THE CHICAGO PLAN: INCENTIVE ZONING AND THE PRESERVATION OF URBAN LANDMARKS

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Present legal methods for preserving America's architectural landmarks are being shown to be only minimally effective in preserving landmarks located in high development sections of the nation's cities. Professor Costonis examines the economic and legal reasons for the ineffectiveness of these ordinances. He then proposes an alternative approach — the Chicago Plan — which promises to be a more effective solution to the landmark problem. After discussing in detail the features of the Plan, Professor Costonis goes on to examine and rebut the various legal challenges that might be brought against the Chicago Plan.

"[T]he issues really being raised concern the relationship of the city's past to its present, and what new construction gives a city in functional, societal and architectural, as well as economic, terms. Questions are being asked everywhere about institutional attitudes toward development objectives and the effect of rigid investment patterns. Ultimately, the problem is the quality of the urban environment and who is responsible for it."

— Ada Louise Huxtable [1]

URBAN landmarks merit recognition as an imperiled species alongside the ocelot and the snow leopard. Over fifty per cent of the 12,000 buildings listed in the Historic American Buildings Survey, commenced by the federal government in 1933, have since been razed.[2] The threat to the remainder continues undiminished as the recent loss of Chicago's Old Stock Exchange Building [3] and the precarious status of New York's Grand Cen-

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[1] Huxtable, *Bank's Building Plan Sets Off Debate on 'Progress,'* N.Y. Times, Jan. 17, 1971, § 8, at 1, col. 2.

[2] *See* Conti, *Preserving the Past*, Wall St. J., Aug. 8, 1970, at 1, col. 1.

[3] The Old Stock Exchange Building was the work of Louis Sullivan and Dankmar Adler, two of the most accomplished practitioners of the internationally renowned Chicago School of Architecture. A precursor of the modern skyscraper, it has been favorably compared with the great palaces of Renaissance Italy in terms of its historic import. *See* Huxtable, *The Chicago Style — On Its Way Out?*, N.Y. Times, Nov. 29, 1970, § 2, at 27, col. 1. The Chicago Landmark Commission, on two separate occasions during the period 1970–71, urged that the Exchange be

tral Terminal attest.[4] If this trend is not reversed, the nation at its bicentennial in 1976 will mourn the loss of an essential part of its architectural and cultural heritage rather than celebrate the visible evidence of its past.

The demise of so many cherished buildings is a peculiarly American phenomenon. In part it reflects the national penchant for identifying change with progress, even at the cost of destroying the nation's links with its past. More fundamentally, however, it is the product of a system that vests the initiative for most urban development decisions in private property owners, whose choices, predictably enough, are shaped by the necessities of the real estate market. 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. Hence there is an incessant trade-off — injurious to the urban environment — of buildings of unique architectural distinction for glass and steel towers that are crammed with as much rentable floor area as local zoning permits and as the market will absorb.

Over the last decade, American cities have adopted a variety of incentive zoning programs in a determined attempt to expand their leverage over private land use decisions.[5] By modifying the economics of downtown development, these programs encourage development decisions that would normally be precluded by the harsh realities of the marketplace. Where successful, they have enabled cities to channel development in accordance with munici-

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accorded formal landmark status, but the Chicago City Council on both occasions refused to accept the Commission's recommendation. A permit for the building's demolition was issued in October 1971. *See* Huxtable, *Non-Fables for Our Time*, N.Y. Times, Nov. 14, 1971, § 2, at 22, col. 4.

[4] The New York Central Railroad, as owner of the site of the Grand Central Terminal, sought in the early sixties to lease the air rights over the Terminal to a developer who intended to erect a second Pan-Am type building there. The New York City Landmarks Commission, however, refused to approve the project on the ground of its aesthetic incompatibility with the facade of the Terminal, a designated landmark. The New York Central responded by threatening to overturn the Commission's action in the courts, but bankruptcy of its successor company, the Penn Central Company, and the softening of the New York City office space market have relieved the pressure on the Terminal, at least for the time being. *See* Address by Norman Marcus, First Conference on Legal Techniques in Preservation, in Washington, D.C., May 2, 1970 (sponsored by National Trust for Historic Preservation) [hereinafter cited as Marcus].

[5] *See* THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES 125–238 (N. Marcus & M. Groves eds. 1970) [hereinafter cited as NEW ZONING]; Comment, *Bonus or Incentive Zoning — Legal Implications*, 21 SYR. L. REV. 895 (1970); *cf.* URBAN LAND INSTITUTE, NEW APPROACHES TO RESIDENTIAL LAND DEVELOPMENT: A STUDY OF CONCEPTS AND INNOVATIONS (Tech. Bull. No. 40, 1961).

pally selected urban design policies. Although these programs differ widely among themselves, they are all premised upon a trade between the city and the developer. The city relaxes its zoning bulk restrictions,[6] thereby allowing the developer to build more profitably by including more rentable floor area in his project than the prevailing zoning otherwise permits. In return the developer must either provide a public amenity, such as a plaza, at his own expense or make a cash payment that will enable the city to finance the purchase of a public improvement.

How does the city derive the additional floor area that it allocates to the developer? If the city seeks an amenity, it simply creates the floor area *ex nihilo* and bestows it upon the developer as a so-called "zoning bonus." The amount of the bonus is calculated to equal or slightly to exceed in value the cost that the developer incurs in providing the amenity. The case is more complicated where the city seeks to retain buildings, such as landmarks, that enrich its character. Recognizing that these buildings often fail to exhaust the floor area authorized for their sites under local zoning, the city allows their owners to sell their unused floor area to developer-owners of other sites, a practice commonly referred to as the "transfer of development rights." The cash carrot that results, it is hoped, will induce owners of the "underimproved" sites to forego demolition of their buildings.

Zoning bonus programs have been enthusiastically received by private developers and by municipal governments.[7] The response to these programs in New York City, the nation's most innovative practitioner of incentive zoning,[8] is illustrative. Almost every major office or commercial development erected in Manhattan's central business district since adoption of the New York bonus provisions in 1961 has included bonus space.[9] The City has employed bonuses to enhance its Broadway theater,[10] Lincoln

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[6] Some communities might also relax use and tower coverage requirements and coordinate variance procedures for the miscellaneous minor adjustments that are necessitated by the grant of incerased floor area. *Cf.* Svirsky, *San Francisco: The Downtown Development Bonus System*, in NEW ZONING 139, 142–43.

[7] *But see* note 229 *infra*.

[8] For a review of the various incentive zoning programs that have been adopted or considered in New York City, see Burks, *City Wants Air Rights to Hop, Skip and Jump*, N.Y. Times, Apr. 26, 1970, § 8, at 1, col. 1; Gilbert, *Saving Landmarks*, HIST. PRESERVATION July–Sept. 1970, at 13; Marcus.

[9] NEW ZONING 201.

[10] NEW YORK, N.Y., ZONING RESOLUTION art. VII, ch. 1, § 81–00 *et seq.* (1971). This provision creates a Special Theater District that includes the area between 40th and 57th Streets and 6th and 8th Avenues. Developers owning parcels within the District who agree to include a legitimate theater in their projects may receive an increase of up to 20 per cent in the floor area authorized

Center,[11] and Fifth Avenue retail [12] districts. It is currently banking upon bonuses to induce private developers to provide a coordinated network of physical facilities to service the traffic generated by its 10,000,000 square foot World Trade Center.[13] And it has even proposed that bonuses be enrolled in the effort to encourage the production of moderate and low income housing.[14]

Development rights transfer programs, on the other hand, have fared poorly. Again the New York experience is instructive.

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for their parcels under prevailing zoning. *See* Weinstein, *How New York's Zoning Was Changed to Induce the Construction of Legitimate Theaters*, in NEW ZONING 131. Plans for the construction of five theaters pursuant to the provision have been announced. *See* N.Y. Times, May 19, 1970, at 39, col. 2.

[11] NEW YORK, N.Y., ZONING RESOLUTION art. VIII, ch. 2, § 82-00 *et seq.* (1971).

[12] NEW YORK, N.Y., ZONING RESOLUTION art. VIII, ch. 7, § 87-00 *et. seq.* (1971). This provision created a Fifth Avenue Retail District encompassing Fifth Avenue between 38th and 59th Streets. It mandates that the two lower floors of any building constructed within the District be used for retail purposes. Developers who elect to provide more than the minimum retail space will be given additional floor area to be used for apartments or hotel accommodations.

[13] NEW YORK, N.Y., ZONING RESOLUTION art. VIII, ch. 6, § 86-00 *et seq.* (1971), creates a Special Greenwich Street Development District encompassing a 29 square block area between the World Trade Center and Battery Park. The District regulations include a map and a manual which prescribe a firm area network of circulation features consisting of open and covered arcades, pedestrian bridges, subway connections, elevated plazas, and the like. Developers building within the District will be required to provide some of these features and may elect to provide others. In return for these features and for payment of sums into a subway improvement fund, developers will receive increases in the floor area authorized for their lots and may also be allowed to build towers that cover a greater amount of lot area than the zoning would otherwise permit.

The District differs in two respects from New York's existing special districts. First, the desired features have been previously mapped so that every lot owner knows beforehand which mandatory and optional features he must or may provide in return for the increased floor area. Second, the area plan is so specific and the schedule of bonuses so precise that developers need not negotiate with the Planning Department, submit their development plans for site and design review, or secure a special permit, all of which are a part of the approval procedure under the regulations applicable to the other districts. *See* N.Y. Times, Dec. 6, 1970, § 8, at 1, col. 1. *See also* Huxtable, *Concept Points to 'City of the Future,'* N.Y. Times, Dec. 6, 1970, § 8, at 1, col. 3.

[14] The New York Planning Commission proposed the establishment of a Special Development District on New York's Lower East Side that would contain 2,355 apartments, of which 1,837 would be luxury class and 418, low income class. Developers were to be given the option either of providing 15 per cent of the units in their buildings for low income rental or of paying $15.30 per square foot of the lot area of their parcels into a special fund to be used to acquire public housing sites. They would have received an additional floor area authorization in return. But the proposal appears to have died as a result of opposition of community residents who saw it as a "give-away" to developers and as a disguised means of displacing low income persons in the area. *See* N.Y. Times, May 13, 1970, at 40, col. 1.

Although that city adopted a transfer program in 1968[15] that was designed to preserve its landmark buildings, the program has not as yet figured in a single executed transaction.[16] A number of reasons account for its failure to win the confidence of landmark owners, real estate developers, and title insurers, as well as at least one member of the New York City Planning Commission.[17] Inadequate analysis of the economic burdens of landmark ownership and of the urban design consequences of development rights transfers have hampered the program. Onerous administrative controls of dubious necessity have dampened the enthusiasm of the private sector for the program. And wholly apart from the merits of the New York program itself has been the uneasiness of its prospective participants concerning the underlying legality of the transfer mechanism.

The object of this article is to offer a development rights transfer proposal, referred to herein as the Chicago Plan,[18] that will provide an effective foundation for municipal landmark preservation efforts. The article contains three sections. The first details the economic causes behind the grave attrition of America's urban landmarks and reviews the conventional legislative responses of the nation's cities to this threat. The second analyzes the use of development rights transfers to preserve urban landmarks, examining the structure and deficiencies of the New York

[15] *See* N.Y. Times, Oct. 7, 1969, at 34, col. 4; NEW YORK, N.Y., ZONING RESOLUTION art. VII, ch. 4, §§ 74-79, 74-791 to -793 (1971).

[16] One transfer has almost taken place. All of the formalities relating to the transfer of the excess floor area of the Amster Yard, a designated landmark, have been completed, but the transaction has been stalled by the softening of the New York office space market. *See* Huxtable, *City Landmark Gets a Chance for Survival*, N.Y. Times, Aug. 2, 1970, § 8, at 1, col. 1; Marcus.

[17] *See* p. 628 *infra*.

[18] Prior to the demolition of Chicago's Old Stock Exchange Building, the National Trust for Historic Preservation and the Chicago Chapter Foundation of the American Institute of Architects commissioned the author and Jared Shlaes, a real estate consultant, to devise a transfer proposal that would safeguard the Exchange and Chicago's remaining architectural landmarks. The product of this study appeared as a report entitled Development Rights Transfers: A Solution to Chicago's Landmarks Dilemma (Chicago Chapter Foundation of the American Institute of Architects & National Trust for Historic Preservation, May 13, 1971) [hereinafter cited as Chicago Report]. The Chicago Report contains a summary legal and economic analysis of the proposal discussed in this article. It also includes draft amendments to the Illinois Historic Preservation and Zoning Enabling Acts and to the Chicago Zoning Code that would permit implementation of the proposal. *See* Chicago Report apps. I, II & III. The proposed amendments to the state legislation have since been adopted. *See* Ill. Pub. A. No. 77-1373 (Ill. Leg. Serv., Aug. 31, 1971), *amending* ILL. REV. STAT. ch. 24, § 11-13-1 (1969); Ill. Pub. A. No. 77-1372 (Ill. Leg. Serv., Aug. 31, 1971), *in part to be codified at* ILL. REV. STAT. ch. 24, § 11-48.2-1A, *in part amending* ILL. REV. STAT. ch. 24, § 11-48.2-2 & -6 (1969).

transfer program and then the content of the Chicago Plan. The third addresses the issues that are likely to arise in a comprehensive legal challenge to the validity of the Chicago Plan.

I. The Problem: The Vanishing Urban Landmark

A. Economics and Landmark Ownership

The history of Chicago's Old Stock Exchange Building illustrates the economic vulnerability of urban landmarks. It was located in Chicago's Loop, an area in which most of the city's other architectural gems are concentrated and, ominously, an area of skyrocketing land values. Its height of thirteen stories exhausted less than one-third of the approximately forty-five stories authorized for its site under present zoning regulations. Hence, it realized a mere fraction of the rental income that a modern office tower would have returned if located on the same site. Its mechanical systems, interior space, and exterior walls were in need of substantial renovation. Even with refurbishing, moreover, the annual maintenance costs of the seventy-eight year old building would probably have exceeded those of its modern steel and glass competitors. Typical of other turn-of-the-century buildings, its interior space was carved up with courts, columns and other structural features that diminished its appeal to large corporate tenants.[19]

Chicago's zoning bonus program intensified the Exchange's vulnerability. Like the programs of other cities, it is intended to encourage the provision of plazas, arcades, and other amenities. By awarding enormous premiums for projects occupying a half block or more,[20] however, the program has brought development

[19] The competitive disadvantages suffered by urban landmarks should not be overstated, however. A review of income and operating expense data for Chicago office buildings revealed that, while maintenance-related expenses

> do tend to increase with the age of the building, [they] do not increase at such a rate as to impose unreasonable burdens upon older buildings as such.
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> It is not apparent from national averages that buildings over 40 years old suffer from any striking competitive disadvantage; indeed, they net more per square foot than buildings 25–40 years old on a national basis, perhaps because of special characteristics of buildings constructed during the depression and war years 1930–45. Net income before depreciation and capital charges for buildings over 40 years old is approximately 78% of the national average for all buildings but tends to approach $1.60 per square foot, indicating that these older buildings, while somewhat penalized by their age, are by no means functionally obsolete.

Chicago Report 21. *See* E. Shultz & W. Simmons, Offices in the Sky 88 (1959) [hereinafter cited as Offices].

[20] An example serves to illustrate the extent of these bonuses. Chicago, Ill., Municipal Code, Zoning Ordinance ch. 194A, art. 8.5-6(5)(c) (1970) provides:

> On any zoning lot, for each floor above the ground floor which is set back from one or more lot lines, a premium equal to 0.4 times the open area of

on small lots to a standstill, and hastened the amalgamation of existing smaller holdings into assemblages that can exploit the program to best advantage. Ironically, therefore, the Exchange was as much the victim of the city's own zoning regulations as of the speculative motives of the building's owners.[21]

If the Exchange's owners had been forced to maintain the Exchange as a landmark, they would thus 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.[22]

B. Municipal Preservation Ordinances: An Inadequate Response

In light of these factors, the conventional municipal ordinance [23] offers scant hope of achieving the preservation of threat-

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the lot at the level of such floor divided by the gross lot area may be added to the permissible floor area ratio . . . .

The "floor area ratio" (FAR) is an integer prescribed by the ordinance for each bulk district, which, when multiplied by the area of the zoning lot, gives the amount of floor area that may be included in a building erected on that lot. Thus, if the district FAR is 10, the maximum floor space of a building erected on a 10,000 square foot lot is 100,000 square feet. However, if the developer of this 10,000 square foot site decided to leave 50% of his lot open when he constructed a building upon it, he would be entitled under the above-quoted provision to 140,000 square feet of floor space. He would receive a premium of 0.4 times 0.5 times the number of initial floors he was entitled to build (0.4 x 0.5 x 20), bringing the FAR to 14. While the above-quoted provision theoretically has equal application to large and small lots, in practice only large projects can benefit from it. There is little economic advantage in building tall buildings with a small base since too much of the space on each floor is devoted to nonrentable uses, such as elevator and support constructions.

[21] *See* note 229 *infra*.

[22] The economic consequences of designation are not entirely negative. Its prestige factor could operate to attract stable, high quality tenants and to reinforce pride of ownership which would be reflected in the marketplace. *See Hearings Before the Commission on Chicago Architectural and Historical Landmarks Concerning the Designation of the Monadnock Building as an Official Chicago Landmark* 90 (Apr. 1970) (on file with the Commission on Chicago Historic and Architectural Landmarks). Moreover, designation makes space in a landmark attractive to tenants who wish to avoid relocation and other vagaries of the development process.

[23] State and local landmarks legislation and programs are reviewed in J. MOR-

ened urban landmarks. The typical ordinance calls for the designation of individual landmarks, such as the Exchange, and of entire historic districts, such as New Orleans' Vieux Carré.[24] The ordinance enumerates the cultural, aesthetic, and historic criteria that the city landmark commission, often with the advice of the city planning commission, must take into account in proposing designation of individual buildings or historic districts.[25] Actual designation, however, generally rests with the legislative body.[26]

After designation, permits for demolition or significant alteration of individual landmarks or of buildings within historic districts require the approval of the landmarks commission.[27] If the commission withholds its consent, it then has a grace period [28] in which to devise a compromise plan acceptable to the landmark owner that will safeguard the structure. If the owner rejects the plan, some ordinances authorize the commission to deny the permit outright regardless of economic hardship [29] while others require approval in such cases.[30] In most cities, however, the

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RISON, HISTORIC PRESERVATION LAW (1965); J. PYKE, LANDMARK PRESERVATION (Citizens Union Research Foundation, Inc., 1970); Wilson, *The Response of State Legislation to Historic Preservation*, 36 LAW & CONTEMP. PROB. No. 3 (to be published); Wolfe, *Conservation of Historic Buildings and Areas — Legal Techniques*, in 2 ABA SECTION ON REAL PROP., PROBATE, & TRUST LAW PROCEEDINGS 18 (1963); Note, *The Police Power, Eminent Domain and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963); Note, *The Landmark Problem in New York*, 22 N.Y.U. INTRAMURAL L. REV. 99 (1967); Comment, *Landmark Preservation Laws: Compensation for Temporary Taking*, 35 U. CHI. L. REV. 362 (1968).

