a result, there is enormous economic incentive for the owner to take down the landmark and construct a new building capable of exploiting the economic potential of the site.²⁹ Unless landmark preservation is made a priority, architectural treasures risk oblivion.³⁰ Second, the congestion of metropolitan and suburban areas has created a demand for open space.³¹ Third, there are economic incentives to develop in ecologically sensitive areas.³² Until land use regu-

[The purpose of Fast Track Development Procedures is to] review and designate economic development projects with a priority status to expedite and facilitate permit approvals. The priority status gives projects a highly competitive market posture in the development and brokerage community, as well as ensuring specific employers an expeditious path through the permit process. Projects are evaluated by an economic development agency of a local government, with input from other agencies, where approval and permits must be secured (planning commission, water and sewer commission, building and transportation departments, utility companies, etc.).

Id. at 550.

26. See Linda A. Malone, *The Future of Transferable Development Rights in the Supreme Court*, 73 Ky. L.J. 759 (1984). "Land use is indeed one of the areas, like medicine and technology, in which innovation has rendered many legal precepts inadequate or obsolete." *Id.* at 792.

27. See *Exploratory Essay*, *supra* note 5.

28. Older landmark buildings may have been constructed when technology, financial resources, or public interest would not support the development of a structure that took full advantage of the allowable density. Modern pressures to maximize a lot owner's return on her investment promote the destruction of landmark buildings and redevelopment of site. See *Chicago Plan*, *supra* note 1, for a full discussion of this phenomenon by Professor Costonis.

29. See *id.* at 579.

30. See *id.*

31. See Marcus, *supra* note 9. "An open space in midtown Manhattan is as important—perhaps even more important to a larger number of people—as an unspoiled beach on the California coast." *Id.* at 77.

32. An ironic consequence of Congress' attempts to compel the cleanup of hazardous waste sites has been to provide incentive to developers to spoil pristine property rather than incur the cost of remediating contaminated industrial property. See Phillip H. Gitlen, *Voluntary Cleanup Programs*, 1 ALB. L. ENVTL. OUTLOOK 28 (1995). The cost of investigating a contaminated site can exceed the cleanup costs and lending institutions balk at financing the redevelopment out of fear that they can held liable for the contamination under CERCLA. See *id.* Developers take the path of least resistance and spread their factories and malls

lation is employed to protect these vulnerable areas, clean air, clean water, and farm land have to compete against land uses that provide higher short-term yields for the property owner.³³ Transfer of Development Rights goes to the heart of the problem by restructuring the economic incentives in land use.³⁴ Development is funneled into areas where it will have the least deleterious effects, and away from properties whose high social and/or biological value might otherwise be overcome by the pressure to develop.³⁵

Transfer of Development Rights diverts economic incentive away from critical areas through the use of "sending" and "receiving" districts.³⁶ The sending district is the area being protected.³⁷ The receiving district is the area that has been determined to be suitable for development.³⁸ By designating these districts, the governing authority is performing the tradi-

across the suburban and rural landscape. *See id.* This despoliation is exacerbated when municipalities must extend infrastructure to serve the new development. *See id.*

33. *See Stable Door*, *supra* note 1.

Farm land cannot be converted to non-agricultural uses unless land use regulations and public spending programs allow and encourage such conversion. Quite often, it is in anticipation of a change of zoning or a subdivision approval that speculators will purchase farm land; speculators sense that local officials will welcome more intense land uses and the greater gross property tax receipts and local employment that they bring. They also assume that as farmland is converted to other uses, the public sector will willingly provide the new developments with the public services and infrastructure they ultimately demand.

Id. at 36-37.

34. *See Exploratory Essay*, *supra* note 5.

35. *See id.*

36. *See* Edward H. Ziegler, *The Transfer of Development Rights (Part I)*, 18 ZONING & PLAN. L. REP. 61 (1995).

37. *See* MANDELKER, LAND USE LAW § 11.26 (1982).

38. *See Transfer of Development Rights*, LEGAL MEMORANDUM, ST. OF N.Y., DEPT. OF ST., at 4 (Jan. 1995).

The receiving districts are the areas to which development rights are transferred, and great care must be taken with their designation for two reasons. First, there should be a market for development rights in the receiving district (this is a basic premise of the whole TDR system). Second, the transfer will necessarily result in an increase in the density or intensity of development in the receiving area, which means that municipal services must be available to support it; consequently, there must be an awareness of the potential impact of such development.

Id.

tional use restriction aspect of zoning.³⁹ Density restrictions in the receiving district are relaxed to accommodate the development being transferred from the sending district.⁴⁰ As these development rights are transferred, a permanent restriction must be recorded against development on the sending property.⁴¹ Property owners in the sending district may transfer their development rights to property they own in the receiving district.⁴² More typically, however, developers will buy these development rights from sending district property owners, and apply them to projects in the receiving district.⁴³ There may be provisions for the sending district property owners to donate development rights to the municipality if they choose to do so.⁴⁴ To facilitate a market for these transactions, the municipality may create a "development rights bank."⁴⁵ If demand is low,

39. See *supra* note 22.

40. See *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332, 1333 (Fla. Dist. Ct. App. 1983) (upheld down zoning of the sending district and the grant of density bonus in receiving district).

41. See Ziegler, *supra* note 36, at 5.

[D]evelopment rights assigned to land in the sending district may be (or must be, if the regulation so requires) transferred to land in the receiving district. When that happens, there is a need to have some indication, recorded in the chain of title, to notify prospective purchasers of the property that development rights have been transferred.

Id.

42. See ALEXANDRA D. DAWSON, LAND-USE PLANNING AND THE LAW 70 (1982).

43. See *id.*

44. See WILLIAMS AM. LAND PLAN. § 159.16 (1985).

45. The creation of a TDR bank is fraught with potential for controversy. The main concern is that the authority manipulating the zoning will also be manipulating the value of TDR credits. See *infra* text accompanying notes 69-73. In *Matlack v. Board of Chosen Freeholders of the County of Burlington*, 466 A.2d 83 (N.J. Super. Ct. Law Div. 1982), defendants' creation of an "exchange" for the trading of Pineland Development Credits (PDCs) was upheld. See *id.* at 96. It is worthy to note that "[t]he exchange has had a significant effect on PDC bracket prices and has established the dominant price. Although PDC transactions have occurred at prices of \$8,000 to \$20,000, three-fourths of the sales have been at an [exchange-set] price of \$10,000." Richard J. Roddewig & Cheryl A. Inghram, *Transferable Development Rights Programs: TDRs and the Real Estate Marketplace*, 401 PLAN-NING ADVISORY SERVICE REP. 6 (1987).

Corrigan v. City of Scottsdale, 720 P.2d 528 (Ariz. Ct. App. 1985) illustrates the concern that regulatory authorities not rely on the possible potential value of TDR credits as "just compensation" in the event that their regulations constitute a taking. See *id.* The City of Scottsdale passed a preservation ordinance that deprived Corrigan of all use of a major portion of her property. See *id.* at 530. The ordinance did allow for the transfer of development rights from Corrigan's prop-

property owners have the option of selling their development rights to the bank, which will in turn sell them to developers when demand picks up.⁴⁶ Any profits realized by the bank are usually reinvested in the TDR program.⁴⁷

New York City began to experiment with TDR in 1961,⁴⁸ but the concept of permitting a heightened level of development in one area, in exchange for foregoing otherwise permissible development in another, dates back to the original Zoning Resolution of 1916.⁴⁹ This early exchange was permitted only with reference to a single zoning lot, which limited its usefulness for developers.⁵⁰ However, it does demonstrate the fundamental concept of TDR: trading a development restriction on one property for the right to develop on another.

