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Transferable Development Rights Programs:
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Vicki Been & John Infranca

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Transferable Development Rights Programs

"POST-ZONING"?

Vicki Been & John Infranca[†]

INTRODUCTION

Once described as "the quirkiest and most invisible place in all of New York City,"[1] the High Line—an elevated railroad track that originally ferried animals to the city's meatpacking district—is now a celebrated urban park. It is also the centerpiece of the Special West Chelsea District, a rezoning that dramatically altered the neighborhood's built environment, enabling the transformation of warehouses and meat processing plants into high-end residential and commercial spaces.[2] This transformation was achieved in part through the use of transferable development rights (TDRs). A sophisticated TDR program allowed owners of property beneath the railway, who were prevented from building

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[1] Kenneth T. Jackson, *From Rail to Ruin?*, N.Y. TIMES, Nov. 2, 2003, at 4.11, *available at* http://www.nytimes.com/2003/11/02/opinion/from-rail-to-ruin.html ("A concrete and steel structure two stories above the sidewalk, it is so big that anyone can see it, but so nondescript and so much a part of the urban landscape that it mostly goes unnoticed."). For a brief history of the High Line see Meera Subramanian, *City Lore, Blasts from the Past*, N.Y. TIMES, Feb. 5, 2006, at 4, *available at* http://www.nytimes.com/2006/02/05/nyregion/thecity/05high.html.

[2] *See infra* notes 65-89 and accompanying text.

upward, to transfer some of their unused development rights to other sites in the district where development was favored.[3]

New York City's Zoning Resolution, like most zoning codes, places restrictions on the number of square feet of floor area a developer can construct on an individual property lot.[4] In certain circumstances, the zoning code permits landowners to transfer unused development capacity from their lot to another parcel of land, effectively increasing the size of what can be built at the receiving site.[5] A granting parcel might be developed below its maximum capacity for a number of reasons: because of a separate regulatory restriction, such as a historic preservation ordinance; because the owner has chosen not to develop to the full permitted capacity; or because a zoning change has given the owner some unused development rights, but not enough to justify redeveloping the site. TDR programs allow property owners to recoup some of the value of unused capacity on their lots through a sale of the unused development rights on the private market.[6]

A number of transfer programs exist in New York City. These include zoning lot mergers, which permit transfers as of right (without the requirement of any review or approval process) but only between adjacent properties; landmark transfers, which allow transfers across a street or intersection, subject to certain restrictions and approvals; and a number of special district transfer programs, which allow transfers from specified granting zones or sites to specified receiving zones, usually within the same neighborhood.[7] TDRs in New York City originally served two central purposes: first, they allowed greater flexibility through a zoning lot merger process that operates akin

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[3] *See infra* notes 65-89 and accompanying text (discussing Special West Chelsea District TDR program).

[4] *See* N.Y.C. DEP'T OF CITY PLANNING, ZONING HANDBOOK 148 (2011) [hereinafter ZONING HANDBOOK] ("The floor area ratio is the principal bulk regulation controlling the size of buildings. FAR is the ratio of total building floor area to the area of its zoning lot.").

[5] *See* David E. Mills, *Transferable Development Rights Markets*, 7 J. URB. ECON. 63, 63-64 (1980).

[6] *See id.* at 64 ("[T]he attractiveness of TDR is held to be the equitable treatment it affords landowners. Specifically, it avoids arbitrary rationing of gains from development associated with direct controls. [T]DRs are assigned on some equitable basis and the land market (working within the constraint of whatever direct controls may remain) determines the most efficient use for every parcel.").