[24] *See, e.g.*, CHICAGO, ILL., MUNICIPAL CODE § 21-64(a) (1970); Mobile, Ala., Ordinance 87-036, Mar. 20, 1962; NEW ORLEANS, LA., CODE § 65-6 (1956).

[25] *See, e.g.*, CHICAGO, ILL., MUNICIPAL CODE § 21-64(b) (1970); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, § 207-1.0h & k (1971).

[26] *See, e.g.*, CHICAGO, ILL., MUNICIPAL CODE § 21-64(f) (1970). The New York ordinance allows the Landmark Commission to designate landmarks; its decision, however, may be overridden or modified by the Board of Estimate. *See* NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, § 207-2.0f(2) (1971).

[27] *See, e.g.*, CHICAGO, ILL., MUNICIPAL CODE § 21-64.1 (1970); NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, §§ 207-4.0 to -8.0 (1971); CHARLESTON, S.C., CODE §§ 51-28 to -30 (1966).

[28] The usual period is 180 days. *See, e.g.*, Mobile, Ala., Ordinance 87-036, Mar. 20, 1962 (6 months); CHARLESTON, S.C., CODE § 51-30(4) (1966). *But see* Los Angeles, Cal., Ordinance 121,971, Apr. 30, 1962 (up to 360 days).

[29] *See, e.g.*, NEW ORLEANS, LA., CODE § 65-10 (1956); CHARLESTON, S. C., CODE § 51-30 (1966).

[30] *See, e.g.*, Mobile, Ala., Ordinance 87-036, Mar. 20, 1962.

The New York City Landmarks Ordinance contains a unique provision that authorizes outright denial of a permit for alteration or demolition in the case of designated landmarks whose owners either receive state or local tax relief or obtain a "reasonable return" — identified as a 6% return on the assessed valuation of the property. NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, §§ 207-1.0q,

landmark commission has no power after this grace period to stay the demolition or alteration of a landmark, but can only recommend that the legislature acquire or condemn the threatened building.[31]

These ordinances have proven useful in preserving both buildings that are within historic districts and landmarks that are outside of high land value areas. These structures usually hold little interest for speculators because they tend to be smaller, easily maintained residential structures located in low density zones. In fact, at times owners of buildings within historic districts will welcome designation for the prestige it lends to the neighborhood and for its beneficial impact upon land values there.[32] Few owners of these buildings litigate permit denials because the prospects for financial gain through demolition or alteration seldom offset the costs and delays of a legal challenge.[33]

The picture differs dramatically for landmarks located on downtown parcels. The gap between the income potential of these parcels as presently developed and as improved to their most profitable use is such that few owners — speculators or otherwise [34] — warmly embrace designation. The typical response of an owner who contemplates redeveloping his site is to force the city's hand by demanding that it either acquire the property outright or issue a demolition permit forthwith.[35]

207–8.0 (1971). By setting the return at this relatively low rate, *see* Comment, *The Landmark Problem in New York*, *supra* note 23, at 107, and requiring the landmark owner to come forward with rather precise evidence establishing the economic burden entailed by designation, the ordinance enables the city's Landmark Commission to exert considerably greater leverage in dealing with landmark owners than commissions in other cities enjoy.

[31] *See, e.g.*, CHICAGO, ILL., MUNICIPAL CODE § 21–64.2 (1970); CHARLESTON, S.C., CODE § 51–30(7) (1966).

[32] *See, e.g.*, N.Y. Times, May 27, 1970, at 35, col. 3; Chicago Sun-Times, Oct. 22, 1970, at 3, col. 2.

[33] In 1970, the author surveyed preservation agencies in 12 representative cities to obtain their appraisals of the efficacy of their ordinances. The agencies were generally enthusiastic about their success in administering historic districts, but many suggested that nonlegal factors, such as those mentioned in the text, accounted for their success.

The agencies were far less sanguine about their efforts in safeguarding individual landmarks. All noted that their city governments assigned a relatively low priority to historic preservation, especially if the latter necessitated the expenditure of general revenues. Few instances of the use of eminent domain or the purchase of threatened properties on behalf of these agencies were reported. Although at least four of the cities are authorized by state law to accord real estate tax abatement to official landmarks, moreover, only one city was actually doing so.

[34] The stakes are so high where downtown properties are concerned that even those institutions that want to "do the right thing," such as museums, churches and service organizations, also balk at designation. *See The Chicago Style*, note 3 *supra*.

[35] The position of the Building Managers of Chicago (BMA) is representative

The city's options when the gauntlet is thrown down are not enviable. Even those landmark commissions that have the power to deny a demolition or alteration permit are unlikely to do so. The constitutionality of provisions authorizing such denials is dubious;[36] moreover, political pressures from downtown developers make such an action by the commission improbable in many cities. On the other hand, condemnation is also unlikely. Other demands of greater priority preclude most cities from expending the enormous sums required for the acquisition of downtown properties.[37] Nor would the city's costs end with

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of the views of most downtown building owners and managers in the United States. In the BMA's view:

> [W]e can see no way to accomplish [the preservation of urban landmarks] unless the City, State or Federal Government purchase the property in question, spend large amounts of money toward rehabilitation and be [*sic*] prepared to operate the property, possibly at a loss.
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> . . . [T]he more we study the subject . . . the more we are convinced that the only solution is for a Government agency to purchase the building and maintain it. The willingness of some Government agency to purchase should be ascertained *before* proceedings are instituted to designate a building as a landmark so as to avoid unnecessary harm to the owner.

Letter from Richard M. Palmer, President, BMA, to Samuel A. Lichtmann, Chairman, Commission on Chicago Historical and Architectural Landmarks, Aug. 6, 1970. For similar views in New York, see N.Y. Times, May 27, 1970, at 35, col. 3; N.Y. Times, Apr. 29, 1970, at 27, col. 3.

[36] Courts have consistently held that landmark preservation statutes may not impose undue economic hardships on landmark owners, and that in cases of undue economic hardship the city must either acquire the building or permit its demolition. *See, e.g.*, People *ex rel.* Marbro Corp. v. Ramsey, 28 Ill. App. 2d 252, 171 N.E. 246 (1960); *In re* Opinion of the Justices, 333 Mass. 773, 128 N.E.2d 557 (1955); *cf.* note 93 *infra*. Thus, the imposition of permanent landmark status on a building that is currently unprofitable seems clearly unconstitutional. On the other hand, the constitutionality of ordinances such as New York's, *see* note 30 *supra*, that do allow permanent designation if the landmark is returning a net profit of 6% of assessed valuation is less clear. While "undue economic hardship" is perhaps not normally thought to apply to ownership of buildings that return a profit, it is certainly arguable that in cases where the landmark owner is forced by designation to forego a vastly more profitable sale of his site the foregone opportunity constitutes such a hardship. *See* Comment, *The Landmark Problem in New York*, *supra* note 23, at 104.

[37] The Committee feels that the aesthetic value of the Old Stock Exchange Building does not exceed the relative cost and, in this day of demand to meet urgent financial needs in other areas, the City of Chicago cannot afford the luxury of a building as a landmark that, though it may be treasured for historic value and architectural originality, is too far deteriorated to warrant the cost of rehabilitation. The Committee is confident that the people of the City of Chicago would want better application of their tax dollars for we are convinced of a resultant dollar deficiency if rehabilitation were attempted — the building would become known as Chicago's White Elephant.

Committee on Cultural and Economic Development, Special Report Relative to Designation of the Old Stock Exchange Building 6 (August 1970) (advising the Chicago City Council to reject the Landmark Commission's recommendation that the Old Stock Exchange be designated).

acquisition. The building may require substantial refurbishing in addition to ordinary maintenance. Removing it from the municipal tax roll will deny the city not only the increased taxes that the proposed project would yield,[38] but also the taxes currently being returned by the landmark property. In addition, redevelopment of the landmark site with a modern structure may benefit the general economic health of the city by revitalizing an entire block or district.[39]

II. The Search for an Alternative Economic Framework: Landmark Preservation Through Development Rights Transfers

Conventional preservation ordinances have failed to safeguard urban landmarks because they ignore the economic realities that lie at the heart of the landmarks dilemma. Owners will not and cities cannot shoulder the full costs of preservation. Resolution of this dilemma requires enlarging the present economic framework to include other participants who will themselves assume a major share of these costs. The most obvious solution, of course, would be to spread the costs of preservation to all taxpayers within the city by a general levy. But political obstacles rule out this approach at the present time:[40] the corollary to the refusal of American cities to spend for preservation [41] is their unwillingness to tax for this purpose.

If preservation efforts are to have any chance of success, therefore, another basis of cost allocation must be found that does not threaten to drain the city's general revenues. New York City's effort to redistribute these costs through development rights transfers constitutes a giant step in this direction.[42] To date, however, that effort has not borne fruit. An examination

[38] The differences between the taxes presently received on the Old Stock Exchange and a new 45-story tower on its site, for example, are estimated at $640,000 per year. *See* Conti, *supra* note 2.

[39] Lewis Hill, Commissioner of the Chicago Planning Department and a member of the Landmark Commission, voted against designation of the Old Stock Exchange on the ground that:

> It remains my judgment that the designation of this building will not contribute to the strengthening of LaSalle Street as the great economic center of the mid-west.

Letter from Lewis W. Hill to Samuel A. Lichtmann, Chairman, Commission on Chicago Historical and Architectural Landmarks, March 17, 1971.

[40] *See* note 33 *supra*.

[41] *See id*; cf. Elliot, *Introduction* to New Zoning at xv (cities lack capital required to maintain or enhance amenity level of urban areas).

[42] New York, N.Y., Zoning Resolution art. VII, ch. 4, §§ 74-79, 74-791 to -793 (1971). The discussion in the following two paragraphs of the text is based on the provisions of these statutes.

of the reasons for its lack of success has given rise to the rather different transfer proposal discussed in this article. The following paragraphs summarize the New York transfer program, catalog its defects, and then turn to a detailed examination of the Chicago Plan.

A. Transfers Under the New York Zoning Resolution

New York landmark owners may transfer the authorized but unbuilt floor area of their landmarks to adjacent lots in certain districts within the city. The "authorized but unbuilt floor area" that may be transferred is determined by multiplying the lot area of a landmark by a factor, known as a floor area ratio (FAR), that differs for the city's various bulk districts.[43] From this product is subtracted the floor area already exhausted by the landmark. An adjacent lot is defined as one that is contiguous to or across a street or intersection from a landmark lot; it may also be one of a series of lots that connect with the landmark lot, provided that all of these lots are in single ownership. Although in most zones the floor area of the transferee lot may not be increased by more than twenty per cent above its authorized level, no limit is set for transferee lots in high density commercial zones. Transfers may be made to one or several lots until the excess floor area is exhausted. Once transferred, the excess floor area is irrevocably withdrawn from the authorized floor area of the landmark lot.

Procedures for obtaining approval of a proposed transfer are complex. First, the New York Landmark Commission must examine the plans for the development which will utilize the transferred development rights in order to determine whether the new development's materials, design, scale, and location are compatible with the landmark. The owners of the landmark and the transferee lot must then apply to the New York Planning Commission for preliminary approval of the transfer. Accompanying this application must be a site plan for both lots showing the proposed development of the adjoining lot, a program for continuing maintenance of the landmark, and a report of the Landmark Commission detailing the effect of the proposed transfer upon the landmark. The Planning Commission must then decide whether the transfer will have unduly detrimental effects on the occupants of buildings in the vicinity of the transferee lot and whether the proposed maintenance program will in fact result in preservation of the landmark. If the Planning Com-

[43] For a detailed evaluation of the FAR system, see OFFICES 280–82; Note, *Building Size, Shape, and Placement Regulations: Bulk Control Zoning Reexamined*, 60 YALE L.J. 506 (1951).

mission recommends approval, the application then goes to the Board of Estimate, which has final authority to grant or deny the application. The difficulties of obtaining transfer approval are further complicated by the power of the Planning Commission in certain instances to condition approval of the transfer upon provision of an amenity by the development rights purchaser; in these cases, the Planning Commission must approve the purchaser's submission for the amenity as well.

Despite the ingenuity evident in its conception, the New York initiative contains at least five drawbacks that have crippled its effectiveness as a vehicle for a comprehensive municipal preservation program. Heading the list is the absence of a rational incentive structure for inducing landowners to agree to preserve their landmarks. By limiting development rights transfers to adjacent lots, the program imposes severe restraints upon the potential market for these rights. Existing zoning in New York and other cities already permits developers to shift unused floor area to contiguous parcels.[44] Hence, the plan is useful only

[44] The New York Zoning Resolution defines the term "zoning lot" to include the following:

> (c) A tract of land, located within a single *block*, which at the time of filing for a building permit . . . is designated by its owner or developer as a tract all of which is to be used, *developed,* or built upon as a unit under single ownership. A zoning lot, therefore, may or may not coincide with a lot as shown on the official tax maps of the City of New York or on any recorded subdivision plat or deed.
>
> For the purposes of this definition, ownership of a *zoning lot* shall be deemed to include a lease of not less than 50 years duration, with an option to renew such lease so as to provide a total lease of not less than 75 years duration.

NEW YORK, N.Y., ZONING RESOLUTION art. I, ch. 2, § 12-10 (1971). *See* CHICAGO, ILL., MUNICIPAL CODE, ZONING ORDINANCE ch. 194A, art. 3.2 (1970). Under these provisions a developer may increase the authorized floor area on the project site by obtaining a long-term lease on an underimproved or vacant adjacent site, designating both that site and the project site as a single "zoning lot," and shifting the unused floor area from the former to the latter.

One hundred thousand square feet of excess floor area authorized for the site of the Appellate Division Courthouse, a New York landmark, were transferred to an adjacent project site pursuant to § 12-10 and without the aid of § 74-79, the landmark transfer provision, which, at the time of the transaction, was not applicable to publicly owned landmarks. A developer, desiring to incorporate the additional floor area into his project on the adjacent site, leased the landmark property for a 50-year period with a 25-year renewal option, then subleased it back to the City reserving the 100,000 square feet of floor area. The operative clause of the lease provides:

> Section 4.01. (a) Tenant is hereby given the right, prior to or during the Demised Term, to combine the zoning lot of the Demised Premises with the zoning lot of the Adjoining Premises, so as to obtain a combined Floor Area Ratio . . . for the zoning lots of the Demised Premises and the Adjoining Premises; however, as a result of such combination of zoning lots, Tenant shall not obtain more than one hundred thousand (100,000) square feet of floor area from the zoning lot of the Demised Premises.

Lease between the City of New York and 41 Madison Company § 4.01(a), Apr.

when a developer can be found who happens to own a lot located across a street or an intersection from a landmark or when a landmark owner who owns a series of lots that connect with the landmark lot desires to build on one or more of those lots. Under the plan, moreover, the market value of the rights is controlled wholly by the vagaries of construction activity within the immediate vicinity of the landmark. Thus, while the transfer of, for example, two hundred thousand square feet of floor space may command a premium if the landmark adjoins the site of a projected skyscraper, that space may be worthless if no construction is contemplated on the sites adjacent to the landmark. Nor does the plan offer a secure basis for predicting that the income received from the transfer of development rights in any given instance will equal or exceed rather than fall short of the economic burdens of landmark ownership. As pointed out earlier,[45] these burdens are attributable to a variety of factors in addition to the unused development potential of the landmark site. Physical and functional obsolescence, assemblage value, and impairment of mortgageability and feasibility of renovation are only some of these additional factors. In a limited number of instances, moreover, the landmark may already utilize virtually all of the floor area authorized for its site.[46] Finally, the New York plan fails to provide supplementary funding for those cases in which development rights sales do not promise full compensation.

The second weakness of the New York plan lies in its labyrinthine procedures governing the issuance of transfer permits. The maze of discretionary approvals based upon vague aesthetic, planning, and urban design criteria are hardly calculated to attract the voluntary participation of developers and landmark owners. These permits, moreover, are issued *after* formal designation has occurred. Yet the battle to safeguard threatened buildings of landmark quality is often lost at the designation stage itself. Owners of proposed landmarks typically oppose designation in response to their quite reasonable fears concerning its economic impact. Local governing bodies, too, have proven reluctant to designate buildings of unquestioned landmark status, as the Exchange debacle itself illustrates.[47] This reluctance may stem either from the potent political influence of downtown realtor and developer groups, who generally oppose meaningful pres-

10, 1970. *See* Sher, *'Air Rights' Lease, Zoning*, 164 N.Y.L.J. Oct. 9, 1970, at 1; N.Y. Times, Apr. 16, 1970, at 34, col. 1. Sher notes that the method is "used commonly by private developers." Sher, *supra*, at 2.

[45] *See* pp. 579–80 *supra*.

[46] An example is the Monadnock Building, Chicago's last and tallest skyscraper of masonry construction, which was designed by John Root.

[47] *See* note 3 *supra*.

ervation programs,[48] or from a concern for the eventual fiscal consequences that designation would entail for the city.[49] If approval of an equitable incentive package, including an appropriate transfer authorization, were included in the designation process, it seems likely that the resistance of landmark owners and local governing bodies would lessen.

A third difficulty with the plan is its reliance upon the voluntary participation of landmark owners. They may balk, because they question the legality of the plan or the marketability of the development rights, because they are developers who wish to proceed with redevelopment of the landmark site, or for any number of other reasons. Without their participation, of course, the prospects for preservation revert to their former unhappy state.

Fourth, it can be questioned whether the New York initiative adequately insures that the landmarks of participating landowners will in fact be preserved. Relying essentially upon the transfer of some or all of a landmark's floor area for this purpose is unnecessarily risky. Under the New York plan a landmark owner apparently retains the right to demolish his landmark and replace it with a building of equivalent bulk if he decides that redevelopment would be more profitable.[50] In addition, a subsequent increase in the FAR of the district in which the landmark is located would rekindle speculative interest in the property; by recreating the excess floor area that had previously been transferred, it would give the owner an incentive to replace his landmark with a larger structure. The New York plan also lacks a mechanism that precisely defines the obligations assumed by the present and future owners of the landmark in consequence

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[48] *See* note 35 *supra*.

[49] *See* pp. 583–84 & notes 37–39 *supra*.

[50] Mr. Frank Gilbert, Secretary of the New York Landmarks Preservation Commission, suggests that development rights transfers would discourage but not prohibit the destruction of the landmark:

> [W]hen completed, [a development rights transfer] reduces much of the economic pressure to tear down the landmark since it *could be replaced only by another building with the same amount of floor space.*

Gilbert, *supra* note 8, at 14 (emphasis added).