In New York, the desire to preserve historic landmarks and "wells of light and air amid the skyscrapers"⁵¹ prompted zoning amendments. These amendments gradually expanded the sites to which a developer could transfer development rights, enhancing the usefulness of TDR. A developer was free to choose TDR as a means of receiving additional density allotments on a particular site. As long as this option was voluntary, it posed no significant legal problems, but then the City of New York went too far.

erty to a receiving district. *See id.* at 532. Because no use was allowed on Corrigan's property, the court deemed the ordinance to constitute a taking which required just compensation. *See id.* at 539. Under Arizona law, just compensation is to be determined by the court, and therefore the value of any TDR credits could not constitute just compensation. *See id.* at 534. The court also held that the provision for TDR weighed against a finding that the ordinance was a valid exercise of the police power. *See id.* at 538. "If this were a valid exercise of the police power there would be no need for any form of compensation." *Id.*

46. *See* Roddewig & Inghram, *supra* note 45, at 27.

47. *See* N.Y. CITY LAW § 20-f(2)(e) (McKinney 1989 & Supp. 1996); N.Y. TOWN LAW § 261-a(2)(e) (McKinney Supp. 1996); N.Y. VILLAGE LAW § 7-701(2)(e) (McKinney 1995).

48. For a thorough discussion of the evolution of TDR in New York City's zoning ordinance see *Development Rights Transfer in New York City*, 82 YALE L.J. 338, 342-67 (1972).

49. *See id.* New York City's 1916 Zoning Resolution permitted a developer additional height allowances in exchange for open space dedications that exceeded mandatory minimums. *See id.*

50. *See id.* at 344.

51. *Id.* at 349.

A. *TDR May Not Diminish a Denial of Due Process*

Tudor City was a residential complex in Manhattan that spanned two 15,000 square-foot parks.⁵² When the owner of the parks announced his plans to build on them to the full extent permitted by the zoning ordinance, there was strong public resentment regarding the loss of open space.⁵³ The Board of Estimate approved the recommendation of the New York City Planning Commission to include the Tudor City Parks in a newly created Special Park District.⁵⁴ This change in zoning prohibited the park's owner from building on the parks, but permitted him to transfer his development rights to other property in Manhattan.

The New York Court of Appeals viewed this involuntary application of TDR as an unconstitutional exercise of the police power.⁵⁵ The zoning amendment immediately altered the property owner's right to develop the parks.⁵⁶ The owner's ability to transfer his development rights to another property was contingent on locating and purchasing a receiving property, and receiving administrative acceptance to the specific transfer plan, or finding a buyer willing to purchase the rights.⁵⁷ In the court's view, these contingencies rendered the value of the transferable development rights too uncertain in comparison with the value of the right to develop the parks prior to the zoning amendment.⁵⁸ The court found that the zoning ordinance was unreasonable and, therefore, constitutionally infirm because "it frustrate[d] the property owner in the use of his prop-

52. See Marcus, *supra* note 9, at 79-85.

53. See French, 39 N.Y.2d 587, 592, 350 N.E.2d 381, 383, 385 N.Y.S.2d 5, 7 (1976).

54. See *id.*

55. See *id.* at 590, 350 N.E.2d at 383, 385 N.Y.S.2d at 7.

56. See *id.* at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.

57. See *id.* at 597-98, 350 N.E.2d at 387-88, 385 N.Y.S.2d at 11.

58. See *id.* at 598, 350 N.E.2d at 388, 385 N.Y.S.2d at 11.

[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.

Id.

erty . . . [it] destroy[ed] its economic value or all but a bare residue of its value."⁵⁹ The issue of uncertainty in valuing development rights is central to both the constitutionality and practicality of TDR programs.

B. *Tepid Approval of TDR*

In 1978 the United States Supreme Court shed some light on the status of TDR in the landmark case *Penn Central Transportation Co. v. City of New York*.⁶⁰ There, plaintiffs desired to construct an office tower above Grand Central Station in New York City.⁶¹ The station, however, had recently been designated as an historic landmark, which meant that construction of the office tower would require the approval of the Landmarks Preservation Commission.⁶² When the Commission vetoed construction plans, Penn Central brought suit in state court alleging that the Landmarks Preservation Law effected an unconstitutional "taking" of its property.⁶³ The Court rejected the takings claim, and held that a property owner is not guaranteed the "most profitable use" of his property.⁶⁴ Furthermore, it held that the Landmarks Preservation Law, as applied, did not interfere with plaintiffs' existing use of the property as a railroad station and concessionary rental property.⁶⁵ Plaintiffs

59. *Id.* at 596, 350 N.E.2d at 387, 385 N.Y.S.2d at 10.

60. 438 U.S. 104 (1978). For an analysis of takings jurisprudence relevant to TDR, see Malone, *supra* note 26.

61. *See* 438 U.S. at 116.

62. *See id.* at 110-12. The Landmark Preservation Commission was composed of architects, historians, realtors, city planners, and borough residents. *See id.* at 111 n.8. The Commission was charged with identifying critical landmarks and designating them as such, subject to approval by the New York City Board of Estimate. *See id.* at 110-11.

63. *See id.* at 119.

64. *See id.* at 120. "The Appellate Division concluded that all appellants had succeeded in showing that they had been deprived of the property's most profitable use, and that this showing did not establish that appellants had been unconstitutionally deprived of their property." *Id.*

65. *See id.* at 136.

Unlike the governmental acts in *Goldblatt*, *Miller*, *Causby*, *Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning

were unable to meet their burden of establishing that the law denied them a "reasonable return" on their property.⁶⁶ The Landmark Preservation Law was upheld.⁶⁷

In his opinion for the majority, Justice Brennan made reference to the TDR program available as a result of the Landmark Preservation Law and the city's zoning ordinance.⁶⁸ Since the Court decided that no taking had occurred, it was unnecessary to decide whether transferable development rights constituted just compensation.⁶⁹ Nonetheless, dicta by both the majority and the dissent cast serious doubt on the constitutionality of TDR as "just compensation." Justice Brennan acknowledged that the TDR program mitigated the financial burden on the property owner and that it should "be taken into account in considering the impact of the regulation."⁷⁰ But he noted that "these [TDR] rights may well not have constituted 'just compensation' if a 'taking' had occurred"⁷¹ Justice Rehnquist, in his dissent, vehemently opposed any scheme that sought to legitimize a taking by paying the owner anything less than "a full and perfect equivalent for the property taken."⁷² Although, as noted in his dissent, Penn Central was offered "substantial amounts for its TDRs," Justice Rehnquist would subject such offers to judicial scrutiny to ensure that they truly reflected the value of the property given up before endorsing them as just compensation.⁷³

the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Id.

66. *See id.*

67. *See id.* at 138.

68. *See id.* at 113.

69. *See id.* at 137.

70. *Id.*

71. *Id.*

72. *Id.* at 150 (Rehnquist, J., dissenting).

73. *See id.* at 152.

C. *Developer Manipulation of TDR*

1. *A Shell Game in Chinatown*

Hon Yip owned a lot located in Chinatown, on Chatham Square and Mott Street.⁷⁴ He wanted to build a twelve story building on that lot, but zoning did not allow such a large structure.⁷⁵ However, New York City's TDR program provided a loophole.⁷⁶ On a lot contiguous to Hon Yip's lot, there was a two story theater.⁷⁷ The theater did not take advantage of the full Floor Area Ratio [hereinafter FAR]⁷⁸ permitted by zoning.⁷⁹ Hon Yip set out to acquire the air rights above the theater so he could transfer them to his own lot, which would then permit him to construct his twelve story building.⁸⁰

Hon Yip contracted to lease the air rights above the theater for seventy-eight years.⁸¹ But the New York City Department of Buildings told him that ownership of the air rights alone did not meet the requirement that the two lots affected by a proposed transfer of development rights be under "single ownership."⁸² So Hon Yip obtained an assignment of the theater's lease, including both land and air rights, from Kaplan, the lessee.⁸³ As soon as Hon Yip's new building was completed, he reassigned his interest in the land under the theater to Kaplan, but retained his leasehold in the air rights.⁸⁴

Hon Yip's shell game was successful, and in 1978 he transferred his interest in the new building, as well as the air rights above the theater, to Wing Ming.⁸⁵ In 1985 the theater was subleased to the Bank of Central Asia [hereinafter BCA].⁸⁶ When BCA installed new air conditioning units on the roof of the thea-

74. See *Wing Ming Properties Ltd. v. Mott Operating Corp.*, 148 Misc. 2d 680, 681, 561 N.Y.S.2d 337, 338 (Sup. Ct. 1990).

