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Many of you share Judge Breitel's position that development rights are "disembodied abstractions of man's ingenuity [that] float in a limbo until restored to reality by reattachment to tangible real property."[1] We talk about development rights and the transfer of development rights (TDR), but many people do not understand what these development rights are, why they are important, and what their limits are. I would like to put them into context; the use of these rights can be an important and strong tool.

It is common for lawyers and property owners to think that land is owned down to the middle of the earth and up to the top of the sky and that the owner ought to be able to do anything he wants with it. Initially, zoning imposed few restrictions on an owner's ability to do things; fundamentally an owner started with the right to build. Now the opposite is the case, particularly in any urban environment.

The value of land is related to the amount and quality of adjacent and available public investment in water, sewers, transportation, streets, lights and fire stations. The value of land also relates to what an owner is allowed to do with the land: zoning regulations determine use of land.[2] For example, if you are allowed to build a one-family house on an acre, the value of that land will differ from the value it would have if you were allowed to build ten houses on that acre.[3]

Planning and preservation considerations often lead to a decision to create a varied development in one zoning district. When the tract is held by one owner, such variety is possible, but when many owners are involved, this decision can lead to an uncompensated taking. The transfer of development rights can remedy this difficulty.[4] For example, assume that you own 10,000 acres, are going to build a new town, and are obligated to provide 2,000 acres of parkland and 1,000 acres of road. The park and road requirements are not uncompensated takings be-

cause when you sell the parcel, you can add the land cost of the parks and of the roads to the amount of money you receive for the rest of the property.

If, however, the land is held by multiple owners, and if the government requires a park in the middle of the land, a different situation is presented. Those who own the land on which the park is going to be located will not be able to build on their land, but those who own the land on which development is allowed can build on their land. That situation would violate due process. That is what an uncompensated taking is; and that is why we have this fundamental issue. In any large scale development, it is common to move the bulk around — to place a building on one place and not another — without any problems. When there are multiple owners and a need to deal with them fairly, the transfer of development rights becomes interesting and useful.

In order to transfer development rights, you do not have to own the underlying land. You can even transfer the development rights if you have a long-term lease. There was a case where a lessor thought he was leasing a building, but the lessee sold the development rights from his leasehold to a person next door for a significant sum of money.[5] The lessor thought he had been injured. Claiming that it was his land and that all he had leased was the building, he went to court. The court held that the lessor had forgotten to retain the development rights when he leased the land, and, since he was getting some value through his rent, he could not recover.

The normal transfer of development rights in New York is a simple transfer between adjacent lots. In a number of places around town, dramatic results have been achieved through the transfer of development rights: in lower Manhattan, across the street from what used to be the U.S. Steel Building, there is a little park that is the result of a transfer of development rights. The rights to build on that piece of land were transferred across the street to the U.S. Steel Building. The building, as a result, is a little bigger, but open space has been retained in the City. In that park is a one-story structure containing Chock Full o' Nuts. U.S. Steel owned the 21-story building in which Chock Full o' Nuts was a ground-floor lessee. Of all the lessees in the building, only Chock Full o' Nuts remained. All the development rights,

less that portion attributable to Chock Full o' Nuts space, were transferred across the street. At the conclusion of the Chock Full o' Nuts lease, that building will be demolished. A park was created through the creative use of this transfer technique.

From a planning point of view it may be undesirable to treat everyone equally under zoning and to allow only similar development on each adjacent parcel, but from a legal point of view it is difficult to avoid treating adjacent owners equally. The difficulty of both creating open space or preserving landmarks and still treating owners equally is what leads to the continued interest in development rights.

The *Penn Central*,[6] *Fred F. French*,[7] *Seaman's Church Institute*,[8] and the *Lutheran Church* case[9] have set the perimeters in this area. But the law is still evolving and, therefore, distinctions that lawyers articulate may or may not hold up.[10]

Transfers of development rights, ordinarily simple conveyances, become more complicated when a transfer out of the immediate area is involved. The *Fred F. French* case dealt with an interesting application of the New York ordinance.[11] The City had designated two private parks in Tudor City as a park district. The effect of that district was to forbid the owner from building on those parks, but to give the owner the right to sell the development rights arising from the parks to anyone within the area from 38th to 60th Street and from Third to Eighth Avenue.

The Fred F. French Company sold the entire Tudor City complex, including the two private parks and apartment houses. The purchaser wanted to transfer the development rights of the two park parcels to a building that would have spanned 42nd Street. There were those in the general New York community who thought that building, while dramatic, might not be desirable. Someone commented that he was impressed by that building, but not favorably. The Planning Commission held a hearing on a series of alternatives and decided that the developer could not transfer the development rights in this fashion. The developer, unable to use the property as he had anticipated, stopped paying on the mortgages held by the seller of the land. He defaulted, and so the person who brought the lawsuit was the Fred F. French Company, the seller. The Fred F. French Company, as plaintiff, claimed that the purchaser defaulted because, in the

view of the purchaser, the rezoning of buildable parks as solely public parkland and the refusal to permit the use, as proposed, of the development rights from that parkland destroyed the value of the property.[12] The case went to the Court of Appeals in that context, and that court held that the rezoning constituted an unreasonable use of the police power. In my view, the court erred in looking at it as though these two private parks and the related lots were earning no revenue at all.[13] In fact, those two private parks had been part of the value of Tudor City.