The absence of an express requirement that a landmark owner convey an interest in the property obligating himself and future owners not to demolish or alter the landmark also points in this direction. Either § 74-791, which calls for a "program for . . . continuing maintenance," or § 74-793, which requires filing at the county registry of "[n]otice of the restrictions upon further development" of the landmark and transferee lots might be construed to include the conveyance of a preservation restriction. NEW YORK, N.Y., ZONING RESOLUTION art. VII, ch. 4, §§ 74-791, -793 (1971). But both are extremely vague. Significantly, no such restriction was contemplated in the Amster Yard transaction, discussed in note 16 *supra*.

of the transfer authorization and that affords the city an effective remedy for the breach of these obligations.

Finally, the adjacency limitation of the New York plan needlessly produces a number of unfortunate urban design consequences. First, mammoth concentrations of bulk within the compass of a block or less [51] might lead to an excessive demand for municipal services and to traffic congestion in the vicinity of the landmark. Second, a landmark building might be suffocated in adjacent superdensity, the visual enjoyment of a landmark being blotted out by the tall buildings around it. New York has responded to these risks by encasing development rights transfers in the straightjacket of administrative controls discussed above. But these controls have served only to deaden the enthusiasm of landmark owners and developers whose participation in the plan is absolutely essential to its success.

B. The Chicago Plan

1. An Overview. — The discussion of the plight of the Old Stock Exchange Building touched upon four characteristics that are fairly common among urban landmarks throughout the United States. First, most utilize only a fraction of the floor area authorized for their sites under modern zoning. Second, most landmarks are currently able to operate at a profit;[52] their imperilment stems from the greater value of their land as the site of large office or commercial structures.[53] Third, endangered landmarks tend to be grouped in one or more reasonably compact areas of the city, usually in high land value commercial and service districts. Finally, municipal facilities and supportive services are also most heavily concentrated in these districts. This network of public facilities and services enables these districts to absorb

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[51] The magnitude of density is enormous in the case of certain New York landmarks. For example, the excess development rights of the United States Customs House are 789,800 square feet, an amount equal to the floor area of the 60-story Woolworth Building. *See* Burks, *supra* note 8, at 9, col. 5.

[52] *See* notes 19 & 22 *supra*.

[53] The impact of rising land values on existing downtown development has been described as follows:

> In our big cities of a half million or more population, [the] demolition of older structures was made economically feasible by parabolic increases in land values. *As a matter of fact, there are very few parcels of land in our largest cities which have not had as many as three different structures on them in the last hundred years* . . . . Our megalopolitan cities have grown so fast, however, that we have seen 25-year periods . . . where the land value has increased so rapidly that it has become economic to demolish even a fairly new building in order to use the land more intensively — to exploit to its highest and best use the new land value created in a short span of time.

Nelson, *Appraisal of Air Rights*, 23 APPRAISAL J. 495 (1955) [hereinafter cited as *Air Rights*] (emphasis added).

large numbers of people with greater efficiency than other areas of the city.

The Chicago Plan attempts to avoid the drawbacks of the New York plan through recognition of these factors. Briefly, the Plan would operate as follows. The city council, upon recommendation of the landmark and planning commissions, would establish one or more "development rights transfer districts," [54] which would roughly coincide with the areas where downtown landmarks are concentrated. Upon designation of his landmark or at any time thereafter, the landmark owner would be entitled to transfer its development rights to other lots within the transfer district in which the landmark is located and to receive a real estate tax reduction reflecting the reduced value of his property. Transfers may be made to one or more transferee lots provided that the constructive lot area of any transferee lot is not increased by more than fifteen per cent.[55] Transfers would be subject to additional planning controls set forth in the municipality's preservation ordinance. In return for this transfer authorization, the owner would be required to convey to the city a "preservation restriction," which would bind him and future owners of the landmark to maintain it in accordance with reasonable standards and to refrain from demolishing or altering it without the city's permission.

Should a landmark owner reject the transfer option, the city would step in and condemn a preservation restriction and the landmark's development rights, though, in exceptional cases, the city might choose to condemn the landmark property in fee. Acquisition costs and other expenses of the program would be funded through a municipal "development rights bank." The bank would be credited with development rights that have been condemned from recalcitrant owners, rights donated by owners of other landmarks, and rights transferred from publicly owned landmarks. The city would sell these pooled development rights as necessary

[54] A development rights transfer district should not be confused with the traditional historic district referred to at p. 581 *supra*. Unlike the historic district, it serves as a marketing area for development rights and contains only a small number of buildings of significant architectural or historic character in relation to the total number of buildings within its boundaries. In addition, the municipal landmark commission reviews only those applications for alteration or demolition that relate to designated individual landmarks within a transfer district. In contrast, the commission engages in building permit review with respect to all buildings within historic districts.

[55] The figure of 15% was concurred in by municipal planners and architects in Chicago who viewed it as low enough to protect against the risk of urban design abuse, but not so low as to deprive the plan of economic appeal for landmark owners. Other cities may wish to increase or decrease this figure on the basis of their peculiar urban design needs and preferences.

to meet program costs, subject to the same planning controls that apply to private owners.

As outlined above, the Chicago Plan redistributes preservation costs equitably and realistically. Transfer authorizations — or cash awards, if the city is forced to condemn the property — and tax relief compensate the landmark owner for his losses. Eliminating the property's development potential by acquisition of the preservation restriction decreases the value of the site and extinguishes speculative interest in it. Landmarks will remain in private hands as vital commercial or office buildings instead of undergoing mummification as museums. Hence, the city avoids outlays for fee acquisition, restoration, and maintenance, and may continue to tax the landmark property, although at a lesser rate. Moreover, these tax losses will be more than offset by increased tax yields from the larger buildings authorized by the transferred development rights. And, in return for their financial contribution to the landmarks program, downtown developers receive full value in the form of governmental licenses to build larger structures than local zoning otherwise permits.

In addition to safeguarding threatened landmarks, the Chicago Plan promises to expedite downtown development generally by easing the difficulties of land assembly. Developers who have assembled all but a small fraction of a unified tract would be permitted to fill out the remainder by purchasing development rights from landmark owners or from the municipal development rights bank. This privilege would be subject, of course, to appropriate safeguards — again set out in advance in the preservation ordinance — concerning light, air and other design features of these projects. At the present time, developers often obtain bulk variances on spurious legal grounds [56] or spend months or years trying to acquire the additional strip needed to make their project economically feasible.[57]

2. The Elements of the Chicago Plan: A Closer Examination. — *a. The Incentive Package.* — Unlike the New York program, the Chicago Plan is designed to compensate the landmark owner for the actual losses that he suffers. Prior to proposing designation of a landmark, the landmark commission will obtain an appraisal of the property that details the economic consequences of designation. The appraisal will also enumerate any structural defects, restoration or rehabilitation problems, or unique maintenance problems that further intensify the burdens of private ownership. The commission will then devise a package to com-

[56] *See* authorities cited in note 201 *infra*.

[57] *See Air Rights* 497. The author is personally familiar with a number of land assemblies in Chicago that required from four to six years to complete.

pensate the owner that will include an authorization to transfer up to one hundred per cent of the landmark's lot area and an appropriate real estate tax reduction. Transfers under the Chicago Plan will be measured in terms of lot area rather than floor area,[58] since the introduction of zoning bonuses and other complications into modern zoning codes makes lot area, rather than floor area, the factor that developers use to calculate the size and volume of projected developments.[59] An additional subsidy, funded out of the municipal development rights bank, may be included to cover losses not met by the package and to deal with special difficulties affecting the building.

The real estate tax reduction, an integral element of the Chicago Plan, should prove especially attractive to landmark owners.[60] The impact of a real estate tax reduction can be dramatic because real estate taxes are the largest single item in the cost of operating downtown buildings.[61] A study recently undertaken in Chicago, for example, concluded that a twenty-five per cent reduction in the assessed valuation of downtown office buildings would result in a tax saving equal to twice the average repairs and maintenance budget for such properties.[62] These savings alone will compensate the owners of many landmarks for their losses.[63] Since tax reductions under the Plan will be geared to the drop in appraised value that landmark properties suffer as a

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[58] The Chicago Plan uses the same technique — combination of the lot area of the landmark and project sites — that was used in the Appellate Division Courthouse transaction. *See* note 44 *supra*. It does *not* entail the transfer of "air rights." The latter are a property interest in a three-dimensional location in space. Development rights, on the other hand, are simply a governmental license to build a defined amount of floor area as measured by the amount of lot area that has been constructively "transferred" to the project site.

[59] Another difference between the New York and Chicago Plans concerns the permanence of a development rights transfer. Transfers of development rights are "irrevocable" in New York. *See* NEW YORK, N.Y., ZONING RESOLUTION art. VII, ch. 4, § 74-792 (4) (1971). Under the transfer proposal, on the other hand, landmark owners may be authorized by the municipal landmark commission and city council to purchase additional development rights to use on their sites if their buildings are destroyed by natural or other casualty occurrences beyond their control.

[60] Real estate tax relief is not included in the New York plan as such. The New York Landmarks Act, N.Y. GEN. MUN. LAW § 96(a) (McKinney Supp. 1970) and the Preservation of Landmarks and Historical Districts Ordinance, NEW YORK, N.Y., ADMIN. CODE ANN. ch. 8-A, § 207-8.0a(2) (1971) both authorize tax abatement. But the latter has not yet been extended to New York landmark owners, either generally or in conjunction with development rights transfers.

[61] OFFICES 123.

[62] Chicago Report 22.

[63] *Id.* at 15.

result of permanent designation, these reductions can be expected to equal or exceed the twenty-five per cent figure in a large number of instances.

b. Preservation Restriction. — Under the Chicago Plan, municipalities will obtain a preservation restriction in landmark properties except in the rare case when fairness requires that the city acquire a property in fee.[64] The advantages of less-than-fee acquisition are substantial. By this means, government limits its interference with private ownership, yet secures the preservation of landmarks. The latter continue in their original use or in an adaptive reuse that serves the space needs of the downtown area. The condemnation award will be reduced; maintenance and restoration costs are borne by the owner aided, in appropriate cases, by subsidies from the development rights bank; and the landmark property remains on the tax rolls.

Other advantages of preservation restrictions may also be cited. The preservation restriction enables landmark owners to qualify for federal[65] and state[66] income tax and local[67] real estate tax benefits that they might not otherwise enjoy. It also allows for more precise regulation of the obligations of landmark ownership. While these obligations can also be defined to some extent by general ordinance, as in New York, the interests of the city and the landmark owner are better served by an instrument that has been carefully tailored to take account of the peculiarities of individual properties. Finally, the preservation restriction offers accurate notice to mortgagees, purchasers, and other interested parties of the encumbrances attaching to the landmark property.[68]

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[64] This will be the case when the economic burdens of landmark ownership, as a result of an individual landmark's structural unsoundness, functional obsolescence or other cause, rise to such a level that its profitable operation is impossible.

[65] A preservation restriction may help to ensure that donors of development rights to the development rights bank receive a federal charitable deduction. *See* INT. REV. CODE OF 1954, § 170; Rev. Ruling 64-205, 1964-2 CUM. BULL. 62. *See also* R. BRENNEMAN, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND ch. 5 (1967) [hereinafter cited as BRENNEMAN]. Presently under consideration is a change in the federal income tax laws that would liberalize guidelines for qualifying donations of preservation restrictions as charitable deductions. Address by Kenneth Gemmill, First Conference on Legal Techniques in Preservations, in Washington, D.C., May 2, 1970 (sponsored by National Trust for Historic Preservation).

[66] Twenty-six states have a personal income tax base that is derivative of the federal income tax base. Hence, charitable deductions taken under the latter may be included under the former as well. Address by Kenneth Gemmill, *supra* note 65.

[67] The existence of a preservation restriction would have probative value in showing a lower appraisal value of property. *See, e.g.*, ILL. REV. STAT. ch. 24, § 11-48.2-6 (1969); N.M. STAT. ANN. § 4-27-14 (Supp. 1971).

[68] The adequacy of existing recording indexes for this purpose, however, has

c. The Development Rights Transfer District. — The adjacency restriction is a principal culprit in the failure of the New York initiative to win the support of the real estate industry and of landmark owners. It severely impairs the marketability of development rights. It scatters density throughout the city on the capricious principle of how closely proposed developments border on landmarks. And it necessitates burdensome design review procedures to insure that landmark buildings are not overwhelmed by adjacent behemoths.[69]

The Chicago Plan dispenses with the adjacency requirement by permitting transfers to any property within the development rights transfer district in which the landmark is located. This approach promises to avoid the economic and planning difficulties that have crippled the New York plan. The market for development rights under the Chicago Plan should prove more lucrative than the market under the New York plan on two counts. First, transfer districts are likely to encompass the high land value

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been questioned on two grounds. First, the absence of an index specifically devoted to public restrictions complicates title searches on landmark properties. Second, in the absence of special legislation, recorded preservation restrictions are subject to termination pursuant to state obsolete restrictions and marketable title acts. *See* note 167 *infra*.

[69] The adoption of the adjacency restriction in New York, despite these drawbacks, was motivated by a desire to fit development rights transfers into the legal rationale that purportedly justifies the award of zoning bonuses. *See* Marcus. The latter, it will be recalled, are granted in return for an amenity. Located on the same lot as the oversize building, the amenity, it is claimed, "digests" the building's extra floor area by providing additional light and air or by facilitating the movement of traffic generated by the building. This rationale thus answers the concern of city planners that the increased intensity of use resulting from the granting of zoning bonuses will be absorbed by the amenity for which the bonus was given. *See generally* DEPARTMENT OF CITY PLANNING, SAN FRANCISCO DOWNTOWN ZONING STUDY, FINAL REPORT (1966); Ruth, *Economic Aspects of the San Francisco Zoning Ordinance Bonus System*, in NEW ZONING 159; Svirsky, *supra* note 6. Landmarks, too, are viewed as amenities in the form of so many "light and air parks." *See* Marcus. But they obviously cannot be located on the same lot as the building to which their excess floor area has been transferred. If they are to digest this additional density, it is thought, they must be as close to the building as possible. Hence, the origin of the adjacency restriction.

While the adjacency restriction thus fits within the digestion rationale, the advantages of this rationale may be more apparent than real. It has not received express judicial approval. Moreover, the rationale seems more metaphorical than legal in content since it is difficult to conceive of an operational test that indicates how much light and air is needed to "digest," let us say, 50,000 additional square feet of office space. In addition, the digestion rationale is demonstrably inadequate as an explanation for some types of incentive zoning. Amenities such as theaters, *see* note 10 *supra*, or retail stores, *see* note 12 *supra*, will actually increase traffic at the project site.

areas of the city since, as already noted,[70] threatened urban landmarks tend to be grouped in such areas. It can be assumed that municipalities will capitalize on this advantage in drawing the boundaries of their development rights transfer districts. Second, the marketability of development rights will not be dependent upon the vagaries of construction activity on sites immediately adjacent to landmarks. They will be governed instead by the general vigor of the construction and real estate markets in the particular municipality's central commercial and service areas.

The area-wide approach, as conceived under the Chicago Plan, also promises to minimize the undeniable risk of urban design abuse that attends any incentive zoning program. It will do so by means of controls that govern the establishment of development rights transfer districts and that regulate transfers that subsequently take place within these districts. Prior to recommending the establishment of any district, the municipal landmark and planning commissions will prepare a study of the area in question that inventories the number and type of prospective landmarks there; that estimates the amount of floor area — over and above that already authorized for the area under present zoning — that might be transferred upon designation of the landmarks; and that details the capacity of the area's public services and facilities to absorb this additional density. In addition, the planning commission will review the compatibility of the proposed district with the municipality's comprehensive plan and its detailed plan, if any, for the area. This study and the accompanying recommendation of the two agencies will provide the basis for the local governing body's decision to establish the district and to determine its boundaries.

Once established, transfer districts will be protected from undue concentrations of density in at least three respects. First, an upper bound on the amount of lot area that may be transferred within a district is fixed by the number of designated landmarks there. That number is not likely to be excessive in absolute terms: Chicago's architecturally-rich Loop area, for example, will probably have no more than thirty designated landmarks. Nor will all of the landmarks within a district incur substantial depreciation upon designation. Measured against the size of the district and its capacity to absorb density, therefore, the total amount of transferable density is likely to be marginal.[71]

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[70] *See* p. 582 *supra*.

[71] It is estimated that the transfer of some 300,000 feet of lot area, coupled with appropriate tax reductions, will be sufficient to fund a preservation program for the landmark buildings in Chicago's Greater Loop area. *See* Chicago Report 20. Because the scope of the program is so limited, concern that a city will be

Second, most if not all of the floor area that will be added to new projects under the Chicago Plan will already have been authorized by existing zoning. The main thrust of the Plan, therefore, is upon the redistribution of previously authorized floor area rather than upon the creation of wholly new floor area as in the case of zoning bonuses. Hence, the Plan will occasion little or no net increase in presently authorized density of the district.[72]

Third, the proposal envisages that transfers will be restricted to selected use and bulk districts — essentially high density commercial and apartment zones — within the development rights transfer district, and that no transferee site may be increased by more than fifteen per cent of its actual lot area. These limitations will further minimize the possibilities of urban design abuse. Preliminary indications are that the principal buyers of development rights will be developers of smaller interior lots in commercial zones that cannot practicably utilize zoning bonuses and of lots devoted to high-rise apartment developments.[73] Such shifts in density are unlikely to distort the cityscape within the transfer district. With the advent of the skyscraper and the absence of stringent height limitations, the American cityscape has assumed a distinctly irregular form best exemplified by the Manhattan skyline. Sprinkling an additional four to six stories on lots in these centrally located districts will make little difference in such a setting.[74]

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engulfed in surplus density is misplaced. But proposals have been made that would escalate development rights transfers to a level that might produce this result. For example, Ira Duchan, New York City Commissioner of Real Estate, has suggested that excess floor area be transferable to nonadjacent sites from *any* building or facility owned by the city. *See* Burks, *supra* note 8.

[72] Under the New York plan, no net increase in density can occur because transfer of only the authorized but unused floor area is allowed from any landmark site. *See* p. 584 *supra*. A net increase is theoretically possible under the transfer proposal, however, because transfers of up to 100% of a landmark's lot area may be authorized in appropriate cases. But data compiled in the Chicago Report indicate that a net increase in the density of a transfer district is highly improbable. Relatively few landmarks are likely to incur such grave depreciation that only a full 100% transfer authorization over and above real estate tax relief will promise to compensate their owners fairly. *See* Chicago Report 12–15. In fact, tax relief alone will be sufficient to compensate landmark owners in many cases. *Id.* at 21–22. Nor should it be anticipated that all of the lot area pooled in the municipal development rights bank will be put on the market. On the contrary, only an amount necessary to provide supplementary funding for the municipal preservation program will be transferred. *Id.* at 20.