75. See *id.* at 682, 561 N.Y.S.2d at 338.

76. See *id.*

77. See *id.*

78. See *supra* note 23.

79. See *Wing Ming*, 148 Misc. 2d at 682, 561 N.Y.S.2d at 339.

80. See *id.* at 682-83, 561 N.Y.S.2d at 339.

81. See *id.* at 683, 561 N.Y.S.2d at 339.

82. See *id.*

83. See *id.*

84. See *id.*

85. See *id.*

86. See *id.*

ter, Wing Ming was alarmed.⁸⁷ Wing Ming feared that the installation would constitute an increase in the FAR of the theater.⁸⁸ In turn, that might invalidate the transfer of air rights upon which his building depended, and Wing Ming might be required to tear down those stories that exceeded the original zoning allowance for that lot.⁸⁹

Wing Ming brought a declaratory judgment action against the owners and lessees of the theater to establish that the air conditioning units constituted a trespass upon the air rights to which he held a leasehold interest.⁹⁰ The resolution of this case hinged upon the court's interpretation of "air rights."⁹¹ The court held that air rights, as intended by the parties to the contract in which they were transferred, were not synonymous with exclusive possession.⁹² A trespass could occur, therefore, only if the air conditioning units actually increased the FAR of the theater.⁹³ Since they did not,⁹⁴ the court held that no trespass had taken place.⁹⁵ The transfer of air rights upon which Wing Ming depended could not be attacked.

87. *See id.*

88. *See id.*

89. *See id.* at 683, 561 N.Y.S.2d at 340.

90. *See id.*

91. *See id.* at 684-85, 561 N.Y.S.2d at 340. The court found the term "air rights" to mean air development rights, not the right to exclusively possess superadjacent airspace. *See id.*

92. *See id.*

93. *See id.* At 686, 561 N.Y.S.2d at 341.

94. To determine whether the air conditioning units could constitute an expansion of the theater's FAR, the court looked to the definition of FAR in Zoning Resolution 12-10:

Specifically excluded from this definition of floor area is "floor space used for mechanical equipment and open terraces provided no more than 50% of it is enclosed by a parapet not higher than three feet eight inches." The new air-conditioning equipment falls under the statutory exception of "mechanical equipment" placed in "open (roof) space." The parapets are similarly excepted since they are less than 3 feet 8 inches high. BCA's construction technically did not increase the floor area space of its building. Therefore, as a matter of law, there has been no trespass on the air-development rights acquired by plaintiff to build the twelve-story structure presently housing a Citibank facility.

Id. at 687, 561 N.Y.S.2d 341-42.

95. *See id.* at 687, 561 N.Y.S.2d at 342.

2. *The Flamingo Flim-Flam*

In 1981 Robert Gordon sold the Caribbean Towers apartment complex to an entity called Firewater, N.V., and took back a purchase money first mortgage.⁹⁶ The rents from the complex were pledged as collateral for the mortgage.⁹⁷ Firewater then conveyed the apartments to Florida East Coast Properties [hereinafter FECP], the owner of adjacent land known as the Flamingo property.⁹⁸ The Caribbean Towers had the right, under the city's zoning plan, to build an additional eighty units on the Caribbean property.⁹⁹ Without Gordon's knowledge, Firewater and FECP entered a unity of title agreement which transferred those development rights from Caribbean to Flamingo.¹⁰⁰

Florida's District Court of Appeals found that the transfer of development rights substantially impaired the value of Gordon's collateral, the Caribbean property.¹⁰¹ When Gordon foreclosed on the property in 1990, the trial court granted Gordon's petition to impose an equitable lien on the Flamingo property for the value of the development rights surreptitiously transferred.¹⁰²

D. *TDR Programs with Promise*

1. *Facial Validity of TDR*

Alachua County, Florida designated the Cross Creek region as a special study area and amended its comprehensive plan to protect Cross Creek from development.¹⁰³ Cross Creek was deemed a valuable resource due to its waterways, wetlands, and

96. See *Gordon v. Flamingo Holding Partnership*, 624 So. 2d 294, 295 (Fla. Dist. Ct. App. 1993) (although this is not a New York case, it is useful for demonstrating the dangers associated with "abstract" property rights). When the "right" to develop that arises from one property is exercised on another property, neighboring property owners may be understandably suspicious of manipulation and deception on the part of the developer. See *supra* note 58.

97. See *Gordon*, 624 So. 2d at 295.

98. See *id.*

99. See *id.*

100. See *id.*

101. See *id.* at 297.

102. See *id.*

103. See *Glisson v. Alchua County*, 558 So. 2d 1030, 1032 (Fla. Dist. Ct. App. 1990).

wildlife habitat.¹⁰⁴ Property owners in the region challenged the preservation provision as an unconstitutional taking of property without compensation.¹⁰⁵ The court held that the regulation did not constitute a taking because:

the contested regulations substantially advance legitimate state interests, in that the regulations are directed to protection of the environment and preservation of historic areas. Furthermore, because the regulations permit most existing uses of the property, and provide a mechanism whereby individual landowners may obtain a variance or transfer of development rights, the regulations on their face do not deny individual landowners all economically viable uses of their property.¹⁰⁶

However, because plaintiffs had not shown that they were actually prevented from developing a specific piece of property, their challenge to the regulation was facial only, and "the taking issue [was not] determined as a factual matter."¹⁰⁷

2. *Protecting the Pine Barrens*

Pine barrens are an ecological resource that provide wildlife habitat, groundwater filtration, and scenic beauty.¹⁰⁸ New Jersey and Long Island have both implemented preservation schemes to protect their pine barrens from development, and both plans implement TDR.¹⁰⁹ The New Jersey Pine Barrens Comprehensive Management Plan is the largest application of TDR in the nation,¹¹⁰ and it has withstood judicial scrutiny.¹¹¹ Long Island's TDR program is the most ambitious of its kind in

104. *See id.*

105. *See id.* at 1034.

106. *Id.* at 1037.

107. *See id.* at 1038.

108. *See Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 254 (N.J. 1991).

109. *See* N.J. STAT. ANN. § 13:18A-1 (West 1991); N.Y. ENVTL. CONSERV. LAW § 57-0105 (McKinney 1984 & Supp. 1996).

110. For an analysis of the success of New Jersey's program, see James B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 YALE J. ON REG. 369, 378-83 (1989); *see also* Ellen M. Randle, *The National Reserve System and Transferable Development Rights: Is the New Jersey Plan an Unconstitutional "Taking?"* 10 B.C. ENVTL. AFF. L. REV. 183 (1982); Roddewig & Inghram, *supra* note 45, at 6.

111. *See Gardner*, 593 A.2d 251 (because plaintiff's existing use of his property was not prohibited, and plaintiff could avail himself of Pineland Development Credits, the regulation did not constitute a taking).

New York, and evolved as a result of litigation over development in the pine barrens.¹¹² Long Island's pine barrens, much like the pine barrens in New Jersey, are a critical natural resource, necessary to preserve the integrity of a fifteen-trillion gallon underground aquifer.¹¹³ In recognition of the pine barrens' hydrological and ecological importance, New York's Legislature passed the Long Island Pine Barrens Protection Act in 1993.¹¹⁴ As a result, a core area of 52,500 acres of the 100,000 acre pine barrens became the third largest forest preserve in New York State.¹¹⁵

The Long Island plan restricts development in the core area, and permits the transfer of development rights to receiving districts in the remaining 47,500 acres.¹¹⁶ Although development density in the receiving districts is increased, it must be accomplished in a manner which will not degrade the pine barrens.¹¹⁷

III. New York's Codification of TDR

The 1989 codification of TDR authority for New York municipalities¹¹⁸ was an effort to encourage the use of TDR while at the same time providing some guidance for the development of TDR programs.¹¹⁹ Although mandatory language is used in the amendments, they are essentially advisory. This is indicated by specific reference to the continued legitimacy of TDR programs erected under other authority,¹²⁰ and by the inclusion of the following statement at the end of each amendment: "Nothing in this section shall be construed to invalidate any

112. See *Peace*, *supra* note 6, at A29.

113. See Tom Morris, *Preserving a Paradise: Officials Sign Historic Pact to Preserve Vast Forest, Aquifer*, *NEWSDAY* (Nassau, Suffolk), June 29, 1995, at A6.