Judge Breitel's opinion for the Court of Appeals in *Penn Central* emphasized that the rights are transferable to sites already owned by Penn Central.[14] Judge Breitel made it clear in both the *Penn Central*[15] and *Fred F. French*[16] cases that the regulations in question did not result in a taking which would entitle the owner to just compensation. If you do not have a taking, that is, if the regulation is reasonable and does not destroy the value of the property, the value of the property may be diminished dramatically. Once the court determines there is no taking, the inquiry usually does not go any further. The development rights, however, must retain some value and some likelihood of being used or a court will find that the deprivation of these rights is a taking. That seems to be the meaning of those two cases.

An example of a transfer of development rights between non-contiguous properties that has been done successfully is the South Street Seaport. A series of banks agreed to accept a mortgage on development rights in place of a mortgage on the land, allowing the land to go to the South Street Seaport and to be used while the banks held the development rights for many years without any return. Those development rights will soon be able to be sold, and some value will come from them.

Difficult problems are coming up with the transfer of development rights. If you transfer the development rights to a contiguous lot, the benefit of the landmark or the open space affects people who are hurt by the larger building. In the situation presented by the *Penn Central* case, the transfer was within a discrete area, so people in that area benefitted from the contrast between the small and the large buildings. If you transfer the rights to a noncontiguous location, you put the benefit of the transfer on one group of the public, and the detriment, if there

is detriment in the larger bulk of a building, on another group. To ameliorate that problem, an attempt has been made to limit the amount that the receiving lot can acquire.

In spite of all the problems, transfer of development rights provides one of the most powerful regulatory tools — one that can be most effectively used by the private development community.

Development Rights

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1. 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, *appeal dismissed*, 429 U.S. 990 (1976).

2. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389-90 (1926).

3. The value of land in cities is also related to the permissible use of that land. One way to determine the amount of usage permissible on a particular lot is to calculate how much floor space can be built on a certain amount of land under the appropriate zoning regulation. The figure which results from this calculation is expressed as the Floor Area Ratio (FAR): if you have 100 feet of land, and if you can build one foot of building for each foot of land, you have 1 FAR, or a Floor Area Ratio of 1. If you pay $200 a square foot for a piece of land, and if you are allowed to build ten times as much floor area as you have land, you pay $20 for each foot of office or apartment space. If construction costs $40 a foot, the cost of land becomes an enormously important part of the total costs. It is difficult, therefore, to find a piece of land with 10 FAR that is worth as much as $200. If, however, you allow the developer to build a little more, if you allow him a 15 FAR (which is not unusual), his land cost drops from $20 per foot of building to $14, with a dramatic multiplier effect.

4. The transfer of development rights is a useful technique not only in the cities, particularly with respect to open space, but also in suburban and rural areas as well. Where you have a 1,000-acre tract owned by four or five owners, if you concentrate the development in 100 acres and keep the other 900 acres vacant, you may have a much

better result than if you put a house on each place. There is an example in New York City of a 110-acre golf course on the edge of Queens of which 9 acres were developed with three large buildings and 100 acres left vacant. The alternative was to have all 110 acres covered by three-story structures.

5. Newport Assocs. v. Solow, 30 N.Y.2d 263, 283 N.E.2d 600, 332 N.Y.S.2d 617 (1972), *cert. denied*, 410 U.S. 931 (1973).

6. Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

7. Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *appeal dismissed*, 429 U.S. 990 (1976).

8. *In re* Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968).

9. Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974).

10. Economic conditions are important, as is the question of time. For instance, if I were to offer development rights to a developer to use on a parcel located anywhere from 38th to 60th Street and from Third Avenue to Eighth Avenue, many people would be willing to pay a significant sum for those rights. This is so because, assuming that no governmental authority is interposed, such rights permit a building to be made 10% larger at a negotiated price. For example, the Penn Central air rights have been bought by the Phillip Morris Company.

11. Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), *appeal dismissed*, 429 U.S. 990 (1976).

12. The plaintiff contended that the rezoning of the parks constituted a compensable "taking." *Id.* at 593, 350 N.E.2d at 384, 385 N.Y.S.2d at 8.

13. The Court of Appeals found that there had been no actual taking by governmental occupation or title. Thus, the plaintiff's sole remedy was the declaration of the zoning amendment's invalidity. *Id.* at 595, 350 N.E.2d at 386, 385 N.Y.S.2d at 10.

14. Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

15. *Id.*

16. Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976).