[73] *See* Chicago Report 16–19.

[74] As described in the text, development rights transfer districts would roughly coincide with geographic areas of the city in which urban landmarks are concentrated. In this way an urban design tradeoff is achieved: bulk within the district

d. The Role of the Municipality. — The municipality's role under the New York plan is both too little and too great. It is too little because the city must expend its own scarce revenues to safeguard threatened landmarks if the development rights carrot fails to entice landmark owners. And it is too great because the plan's labyrinth of discretionary approvals tends to discourage owners and developers from electing to participate in the program at all.

The Chicago Plan directly addresses both of these problems. As to the first, it enables the municipality to finance a vigorous preservation program without dipping into general revenues. Sales of development rights from the municipal development rights bank should provide the financial basis for effective public intervention in whatever form individual cases may require.

Development rights credited to the bank will derive from three sources. The principle source will be landmark owners who decline the transfer option and insist that the city pay them a

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is redistributed in exchange for the increased amenity resulting from the presence of low density structures there. Moreover, the bulk restrictions of the traditional bulk zones within the district are left unchanged.

A second approach is conceivable under which transfer districts would coincide with areas that, though presently zoned to relatively low densities, are expected to undergo intensive development soon. Whether or not these areas contain landmarks would be irrelevant. In rezoning them to the greater densities warranted by development expectations, densities permitted as of right would be deliberately skewed to levels falling somewhat short of the total amount of density that the market could absorb and that would be consistent with community health and safety. Developers within these areas would be permitted to purchase the remaining density increments from landmark owners, wherever located, or from the municipal development rights bank.

A proposal for restoring the Georgetown Waterfront Historic District has been advanced along these lines. Premised on the expectation that the stringent height limitations presently in force in downtown Washington will be removed, it would enable owners of property within the Historic District to sell development rights to developers within the downtown Washington area, the receipts of these sales being used to upgrade the Historic District. *See* Von Eckardt, *Getting Charm and Height*, Wash. Post, Feb. 27, 1971, § C, at 1, col. 5.

Unlike the Chicago Plan, this alternative method is open to serious due process challenges. As will be shown later, the existence of the Chicago Plan casts no doubt on the underlying reasonableness of the bulk restrictions that remain in effect on nontransferee lots in the development rights transfer district, *see* pp. 628–31 *infra*. Under the alternative, however, communities have conceded that the bulk levels permitted as of right in the transfer district are below those that would pose a threat to public health and safety.

That the landowners may nevertheless obtain what the courts may deem a "reasonable return" on their property is not a sufficient answer to this objection. In addition to meeting the reasonable return criterion, communities adopting these programs must also convince the courts that the development potential of private property may be regulated under the police power to raise funds or otherwise provide compensation for public improvements that government is unable to

cash award for their losses.[75] The bank will receive an increment of lot area in such cases equal to the value of the award but in no event greater than one hundred per cent of the landmark site. A second source will be other landmark owners who donate lot area. That such donations will be forthcoming is highly probable in view of the tangible federal, state, and local tax benefits that donors will enjoy and, perhaps more importantly, in light of the central role that private philanthropy has traditionally played in the American preservation movement. The third will be the city itself, which is likely to own a fair number of the community's landmarks. The bank would be credited in the last two instances with increments of lot area proportional to the authorized but unbuilt floor area of the landmarks.

The lion's share of the city's preservation costs will be covered by the sale of condemned development rights. But additional funds will be necessary for subsidies and for the relatively infrequent cases in which the transfer authorization-tax reduction package fails to provide adequate compensation. Donated development rights and those provided by the city should provide an ample cushion in these cases.

The Plan also seeks to simplify the administrative procedures governing development rights transfer authorizations. The problem here is to strike a correct balance between preventing urban design abuse through proper planning controls and facilitating the marketability of development rights by freeing them of onerous restrictions. Under its program New York has little choice

finance through general tax revenues. That question will be resolved affirmatively only if the courts are prepared frankly to extend the general welfare concept in the incentive zoning context to include fiscal as well as regulatory objectives. Whether the courts will take this step at the present time is unclear.

[75] Some commentators have intimated that an award of development rights alone may be sufficient to meet the constitutional requirement of just compensation that incentive zoning programs may trigger. Professor Mandelker, for example, speaks of zoning bonuses as "a *de facto quid pro quo* for corresponding increases in development costs." Mandelker, *The Basic Philosophy of Zoning: Incentive or Restraint?*, in NEW ZONING 16. Norman Marcus has suggested that the availability of the transfer option might make it more difficult for landmark owners to establish that landmark restrictions deprive them of a reasonable return on their property. *See* Marcus. While this view may be acceptable in some jurisdictions, *see generally* Haar & Hering, *The Determination of Benefits in Land Acquisition*, 51 CALIF. L. REV. 833 (1963), it is open to two objections in others. First, the jurisdiction may require that compensation for the interest taken be in cash. *See, e.g.*, 3 P. NICHOLS, NICHOLS' THE LAW OF EMINENT DOMAIN § 8.2 (3d rev. ed. 1970) [hereinafter cited as NICHOLS]; Department of Pub. Works v. Caldwell, 301 Ill. 242, 133 N.E. 642 (1921). Those jurisdictions that do permit special benefits to be set off against the interest taken might nevertheless regard development rights as having too uncertain a value to merit recognition as a form of special benefits.

but to err on the side of the former. Because every transfer shifts bulk to a site adjacent to a landmark, its aesthetic impact on the landmark must be examined on an individualized basis and in terms of highly subjective criteria. Moreover, the New York program provides no assurance beforehand that the physical services and facilities in the landmark's immediate area will be able to absorb the additional density resulting from the transfer. This uncertainty, too, necessitates case-by-case review.

The Chicago Plan largely avoids both problems by permitting transfers throughout development rights transfer districts. Few, if any, transfers under the Plan will be to sites adjacent to landmarks because the number of potential transferee sites is vastly expanded and because most cities already permit such transfers as of right under conventional zoning provisions. Except in the rare cases when such transfers occur, therefore, no need for design review exists. Further, development rights transfer districts are selected expressly upon the basis of the capacity of their public services and facilities to absorb any increased density that may be allocated within them under the Plan. Preselecting the districts in this way also enables the city to dispense with case-by-case review. The remaining controls envisaged under the Plan, such as the limitations concerning bulk and use districts to which transfers may be made and the permitted increases in the size of transferee lots, will be set forth in advance in the preservation ordinance and need not, therefore, be administered on a discretionary basis. An additional advantage of the Chicago Plan is that it telescopes into a single proceeding the separate proceedings in New York. By this means, it will tend to reduce the resistance of owners and city councils to the formal designation of landmark buildings.[76]

e. Implementation of the Chicago Plan. — The Chicago Plan employs zoning techniques to advance preservation objectives; thus it could be implemented either as a zoning or as a preservation measure. This choice will determine whether municipal authority to adopt the Plan should originate in state zoning or state preservation enabling legislation and whether the zoning or the preservation ordinance should be the primary tool for its implementation at the municipal level. It may also shape the relative influence of the local planning and landmark commissions in administering the Plan.

The American Law Institute's Model Land Development Code [77] offers an ideal solution. Intended to serve as a comprehensive state enabling act to empower local communities to regu-

[76] *See* pp. 587–88 *supra*.

[77] ALI MODEL LAND DEVELOPMENT CODE (Tent. Draft No. 2, 1970).

late land use and development, the Code treats zoning [78] and preservation [79] as two categories of this regulatory power. It thereby recognizes the close ties of technique and objective that zoning and preservation share,[80] but does not ignore their separate identities. It envisages adoption at the local level of a single Land Development Ordinance [81] to be administered by a single Land Development Agency.[82] Under this arrangement, the Plan could serve as one component of the Ordinance, which is intended to address a variety of land use concerns on a coordinated basis. "Ultimate responsibility" [83] for administering the Ordinance — and thus the Plan — would rest with the Agency, an entity that most resembles the municipal planning commission. But landmark commissions would likely play an influential role as well in view of the Code draftsmen's suggestion that the Agency "delegate the administration of historic and other special preservation regulations to specialized bodies expert in architecture and planning." [84]

The Code, unfortunately, is still adrafting, and resort must be had to a less satisfactory approach. Two alternatives are suggested by the existing legislative framework that governs zoning and preservation matters. First, the Plan might be treated essentially as a preservation undertaking: authority to adopt it would appear in the state preservation enabling act; its mechanics would

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[78] *Id.* Art. 2.

[79] *Id.* §§ 2–208 to –209.

[80] Municipal preservation efforts have been upheld as a manifestation of local zoning powers. City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 415, 389 P.2d 13, 17 (1964). They have been deemed "auxiliary to the general zoning power" in states having independent preservation enabling acts. Rebman v. City of Springfield, 111 Ill. App. 2d 430, 440, 250 N.E.2d 282, 287 (1969). Many municipalities incorporate some or all of their preservation measures in their zoning ordinances. *See, e.g.*, NEW YORK, N.Y., ZONING RESOLUTION art. 1, ch. 1, § 11–121; art. 2, ch. 1, § 21–00; art. 2, ch. 3, § 23–69; art. 7, ch. 4, §§ 74–71, 74–79 (1971); CHARLESTON, S.C., CODE ch. 51, art. III (1966). Some state legislatures have expressly authorized municipalities to pursue historic preservation objectives under the zoning power. *See, e.g.*, MO. REV. STAT. § 89.040 (1971); NEB. REV. STAT. § 19–903 (1970). And numerous preservation enabling acts contain provisions expressly keyed into local zoning procedures. *See, e.g.*, N.H. REV. STAT. ANN. § 31:89–b (1970) ("All [historic] districts and [preservation] regulations shall be established in relation to the comprehensive plan and the comprehensive zoning ordinance of the city, or town"); R.I. GEN. LAWS ANN. § 45–24.1–7 (1971) (denials of building permits by the historic district commission appealable to zoning board of appeals).

[81] ALI MODEL LAND DEVELOPMENT CODE § 2–101 (Tent. Draft No. 2, 1970).

[82] *Id.* § 2–301.

[83] *Id.* § 2–209, Note at 52.

[84] *Id.* § 2–209, Note at 52.

be detailed in the local preservation ordinance; and its administration would be vested primarily in the municipal landmark commission. The second alternative, on the other hand, would emphasize the Plan's hybrid character by according an increased role to the state zoning enabling act and to the local zoning ordinance and planning commission.

The first of these routes was generally followed in Illinois.[85] That state's preservation enabling act was amended in 1971 to empower municipalities to implement all features of the Plan, including establishment of a development rights bank, acquisition of preservation restrictions and transfer of development rights.[86] As a precautionary measure, the "purposes" section of the state zoning enabling act was also revised to reflect that preservation of historic buildings is a proper objective of zoning.[87] Local communities will implement the Plan through their preservation ordinances,[88] but must revise the definition of "zoning lot" in their zoning ordinances to include the constructive lot area which owners are authorized to transfer under the Plan as well as actual lot area.[89] The respective responsibilities of the landmark and planning commissions assume the form outlined earlier in this article.[90]

The second approach has been chosen in New York. Provisions implementing the New York program appear in the city's zoning ordinance,[91] which assigns the dominant administrative role to the planning commission.[92] Since no amendatory legislation was sought at the state level, the city apparently concluded that its state zoning enabling act already empowered it to adopt these provisions.

Although either approach is workable, the Illinois route seems preferable because it permits coordinated treatment in a single statutory enactment of the property, condemnation, and land use features of the Plan. In addition, it recognizes that zoning and

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[85] *See* Ill. Pub. A. No. 77-1372 (Ill. Leg. Serv., Aug. 31, 1971), *in part to be codified at* ILL. REV. STAT. ch. 24, § 11-48.2-1A, *in part amending* ILL. REV. STAT. ch. 24, § 11-48.2-2 & -6 (1969).

[86] *Id.*

[87] *See* Ill. Pub. A. No. 77-1373 (Ill. Leg. Serv., Aug. 31, 1971), *amending* ILL. REV. STAT. ch. 24, § 11-13-1 (1969). Other state zoning enabling acts containing a similar provision are listed in note 80 *supra*.

[88] *See* Chicago Report app. III.

[89] *Id.*

[90] *See* pp. 591-92, 595 *supra*.

[91] *See* NEW YORK, N.Y., ZONING RESOLUTION, art. VII, ch. 4, § 74-79 *et seq.* (1971).

[92] *See* p. 585 *supra*.

the regulation of individual landmarks are actually separable manifestations of the police power.[93]

III. Legality of the Transfer Proposal

Despite the economic feasibility and sound urban design features of the Chicago Plan, the prospect of a legal challenge may deter its acceptance by landmark owners, the real estate industry, and local government. A court test of the plan is likely to center upon three of its principal features: the condemnation of preservation restrictions, insofar as it makes possible the sale of development rights; the use of preservation restrictions to encumber landmark properties; and the authorization of greater floor area for development rights purchasers than for other property owners within the transfer district. Opponents of the proposal will contend that it violates the "public use" limitation on governmental

[93] The misconception that zoning and the regulation of individual landmarks are indistinguishable manifestations of the police power probably results from the fact that early preservation ordinances focused almost exclusively on the regulation of historic districts. Historic districting may properly be viewed as a special case of zoning because of its area-wide focus. But a "zoning" measure that singles out an individual landmark property for severe bulk, use, and area restrictions not applicable to its neighbors generally would risk invalidation on spot zoning and equal protection grounds. *See also* note 36 *supra*. Further, while zoning establishes area-wide restrictions that may be varied only in cases of individual hardship, most preservation ordinances treat *all* formally designated landmarks as potential candidates for variances. Formal designation does not and is not intended to impose permanent landmark status on these properties. Rather, it continues under most ordinances only so long as the landmark owner consents or, under others, until the owner establishes that designation entails undue economic burdens. *See* p. 581 *supra*. It is for this reason that courts typically reject due process attacks on designation alone, but caution that designation and its attendant restrictions must be lifted upon a proper showing of economic deprivation. *See, e.g.*, Trustees of Sailor's Snug Harbor v. Platt, 53 Misc. 2d 933, 280 N.Y.S.2d 75 (Sup. Ct. 1967), *rev'd on other grounds*, 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1968); Manhattan Club v. Landmark Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966); *cf.* State *ex rel.* Marbro Corp. v. Ramsey, 28 Ill. App. 2d 252, 171 N.E.2d 246 (1960); *In re* Opinion of the Justices, 33 Mass. 773, 128 N.E. 2d 557 (1955).

If individual landmarks could be regulated through the zoning power, the objectives of the Chicago Plan could be achieved largely by downzoning all landmark sites to the bulk of their present improvements. Measures akin to this technique were upheld in Rebman v. City of Springfield, 111 Ill. App. 2d 430, 250 N.E.2d 282 (1969) (downzoning of commercial area around President Lincoln's home to low density residential uses upheld), and underlie the "limited height district" provision of the New York Zoning Resolution. See New York, N.Y., Zoning Resolution art. 1, ch. 1, § 11–121; art. 1, ch. 2, § 12–10 (1971) (strict height limits may be imposed throughout designated historic districts). Both examples, however, entail regulation of entire areas of a city, not of individual landmarks.

power under the state and federal constitutions to condemn property because the acquisition of preservation restrictions is linked to a scheme of selling development rights on the private market. They will attack the use of preservation restrictions on various grounds: the most troublesome is that such restrictions are not recognized property interests and that their acquisition is not authorized by existing preservation enabling acts and ordinances. And they are likely to assert that nonuniform floor area allocations violate state zoning enabling legislation and deny equal protection and due process to property owners who do not purchase development rights.

A. *The Public Use Requirement*

If the Chicago Plan envisaged only the condemnation of an interest in landmark properties, no serious constitutional objection based on the public use requirement could be asserted against the Plan's employment of the condemnation power. The courts have repeatedly held that landmark preservation is a public use, in aid of which that power may be exercised.[94] Moreover, the objection that acquisition of less-than-fee interests fails to promote a public use because such interests are not susceptible to physical use or occupation by the public has also been discredited.[95] It is now recognized that visual enjoyment alone constitutes a sufficient use by the public to warrant condemnation.

But the Chicago Plan also authorizes municipalities to resell in the private market the development rights associated with the preservation restriction that it condemns in private properties. Because condemnation of the preservation restriction and resale of the associated development rights are connected steps in an integral scheme, opponents of the Chicago Plan may assert that it violates the public use requirement on two further grounds. First, it may be argued that, despite its claimed public objectives, the Plan in fact serves the interests of a distinct private group, namely development rights purchasers. Second, it may be argued that governmental action taken to recoup the costs of condemnation of the preservation restriction violates the public use requirement.

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[94] *See, e.g.*, Roe v. Kansas *ex rel.* Smith, 278 U.S. 191 (1929); United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896); Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939); United States v. Certain Parcels of Land, 99 F. Supp. 714 (E.D. Pa. 1951), *aff'd*, 215 F.2d 140 (3d Cir. 1954).

[95] *See, e.g.*, Kansas City v. Liebi, 298 Mo. 569, 252 S.W. 404 (1923); *In re* New York, 57 App. Div. 166, 173, 68 N.Y.S. 196, 200–01, *aff'd per curiam*, 167 N.Y. 624, 60 N.E. 1108 (1901); Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

1. *Private Benefit.* — Without the active participation of private developers, the transfer proposal cannot succeed. To secure their support, it accords them preferential treatment by relaxing zoning restrictions to permit them to build more profitably than nonparticipants in the program. Hence, there is the possibility of an attack on grounds that the proposal serves private rather than public interests and that the use of eminent domain to this end is invalid. Similar charges are seen in cases dealing with governmental efforts to enlist private enterprise in programs designed to renew urban areas,[96] attract industry to depressed locations,[97] revitalize port and terminal facilities,[98] and secure the construction of parking facilities [99] and government buildings.[100]

This charge is a difficult one for the courts to handle. The dangers of improper private gain are often quite real. And, regrettably, favoritism or venality on the part of the public officials who administer these programs is not uncommon. But this century has witnessed a vast expansion of governmental responsibilities as a result of population growth and the population movement to the cities. The courts have responded by broadening earlier notions of the ambit of the public use concept and by according legislatures wide discretion in selecting means for meeting these responsibilities.[101] Moreover, the charge that a program, legislatively declared to be a public use, actually serves private interests requires courts to go behind the statute to peer into legislative motive and into the program's history and implementation. Few courts welcome these tasks.

Judicial discomfort in the face of these difficulties pervades the decisions that examine allegations of undue private gain. Four conclusions emerge from an examination of such cases. First, private gain, whether accruing to identified individuals [102]

[96] *See, e.g.*, Belovsky v. Redevelopment Auth., 357 Pa. 329, 340, 54 A.2d 277, 282 (1947).