114. 1993 N.Y. LAWS ch. 262, § 4.

115. See Morris, *supra* note 113.

116. See *id.*

117. See LONG ISLAND CENTRAL PINE BARRENS JOINT PLANNING AND POLICY COMMISSION, PROPOSED DRAFT PLAN, CENTRAL PINE BARRENS COMPREHENSIVE LAND USE PLAN, pt. V(B)(2), (1994) [hereinafter LIPB DRAFT PLAN].

118. See N.Y. GEN. CITY LAW § 20-f; N.Y. TOWN LAW § 261-a; N.Y. VILLAGE LAW § 7-701.

119. See N.Y. GEN. CITY LAW § 20-f, Legislative Declaration and Intent for L. 1989, ch. 40. (McKinney 1989 & Supp. 1996).

120. See N.Y. GEN. CITY LAW § 20-f(2); N.Y. TOWN LAW § 261-a(2); N.Y. VILLAGE LAW § 7-701(2).

provision for transfer of development rights *heretofore or hereafter* adopted by any local legislative body."¹²¹ The Declaration of Legislative Intent explicitly states that the amendments are intended to "clarify an application of existing authority and to provide guidelines whereby any city, town or village may provide for transfer of development rights."¹²² The advisory nature of the amendments begets the flexibility which is fundamental to the successful implementation of TDR. The demand for TDR stems from a need to circumvent the rigidity of Euclidian zoning,¹²³ so adaptability in the application and implementation of TDR received well deserved recognition in the amendments.

A close reading of the amendments suggests that if a municipality cites the codification as the basis of authority for implementing a TDR program, that program must comport with the methodology outlined in the amendments.¹²⁴ But by preserving other TDR authority, the statutes imply that a municipality may enact a TDR program which does not satisfy the requirements of the amendments.¹²⁵ Such a program, presumably, would be subject to traditional zoning analysis for compliance with a comprehensive plan.¹²⁶

The purpose of TDR under the amendments is clearly defined: "To protect natural, scenic, recreational and agricultural qualities of open lands . . . and to enhance sites and areas of special character or special historical, cultural, aesthetic or economic interest or value."¹²⁷ The traditional applications of TDR to preserve landmarks, open space, and the environment fall easily within the above stated purposes. Curious, however, is

121. See N.Y. GEN. CITY LAW § 20-f(3) (emphasis added); N.Y. TOWN LAW § 261-a(4) (emphasis added); N.Y. VILLAGE LAW § 7-701(4) (emphasis added).

122. See N.Y. GEN. CITY LAW § 20-f, Legislative Declaration and Intent for L. 1989, ch. 40.

123. See *supra* notes 24-25 and accompanying text.

124. See N.Y. GEN. CITY LAW § 20-f(2); N.Y. TOWN LAW § 261-a(2); N.Y. VILLAGE LAW § 7-701(2).

125. See N.Y. GEN. CITY LAW § 20-f(4); N.Y. TOWN LAW § 261-a(3); N.Y. VILLAGE LAW § 7-701(4).

126. Land use regulation must be in accordance with a comprehensive plan. See N.Y. GEN. CITY LAW § 28-a(12)(a) (McKinney 1989 & Supp. 1996); N.Y. TOWN LAW § 272-a (McKinney Supp. 1987 & 1996); N.Y. VILLAGE LAW § 7-722(11) (McKinney Supp. 1996).

127. See N.Y. GEN. CITY LAW § 20-f, Legislative Declaration and Intent for L. 1989, ch. 40.

the provision "to enhance sites and areas of special economic value."¹²⁸ It would seem that property of special economic value would be inherently insured against the economic pressure to develop that TDR is designed to thwart. Precisely what property with special economic value requires TDR protection is hard to imagine. More likely, TDR might be implemented under the amendments to preserve external economic benefits to surrounding property owners. For example, if a particular property had characteristics that supported a thriving tourism industry for the surrounding communities, TDR could be implemented to restrict development on that property for the purpose of preserving those external economic benefits.¹²⁹ Under the amendments such authority may exist; the authority is subject, of course, to traditional police power analysis.

The amendments go on to prescribe a methodology intended to preserve the declared purposes of the codification. The first requirement, as is the case with all zoning in New York state, is that the program be established "in accordance with a comprehensive plan. . . ."¹³⁰ Normally, this requirement is not very stringent. Zoning amendments have been upheld as being in accord with a comprehensive plan even where no written document existed evincing such a plan.¹³¹ It is generally sufficient that changes in zoning are accomplished for a legitimate public purpose and not for the gain or detriment of individual property owners.¹³²

The comprehensive planning required under the TDR amendments¹³³ entails a litany of considerations including traf-

128. *See id.*

129. This scenario is not unlike the use of TDR in New York City's Landmark Preservation Law. *See supra* notes 60-73 and accompanying text.

130. *See supra* note 126.

131. *See* *Herrington v. Town of Mexico*, 91 Misc. 2d 861, 398 N.Y.S.2d 818 (Sup. Ct. 1977) (a comprehensive plan does not require a written document; zoning may be enacted without a master plan).

132. *See, e.g.,* *Rodgers v. Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951) (singling out a small parcel for special treatment, to the detriment of surrounding property (spot zoning), is the antithesis of planned zoning); *Twenty-one White Plains Corp. v. Village of Hastings-on-Hudson*, 14 Misc. 2d 800, 180 N.Y.S.2d 13 (Sup. Ct. 1958).

133. "The transfer of development rights, and the sending and receiving districts, shall be established in accordance with a comprehensive plan within the meaning of section two hundred sixty-three of this article." N.Y. TOWN LAW § 261-a(2)(a). *See also*, N.Y. GEN. CITY LAW § 20-f(2)(a); N.Y. VILLAGE LAW § 7-701(2)(a).

fic congestion, fire and flood protection, open space, population density, adequate infrastructure, the character of the district, and even the accommodation of solar energy systems¹³⁴ should they become viable. Promoting the general health and welfare and encouraging the "best use" of land are pliant and adaptable considerations that can be offered to support any number of planned land uses.¹³⁵ In essence, the amendments seem to require municipal planners to give some consideration to the ramifications of implementing TDR, while preserving significant flexibility for establishing and prioritizing municipal goals.

Sending districts are limited to those which epitomize the values deemed worthy of protection under the purpose section of the TDR amendments.¹³⁶ They do not otherwise receive much attention in the amendments. There is no reference to the "downzoning" or general proscription on development that characterizes a sending district.¹³⁷ The amendments leave open the possibility of designating a particular district as one from which development rights can be transferred, even though the entire district has not been downzoned.

Receiving districts must be carefully scrutinized for their capacity to absorb development transferred from the sending districts. Specific attention must be paid to the effects of increased development on available resources, environmental quality, transportation, waste disposal, and fire protection.¹³⁸ Although existing zoning was based on similar considerations, zoning changes in the receiving districts do not necessarily invalidate the basis upon which the existing zoning was predi-

134. Land use regulations should preserve access to sunlight for solar energy equipment.

135. For example, a municipality may look upon a parcel of open land, and envision a golf course, a park, or a residential subdivision. Which use is the "best use" is a matter of opinion.

136. "The sending district from which transfer of development rights may be authorized shall consist of natural, scenic, recreational, agricultural or open land or sites of special historical, cultural, aesthetic or economic values sought to be protected." N.Y. GEN. CITY LAW § 20-f(2)(a); N.Y. TOWN LAW § 261-a(2)(a); N.Y. VILLAGE LAW § 7-701(2)(a).

137. See N.Y. GEN. CITY LAW § 20-f(2)(a); N.Y. TOWN LAW § 261-a(2)(a); N.Y. VILLAGE LAW § 7-701(2)(a). "The municipality may need to downzone the transfer sites in order to make the purchase of development rights at these sites attractive." MANDELKER, *supra* note 37, at § 11.26.