[7] *See infra* Part I (discussing history and regulatory structure of New York City's TDR programs).

to density zoning, and second, they offset the burdens imposed on property owners by landmark preservation regulations.[8]

TDR programs recently have been used in New York City, particularly in the Special West Chelsea District and the Special Hudson Yards District, to control the location and intensity of new development by carefully designating the subdistricts authorized to receive TDRs under various rules.[9] Similarly, the Bloomberg administration's recent proposal to rezone East Midtown would allow developers to purchase unused development rights above Grand Central Terminal, a landmarked building. Those unused development rights have remained unused (for want of a market) since the Supreme Court upheld New York City's Landmark Preservation Act, and first confronted the concept of TDRs in 1978.[10] The proposed East Midtown rezoning could, in theory, create towers that would rival the Empire State Building. As it is currently structured, however, the proposal would only allow transfers of development rights from Grand Central Terminal and other landmarks to specific sites where the city wants to encourage more intense development.[11]

TDR programs with a range of structures[12] and purposes exist throughout the United States and internationally.[13] TDR

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[8] *See infra* Parts I.A (discussing zoning lot mergers) and I.B (discussing landmark TDR program). For a definition of "density zoning" see *infra* note 112 and accompanying text.

[9] TDRs have been used to serve a variety of preservation goals. The New York State statute that empowers cities to adopt a TDR program states:

> The purpose of providing for transfer of development rights shall be to protect the natural, scenic or agricultural qualities of open lands, to enhance sites and areas of special character or special historical, cultural, aesthetic or economic interest or value and to enable and encourage flexibility of design and careful management of land in recognition of land as a basic and valuable natural resource.

N.Y. GEN. CITY LAW § 20-f(2) (McKinney 2012).

[10] *See infra* notes 97-102 and accompanying text (discussing proposed East Midtown rezoning).

[11] For preliminary reports on the plan, which is still a work in progress as this article went to press, see, for example, Theresa Agovino, *City Hall: Supersize Midtown's East Side*, 28 CRAIN'S N.Y. BUS. 3 (July 8, 2012), *available at* http://www.crainsnewyork.com/article/20120708/REAL_ESTATE/307089970; Matt Chaban, *Faulty Towers: Midtown Needs a Makeover, with Twice as Tall Towers, but Can Mayor Bloomberg Get it Right?*, N.Y. OBSERVER (June 27, 2012, 11:00 AM), http://observer.com/2012/06/faulty-towers-midtown-needs-a-makeover-but-can-the-bloomberg-administration-get-it-right/?show=all.

[12] TDR programs differ in how they permit unused capacity at a granting site to be transferred and converted into more intense development at a receiving site. Some programs convert the preservation of, for example, a certain number of acres of farmland into a defined number of development credits. These credits allow for a specified amount of additional density at the receiving site, for instance, one additional

programs outside New York City serve various (and sometimes multiple) purposes, including the preservation of historic sites, farmland, and environmentally sensitive land; the development of affordable housing; and broader urban design and revitalization goals.[14] As in New York City, these programs have become increasingly sophisticated over time, introducing new techniques to confront local needs.[15]

In this essay, we look primarily at how transferable development rights programs in New York City—particularly in the Special West Chelsea District, the Hudson Yards District, and the proposed East Midtown rezoning—are being substituted for the upzonings, density bonuses, and other flexibility devices the city has traditionally used to enable added density in a particular area. These newer programs make TDRs more flexible in some ways, but they also mark a shift away from the density zoning reflected in zoning lot mergers, landmark transfers, and earlier transfer district concepts.

We begin, in Part I, by reviewing the basic design of New York City's transferable development rights programs. We specifically consider the increasing sophistication of these programs and their practice of carefully designating potential receiving parcels for the purpose of furthering discrete land use

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residential unit for ten acres of preserved farmland. *See* ARTHUR C. NELSON ET AL., THE TDR HANDBOOK 3 (2012). In New York City, the transfer of development rights occur on a one-to-one basis, with transfers taking the form of a specific number of square feet of floor area. *See, e.g.*, Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOK. L. REV. 867, 879 (1984) ("To arrive at the amount of transferable floor area, the floor area of the existing landmark building is subtracted from the floor area that would be allowable if the lot were vacant. Any floor area transferred is irrevocably subtracted from the development potential of the landmark site.").

[13] *See* NELSON ET AL., *supra* note 12, 131 (identifying 239 communities in the United States with TDR programs); Rick Pruetz & Erica Pruetz, *Transfer of Development Rights Turns 40*, 59 PLAN. & ENVTL. L. 3, 3 (2007) ("We know of 181 TDR programs in 33 states that have preserved at least 300,000 acres of farmland, natural areas, and open space to date.").