[97] *See, e.g.*, City of Frostburg v. Jenkins, 215 Md. 9, 16–17, 136 A.2d 852, 856 (1957); Basesore v. Hampden Indus. Dev. Auth., 433 Pa. 40, 50, 248 A.2d 212, 217 (1968).

[98] *See, e.g.*, People *ex rel.* Adamowski v. Chicago R.R. Terminal Auth., 14 Ill. 2d 230, 236, 151 N.E.2d 311, 315 (1958).

[99] *See, e.g.*, Poole v. City of Kankakee, 406 Ill. 521, 530, 94 N.E.2d 416, 421 (1950); Court St. Parking Co. v. Boston, 336 Mass. 224, 230, 143 N.E.2d 683, 687 (1957).

[100] *See, e.g.*, People *ex rel.* Adamowski v. Public Bldg. Comm'n, 11 Ill. 2d 125, 144, 142 N.E.2d 67, 77–78 (1957).

[101] *See, e.g.*, People *ex rel.* Adamowski v. Public Bldg. Comm'n, 11 Ill. 2d 125, 142 N.E.2d 67 (1957); Lerch v. Maryland Port Auth., 240 Md. 438, 214 A.2d 761 (1965); Court St. Parking Co. v. Boston, 336 Mass. 224, 143 N.E.2d 683 (1957).

[102] *See, e.g.*, Hanston v. Danville & W. Ry., 208 U.S. 598 (1908); Town of Steilacoom v. Thompson, 69 Wash. 2d 705, 419 P.2d 989 (1966).

or to the private sector generally,[103] does not itself invalidate a program. Second, private gain must be justified by the benefits accruing to the public under the program.[104] Judicial tests of justification are crude and, in large measure, conclusory: some courts reason that private gain must be "incidental" or "subordinate" to the public gain;[105] others emphasize that the public gain must justify the risk sustained by the government in the program.[106] Third, each case turns very much on its own facts and the specific legislative framework within which the program operates. Fourth, and perhaps most important, allegations of undue private gain are rejected in the overwhelming majority of cases; they prevail only under circumstances of clearly disproportionate private gain.[107]

These conclusions augur well for the transfer proposal. That developers receive substantial benefits does not of itself taint the proposal. Authoritative recognition of landmark preservation as a public use is persuasive evidence that the public advantages of the proposal offset those benefits.[108] Moreover, the transfer proposal contains safeguards to insure that the benefits to private developers do not become the tail that wags the dog. Condemned development rights are credited to the municipal bank in an amount strictly calculated to reimburse the city for its condemnation costs. Besides, since developers will be expected to bid for the development rights on the open market, the value of these rights will be returned to the city in the form of cash payments from these developers.

2. Recoupment. — The second aspect of the public use limitation proscribes condemnation solely designed to recoup the cost of public programs or to add to the public fisc generally. It is on this basis, for example, that courts have frowned upon excess condemnation,[109] the acquisition of more land than is needed for

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[103] *See* cases cited notes 96–100 *supra*.

[104] *See* Note, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717, 724–25 (1964); Note, *The 'Public Purpose' of Municipal Financing for Industrial Development*, 70 YALE L.J. 789, 796 (1961).

[105] *See, e.g.*, Papadinis v. City of Somerville, 331 Mass. 627, 632, 121 N.E.2d 714, 717 (1954); Denihan Enterprises, Inc. v. O'Dwyer, 302 N.Y. 451, 458, 99 N.E.2d 235, 238 (1951).

[106] *See* Price v. Philadelphia Parking Auth., 422 Pa. 317, 336, 221 A.2d 138, 149 (1966).

[107] *See, e.g.*, Shizas v. Detroit, 333 Mich. 44, 52 N.W.2d 589 (1952); Denihan Enterprises, Inc. v. O'Dwyer, 302 N.Y. 451, 99 N.E.2d 235 (1951); Price v. Philadelphia Parking Auth., 422 Pa. 317, 221 A.2d 138 (1966); Note, *State Constitutional Limitations on Eminent Domain*, *supra* note 104, at 724–25.

[108] *See* cases cited note 94 *supra*.

[109] *See* Cincinnati v. Vester, 33 F.2d 242 (6th Cir. 1929), *aff'd*, 281 U.S. 439 (1930); *cf.* Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371,

a public project with the intent to resell the remainder at a profit after completion of the project. Needless to say, the recoupment objection has particular relevance to the transfer proposal: only by selling development rights acquired from nonparticipating landmark owners will a city be able to compensate them for their losses.

The courts have been no more comfortable with the recoupment objection than with the claim of undue private benefit. Again, the competing considerations are not easily reconciled. The key objection to recoupment concerns the propriety of utilizing eminent domain, one of the harshest of governmental powers, to fund public programs, rather than resorting to general tax revenues for this purpose. Municipal poverty, it is argued, does not justify such drastic interference with private ownership.[110] For some, the objection is ideological:[111] government has no place in the private real estate market and thus should not be able to sell or lease portions of condemned property to private parties. For others, it rests on the practical consideration that government enjoys unfair advantages over the private real estate industry in any competition between the two.[112] Still others express misgivings about the wisdom of government becoming involved in high-risk ventures.[113] The final objection is the familiar one that opportunities for favoritism and corruption are heightened by public programs that return large sums of money to municipalities.[114] On the other hand, adherents of recoupment counter that expanding governmental responsibilities in this century have created demands for public funding that simply cannot be met out of

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102 N.E. 619 (1913). *See generally* R. CUSHMAN, EXCESS CONDEMNATION (1917) [hereinafter cited as CUSHMAN]; Hodgman, *Air Rights and Public Finance: Public Use in a New Guise*, 42 S. CAL. L. REV. 625 (1969).

[110] *See, e.g.*, CUSHMAN 14–16.

[111] *See* Housing Auth. v. Johnson, 209 Ga. 560, 563, 74 S.E.2d 891, 894 (1953) (to permit eminent domain for urban renewal would "cut the very foundation from under the sacred right to own property").

[112] *See, e.g.*, Wilmington Parking Auth. v. Ranken, 34 Del. Ch. 439, 485, 105 A.2d 614, 640 (Sup. Ct. 1954) (dissenting opinion); Adams v. Housing Auth., 60 So. 2d 663, 668–69 (Fla. 1952); Courtesy Sandwich Shop, Inc. v. Port Auth., 12 N.Y. 2d 379, 398, 190 N.E.2d 402, 411, 240 N.Y.S.2d 1, 13–14 (1963) (Van Voorhis, J., dissenting).

[113] *See, e.g.*, Adams v. Housing Auth., 60 So. 2d 663, 670 (Fla. 1952) (characterizing urban renewal as a "gigantic real estate promotion"). After detailing the enormous losses of public monies suffered by European countries that utilized excess condemnation schemes in the 19th century, Cushman states that "[t]he first conclusion is that the risk of loss is too serious to warrant [the] adoption [of excess condemnation] as a method of municipal finance." CUSHMAN 212.

[114] *See, e.g.*, Pennsylvania Mut. Life Ins. Co. v. Philadelphia, 242 Pa. 47, 57–58, 88 A. 904, 908 (1913).

general tax revenues.[115] Without recoupment of at least some of these funds, they note, many programs of vital importance to public welfare would be gravely endangered.[116]

Caught between these opposing contentions, the courts have found uneasy refuge in the formula that recoupment objections will be overridden if the recoupment is but an "incidental" element of a program that furthers an independent public use.[117] This formula is first cousin to the judicial formula used to evaluate claims of undue private gain, both formulas approving the challenged feature if it rides piggyback on a recognized public use.[118] While both formulas are imprecise, they allow the judiciary to control the more egregious of legislative excesses. And both formulas result in the approval of the great majority of the programs to which they are applied.

Three groups of cases serve to illustrate judicial reluctance to invalidate the use of eminent domain because of a recoupment objection. The first concerns the propriety of selling a byproduct of property condemned for a public project,[119] best illustrated in litigation dealing with the sale of electricity from navigation improvement projects undertaken by federal and state agencies. Recoupment challenges to such sales have been decisively rejected.[120] In rejecting such challenges, the courts have pointed to three grounds for validating such sales: they enable public agencies to recapture the costs of public improvements;[121] they

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[115] *See, e.g.*, Wilmington Parking Auth. v. Ranken, 34 Del. Ch. 439, 461, 105 A.2d 614, 627 (Sup. Ct. 1954); *cf.* Haar & Hering, *supra* note 75; Hodgman, *supra* note 109.

[116] *See* cases cited note 101 *supra*.

[117] *See, e.g.*, Kaukauna Water Power Co. v. Green Bay & Miss. Canal, 142 U.S. 254, 273 (1891); Wilmington Parking Auth. v. Ranken, 34 Del. Ch. 439, 450, 105 A.2d 614, 620–21 (Sup. Ct. 1954); Courtesy Sandwich Shop, Inc. v. Port Auth., 12 N.Y.2d 379, 390, 190 N.E.2d 402, 406, 240 N.Y.S.2d 1, 7 (1963).

[118] An examination of the opinions reveals that a court's willingness to label the recoupment feature "incidental" to the underlying purpose frequently turns upon its willingness to concede that the latter is indeed a public purpose. *Compare In re* Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955), *and* Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959), *with* Lerch v. Maryland Port Auth., 240 Md. 438, 214 A.2d 761 (1965), *and* Atwood v. Willacy County Navigation Dist., 271 S.W.2d 137 (Tex. 1954), *appeal dismissed*, 350 U.S. 804 (1955). Especially illustrative of the mixing of the two issues is the dissenting opinion of Judge Van Voorhis in Courtesy Sandwich Shop, Inc. v. Port Auth., 12 N.Y.2d 379, 393, 190 N.E.2d 402, 407, 240 N.Y.S.2d 1, 9 (1963).

[119] *See, e.g.*, Ashwander v. TVA, 297 U.S. 288 (1936); Arizona v. California, 283 U.S. 423 (1931); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254 (1891).

[120] *See* cases cited note 119.

[121] *See, e.g.*, United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53,

advance community welfare by making possible the fulfillment of vital public needs that would otherwise go unmet for lack of funds;[122] and they encourage the productive use of valuable resources.[123]

In the byproduct cases no portion of the condemned land is devoted to private uses. The recoupment question is more difficult in the second group of cases, which examine projects in which space in buildings erected on condemned land is leased to private firms to defray project costs. Such arrangements are common in highway, port, railroad terminal, governmental center, and parking projects.[124] Again, however, the courts generally find that recoupment of project costs through leasing arrangements with private firms is "incidental" to an overall public use.[125]

Certain factors stand out in the leasing cases which are relevant to the Chicago Plan. If the project cannot be carried on without recoupment or if it responds to a public need that private enterprise cannot or will not meet, the courts are likely to be sympathetic.[126] That the project involves government in competition with private enterprise is irrelevant provided that an independent public use is served by the endeavor.[127] Nor are the courts im-

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72–73 (1913); Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254, 273 (1891).

[122] *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 336–37 (1936); Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254, 273 (1891).

[123] *Cf.* Ashwander v. TVA, 297 U.S. 288 (1936); Arizona v. California, 283 U.S. 423 (1931).

[124] *See, e.g.*, People *ex rel.* Adamowski v. Public Bldg. Comm'n, 11 Ill. 2d 125, 142 N.E.2d 67 (1957) (public buildings); Lerch v. Maryland Port Auth., 240 Md. 438, 214 A.2d 761 (1965) (port facilities); Court St. Parking Co. v. Boston, 336 Mass. 224, 143 N.E.2d 683 (1957) (parking facilities); Bush Terminal Co. v. New York, 282 N.Y. 306, 26 N.E.2d 269 (1940) (railroad terminal facilities).

[125] *See, e.g.*, Wilmington Parking Auth. v. Ranken, 34 Del. Ch. 439, 105 A.2d 614 (Sup. Ct. 1954) (lease of space in municipal parking facility); People *ex rel.* Adamowski v. Chicago R.R. Terminal Auth., 14 Ill. 2d 230, 151 N.E.2d 311 (1958) (lease of space in railroad terminal); *In re* Opinion of the Justices, 330 Mass. 713, 113 N.E.2d 452 (1953) (lease of space for restaurants and filling stations along highways). *But see* Shizas v. Detroit, 333 Mich. 44, 52 N.W.2d 589 (1952) (lease of space in parking facility invalid); Price v. Philadelphia Parking Auth., 422 Pa. 317, 221 A.2d 138 (1966) (same).

[126] *See* cases cited note 125 *supra*; *cf. In re* Slum Clearance, 331 Mich. 714, 50 N.W.2d 340 (1951).

[127] In his dissenting opinion in Courtesy Sandwich Shop, Inc. v. Port Auth., 12 N.Y.2d 379, 393, 190 N.E.2d 402, 407, 240 N.Y.S.2d 1, 9 (1963), Judge Van Voorhis warned that centralization of international trade firms in one governmentally sponsored center threatened to wreak havoc with New York City's private real estate market. However, private enterprise has no constitutionally protected immunity from competition by governmental agencies, *see, e.g.*, Green v. Frazier, 253 U.S. 233, 243 (1920); Poole v. City of Kankakee, 406 Ill. 521, 529, 94 N.E.2d 416, 420 (1950).

pressed with claims that a program is not financially feasible; they defer to legislative judgment on questions of program content and merit unless the program is patently unreasonable.[128] Similarly, they reject the oft-repeated charge that use of the eminent domain power in part for recoupment goals opens the way to "outside land speculation" and other abuses.[129] Should these abuses eventuate, they note, an appropriate remedy will lie in the courts. Otherwise, government, too, is entitled to exercise sound business judgment in the formulation and conduct of public programs.[130]

In the final group of cases, which deal with the recoupment objection in the context of urban renewal, the government's involvement with the condemned property is the most attenuated. In urban renewal programs, after the city has acquired and cleared the land, it resells it to private developers. Once again, however, the courts have overridden the recoupment objection. Public use of the land, these courts say, is achieved once the city has acquired and cleared it.[131] Its resale to private developers

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[128] *See, e.g.*, Wilmington Parking Auth. v. Ranken, 34 Del. Ch. 439, 448–49, 105 A.2d 614, 620 (Sup. Ct. 1954); Lerch v. Maryland Port Auth., 240 Md. 438, 449, 214 A.2d 761, 767 (1965).

[129] *See, e.g.*, People *ex rel.* Adamowski v. Public Bldg. Comm'n, 11 Ill. 2d 125, 144, 142 N.E.2d 67 (1957); People *ex rel.* Gutknecht v. Chicago, 3 Ill. 2d 539, 545, 121 N.E.2d 791, 795 (1954); Courtesy Sandwich Shop, Inc. v. Port Auth., 12 N.Y.2d 379, 391, 190 N.E.2d 402, 406, 240 N.Y.S.2d 1, 7 (1963).

[130] In United States *ex rel.* TVA v. Welch, 327 U.S. 546 (1946), the Supreme Court upheld the condemnation of a strip of land not directly included within a TVA project area against the claim that the TVA's sole motive in acquiring the land was to reduce project costs. The Court reasoned:

> The cost of public projects is a relevant element . . . . [T]he Government, just as anyone else, is not required to proceed oblivious to elements of costs. . . . And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interests of all the public.

Id. at 554 (citations omitted). Numerous cases, both before and since, have expressly acknowledged that government may exercise its power of eminent domain in accordance with sound business judgment provided, of course, that a valid public use underlies the governmental program. *See, e.g.*, Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925); Simmonds v. United States, 199 F.2d 305, 306 (9th Cir. 1952); Boston v. Talbot, 206 Mass. 82, 90, 91 N.E. 1014, 1016 (1910); *cf.* Brown v. United States, 263 U.S. 78 (1923).

[131] *See, e.g.*, People *ex rel.* Tuohy v. Chicago, 394 Ill. 477, 485, 68 N.E.2d 761, 766 (1946); Papadinis v. City of Somerville, 331 Mass. 627, 632, 121 N.E.2d 714, 717 (1954); Foeller v. Housing Auth., 198 Ore. 205, 241, 256 P.2d 752, 769 (1953). It should be noted, however, that a number of jurisdictions find that the public use requirement is satisfied whenever a government program serves a public purpose. *See, e.g.*, Gohld Realty Co. v. Hartford, 141 Conn. 135, 104 A.2d 365 (1954). These jurisdictions, therefore, would not even need to focus on the city's temporary occupancy of condemned land in considering the validity of an urban renewal program.

thereafter is but an "incidental" aspect of the urban renewal process, akin to, if not identical with, the general municipal practice of disposing of city property no longer needed for public purposes. Retention of the land, they note, would be poor municipal stewardship because resale enables the community to recapture much of its initial outlay and to return the land to productive use and to the tax rolls.[132]

Taken together, the three groups of cases indicate that the success of a recoupment challenge to the condemnation of preservation restrictions under the Chicago Plan is extremely unlikely, even though condemnation is connected with a scheme of selling development rights to fund the costs of condemnation. Like by-product sales, the transfer of development rights enables public agencies to recapture the costs of public improvements (the costs of preserving landmarks); to fulfill community needs that would go otherwise unmet (landmark preservation being impractical without the sale of development rights); and to ensure the productive use of valuable resources (the unused but authorized development rights of public and private landmarks otherwise being lost upon permanent designation).

The leasing cases reinforce this conclusion. They emphasize the legal irrelevancy of the fact that the sale of development rights may involve the city in competition with private enterprise if developers elect to purchase these rights rather than to acquire privately owned parcels in completing land assemblages. The leasing cases confirm that competition between government and the private sector is not legally objectionable so long as government enters the private marketplace in furtherance of a program that serves an independent public use. Questions concerning the financial feasibility of the Chicago Plan will also not be litigable under these precedents. Finally, charges that the Chicago Plan might involve a municipality in land speculation and other abuses will receive scant attention since the leasing cases establish that this question will be considered only if and at the time that such abuses eventuate.