138. See *Transfer of Development Rights*, *supra* note 38.

cated. This is due to the fundamental change in expectations that TDR is designed to accomplish. Instead of calculating how far existing resources can be exploited to support development throughout the municipality, the resources of the entire municipality can now be devoted to the development occurring only in limited areas.

Transferring development will tend to alter the tax base for schools and special districts.¹³⁹ The amendments do not bar changes in the tax burden, but require only that the changes not be unreasonable.¹⁴⁰ Again, there is flexibility in the wording of the statute. Presumably, any test for reasonableness would weigh the benefit of the protection sought under the TDR program against the heightened tax burden of affected property owners. The more compelling the need for preserving a particular value, the more likely it will overcome objections to changes in the tax base.

The restrictive zoning that typically accompanies TDR will lower the property value of land in the sending district.¹⁴¹ Accordingly, the amendments require that tax assessments on property from which development rights have been transferred properly reflect the devaluation.¹⁴² Lowered assessments in the sending district will result in a smaller tax base even though the cost to the municipality for maintaining existing infrastructure may not have changed.¹⁴³ In the receiving district, higher

139. See LONG ISLAND CENTRAL PINE BARRENS JOINT PLANNING AND POLICY COMMISSION, FISCAL AND ECONOMIC EVALUATION OF THE CENTRAL PINE BARRENS COMPREHENSIVE LAND USE PLAN (June 12, 1995) [hereinafter FISCAL].

140. See N.Y. GEN. CITY LAW § 20-f(2)(a); N.Y. TOWN LAW § 261-a(2)(a); N.Y. VILLAGE LAW § 7-701(2)(a).

141. The value of property is dependant upon the uses to which it can be put. See *supra* notes 3, 9. As restrictive zoning decreases the uses to which a parcel may be put, it degrades the economic value of that property.

142. See N.Y. GEN. CITY LAW § 20-f(2)(d); N.Y. TOWN LAW § 261-a(2)(d); N.Y. VILLAGE LAW § 7-701(2)(d).

143. See FISCAL, *supra* note 139. "School districts are impacted by changes in actual land values because actual land values are the basis of assessed land values which, in turn, are the basis for real property tax revenues. Tax revenues from real property taxes make up a substantial portion of the revenue used for school district operations . . ." *Id.* Although a TDR program is designed to shift future development to the receiving districts, municipalities are unlikely to abandon the existing development in the sending districts. See *id.* The existing infrastructure in the sending district may continue to be supported, even though the tax revenue from the sending district will diminish. See *id.*

real property assessments will somewhat undermine the economic incentive for participation in the TDR program.¹⁴⁴ In addition, any gain realized on the transfer of development rights is taxable.¹⁴⁵ This prevents a TDR program from becoming an investment haven for speculators who might buy TDR credits and hold on to them as investments. Deterring such speculation is beneficial because it artificially drives up the cost of development in the receiving districts.

Due process notice concerns are addressed in the amendments by requiring that TDR programs have specified procedures, that the sending and receiving districts be mapped with specificity, that conservation easements are recorded on the deeds of property from which development rights have been transferred, and that the usual notice requirements for zoning amendments be followed.¹⁴⁶ As a practical matter for the immediate future, the issue of notice is unlikely to be raised where new TDR programs are implemented, since they tend to receive much public and media attention.¹⁴⁷ However, the recording requirements specifically, and the mapping and procedural requirements generally, serve to give notice to those coming into the community to purchase property that certain parcels may not be developable.¹⁴⁸

The amendments make some effort to coordinate preservation efforts under local TDR programs with environmental regulation efforts of other levels of government.¹⁴⁹ However, the initial decision on a proposed TDR program's compatibility with the preservation efforts of other levels of government lies with

144. What the right hand giveth, the left hand taketh away. Property values in the receiving districts will increase if development is restricted elsewhere. The increased property values will result in higher tax assessments, which means that a portion of the property's appreciation goes to the government's coffers.

145. See *In re* Petition of Rubin Brothers Holding Co., No. 810562, 1995 WL 321884, at *2 (N.Y. Tax. App. Trib. May 18, 1995)(involving a real property transfer gains tax on the transfer of development rights).

146. See N.Y. GEN. CITY LAW § 20-f(2)(3); N.Y. TOWN LAW § 261-a(2)(3); N.Y. VILLAGE LAW § 7-701(2)(3).

147. See *supra* note 6.

148. See N.Y. GEN. CITY LAW § 20-f(2)(b)(c); N.Y. TOWN LAW § 261-a(2)(b)(c); N.Y. VILLAGE LAW § 7-701(2)(b)(c).

149. See N.Y. GEN. CITY LAW § 20-f(2)(a); N.Y. TOWN LAW § 261-a(2)(a); N.Y. VILLAGE LAW § 7-701(2)(a).

the local legislative body.¹⁵⁰ A generic environmental impact statement [hereinafter GEIS] is required prior to the implementation of TDR.¹⁵¹ Individual TDR transactions are subject to review for their effect on the environment only to the extent that review under the GEIS was inadequate.¹⁵² This places a significant burden on the municipality wishing to implement TDR to accurately forecast the environmental ramifications of increased density. The amendments prudently require the municipality to amend its environmental impact statement if "there are material changes in circumstances."¹⁵³ The possibility of changes subsequently invalidating the TDR program will be among the risk factors taken into account by property owners and developers in negotiating the value of TDR credits.¹⁵⁴

In an attempt to ensure that the price paid to owners of TDR credits reflects their value on the market, the amendments authorize municipalities to establish TDR banks.¹⁵⁵ However, by permitting the banks to operate "in the best interests of the town,"¹⁵⁶ the market for TDR credits may be manipulated to the detriment of the credit holders. Where a municipality sets a baseline value on TDR credits, the "just compensation" issue may be raised by property owners in the sending districts.¹⁵⁷ A municipality cannot downzone property to devalue it and so make it more affordable in condemnation.¹⁵⁸ Neither should a municipality be authorized to cause the devaluation of property

150. *See id.*

151. *See id.*

152. *See* N.Y. GEN. CITY LAW § 20-f(2)(b); N.Y. TOWN LAW § 261-a(2)(b); N.Y. VILLAGE LAW § 7-701(2)(b).

153. *See* N.Y. GEN. CITY LAW § 20-f(2)(a); N.Y. TOWN LAW § 261-a(2)(a); N.Y. VILLAGE LAW § 7-701(2)(a).

154. If a developer pays for TDR credits in order to build at a higher density in the receiving district, she is gambling that the allowable zoning densities in the receiving district will not be increased before she has recaptured her investment. Since TDR programs are often accompanied by more optimism than success, subsequent invalidation of the program is a legitimate concern.

155. *See* N.Y. GEN. CITY LAW § 20-f(2)(e); N.Y. TOWN LAW § 261-a(2)(e); N.Y. VILLAGE LAW § 7-701(2)(e).

156. *See id.*

157. *See supra* notes 70-72 and accompanying text.

158. *See* ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING*, § 7.31 (3d ed. 1986).

A zoning ordinance may not have as its main purpose the depressing or freezing of property values. . . . While a zoning restriction is not invalid simply because it reduces the value of certain land, the depression of value

to effect the same purpose that a condemnation proceeding would have. Since the usefulness of a TDR program is to effect public preservation goals at a cost less than that of outright acquisition, the zoning authority should not also have the power to set the value of TDR credits.

IV. What Does it Take to Make TDR Work?

Our history is replete with examples of our desire to expand the amount of land over which we hold dominion. The Louisiana Purchase, Seward's Folly, the Mexican-American War, and the Indian wars attest to America's thirst for land. But contemporary political notions of the world order do not allow for further expansion. For the most part we recognize existing political boundaries, and we no longer rationalize the taking of territory by force. But our national character is still marked by the desire to have our own space, and to do with it as we wish. The current property rights movement¹⁵⁹ is an embodiment of our concept of liberty based on the right to own and the right to be free from the control of others. Yet we must reconcile individual property ownership with the reality of burgeoning populations and limited land.