[14] *See* NELSON ET AL., *supra* note 12, at 131-227 (cataloguing and discussing TDR programs by purpose); *see also* MARGARET WALLS & VIRGINIA MCCONNELL, RESOURCES FOR THE FUTURE, TRANSFER OF DEVELOPMENT RIGHTS IN U.S. COMMUNITIES (2007), *available at* http://www.rff.org/rff/News/Features/upload/30347_1.pdf (discussing ten primarily rural and suburban examples of TDR programs). Notable TDR programs outside New York City include Montgomery County, Maryland's farmland preservation program, and New Jersey's Pinelands program. Pruetz & Pruetz, *supra* note 13, at 4; *see also* Sarah J. Stevenson, Note, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329, 1347-58 (1998) (discussing TDR programs in New Jersey, Montgomery County, and Seattle).

[15] *See* NELSON ET AL., *supra* note 12, at 236-40 (same); Pruetz & Pruetz, *supra* note 13, at 7-9 (discussing new TDR techniques).

goals. We also look closely at the regulatory structure of the West Chelsea TDR program and at the transfers that have occurred since its inception. We then briefly review the recently adopted Hudson Yards TDR Program and the Bloomberg administration's latest proposal to use TDRs in a rezoning of the area surrounding Grand Central Terminal. In Part II, we discuss the conceptual frameworks that legal scholars developed in crafting the TDR programs New York City and many other jurisdictions across the nation have adopted. With those frameworks in mind, in Part III we consider how New York City's TDR programs have shifted toward using TDRs as a tool to channel development in service of the city's goals, rather than as a flexibility device for property owners. Finally, we consider some of the implications of this shift, arguing that it brings various advantages even while it reduces flexibility.

While the definition of "post-zoning" remains a work in progress, TDRs, given their close relationship with traditional elements of zoning, are unlikely to qualify under any definition of the term. For instance, TDRs derive their structure from many basic components of zoning, including floor area ratio and the definition of a zoning lot. Indeed, in reviewing the creation of New York City's Theater Subdistrict, Norman Marcus—one of the earliest proponents of TDRs and the chief legal counsel of New York's City Planning Commission—sought to place the concept "within the framework of traditional zoning principles."[16] At the same time, however, the early conception of TDR districts as a form of density zoning gave TDRs promise as a flexible, market-oriented tool that would cap the total density within a district while allowing landowners within the district to decide how to allocate it.

The more recent programs give developers who want to use TDRs a greater ability to break out of existing zoning constraints and, therefore, to some extent, move TDRs beyond traditional zoning. But these programs fall considerably short of density zoning and lack the flexibility required to qualify as "post-zoning." Instead, these newer programs are marked by

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[16] Michael Kruse, *Constructing the Special Theater Subdistrict: Culture, Politics, and Economics in the Creation of Transferable Development Rights*, 40 URB. LAW. 95, 137-39 (2008); *see also id.* at 130 ("TDRs have been seen as inconsistent with traditional principles of zoning and land use regulation."); Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has* Penn Central *Failed to Weather the Storm?*, 39 NAT. RESOURCES J. 459, 510 (1999) ("[TDRs] are a flexible market-based tool that can help land planners overcome many of the shortcomings associated with traditional zoning practices.").

three important and interrelated features: first, they use complex subdistricting designations to determine the location of TDR recipient sites and the density permitted on those sites; second, they use TDRs as one component of a comprehensive rezoning and redevelopment plan; and third, they use additional regulations and incentives to strengthen the market for these TDRs. In sum, these newer programs enable more creative uses of TDRs and more distant transfers, but they accomplish these results through complex regulations that render TDRs less a mechanism to alleviate zoning's rigidity than simply another tool in service of traditional zoning principles.

I. TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS IN NEW YORK CITY

In this first part, we review the purposes and regulatory structure of New York City's various TDR programs and highlight crucial distinctions between the programs. This review sets the stage for Parts II and III, where we consider how these different programs' features relate to early scholarship on TDRs and how they might move TDRs into the realm of "post-zoning."