The urban renewal cases offer further proof that, in and of itself, the recoupment feature of the Chicago Plan does not constitute a basis for the Plan's invalidation. Under the Plan the city retains a continuing interest in the landmark property in the form of a preservation restriction. Yet, in the urban renewal context, many courts have rejected the recoupment objection under a rationale that does not obligate the city to keep any interest what-

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[132] *See, e.g., In re* Slum Clearance, 331 Mich. 714, 722, 50 N.W.2d 340, 344 (1951).

soever in the urban renewal tracts that it resells to private developers.[133]

B. The Preservation Restriction

The purchase or condemnation of preservation restrictions raises a host of legal problems that lack clear resolution in most states. Their range is suggested in *Pontiac Improvement Co. v. Board of Commissioners*,[134] a 1933 Ohio case that puzzled over a statute authorizing local governments to condemn the "fee or any lesser interest" in real estate. In *Pontiac*, the Cleveland Park Commission attempted to condemn the right to impose controls respecting drainage, construction, planting, and the like over the plaintiff's land, which adjoined a city park. The court invalidated the taking in a rather confused opinion that appears to reflect at least three concerns. One is the injustice to the plaintiff of taking a less-than-fee interest in his land, thereby leaving him with all of the responsibilities but few of the privileges of ownership.[135] The second is the novelty of the interest in question and, by implication, the vagueness of the statutory mandate on which the taking was premised. The court might have approved the taking had the interest fit within one of the traditional less-than-fee interests recognized at common law or had the authority for its acquisition been clearly spelled out in the statute. Third, its doubts on both counts led it to conclude that, whatever the nature of the interest, the statute failed to define the rights and obligations of the parties with sufficient clarity to be enforceable.[136]

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[133] To be sure, all local governments sell urban renewal tracts subject to restrictive covenants that ensure that the urban redevelopment plan for the area will be accomplished. *Cf. Project Planning* ch. 2, at 1 (RHA No. 7207.1, 1969), in U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, URBAN RENEWAL HANDBOOK (1971). Some jurisdictions, in finding that urban renewal serves a public use, point to this factor. *See, e.g.*, Foeller v. Housing Auth., 198 Ore. 205, 256 P.2d 752 (1953). A significant number of other jurisdictions, however, find that a public use is achieved merely by the city's ownership of the urban renewal property during the period of clearance. *See, e.g.*, People *ex rel.* Tuohy v. Chicago, 394 Ill. 477, 485, 68 N.E.2d 761, 766 (1946).

[134] 104 Ohio St. 447, 135 N.E. 635 (1922). *See also* Albright v. Sussex County Lake & Park Comm'n, 71 N.J.L. 303, 57 A. 398 (Ct. Err. & App. 1904) (taking under statute authorizing acquisition of "rights of fishing common to all in freshwater lakes" held invalid).

[135] Pontiac Improvement Co. v. Board of Comm'rs, 104 Ohio St. 447, 456–57, 135 N.E. 635, 637–38 (1922).

[136] *Id.* at 463–64, 135 N.E. at 640. A further ground for the court's invalidation was its conclusion that the condemnation did not promote a public use. *Id.* at 459, 135 N.E. at 638. This conclusion seems clearly inapplicable to preservation restrictions, *see* p. 603 *supra*.

Pontiac dealt not with a preservation restriction but with what would now be termed a "conservation" or "scenic easement." [137] The relation between the two types of interests, however, is sufficiently close that the concerns expressed in *Pontiac* provide a useful framework for an examination of the legal problems affecting the preservation restriction.

1. Acquisition in Fee. — *Pontiac*'s concern that a less-than-fee taking by itself is unfair to the landowner seems misplaced. It runs counter to the well-settled view that public authorities neither may nor should take a greater interest in or amount of land than the public use necessitates.[138] This view finds strong support in the policies that favor limiting outlays of public funds and minimizing governmental interference with private ownership.[139] *Pontiac*'s concern seems especially inapplicable to urban landmarks. Most of these buildings return amounts well in excess of their taxes and operating expenses. Thus, even after condemnation of a preservation restriction (with its concomitant tax reduction), the landmark should be able to operate at a profit.

However, in some cases landmarks will be unable to return a profit after condemnation of a preservation restriction. In these cases, leaving a landmark owner with what one commentator calls the "rump rights" [140] of ownership may raise questions of equity to the landmark owner. Structural unsoundness, advanced deterioration, or changes in the surrounding neighborhood may mean that acquisition of a preservation restriction will, in effect, saddle the owner with a white elephant. In such instances, the landmark commission should recommend that the city acquire the property in fee.

2. Acquisition of a Less-Than-Fee Interest. — The powers of purchase and eminent domain granted in many preservation acts

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[137] The literature concerning this interest has been extensive in recent years. *See, e.g.*, BRENNEMAN; S. SIEGEL, THE LAW OF OPEN SPACE (1960); A. STRONG, OPEN SPACE FOR URBAN AMERICA (1965); W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (Urban Land Institute, Technical Bull. No. 36, 1959); N. WILLIAMS, LAND ACQUISITION FOR OUTDOOR RECREATION — ANALYSIS OF SELECTED LEGAL PROBLEMS (Outdoor Recreation Resources Review Comm'n Study Report No. 16, 1962) [hereinafter cited as WILLIAMS]; Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622 (1962); Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960).

[138] *See, e.g.*, Miller v. Commissioners of Lincoln Park, 278 Ill. 400, 406, 116 N.E. 178, 181 (1917); 3 NICHOLS § 9.2 (3d rev. ed. 1965); WILLIAMS 46.

[139] 3 NICHOLS § 9.2 (3d rev. ed. 1965).

[140] WILLIAMS 48. In Professor Williams' view, a "policy of taking conservation easements under the characteristic general statute is undesirable, potentially unfair, and legally dangerous." *Id.*

are as imprecisely defined as those in the *Pontiac* statute.[141] Do these acts authorize the acquisition of a preservation restriction in landmark properties? As suggested above, that question can be answered affirmatively only if a court is prepared to conclude either that preservation restrictions fall within one of the less-than-fee interests recognized at common law or that the statutory language itself creates a novel property interest.

(*a*) *Traditional Interests.* — The first alternative assumes an extremely sympathetic court. Preservation restrictions do not easily assume the garb of easements, real covenants, or equitable servitudes, the relevant common law categories.[142] They are most often compared with negative easements,[143] which obligate a landowner to refrain from performing acts on his property that would otherwise be permitted as an incident of fee ownership. Landmark owners, for example, may not build in the airspace over their buildings nor may they demolish or significantly alter them. But negative easements have normally been restricted to the four types approved in the early English cases: easements for light, for air, for support of a building laterally or subjacently, and for the flow of an artificial stream.[144] Although resembling easements for light and air in its restriction against building above the landmark, a preservation restriction goes beyond the former in its controls over alteration and demolition.[145] In addition, some courts may not enforce negative easements that are not "appurtenant" to the benefited parcel, the dominant estate.[146] The appurtenancy requirement is satisfied only if the easement benefits the owner of that estate in the physical use and enjoyment of the

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[141] *See, e.g.*, FLA. STAT. ANN. § 266.06 (1962) ("real property or rights or easements therein"); IND. ANN. STAT. § 48-9004(1) (Supp. 1971) ("any real estate").

[142] The discussion of this extremely complex topic is necessarily abbreviated in this paper. More detailed analyses may be found in BRENNEMAN 20-64; WILLIAMS 37-55; Commonwealth of Massachusetts: Metropolitan Area Planning Council, Massachusetts Open Space Law: Government's Influence Over Land Use Decisions, 4 Open Space and Recreation Program for Metropolitan Boston, April 1969, at 18-23, 140-56.

[143] *See, e.g.*, WHYTE, *supra* note 137, at 44-46; Comment, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611, 621 (1970). The easement category appears to be the one most readily invoked by courts when confronted with a novel less-than-fee interest. *See, e.g.*, Buck v. City of Winona, 271 Minn. 145, 151, 135 N.W.2d 190, 194 (1965); Piper v. Ekern, 180 Wis. 586, 596, 194 N.W. 159, 163 (1923).

[144] *See* 2 AMERICAN LAW OF PROPERTY §§ 8.5, 9.12, 9.24 (A.J. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY]; RESTATEMENT OF PROPERTY §§ 450(e), 452 (1944). *But see* BRENNEMAN 23-24; WILLIAMS 49-50 & nn. 72-76.

[145] *See* pp. 618-19 *infra*.

[146] *See* 2 AMERICAN LAW OF PROPERTY § 8.2. *But see* WILLIAMS 51.

land and was created expressly for the purpose of conferring that benefit.[147] If these requirements are not met, the easement will be deemed to be held "in gross." Municipal ownership of parcels that will qualify as "appurtenant" is likely to be infrequent unless the courts will so categorize city-owned properties within the general vicinity of a landmark or the publicly owned streets and alleys that border on it.[148] Even assuming that a jurisdiction approves negative easements in gross, moreover, the assignability of these interests has been questioned.[149]

It is even less likely that preservation restrictions will be enforceable as real covenants. Courts generally insist that these interests, too, must be appurtenant to a benefited dominant estate.[150] An additional requirement, privity of estate between the original promisor and promisee, dictates that the benefited and burdened parcels must initially have been in common ownership and that the burden must have been imposed on the latter parcel at the time the ownership was divided. Otherwise, the burden of the real covenant will not bind subsequent takers of the parcel.[151] Because few, if any, cases under the transfer proposal are likely to duplicate these rather specialized facts, it is doubtful whether a municipality will be able to enforce a preservation restriction against a successor of the owner who executed it. In addition, some jurisdictions balk at the enforcement of affirmative duties in real covenants,[152] a qualification that could prove troublesome if a municipality wished to include maintenance obligations in the preservation restriction.[153]

Characterizing a preservation restriction as an equitable servitude offers a more promising route than either of the pre-

[147] *See* 2 AMERICAN LAW OF PROPERTY §§ 8.6, 9.8.

[148] *See* WILLIAMS 50.

[149] For accounts of the confused state of the law on this problem, *see, e.g.*, BRENNEMAN 30; C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND 67–79 (2d ed. 1947); Comment, *Assignability of Easements in Gross*, 32 YALE L.J. 813 (1923).

[150] *See, e.g.*, Young v. Cramer, 38 Cal. App. 2d 64, 100 P.2d 523 (1940); London County Council v. Allen, [1914] 3 K.B. 642. *But see* Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938). The British National Trust, which typically acquires real covenants in historic properties, has secured legislation that eliminates the common law requirement that it own nearby land as a condition to its right to enforce the benefit of the covenants. *See* National Trust Act, 1 Edw. 8 & 1 Geo. 6, c. lvii, § 8 (1937).

[151] *See, e.g.*, Hall v. Risley, 188 Ore. 69, 213 P.2d 818 (1950); BRENNEMAN 54. *But see* Nicholson v. 300 Broadway Realty Corp., 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959); CLARK, *supra* note 149, at 116–21.

[152] *See, e.g.*, Miller v. Clary, 210 N.Y. 127, 103 N.E. 1114 (1913); BRENNEMAN 57; Lloyd, *Enforcement of Affirmative Agreements Respecting the Use of Land*, 14 VA. L. REV. 419 (1928).

[153] *See* pp. 618–19 *infra*.

vious alternatives. Equitable servitudes are not restricted to four specific types as are negative easements, but may incorporate any obligation that does not violate public policy.[154] No privity of estate other than that provided by the agreement need exist between the landmark owner who executes it and the city in order for the agreement to be effective against successors of the former.[155] Servitudes are enforceable by injunction[156] and may include affirmative as well as negative obligations.[157] They must reflect the intent to bind subsequent takers;[158] and the latter must have notice of the agreement,[159] requirements easily satisfied by careful draftmanship and use of the deeds registry, respectively. But in many jurisdictions servitudes held in gross are not enforceable against subsequent takers of the burdened parcel[160] and may not be assignable as well.[161] So again, municipalities in these jurisdictions must be prepared to argue that municipally owned property, whether adjacent to or nearby the landmark property, will be directly benefited by enforcement of the servitude.

The technicalities attending each of the common law interests confuse the status of the preservation restriction under the common law. Though the courts in some jurisdictions may be willing to enforce the preservation restriction under the rubric of one of the foregoing interests, a preferable solution would seem to lie in clarifying legislation.

(*b*) *Statutory Authorization.* — Whether statutory authorization to acquire an imprecisely defined, less-than-fee interest relieves a municipality of the burdensome restrictions of the common law rules is problematic. *Pontiac* suggests not. But an opposite view, which may well have supplanted *Pontiac* in most jurisdictions,[162] was tersely stated by then Chief Judge Holmes in *Newton v. Perry*:

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[154] BRENNEMAN 50–51, 55.

[155] *See, e.g.*, Trustees of Columbia College v. Lynch, 70 N.Y. 440 (1877); 2 AMERICAN LAW OF PROPERTY § 9.26; BRENNEMAN 56.

[156] BRENNEMAN 55. Real covenants, on the other hand, may only be enforced in an action at law for damages. *Id.*

[157] *See* BRENNEMAN 57; Lloyd, *supra* note 152.

[158] *See* Mass. Open Space Law, *supra* note 142, at 148–49.

[159] *Id.* at 148.

[160] *See* 2 AMERICAN LAW OF PROPERTY § 9.32; BRENNEMAN 58. *But see* Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913); Pratte v. Balatsos, 99 N.H. 430, 113 A.2d 492 (1955).

[161] *See* BRENNEMAN 59.

[162] *See, e.g.*, State *ex rel.* Ervin v. Jacksonville Expressway Auth., 139 So. 2d 135, 138 (Fla. 1962); Cornwell v. Central Ky. Natural Gas Co., 249 S.W.2d 531, 533 (Ky. Ct. App. 1952).

> [I]t is plain . . . that the purpose of the taking must fix the extent of the right. The right, whether it be called easement or by any other name, is statutory, and must be construed to be large enough to accomplish all that it has taken to do.[163]

The question is further confused by decisions that subsume less-than-fee interests under one of the traditional categories even though they clearly fail to meet the formal requirements of the latter.[164]

State legislatures have grown uneasy with the dubious formalism of the common law and the ambiguity in the case reports. To facilitate highway beautification and open-space programs, many have expressly authorized state and local agencies to acquire "scenic easements," "development rights," and other novel less-than-fee interests.[165] Although the statutes fail to detail precisely what is intended by these labels, *Kamrowski v. State*,[166] which upheld a Wisconsin statute authorizing acquisition of "scenic easements" along the Great River Road, confirms the readiness of the judiciary to construe them most favorably to the public agency. Significantly, *Kamrowski* did not even mention the possible difficulties posed by the differences between the statutory easement and its common law cousin, but focused instead upon the compatibility of the statute with the public use requirement.

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[163] 163 Mass. 319, 321, 39 N.E. 1032, 1032 (1895).

[164] *See, e.g.*, cases cited note 143 *supra*; Burger v. St. Paul, 241 Minn. 285, 64 N.W. 2d 73 (1954). *Burger* is of special interest to this article because it construes a statute that parallels the transfer proposal in enabling municipalities to zone by acquiring the development potential of parcels within "designated residential districts" in order to prevent them from being utilized for other than low-density, residential uses. *See* MINN. STAT. ANN. §§ 462.12–.14 (1963). In *Burger*, the court variously labeled the interest that the statute empowered communities to condemn an "easement," a "negative easement," a "reciprocal negative easement," a "restrictive covenant," and, for good measure, a "negative equitable easement." Burger v. St. Paul, *supra* at 293, 294, 297, 299, 64 N.W.2d at 78, 79, 80, 81. It did not discuss whether the common law formalities applicable to easements and real covenants were superseded by the statute notwithstanding the obvious differences between the interest acquired and the common law interests. Other cases construing the statute include State *ex rel.* Madsen v. Houghton, 182 Minn. 77, 233 N.W. 831 (1930); Summers v. Midland Co., 167 Minn. 453, 209 N.W. 323 (1926); State *ex rel.* Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920). Approving a similar zoning scheme, the Missouri Supreme Court labeled the interest acquired a "negative restriction." Kansas City v. Kindle, 446 S.W.2d 807, 813–14 (Mo. 1969). That court, too, ignored the common law problems associated with its characterization of the interest.

[165] *See, e.g.*, CAL. GOV'T CODE §§ 6950–54 (West 1966); MASS. ANN. LAWS ch. 92, § 79 (1969); WIS. STAT. ANN. § 23.30 (Supp. 1971).

[166] 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

Of greater interest are statutes in three states [167] that accord express recognition to the preservation restrictions as an independent, valid less-than-fee interest. Directly addressing the difficulties outlined in this section, these statutes provide that preservation restrictions shall not be unenforceable because of lack of privity of estate or of ownership of benefited land. They also stress the assignability of preservation restrictions, even if held "in gross." Less elaborate statutes have also been passed [168] that modify the common law by recognizing "easements in gross," which are assignable and, if negative, not restricted to the four types known to the common law. By clarifying an intolerably opaque area of the law, both groups of statutes enable government and the private sector to participate in preservation and conservation programs confident that some hoary doctrine will not frustrate their reasonable expectations.

3. Indefiniteness. — The *Pontiac* court considered that the rights acquired by the park department were so indefinite as to be incapable either of valuation or of enforcement. The valuation objection does not seem well taken. Less-than-fee interests are condemned as a matter of course by government and public utilities. In these cases, a basic "before and after" theory of valuation is used that measures the value of the parcel with and without the encumbrance.[169] And, although "not simple," setting a price tag for preservation restrictions "by no means goes beyond techniques which are widely recognized in the field of real estate valuation." [170]

Nor is the court's skepticism concerning enforcement insuperable if the preservation restriction is properly drafted. In fact,

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[167] *See* CONN. GEN. STAT. REV. P.A. No. 173, § 2 [Jan. 1971] Conn. Legis. Service No. 2 (May 16, 1971); ILL. REV. STAT. ch. 24, § 11-24.2-1A(2) (1971); MASS. GEN. LAWS ANN. ch. 184, § 32 (Supp. 1970).

In addition to curing the ambiguities of the common law in relation to preservation restrictions, the Massachusetts statute also provides for the recordation of these interests on a public tract index and suspends the operation of Massachusetts' marketable title and obsolete-restrictions legislation for any interest entered upon the index. *See* MASS. GEN. LAWS ANN. ch. 184, §§ 3, 33 (Supp. 1970).

[168] *See, e.g.*, MD. ANN. CODE art. 21, § 8 (1957); VA. CODE ANN. § 21.12 (Supp. 1971).

[169] For appraisal techniques used with respect to the acquisition of less-than-fee interests generally, *see, e.g.*, 4 NICHOLS § 12.4 (3d rev. ed. 1971); South v. Texas E. Transmission Co., 332 S.W.2d 442 (Tex. Civ. App. 1960). A useful analysis of the valuation techniques used in the acquisition of scenic easements along highways is found in DEPARTMENT OF TRANSPORTATION OF WISCONSIN, A MARKET STUDY OF PROPERTIES COVERED BY SCENIC EASEMENTS ALONG THE GREAT RIVER ROAD IN VERNON AND PIERCE COUNTIES (Special Report No. 5, 1967). Valuation of preservation restrictions is discussed in Chicago Report 11-15.