As land use intensifies, the ramifications of such use are felt by more and more people.¹⁶⁰ New York City has just negoti-

for the purpose of acquiring the land at the depressed price is a taking which offends the Constitution.

Id.

An owner of land taken by eminent domain is entitled to the market value thereof based on its highest and best use. Such use cannot be cut down because the condemnor is in a position to refuse a consent necessary to make available the lands for such use, and does so refuse because of the effect upon the price in a contemplated condemnation.

51 N.Y. JUR. 2D, EMINENT DOMAIN §185 (1986).

159. See Neil R. Pierce, *Takings—the Comings and Goings*, NAT'L J., Jan. 6, 1996. "All 50 [state] legislatures have considered some form of property-rights legislation in the 1990s. At least 18 have passed property-rights statutes—usually so-called assessment laws, which require a 'takings impact analysis' before a new government regulation can go into effect." *Id.*

160. See JOHN PEET, *ENERGY AND THE ECOLOGICAL ECONOMICS OF SUSTAINABILITY* 217-18 (1992).

Until relatively recent times, when population increased, new lands and new technologies could always be brought into use to provide for the new people. There was always "room for one more." Nowadays, the tragedy of the commons is painfully obvious in many countries in that "one more" has

ated a deal with municipalities in the Adirondacks, over two hundred miles away, to preserve the water quality of the reservoirs that serve its population of nine million plus.¹⁶¹ The agreement is going to cost the city over one billion dollars.¹⁶² The negotiations arose out of the tension between legitimate public welfare concerns in the city and the legal rights of up-state property owners.¹⁶³ Similar battles will continue to arise as our understanding of the interaction between land use activities develops. Transfer of Development Rights is one of the weapons in our arsenal for fighting such battles.

Unfortunately, TDR is an intricate and complex tool that requires very specific conditions in order for it to function adequately. It is the inherent delicacy of TDR that will limit its usefulness and scope of application.

The cornerstone of a successful TDR program is public confidence in the value of TDR credits. Participation in the TDR program should be voluntary to avoid constitutional defects.¹⁶⁴ Voluntary participation will hinge on whether the purchase of

turned into millions more, all looking for sustenance from a fixed land area. The result is an inexorable trend toward destruction of the biophysical (and therefore the economic) base for all.

In the future, increased food production will have to come from land already under cultivation, from marginal land currently used for grazing, or from clearing of the remnants of land that still retain forest cover. That will have immense consequences for soils and on demand for fertilizers, tractors, water supply, and so on. Even then, the process cannot proceed indefinitely. There are limits to the ability of land to grow food, and they are only temporarily avoided by the use of artificial fertilizers, chemicals, machinery, and so on. The ultimate restraint, a fixed physical resource base, remains. The historical reality of enhanced production often causing long-term deterioration or destruction of the agricultural resource base is confirmed by the experience of virtually all countries, developed and developing.

Id.

161. See Lisa Mullenneaux, *Watershed Agreement*, N.Y. DIGEST, Jan., 1996, at 7.

162. See *id.*

163. See *id.*

164. The motivation behind using TDR as part of a preservation program is the ability to protect property from development without having to pay full market price for the property. If the value of TDR credits is less than the actual market value of the right to develop property, or if the program denies an owner all economically viable use of her property, then the program is vulnerable to a takings challenge unless participation is voluntary.

TDR credits is financially attractive.¹⁶⁵ To be attractive, the value of TDR credits must evoke some confidence in the public.

Confidence in the value of TDR credits will be affected by a number of factors. First, credits must be valued by the market, and not a TDR bank,¹⁶⁶ so that they reflect their full value. Although the idea of having a TDR bank set a minimum value for credits may be an appealing way to start the ball rolling, the perception that government will buy low and sell high smacks of a taking without just compensation. The proposition that setting a minimum value is only aimed at reducing the burden on property owners in the sending districts, and is not an attempt to pay just compensation, will not pass muster in an uncharitable review by fellow taxpayers. Indeed, the idea that certain property owners should have their burdens lightened while others must pay the full price of land use restrictions appears inequitable on its face. The only way to avoid these pitfalls is to have the objective and impersonal marketplace set a price for TDR credits.¹⁶⁷

Once we have resolved to value credits in adherence to the principles of capitalism, we must examine the factors that will affect demand for the credits. Demand will be determined principally by the nature of the receiving districts and the stability of the regulatory structure.¹⁶⁸

Two elements are of critical importance in designing the receiving districts. The first is consideration of the receiving district's capacity to absorb the credits that will be generated in the sending district.¹⁶⁹ Zoning in the receiving district is typically amended to absorb the additional density,¹⁷⁰ but where there is some ultimate limit to the density any one lot can achieve, there is a limitation on the ability to transfer TDR

165. See Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565 (1992). "Whether they purchase development rights directly from the selling owner of the rights or from a development rights bank, eventual users must be able to exceed otherwise applicable command-and-control zoning restrictions be the amount purchased. Otherwise, the buyers would have no use for the excess rights." *Id.* at 576.

166. See *supra* note 45.

167. See *supra* note 45.

168. See Roddewig & Inghram, *supra* note 45, at 21.

169. See *id.*

170. Zoning regulates density via FAR. See *supra* note 23.

credits. This obstacle can be overcome by increasing the size of the receiving district to encompass more lots. As a result, receiving districts that have already been developed¹⁷¹ must likely be much greater in area than the sending districts. The capacity to fully absorb all of the TDR credits adherent to the sending districts forms the lower limit for determining the size of the receiving district.

But the degree to which receiving districts can exceed the sending districts in size also has an upper limit. The second element of crucial import in designing the receiving district is its overall proximity to the sending district. Zoning is an exercise of the police power.¹⁷² Fundamental to the justification for zoning is the concept of "reciprocity of advantage."¹⁷³ That is, we are all willing to submit to the burdens of police power regulation only because we all benefit from that regulation. Although zoning setback requirements might deprive a property owner of the increased rent she could receive by building to the sidewalk, she is compensated by the fact that if her building catches fire, those setback restrictions make it easier for the fire department to save her house from destruction.

A problem may arise, however, when a regulation burdens a particular set of property owners without providing some off-

171. To further the principles of land conservation, transfer of density under a TDR program will normally be targeted at an area which has already undergone some development. The goal is to eliminate redundancy and inefficiency in the infrastructure. If TDR credits were to be applied to pristine, undeveloped land, entire new municipal service systems would have to be created, at great cost. Furthermore, it is inconsistent to design a land preservation system that fosters further encroachment onto unspoiled territory.

172. See *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926).

173. See *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 139-40 (1978) (Rehnquist, J., dissenting).

Typical zoning restrictions may . . . so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes . . . there is "an average reciprocity of advantage."

Id.

setting benefit.¹⁷⁴ Accordingly, if a receiving district is so large that portions of it are simply too distant to realize whatever benefit is being protected in the sending district, reciprocity of advantage is lacking. In this situation a TDR program will face tremendous public resentment. Public sentiment is likely to affect TDR credit values since proposed transfers will come under attack at public hearings.¹⁷⁵ Although developers do not cower before every expression of public resentment to their development proposals, neither do they ignore the increased cost of doing business in a hostile environment.

Both of the aforementioned considerations are key in designating receiving districts. Fairness dictates that everyone whose property in the sending district is burdened by a ban on development be afforded the opportunity to realize whatever profit TDR credits may provide. By the same token, it would be inequitable to burden some property owners with congestive development when they realize little or no utility from preservation of the sending district.

There is another factor which makes or breaks the public's confidence in the value of TDR credits, and that is the stability of the program and the attendant zoning regulations.¹⁷⁶ As alluded to above, if developers fear that the tide of public resentment will incite a legislative renunciation of the TDR program, the developers will not buy into it. Even if districts are drawn

174. This objection has temporal as well as physical dimensions. Owners of a landmark building near Grand Central Terminal applied for a special permit that would allow the transfer of development rights to another site for the construction of a 74 story building. *See* 383 Madison Assocs. v. City of New York, 193 A.D.2d 518, 519 (N.Y. 1st Dep't 1993). One of the objections raised by the City was that the new building would "disproportionately impact access of surrounding sites to air and light." *See id.* at 520. The court rejected this argument, finding that the City Planning Commission had anticipated trade-offs of light and air space between the landmark site and the receiving site more than 20 years earlier when it proposed the TDR program. *See id.* "Since transferable development rights originally were envisioned as a trade-off, shifting as-of-right development to adjacent sites, we find no basis to conclude that the facts of this case would have created a burden greater than that originally contemplated." *Id.* The moral of this story is that burdens on the receiving district may not materialize until long after the benefit of the sending district has been taken for granted.

175. *See supra* note 6.

176. *See* Kayden *supra* note 165, at 578. "Markets for development rights depend on stable and predictable zoning, a species as endangered as the whooping crane." *Id.*

to achieve reciprocity of advantage, a public relations campaign will be necessary to dispel any perceptions to the contrary. Logistical and political impediments weigh heavily against the implementation of TDR, even under the best circumstances. Adding to the complexity of any attempt to regulate land use is the concept of "comprehensive planning."

The concept of reciprocity of advantage, when applied to zoning, has been embodied in the notion that zoning must be in accord with a comprehensive plan.¹⁷⁷ Unfortunately, this notion is not nearly as straightforward as it sounds. The truth is that a comprehensive plan does not require much of a plan at all. No formal document is required,¹⁷⁸ no outside expert need be consulted, and no overt effort to reconcile one municipality's zoning with that of another need be made. The courts have found comprehensive planning to exist in the mere aggregate of a municipality's land use regulations.¹⁷⁹ This muddled approach to defining the comprehensive plan arises from the twin objectives of comprehensive planning. The first objective, and the one which courts are most comfortable with imposing on a municipality, is a prohibition against zoning that is intended to benefit a single property owner, usually to the detriment of his neighbors.¹⁸⁰ The concern is an improper motive on the part of the zoning authority, and the courts are quick to rebuke such an abuse of authority.

The second objective of comprehensive planning is to promote zoning that is carefully construed to benefit the entire community; that is, to maximize the efficient use of community

177. See *supra* note 126.

178. A comprehensive plan as required for zoning is not necessarily a written document; it is an underlying purpose to control land uses for benefit of the whole community. See *Walus v. Millington*, 49 Misc. 2d 104, 266 N.Y.S.2d 833 (Sup. Ct. 1966).

179. The statutory requirement that zoning regulations be in accordance with a "comprehensive plan" is not dependent upon any particular document. See *Curtiss-Wright Corp. v. Town of East Hampton*, 82 A.D.2d 551, 442 N.Y.S.2d 125 (2d Dep't 1981). Land use policies and development plans of community may be garnered from any available source, most especially master plan of community, if any has been adopted, the zoning law itself and zoning map. See *Albright v. Town of Manlius*, 34 A.D.2d 419, 312 N.Y.S.2d 13 (4th Dep't 1970), *modified on other grounds*, 28 N.Y.2d 108, 268 N.E.2d 785, 320 N.Y.S.2d 50, *reargument denied*, 29 N.Y.2d 649, 273 N.E.2d 320, 324 N.Y.S.2d 1031 (1971).

180. See *supra* note 132.

resources and to minimize the deleterious consequences of development. Again, we are dealing with the motive of the zoning authority, but here we have a proper, rather than improper, motive—the general welfare. The difficulty for the courts, however, lies in deciding how much of a proper motive is proper. Local officials often do not have the expertise or the resources to engage in truly comprehensive planning. Their best and honest effort is to deal with each issue as it arises, in a manner that seems equitable for the entire community. Unfortunately, the decisions made in this manner routinely fail to anticipate possible negative repercussions. The courts are loathe to claim a competence in this regard that local legislatures frequently lack. They are equally loathe to compel municipalities with limited resources to hire costly experts for guidance.

The legislature has attempted to respond to criticism from the courts¹⁸¹ regarding the lack of compulsory formal comprehensive planning. Unfortunately, the legislature's response has been as befuddled as the courts', probably for good reason. In 1993 the legislature set out to define comprehensive planning

181. In the landmark case *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), both the majority and the dissent expressed vexation at the lack of legislatively mandated regional planning.

[P]roblems [in providing affordable housing] cannot be solved by Ramapo or any single municipality, but depend upon the accommodation of widely disparate interests for their ultimate resolution. To that end, State-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies.

Id. at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.

To leave vital decisions controlling the mix and timing of development to the unfettered discretion of the local community invites disaster . . . [T]he supervening question is whether [land use decisions] must be decided by the larger community represented by the Legislature. Legally, politically, economically, and sociologically, the base for determination must be larger than that provided by the town fathers.

Id. at 391, 393, 285 N.E.2d at 310, 311, 334 N.Y.S.2d at 163, 165 (Breitel J., dissenting).

Three years later the Court of Appeals again expressed its displeasure at having to perform what should properly be a legislative function. See *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 682 (1975). "Zoning . . . is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning." *Id.*

and list the various factors that should be taken into account.¹⁸² But by using permissive language rather than compelling adherence to the legislature's scheme for comprehensive planning, the legislature evinced the same reluctance for impinging upon local land use decision making as did the courts.

Such schizophrenia by the legal authorities is due in large part to their recognition of the fact that comprehensive planning is a daunting task. To maximize reciprocity of advantage, a comprehensive plan should consider the views of as many members of the community as possible. But in doing so, the goal of creating a vision for the community is complicated manyfold: as greater numbers of citizens become involved in the development of the plan, the likelihood of consensus grows ever more remote. In a sense, comprehensive planning is a good idea, much as "perpetual motion"¹⁸³ is a good idea. Although great benefits would flow from their implementation, they cannot, as a practical matter, overcome the forces of friction. Just as mechanical friction bars the achievement of perpetual motion, social friction stands in the way of any true accord on a single vision for the community's future. To the extent that such an accord cannot be reached, any attempt to devise a comprehensive plan will fall short of achieving full reciprocity of advantage for all members of the community.

Despite its shortcomings and the difficulties surrounding its implementation, the need for comprehensive planning is great. Where resources are limited, efficient use of those resources prolongs their existence. Comprehensive planning aims to make land use as efficient as practicable, preserving physical resources for future generations. At the same time, comprehensive planning tends to make land use much more predictable, fostering stability in the development market. Implementing a TDR scheme in the absence of true comprehensive planning represents a failure to recognize the dependence of credit values on a stable and predictable real estate environment. Compre-

182. See N.Y. GEN. CITY LAW § 28-a; N.Y. TOWN LAW § 272-a; N.Y. VILLAGE LAW § 7-722.

183. "Perpetual motion" is the term given to the concept of a machine that, once started, requires no additional energy and will therefore run forever. This ideal is unachievable because all machines have some amount of friction to overcome, and since friction causes a loss of energy (usually in the form of heat), even the most efficient machines eventually "run out of gas."

hensive planning greatly enhances the potential for success of any TDR program.

Once agreement has been reached on the need to undertake comprehensive planning, the first question to be answered is how comprehensive shall the plan be? Specifically, what will the scope of the plan encompass: a single municipality or an entire geographic region? The answer to date has depended on the type of resource that is being protected. When Chicago sought to preserve its historic landmarks, its TDR program was bound by the city limits.¹⁸⁴ But the recently adopted Comprehensive Land Use Plan for the Central Pine Barrens of Long Island governs an area that includes portions of three towns and two villages.¹⁸⁵ One might ask how the Town of Brookhaven would go about implementing a TDR program to preserve its landmarks without interfering with the regional plan protecting the pine barrens. If the other participants in the regional plan have no need for landmark preservation, they may strongly resent the use of any receiving district under the regional plan for the transfer of Brookhaven's landmark preservation credits. Of course, this problem could be avoided if the regional plan had anticipated and provided for every development related contingency its participants might face, but such omniscience is unrealistic, and the degree of cooperation required would probably be too much to ask. Transfer of Development Rights programs and regional planning both face significant political hurdles when they traverse municipal boundaries. Their application, therefore, will be limited to those situations where a clear consensus can be reached on the appropriate method for dealing with a common problem.