[170] Chicago Report 11.

with the increasing refinement of these instruments, indefiniteness no longer appears to be a serious problem. Typical preservation restrictions [171] detail the legal authority on which acquisition is premised, restrictions on use, maintenance obligations, duration, remedies, and miscellaneous matters. Public agencies and preservation societies carefully spell out the statutory basis for acquisition to emphasize that they are empowered to acquire the interest and that enforcement of the latter is consistent with sound public policy. Use restrictions are as varied as the character and setting of particular landmarks. They may include prohibitions against alteration or demolition, signs, subdivision of the landmark tract, addition of buildings to the site and specified uses of the landmark. Administrative provisions detail the procedures for obtaining approval for permitted modifications and for making periodic inspections of the premises to insure that the restrictions are being honored. Maintenance obligations are variously stated. Landmark owners may agree simply to keep their properties in good repair or they may undertake to comply with property maintenance standards that are incorporated by reference into the preservation restriction. In some instances, owners even commit themselves to restore the properties in accordance with detailed specifications and schedules.

Duration of the restriction may be in perpetuity or be limited to a number of years. The instruments underscore the intent of the parties that the benefits and burdens of the restriction shall run to their successors in interest. The remedies clause identifies who may sue for breach of the restriction and what relief may be obtained. Miscellaneous provisions may include anything from rights of first refusal to express disclaimers of rights of public access to the landmark. Surveys, line drawings, and photographs appear increasingly as appendices to preservation restrictions. They permit precise identification of prized interior or exterior features, such as paneling, fireplaces, and cornices.

Although most preservation restrictions relate to residential properties at the present time, they can be drawn just as effectively for downtown office and commercial buildings. Remedies and legislative authority clauses will be similar in the two cases. Use restrictions should prove simpler for downtown buildings

[171] Instruments reviewed in compiling the outline in the text are those actually being used by the following organizations and institutions: Maryland Historic Trust; Historic Annapolis, Inc.; Historic Savannah Foundation; Ipswich (Mass.) Historic Trust; Cambridge (Mass.) Historic Trust; and the United States Dept. of the Interior. Useful guidelines and examples for use in drafting conservation and, derivatively, preservation restrictions may be found in BRENNEMAN apps. II, IV; WHYTE, *supra* note 137, at 44–46, apps. A–H *passim*; WILLIAMS 53–55; Mass. Open Space Law, *supra* note 142, at app. 8.

because tract subdivision and the addition of new buildings are not serious problems. Continuation of office or commercial uses within these buildings, moreover, will not impair their status as landmarks. Controls over alteration will deal mostly with changes in the exterior facades of these buildings, an infrequent occurrence and one that is relatively easy to regulate.

The definition of proper maintenance standards is no different for downtown landmarks than for other centrally located office and commercial buildings. It is a routine responsibility for attorneys who represent the holders of mortgages on the latter structures and the tenants who occupy space in them under long-term leases. The task will be somewhat complicated, however, if the landmark commission's appraisal of a building reveals that restoration of the building or one or more of its characteristic features is in order. In those instances, the financial package that the commission proposes to the landmark owner may include sums for this work. If so, the nature of the restoration and any specific requirements regarding subsequent maintenance must be detailed in the restriction or in a related document, as the sense of the transaction dictates.

The most troublesome drafting problem is posed by the fact that many downtown office and commercial buildings have a limited economic life. The day may come, sooner for some landmarks than for others, when they can no longer meet debt service and operating costs as a result of increases in the latter and declining revenues. At that point, ownership for private profit obviously becomes impossible.

Among the potential solutions to this problem, three seem especially promising.[172] One is to project the costs and income curves of individual landmarks to arrive at a date in the future when those curves are likely to intersect. The owner of the landmark could be given the option at that date either of continuing to operate the building or of turning it over to the city. Acquisition costs then would be nominal because of the landmark site's lack of development potential and the further age of the building. The city could use the building for its own space needs or lease it to a suitable tenant who desires the prestige of a landmark location.[173] The second is to devise appropriate subsidies for

[172] The Department of Housing and Urban Development has awarded a demonstration grant to the National Trust for Historic Preservation to examine the general applicability of the transfer proposal in the United States. A major concern of this broader study, which is being directed by the author of this article, is the problem of duration discussed in the text.

[173] Numerous illustrations of this possibility are recounted in *Dollars and Sense: Preservation Economics*, HIST. PRESERVATION, Apr.–June 1971, at 15. *See also* N.Y. Times, Aug. 12, 1971 at 1, col. 1, for an account of the plans to rent the Villard

landmark owners out of monies generated by the development rights bank. The third is to seek an institutional buyer, such as a college or other nonprofit organization, to acquire the building after its development rights have been transferred. Developers and speculators will probably not wish to retain the building after that point, and the buyer will be in a position to acquire it at a favorable price.

C. Development Rights Transfers

The Chicago Plan contemplates a two-level system of bulk zoning regulation — development rights purchasers are permitted to build larger structures than the other lot owners in a development rights transfer district. The legal issues inherent in this disparate treatment will be addressed in this section, examining, first, challenges based on the uniformity provisions of state zoning acts and the equal protection clauses of the federal and applicable state constitutions, and, second, objections grounded in issues of substantive due process.

1. "Uniformity" as a Statutory and Constitutional Restraint. — The question whether application of a dual standard of bulk regulation to lots within a transfer district denies uniform treatment to property owners within the district may be posed in either statutory or constitutional terms. The relevant statutory text is the requirement of most state zoning enabling acts that "[a]ll [zoning] regulations shall be uniform for each class or kind of buildings throughout each district." [174] The governing constitutional principle is the equal protection requirement of the federal [175] and applicable state constitutions.

As seen above,[176] the Chicago Plan could be implemented exclusively through a preservation enabling act. There are, however, compelling reasons for analyzing the legal issues inherent in the Plan's two-level system of bulk regulation through examining judicial interpretations of the uniformity requirement of state zoning enabling acts. In the first place, it is doubtful whether the preservation enabling legislation of any state,[177] Illinois excepted,

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Houses, designated New York landmarks, to a "conservative commercial firm that will use and maintain them in a style befitting a landmark."

[174] ADVISORY COMMITTEE ON ZONING, DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 2 (rev. ed. 1926).

[175] U.S. CONST. amend. XIV, § 1.

[176] *See* p. 601 *supra*.

[177] While not expressly authorizing municipalities to engage in such programs, the following state preservation enabling acts contain grants of power that may be of sufficient breadth to warrant such a construction. CAL. GOV'T CODE § 37361 (West 1968); N.M. STAT. ANN. § 14-21-4 (1968). A less affirmative but possibly

authorizes the use of transfers as a means of safeguarding landmarks. Thus communities that wish to avoid the problem of securing amendments to that legislation must look to their zoning enabling acts as the basis for their power to authorize development rights transfers. Second, zoning precedents offer the most useful basis for predicting the likely judicial reaction to the transfer technique even if it is implemented under preservation enabling statutes. If transfers pass muster under zoning precedents, they would undoubtedly be valid under a properly drafted preservation statute as well. Finally, commentators are in general agreement that the statutory requirement of uniformity duplicates the constitutional requirement of equal protection.[178] Hence, if the transfers of development rights do not run afoul of the uniformity requirement, it would appear that these transfers would survive the equal protection challenge as well.

At first blush, the uniformity requirement seems to present an obstacle to the legality of the Chicago Plan: regulations for buildings within a development rights transfer district are not uniform in the sense that purchasers of development rights can build to greater bulk than other property owners within the district. This reading of the uniformity requirement, however, ignores the growing recognition of urban planners and municipal governments that in many cases the individual lot is not the appropriate unit of development control, and the corresponding willingness of the courts to interpret the uniformity requirement so as not to foreclose alternative planning methods.[179]

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useful basis for implementing the proposal might be found in the language of many state preservation enabling acts authorizing local preservation commissions to devise an "economically feasible plan" to safeguard threatened landmarks in private ownership. *See, e.g.*, MD. ANN. CODE art. 66B, § 8.09 (Interim Supp. 1970); MICH. COMP. LAWS ANN. § 399.205(4) (Supp. 1971).

[178] The chief draftsman of the Standard State Zoning Enabling Act has written that the purpose of the uniformity requirement is "to make it understood that all property situated alike shall be treated alike." E. BASSETT, ZONING 50 (1940). *See, e.g.*, Haar, *"In Accordance with a Comprehensive Plan,"* 68 HARV. L. REV. 1154, 1172 (1955). Significantly, the uniformity provision has most frequently been invoked in the spot-zoning context — where a small tract is zoned differently from its surrounding area. *See, e.g.*, Bartram v. Zoning Comm'n, 136 Conn. 89, 68 A.2d 308 (1949); Cassel v. Mayor & City Council, 195 Md. 348, 73 A.2d 486 (1950). Spot zoning, however, raises the statutory issue of conformity with a "comprehensive plan" and the constitutional issue of equal protection. *See* Haar, *supra*. It does not put in issue the statutory requirement of uniformity, which, by the terms of the zoning enabling act, relates only to the manner in which regulations are applied within the *same* zoning district.

[179] At least four factors account for the current disrepute, among land use scholars and local governments, of the premise that the individual lot should serve as the unit of development control. First, it hampers sound planning on a community-wide basis and promotes sterile design on individual sites. Second, it

Virtually every major innovation in the land use field over the last fifteen years rejects the notion that individual lots must serve as the unit of development control.[180] Two of these innovations — density zoning and the special development district — are of particular relevance to the question whether development transfers conflict with the uniformity requirement: they provide the twin pillars upon which the development rights transfer element of the Chicago Plan is founded. Rejecting the individual lot as the unit of bulk control, density zoning [181] substitutes entire areas of the community in its place. It prescribes a maximum amount or range of bulk for an area as a whole, and permits developers to concentrate bulk there in accordance with flexible site planning or urban design criteria. Typically, density zones are overlay districts that include one or more traditional bulk zones within their boundaries. Developers may elect to build under the bulk regulations of the density zone or under those of the residual bulk zone.

The special development district [182] complements density zoning by particularizing the development goals that will guide the distribution or redistribution of bulk within a density zone. A special development district is established only after a municipality has evaluated the special functions or needs of the geographic area in question, and selected the goals that will channel development or redevelopment there. In most cases, these goals are

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assumes that development still occurs on a lot-by-lot basis rather than on large landholdings, as in urban renewal areas and on the metropolitan fringe. Third, it fails to take account of the special needs and functions of a community's unique areas and to protect these areas from the destructive impact of private market decisions. Finally, it prevents communities from enhancing their amenity levels generally by means of incentive zoning programs such as those described in this article. *See, e.g.*, E. LOVELACE & W. WEISMANTEL, DENSITY ZONING: ORGANIC ZONING: ORGANIC ZONING FOR PLANNED RESIDENTIAL DEVELOPMENT (Urban Land Institute, Technical Bull. No. 42, 1961); NEW ZONING *passim*; Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959); *Symposium, Planned Unit Development*, 114 U. PA. L. REV. 1 (1965).

[180] Among these developments are expanded use of the variance and special exception, and innovations such as floating zones, cluster zones, planned unit developments, overlay districts, and special development districts. Accounts of the evolution of these techniques may be found in authorities cited note 179 *supra*.

[181] *See* authorities cited note 179 *supra*.

[182] For discussions of special development districts *see, e.g.*, Fonoroff, *Special Districts: A Departure from the Concept of Uniform Controls*, in NEW ZONING 82; Huxtable, *A Solid Dross City?*, N.Y. Times, Mar. 14, 1971, § 2, at 16, col. 5; Huxtable, *supra* note 13. Examples of special development districts include the New York Special Theater District, *see* note 10 *supra*; Fifth Avenue Retail District, *see* note 12 *supra*; and the Special Greenwich Street Development District, *see* note 13 *supra*.

incorporated into a detailed area plan that itself is coordinated with the community's comprehensive plan.

A development rights transfer district is, in effect, a special development district in which bulk is redistributed in accordance with the density zoning technique. It encompasses an area of the community that is unique because of the concentration there of many of the community's landmark buildings. The community's goal in establishing the transfer district, of course, is to safeguard the landmarks within the district from destruction. The detailed plan that the landmark and planning commissions draw up for the district is the product of exhaustive studies by both agencies that inventory the landmark buildings there, identify the boundaries within which transfers may be made, and coordinate bulk concentrations within the district with the community's overall development program. Bulk is allocated within the transfer district on an area-wide rather than lot-by-lot basis because landmark lots must remain underimproved while lots utilizing the transferred development rights must be allowed to exceed the bulk limitations that are prescribed for individual lots in the traditional bulk zones within the district. The regulations of the residual bulk zone are superseded when the local governing body approves development rights transfer authorizations recommended by the landmark commission.

Judicial reaction to challenges to density zoning measures under the uniformity requirement augur well for the Chicago Plan: no density zoning measure that has come before the courts to date has been invalidated on the ground that it denies uniform treatment to affected property owners.[183] Challenges to these

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[183] *See, e.g.*, Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970); Chrinko v. South Brunswick Tp. Planning Bd., 77 N.J. Super., 594, 187 A.2d 221 (L. Div. 1963); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968); *cf.* Millbrae Ass'n for Residential Survival v. City of Millbrae, 262 Cal. App. 2d 222, 242–43, 69 Cal. Rptr. 251, 265–66 (1968) (dictum).

The rock on which some density zoning ordinances have foundered has not been the uniformity objection but the challenge of improper delegation of legislative power. *See, e.g.*, Millbrae Ass'n for Residential Survival v. City of Millbrae, *supra*; Hiscox v. Levine, 31 Misc. 2d 151, 216 N.Y.S.2d 801 (Sup. Ct. 1961). *See generally* Krasnowiecki, *Planned Unit Development: A Challenge to Established Legal Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47 (1965); Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. L.Q. 60 (1963). Although the decisions are hardly consistent, *compare* Cheney v. Village 2 at New Hope, Inc., *supra*, *with* Hiscox v. Levine, *supra*, some courts have invalidated these measures on the ground that the regulation of bulk and area requirements on a district-wide basis is a legislative function that cannot be delegated to a planning commission, an administrative agency. *See, e.g.*, Millbrae Ass'n for Residential Survival v. City of Millbrae, *supra*.

measures have arisen in the context of two distinct applications of the density zoning technique: cluster zoning and planned unit development (PUD). Cluster zoning ordinances offer the developer a trade: if he agrees to devote a prescribed percentage of this tract to a community use, such as a park or a schoolground, he is authorized in return to build the same number of residential units on the remaining portion of his tract that he formerly could have built on the tract as a whole.[184] PUD ordinances go further by relaxing building type and use restrictions as well as area restrictions: single family, multifamily, and high-rise units, and residential, commercial, and light industrial uses — all of which are segregated within separate districts under traditional zoning — often may be included within a single zone under these ordinances.[185]

The courts have expressly held that both types of ordinances will meet the uniformity requirement if they entitle all property owners within the cluster or PUD district to take advantage of the opportunity to develop their parcels in accordance with the flexible density, building type, or use requirements of these ordinances.[186] Rejecting a uniformity objection to a cluster ordinance, for example, a New Jersey appellate court held in *Chrinko v. South Brunswick Township Planning Board*[187] that the clustering technique "accomplishes uniformity because the option is open to all developers within a zoning district."[188] *Chrinko* echoes a number of earlier, nondensity zoning cases in emphasizing that the uniformity required by statute refers not to the end product of the development decisions within the district — in *Chrinko*, the minimum lot size of the dwellings actually constructed there — but to uniform application of the regulation to all landowners within the district.[189]

Since the Chicago Plan vests approval for transfers in the local legislative body, rather than in the planning commission, it will be immune from delegation problems that have afflicted other density transfer measures.

[184] *See* URBAN LAND INSTITUTE, NEW APPROACHES TO RESIDENTIAL LAND DEVELOPMENT (Tech. Bull. No. 40, 1961); W. WHYTE, CLUSTER DEVELOPMENT (1964). Representative state and local cluster provisions are collected in W. WHYTE, *supra*, at apps. B & C.

[185] *See, e.g.*, Goldston & Scheuer, *supra* note 179, at 255–62 (1959); *Symposium*, *supra* note 179.

[186] *See, e.g.*, Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970); Chrinko v. South Brunswick Tp. Planning Bd., 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968).

[187] 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963).

[188] *Id.* at 601, 187 A.2d at 225.

[189] *See, e.g.*, Greenpoint Sav. Bank v. Board of Zoning Appeals, 281 N.Y. 534,

The same rationale appears in *Orinda Homeowners Committee v. Board of Supervisors*,[190] which upheld a PUD ordinance against a claim of nonuniform application of district regulations concerning building types:

> A residential planned unit development . . . does not conflict with [the uniformity provision] merely by reason of the fact that the units are not uniform, that is, they are not all single family dwellings and perhaps the multi-family units differ among themselves. [The uniformity provision] provides that the *regulations* shall be uniform for each class or kind of building or use of land throughout the zone. It does not state that the units must be alike even as to their character, whether single family or multi-family.[191]

The uniformity problem is somewhat more complicated than the stated rationale in *Chrinko*, *Orinda* and related cases indicates because access to the benefits of cluster or PUD ordinances is normally limited to owners of sizeable parcels.[192] However, neither uniformity nor its constitutional equivalent, equal protection, would appear to be violated by the size criterion. Discriminations among the members of a regulated class are permissible if they can be reasonably grounded in the purpose of the underlying regulation.[193] Since the principal objective of both cluster and PUD ordinances is to promote large-scale developments of attractive design, limiting the benefits of these ordinances to developers with substantial land holdings would appear to meet this test.[194]

540, 24 N.E.2d 319, 322 (1939), *appeal dismissed*, 309 U.S. 633 (1940); Mandis v. Gorski, 24 App. Div. 2d 181, 186, 265 N.Y.S.2d 210, 216 (1965).

[190] 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970).

[191] *Id.* at 773, 90 Cal. Rptr. at 90–91.

[192] *See, e.g., id.* (187 acres); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968) ("a large tract of land").

[193] *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961); Goesaert v. Cleary, 336 U.S. 106 (1949). More rigorous review has been applied when "fundamental interests" or "suspect classifications" are involved. *See Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1087–1132 (1969). However, strict review does not appear to apply to wealth classifications by themselves. *See* p. 627 *infra*.

[194] Whether the uniformity provision is even applicable to bulk or area regulations is dubious. On its face, it appears to deal only with use restrictions. *See* p. 620 *supra*. *But see* IND. ANN. STAT. § 53–755(1) (1964):

> Regulations as to *height, area, bulk* and use of buildings and as to the area of *yards, courts* and *open spaces* shall be uniform for each class of buildings throughout each district. (Emphasis added.)