Confidence in the TDR program and the development credits can be undermined when property owners fear that developers will manipulate credits to their advantage. An example of astute manipulation occurred in *Wing Ming Properties, v. Mott Operating Corp.*¹⁸⁶ This case is interesting for two reasons. First, Hon Yip's transfers of interest in the theater lot were a

184. See *Chicago Plan*, *supra* note 1, at 590.

185. Towns of Brookhaven, Southampton, and Riverhead; Villages of Quogue and Westhampton Beach.

186. 148 Misc. 2d 680, 561 N.Y.S.2d 337 (Sup. Ct. 1990). See *supra* notes 74-95 and accompanying text.

deft manipulation of the zoning ordinance. The requirement that development rights be transferred between contiguous lots under single ownership was intended to limit who could take advantage of this loophole. Otherwise, the city could have simply authorized the sale of air rights between different owners of neighboring lots. This "straw man" type transaction raises the suspicions of those who are already distrustful of powerful commercial developers. When the intent to limit the scope of a TDR program is so easily thwarted, fuel is added to the fire of TDR's opponents.

The second point *Wing Ming Properties* illustrates is that when we deal in "double abstractions,"¹⁸⁷ the parties themselves may not know exactly what it is they are buying and selling.¹⁸⁸ Wing Ming's assertion that the right to develop private property should include the exclusive right to occupy it sounds quite logical. When Justice Saxe explained that a transfer of air rights only conveys exclusive possession of the property's FAR allotment, perhaps the "abstraction" has been actually tripled!¹⁸⁹ As the nature of a TDR credit becomes increasingly nebulous, confidence in the program can only wane.

The Long Island Pine Barrens Plan is the culmination of a long and often bitter negotiation between the State, environmentalists, property owners, and developers.¹⁹⁰ It is a document of compromise, and the TDR program is illustrative of that compromise. Prior to the intense development Long Island has experienced, the pine barrens comprised approximately 250,000 acres.¹⁹¹ By the time the Preservation Act was passed only 100,000 acres remained.¹⁹² The core area represents slightly more than half of the remaining undeveloped barrens. The receiving districts are a concession to our insatiable appetite to develop. The TDR program is a concession to the prop-

187. *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 598, 350 N.E.2d 381, 388, 385 N.Y.S.2d 5, 11 (1976).

188. It is in fact quite interesting to note that in defining "air rights," Justice Saxe looked to the parties' intent and prevalent custom and usage. *See Wing Ming*, 148 Misc. 2d at 685, 561 N.Y.S.2d at 340. This seems to indicate that the zoning ordinance that permits the transfer of air rights does not, itself, define air rights adequately.

189. *See supra* note 58.

190. *See Referendum*, *supra* note 6.

191. *See Morris*, *supra* note 113.

192. *See id.*

erty owners in the sending districts whose property values will be drastically undermined due to the Plan. The mapping of the districts reflects an attempt to maintain corridors for the migration of species, but also shows significant respect for political boundaries.¹⁹³

On its face, the Plan does not alter the amount of development that will occur in the pine barrens. The receiving districts were drawn, and the municipalities must zone to accommodate development sufficient to absorb 2.5 times the number of credits that will be transferred from the sending districts.¹⁹⁴ The Plan appears to simply redistribute rather than reduce the amount of development that will occur in the pine barrens. In reality, the receiving districts will probably not realize their full development potential due to the additional complexity TDR brings to development projects.

The Plan includes a projection on the economic impact of the TDR program for the affected municipalities.¹⁹⁵ A significant concern for any program that alters patterns of development is the effect on school districts.¹⁹⁶ Since school districts receive much of their funding based on the value of property within the district, TDR will impact school revenues.¹⁹⁷ Also, shifting patterns of development will change student populations among the districts.¹⁹⁸ The Plan's economic analysis suggests that TDR may result in a significant negative impact on many of the affected school districts.¹⁹⁹ The analysis tempers its results with the assurance that many factors will operate to mitigate these negative impacts, including the expanded tax

193. The Long Island plan exhibits significant respect for the municipal boundaries. Transfers of TDR credits are authorized as of right within a town. But if a property owner has property in the sending district of one town, and the receiving district of another, she may or may not be able to transfer her TDR credits from one property to the other. See *Central Pine Barrens Comprehensive Land Use Plan*, Vol. 1: POLICIES, PROGRAMS AND STANDARDS, FINAL PLAN, CENTRAL PINE BARRENS JOINT PLANNING AND POLICY COMMISSION [FINAL PLAN], §§ 6.4.1.1, 6.5.2.1 (June 28, 1995). The Town of Southampton recognizes not only municipal, but also school district boundaries: "In no case will it be necessary to cross school district boundaries on an as of right basis." *Id.* § 6.4.4.2.

194. See LIPB DRAFT PLAN, *supra* note 117, pt. V(D), at 3.

195. See *id.* pt. VI, at 1-23.

196. See *id.* pt. VI, at 16.

197. See *id.* pt. VI, at 27.

198. See *id.*

199. See *id.*

base that industrial development will provide and the possibility of land acquisitions that will serve to lighten the student population within a given district.²⁰⁰

Industrial development, in the context of TDR, raises two significant issues. First, since TDR credits for industrial development will be valued higher in the market than will credits for residential development, the amount of industrial development resulting from the program may be disproportionate to residential development. This is because TDR credits will normally be applied toward the use that yields the highest return.²⁰¹ That use is industrial development.²⁰² Since the number of credits generated by the sending districts will be limited, competition for them might favor an inordinate amount of industrial development. The municipalities will need to be aware of this side effect of TDR, especially in light of their obligation under *Berenson v. Town of New Castle*²⁰³ to consider the regional needs for affordable housing when implementing land use regulations.

The second effect that a preference for industrial development might bring about is a tendency to reward the holders of larger parcels in the sending districts to the detriment of smaller lot owners. Since industrial projects are typically larger in scale than other types of development, each project will tend to consume a larger block of credits. This creates a market that favors the holders of large blocks of credits who can negotiate a price, knowing they are able to fulfill the developer's requirements. To mitigate this inequity, the creation of a corporation for the purpose of selling all of the credits generated in the sending district may be in order. Owners of credits could transfer their credits to the corporation in exchange for a proportional amount of stock in the corporation. As credits are sold to developers by the corporation, stockholders receive a dividend. This would avoid the current prospect of a windfall for those property owners who negotiate a successful sale of their credits, and a "wipe out" for those who do not.

200. *See id.*

201. *See FISCAL*, *supra* note 139, at § 1.1.

202. *See id.* at T.2.

203. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975). Municipalities have an obligation to consider local and regional needs for low and moderate income housing when making zoning decisions. *See id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

V. Conclusion

As the examples herein suggest, a TDR program faces significant hurdles in the effort to achieve effective and equitable land use regulation. An educational campaign is necessary to aid the affected parties in understanding the concept of TDR. A public relations campaign is necessary to instill confidence in the public that the TDR credits will have value. The drawing of districts must consider both political boundaries and the nature of the resource that the program serves to protect. These and other difficulties do not eliminate the usefulness of TDR, but they do limit its potential application. Because the program itself is inherently complex, it will be received with the least resistance where the externalities, such as existing development and political stability, are less complex. Accordingly, TDR can be effectively employed in the preservation of large tracts of land that have yet to receive intense development. But where the existing development is more extensive, accommodating the conflicting interests may render TDR impractical. Similarly, where TDR is employed for a very limited purpose, such as landmark preservation, it may survive the otherwise crushing external considerations that characterize metropolitan land use regulation.

The difficulties of implementing TDR should not obfuscate the benefits that are realized where TDR is successful. As land becomes an ever more precious resource, restrictions on the private use of land are bound to multiply. A TDR program eases the burden of those restrictions on individual property owners while simultaneously preserving endangered physical resources for the general welfare. Transfer of Development Rights is not the answer to the difficult questions we face in land use regulation, but it is part of the answer. It is one arrow in the quiver of techniques we may employ to achieve "reciprocity of advantage."

*Joseph D. Stinson**

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