At least one court has held the uniformity requirement inapplicable to bulk restrictions. *See* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 418,

These density zoning precedents strongly indicate that the development rights transfer component of the Chicago Plan will not fall before the objection that it denies uniform treatment to lot owners within a transfer district. By providing for the disposal of development rights through appropriate public bidding and sale procedures, the Plan will insure that all district owners have access to the purchase and enjoyment of development rights. This is not to say, of course, that some lot owners may not enjoy greater advantages than others as a result of the Plan. The configuration of particular lots may be such that the acquisition of additional development rights would carry no economic benefit for their owners.[195] Since the demand for the rights will probably exceed the available supply at any given time,[196] many lot owners will lack the financial resources to acquire these rights at prevailing market prices. But these or similar impediments to practical as opposed to formal access attend any program in which surplus public property is disposed of by public sale and bidding procedures. Moreover, though the benefits of cluster and PUD zoning are limited to owners of large acreage, and thus possibly to a wealthier class of developers, this has not deterred judicial acceptance of these plans. A uniformity challenge to the Chicago Plan, based on the fact that the bidding technique for disposal of transfer rights favors wealthier bidders, would thus seem unlikely to succeed.

Finally, the Chicago Plan is likely to encounter even less judicial resistance under the uniformity requirement than PUD ordinances and other forms of innovative zoning that mix diverse building types and uses. Use zoning has traditionally proven more controversial than bulk zoning because of its more immediate impact upon surrounding property.[197] The increasing willingness of American courts to approve the mixture of uses and building types once thought incompatible[198] offers strong evi-

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79 Cal. Rptr. 872, 877 (1969). Numerous others have implied this result. *See, e.g.*, Rockhill v. Township of Chesterfield, 23 N.J. 117, 126, 128 A.2d 473, 478 (1957); Schmidt v. Board, 9 N.J. 405, 417, 88 A.2d 607, 612–13 (1952); Walker v. Elkin, 254 N.C. 85, 118 S.E.2d 1 (1961). These decisions appear to recognize that use zoning has a more immediate impact upon community welfare than bulk or area zoning. Hence, they do not insist that the latter secure mathematical uniformity, but seem willing to approve the flexible application of bulk or area regulations even in traditional bulk zones.

[195] As lot size decreases, higher construction becomes unprofitable because a substantial portion of a building's interior space must be given over to its elevator core and mechanical systems.

[196] *See* Chicago Report 16–19.

[197] *Cf.* Heyman, *Innovative Land Regulation and Comprehensive Planning*, in NEW ZONING 23.

[198] *See, e.g.*, Millbrae Ass'n for Residential Survival v. City of Millbrae, 262

dence that the marginal bulk adjustments permitted under the Chicago Plan will not be found offensive by the courts.

The Chicago Plan appears equally able to surmount any direct equal protection challenge to its transfer feature. Recent Supreme Court decisions have suggested that the mere fact that a law works to the disadvantage of less wealthy individuals does not call for more than a rational basis for the state's actions.[199] This basis is present in the Chicago Plan: by selling development rights at the highest possible price, the city maximizes the revenues it has available for the operation of its landmark preservation program.

Basing the development rights transfer component of the Chicago Plan on the density zoning precedents above carries the additional advantage of differentiating transfers from the traditional zoning variance. At first blush, the two may be confused because both enable their recipients to erect larger buildings than are permitted by the regulations of the bulk zone in which the buildings will be located. A court that identified a development rights transfer with a variance, however, would probably invalidate the transfer because transfer authorizations are not administered by the board of zoning appeals and are not granted on the basis of economic hardship, as required for variances by most zoning enabling acts.[200] But the right of the development rights purchaser to build to greater bulk originates in the bulk regulations applicable to the transfer district, and hence is substitutive of, rather than a variation from, the regulations of the traditional bulk zone. This right, moreover, is founded on the planning considerations that support density zoning generally, not on grounds of special hardship.

The transfer authorization and the variance are not wholly unrelated, however. The administration of variances by lay

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Cal. App. 2d 222, 69 Cal. Rptr. 251 (1968); Hiscox v. Levine, 31 Misc. 2d 151, 216 N.Y.S.2d 801 (Sup. Ct. 1961).

[199] *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970). *See* Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 349 (1969).

An equal protection challenge to the Chicago Plan should be distinguished from equal protection challenges to government zoning practices that have the effect of pricing housing in a given community out of the reach of low-income groups. This practice, referred to as "exclusionary zoning," has aroused the increasing concern of commentators, *see, e.g.*, Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971). Unlike exclusionary zoning, the Chicago Plan appears to have no differential impact on the housing of low-income groups.

[200] *See, e.g.*, ADVISORY COMMITTEE ON ZONING, DEP'T OF COMMERCE, *supra* note 174, § 7; CAL. GOV'T CODE § 65906 (West 1966).

boards has been roundly condemned on all sides [201] because these boards, whether through incompetence or outright corruption, have freely granted variances with little regard for the statutory requirement of economic hardship. Municipalities that adopt the Chicago Plan can restore the variance to its proper role by requiring developers who seek bulk variances on spurious grounds to purchase development rights from landmark owners or from the municipal development rights bank.

2. Substantive Due Process as a Constraint Upon Transfer Authorizations. — Of the various obstacles to public and judicial acceptance of development rights transfer programs such as the Chicago Plan, none looms larger than the specter of urban design abuse that critics of these programs have raised. For example, Beverly Moss Spatt, as a member of the New York City Planning Commission, denounced that city's landmarks transfer program as a "gimmick" that "can only lead to an unplanned future — to chaos." [202]

The argument implicit in this charge cannot be easily dismissed. The greater bulk authorizations permitted for transferee sites under the program do appear to call into question the reasonableness either of the community's existing zoning plan or of the transfer program. If the existing zoning is sound, it may be claimed, relaxing bulk restrictions on transferee sites will overload public services and distort the urban landscape, thereby producing the planning chaos of which Mrs. Spatt warns. If it is too stringent, the proper course is to raise prevailing bulk limitations within the area generally and, in the process, to remove unwarranted public restrictions on the rights of property owners there. But, the argument proceeds, a program that retains existing bulk levels for most property owners while relaxing them for development rights purchasers sacrifices sound zoning and planning to short-term fiscal advantage. Hence, it is an arbitrary exercise of the police power, condemned under the due process clause of the fourteenth amendment.[203]

This argument fundamentally misconceives the process by

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[201] *See, e.g.*, R. BABCOCK, THE ZONING GAME 7 (1966); S. TOLL, ZONED AMERICAN 184 (1969); Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1962).

[202] Dissent from Resolution CP-21166 of the New York City Planning Commission to the Board of Estimate, May 13, 1970.

[203] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (zoning ordinances are valid unless shown to be "clearly arbitrary and unreasonable"). One commentator has summarized the current content of the due process challenge to zoning regulations as follows:

> [W]here a zoning ordinance is challenged on the ground that it takes property without due process of law, [a court] will consider: (1) the impact of the restriction upon the land of the plaintiff (How serious is the

which bulk levels are determined and the functions that they serve. As a result, it invests the numbers in the zoning code with an aura of scientific exactitude that is largely without foundation in fact. The precision that is attainable in setting bulk limitations in the downtown commercial and high-rise residential zones that will be included in transfer districts under the Chicago Plan turns upon the purposes that these limitations are designed to achieve. Among these purposes are the following: regulating population; insuring an adequate amount of light, air, and open space; rationing demands upon public services and facilities; and accommodating market demands for new office and residential space.[204]

The process by which these objectives are translated into numbers is among the most complex in the urban design field.[205] It proceeds on at least two levels: fact determination and political judgment. The facts that must be established or projected, such as the correlation of population increments with demands upon public facilities or the capacity of the market to absorb a stated amount of office space over a given period, are often elusive and inevitably tentative.[206] Political judgment must be exercised in selecting the desired development objectives for specific areas of the city and in resolving conflicts that may be inherent in these objectives. For example, the bulk levels that will satisfy demands for office space in a booming economy may clash with those that are thought appropriate for the particular city's aesthetic character.[207] Such clashes are unscrambled, not on the planner's slide rule, but in the political arena [208] and, in some instances, in public referenda as well.[209]

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deprivation attributable to the ordinance?); (2) the objective of the restriction (Is it intended to serve the public health, safety, morals, or the general welfare?); and (3) the reasonableness of the restriction (Do the means selected have a rational tendency to achieve the objective?).

Anderson, *A Comment on the Fine Line Between "Regulation" and "Taking,"* in NEW ZONING 66, 70. The due process challenge discussed in text relates primarily to the last consideration enumerated by Anderson.

[204] *See* authorities cited note 43 *supra*.

[205] Accounts of this process may be found in, *e.g.*, G. FORD, BUILDING HEIGHT, BULK AND FORM (Harvard City Planning Studies II, 1931); S. TOLL, *supra* note 201, at 161–66; Randall, *The Question of Size: A Re-approach to the Study of Zoning*, 54 ARCH. F. 117 (1931).

For excellent analyses of the process by which the City of San Francisco arrived at the bulk levels of its present zoning ordinance, see Ruth, *supra* note 69; Svirsky, *supra* note 6.

[206] *See* authorities cited notes 43 & 205 *supra*.

[207] Members of the real estate industry have expressed the view that contemporary zoning impairs downtown development by overemphasizing requirements of light, air, and open space in central areas. *See, e.g.*, OFFICES 280–81; *Air Rights* 497.

[208] *See* S. TOLL, *supra* note 201, *passim*.

[209] Objecting to the "Manhattanization" of their skyline resulting from in-

The specific bulk levels that emerge from this two-step process fall considerably short of Platonic absolutes, the slightest deviation from which threatens the dire planning consequences predicted by Mrs. Spatt.[210] Were it not for the risk of discriminatory official action,[211] in fact, it would be far less arbitrary to express bulk levels in terms of a *range* of integers rather than as *fixed* integers. [212] Whether office buildings in the downtown section of a major city are permitted to go to sixty-five rather than sixty-two stories, after all, is not an issue of great moment. What is critical, however, is that this range of stories — or its equivalent in terms of FAR's — accurately reflects the development objectives that the city seeks to achieve in its downtown section.

On the basis of this analysis, the charge that the Chicago Plan fosters arbitrary zoning should be rejected since the bulk increments allotted to development rights purchasers fall within a range that is defensible in planning terms. The reasonableness of deviations under the Chicago Plan from preexisting bulk regulations is not called into doubt by the presumed soundness of these regulations: the net increases, if any,[213] in overall density in the district under the Chicago Plan will not be enough to bring the overall density of the district outside that range originally decided upon, and the increases in bulk on individual transferee lots will not be arbitrary in planning terms.[214] The argument that builders

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creased bulk levels adopted in 1961, an organization of San Franciscans succeeded in having submitted to referendum a proposition that would have required specific voter approval of the construction of any building over six stories or 72 feet. The proposition was defeated. N.Y. Times, Nov. 4, 1971, at 36, col. 1.

[210] In an exhaustive examination of the problem of the optimum size of downtown structures, one commentator concluded:

> Conclusive quantitative proof of the desirability of these things [sunlight, air, etc.] is almost impossible, as is also the setting up of any unqualified standard for safety and well-being below which we should not go. The general indications would lead to the belief that, while sunlight, air, outlook, privacy, the avoidance of a sense of "shut-in-ness" and of actual congestion are highly desirable, we are not able to set up a minimum which, let us say, if curtailed by 10 per cent would spell disaster or if augmented by 10 per cent would spell relative happiness and prosperity.

Randall, *supra* note 205, at 117; *see* S. TOLL, *supra* note 201, at 137.

[211] Professor Mandelker has noted that "conventional lot regulations are utilized because they simplify the problems of control." Mandelker, *Reflections on the American System of Planning Controls: A Response to Professor Krasnowiecki*, 114 U. PA. L. REV. 98, 101 (1965).

[212] One interesting attempt at expressing density for individual parcels on the basis of a sliding scale of integers is the Land Use Intensity system described in Hanke, *Planned Unit Development and Land Use Intensity*, 114 U. PA. L. REV. 15, 22–30 (1965).

[213] *See* notes 71 & 72 *supra*.

[214] *See* p. 590 & note 55 *supra*.

who do not purchase development rights are suffering unconstitutional encroachments upon their right to develop their property is equally unsound. If all builders in the development rights district were allowed to exceed the original bulk restrictions, then the increase in bulk *would* exceed the range that had been previously decided upon.

There is good reason to believe that the courts will accept this analysis and uphold the Plan against the due process attack. Judicial approval of density zoning [215] implies acceptance of the principle that a community may prescribe multiple densities for individual lots as long as a sound planning rationale supports this decision. Moreover, the courts have traditionally accorded wide deference to legislative economic measures that are challenged on substantive due process grounds.[216] In the land use field, the American judiciary has proven especially responsive to the efforts of local governments to meet pressing development needs,[217] and, since 1926,[218] has approved a broad array of innovative measures that, like the Chicago Plan, promised to enhance community welfare.[219] In light of this fact, it seems most unlikely that the courts would undertake to second-guess either the wisdom or the arithmetic [220] of a community's transfer program if the latter is rooted in careful planning studies of the kind envisaged in the Chicago Plan.[221]

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[215] *See* cases cited note 183 *supra*.

[216] *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934).

[217] *See* Anderson, *supra* note 203, at 75; *cf.* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 75–76 (1971); Heyman, *supra* note 197, at 40, 51–52.

[218] The United States Supreme Court upheld zoning as a constitutional exercise of the police power that year in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Prior to this decision, substantial conflict existed among the state courts concerning the constitutionality of zoning. *See* Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245, 257 (1967).

[219] *See, e.g.*, Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (Ct. App. 1970) (PUD zoning); Beall v. Montgomery County Council, 240 Md. 77, 212 A.2d 751 (1965) (floating zoning); Bucholz v. Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963) (conditional zoning); Chrinko v. South Brunswick Tp. Planning Bd., 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963) (cluster zoning).

[220] On the basis of an exhaustive review of bulk zoning decisions, one commentator has concluded that "[s]o far, courts have shown a healthy respect for the figures arrived at after careful research and planning." Note, *supra* note 43, at 512.

[221] The importance of thorough, well-documented planning studies in withstanding due process as well as equal protection and spot-zoning challenges to innovative measures has been stressed in a comprehensive analysis of incentive zoning measures prepared by Professor Heyman. *See* Heyman, *supra* note 197, *passim*. The recurring thesis of the Heyman study provides additional support for

IV. CONCLUSION

Despite their apparent novelty, the principal features of the Chicago Plan are solidly grounded in precedents derived from the areas of condemnation, property, and land use law. Public programs in which government resells or leases condemned interests in order to recapture program costs are commonplace today, as the byproduct, leasing, and urban renewal cases discussed earlier illustrate.[222] Similarly, government, whether with or without clear statutory authority, has acquired some portion of the development potential of private property for any number of reasons including open space preservation,[223] highway beautification,[224] and even use zoning based on eminent domain rather than the police power.[225] Finally, local governments in recent years have employed their land use powers imaginatively to secure desired patterns of community development in areas other than landmark preservation. Density zoning (which underpins PUD and cluster zones), special development districts, and a variety of other measures that duplicate or surpass development rights transfers in the degree of their departure from traditional zoning have been sanctioned in numerous decisions of state courts.[226]

Taken collectively, these precedents should provide a firm basis for judicial approval of the Chicago Plan. The prospects for the Plan's success in court would be even further improved by an assist from state legislatures. Either of two types of legislation should prove sufficient. The first, adopted in Illinois,[227] would provide in a single enactment an independent statutory foundation for each of the Plan's three principal features: the condemnation and resale of development rights, the acquisition of preservation restrictions, and the transfer of development rights within transfer districts. The second would proceed more modestly against the backdrop of existing statute and case law, providing legislative sanction only for particular features of the

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the position that the Chicago Plan will be upheld by the courts. As stated by Heyman:

> [The] courts should and will approve a flexible regulatory device where it is shown that its use sensibly relates to public objectives identified in advance in a planning process and is justified by a detailed explanation showing the actual relationship between the objective and the action.

Id. at 40.

[222] *See* pp. 605–11 *supra*.

[223] *See* WHYTE, *supra* note 137.

[224] *See* notes 137 & 165–66 *supra*.

[225] *See* note 164 *supra*.

[226] *See* notes 183 & 219 *supra*.

[227] Ill. Pub. A. No. 77-1372 (Ill. Leg. Serv., Aug. 31, 1971), *in part to be codified at* ILL. REV. STAT. ch. 24, § 11-48.2-1A, *in part amending* ILL. REV. STAT. ch. 24, §§ 11-48.2-2 & -6 (1969).

Plan, such as the enforceability of preservation restrictions, which may be in doubt in a given jurisdiction.[228]

The likelihood that the Chicago Plan will withstand judicial challenge, of course, does not of itself establish that it should be implemented by local governments. In the author's judgment, the truly hard questions posed by the Plan's adoption are not legal ones at all. Three of these questions bear special mention. First, are the risks of favoritism or worse that attend administration of the Plan acceptable ones for communities that wish to preserve urban landmarks? There is no easy answer to this question. The willingness of communities throughout the United States to adopt a wide variety of other innovative land use measures that carry equivalent or greater risks, however, suggests that the risk factor alone should not necessarily prove conclusive against the Plan. Second, can municipal planning agencies handle the urban design challenges that they will confront in establishing development rights transfer districts and in supervising the other planning controls in the Chicago Plan? While the unhappy history of zoning bonuses in some cities gives cause for hesitation,[229] the grim prospects for the nation's remaining urban landmarks if nothing is done must also be weighed in the balance.

Finally, the impact of the Plan on the community's other incentive programs and development goals must be scrutinized. In a stagnant real estate market, for example, the development rights made available under the Plan may undermine the value of development rights offered to builders under other incentive programs. Again, the community's other development goals, which may include, for example, increasing the supply of residential units, will be deterred to the extent that the city requires builders to purchase development rights rather than directly relaxes the bulk levels permitted as of right in the pertinent

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[228] *See* pp. 611–17 *supra*.

[229] Zoning bonuses were originally conceived for the laudable purpose of raising urban amenity levels by encouraging light, air, and circulation in downtown areas. Abetted by high land and construction costs and allocated on an overly generous basis, however, they have threatened or destroyed the diversity and vitality of these areas in some instances. Ada Louis Huxtable's description of their impact upon the redevelopment of New York's Sixth Avenue is vivid and bleak:

> The zoning is a failure in urbanistic terms — or how a city looks and works. The zoning, combined with the rising cost of land and building, has been the definitive factor in driving out the small enterprises, the shops, restaurants and services that make New York a decent and pleasurable place in which to live and work. In their place is a cold parade of standard business structures set back aimlessly from the street on blank plazas that ignore each other.

Huxtable, *Thinking Man's Zoning*, N.Y. Times, Mar. 7, 1971, § 2, at 22, col. 1; *see* Chicago Report 17.

zones.[230] Hence, in pondering the advisability of adopting the Chicago Plan or any other incentive program for that matter, the community must ask itself — incentives for what? Resolving this question requires frank recognition that landmark preservation must compete with other worthy candidates for favorable regulatory treatment.

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[230] The conflict of goals portrayed in the text has arisen in New York City. *See* Marcus.