A. The Zoning Lot Merger

The "zoning lot merger" is the "simplest example of transferable development rights" in New York City.[17] The zoning lot is the unit that the city uses to determine a structure's compliance with applicable zoning requirements. Often, but not always, a zoning lot is identical in size and location to a tax lot, the principal unit of property ownership.[18] Through a zoning lot merger, the owners of separate tax lots may merge these lots—for zoning-compliance purposes only—into a single zoning lot.[19] In doing so, these private owners alter the unit of zoning control and create a merged zoning lot within which they can freely transfer bulk and density between their tax lots.[20] Buildings remain subject to regulations governing

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[17] Marcus, *supra* note 12, at 870.

[18] According to the New York City Zoning Handbook, a tax lot "is a parcel of land identified with a unique borough, block and lot number for property tax purposes." A zoning lot "is a tract of land comprising a single tax lot or two or more adjacent tax lots within a block . . . . [t]he zoning lot is the basic unit for zoning regulations . . . ." ZONING HANDBOOK, *supra* note 4, at 149, 156.

[19] Marcus, *supra* note 12, at 875-76.

[20] *Id.*

height, setbacks, and other considerations. Ownership—and its attendant rights and duties unrelated to zoning—remains a function of the tax lots.

The city's Zoning Resolution uses floor area ratio (FAR) as the primary land use control. FAR "is the ratio of total building floor area to the area of its zoning lot" and determines a building's maximum bulk.[21] For example, a building on a 10,000-square-foot zoning lot, in a zoning district with a maximum FAR of five, cannot exceed 50,000 square feet of floor area. Figure 1 demonstrates two possible configurations for this lot. If the building covered the entire zoning lot, it could only be five stories high.[22] But, if it covered only half the lot, the building could rise to ten stories (as long as there are no separate height controls). If a zoning lot is coterminous with the owner's tax lot, the FAR must be used on the tax lot. When two zoning lots coterminous with two different tax lots are merged to become one zoning lot, however, the parties are able to transfer unused FAR between tax lots in the form of a specific number of square feet of development rights.

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[21] ZONING HANDBOOK, *supra* note 4, at 148. FAR was first developed in New York City in 1940 but initially only applied to low-density areas of the city. Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338, 346 (1972) [hereinafter *Development Rights*]. The real estate industry initially objected to this new bulk restriction. *Id.* at 347. To gain their support, the 1961 resolution included two additional changes to offset the effect of the new FAR regulations: first, the availability of a bonus of twenty percent of a building's FAR in exchange for adding a plaza to the development, and second, a redefinition of the "zoning lot" to which the FAR would apply. *Id.* at 347-48. The new definition of a zoning lot included any other parcel owned by a developer within the same city block. *Id.* This new definition, by applying the FAR limit to the entire zoning lot, allowed for the transfer of bulk from underdeveloped buildings to a new development, creating the zoning lot merger. *Id.* at 348.

[22] ZONING HANDBOOK, *supra* note 4, at 148.

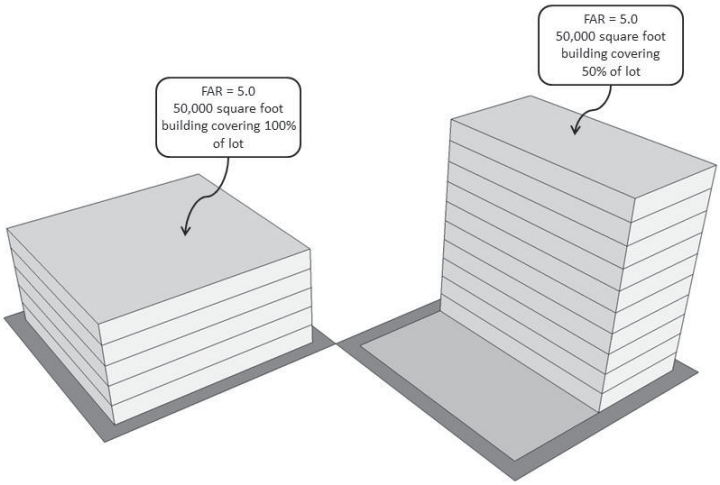

Figure 1: FAR Example

When the current Zoning Resolution was introduced in 1961, it did not include a specific mechanism for transferring development rights. But the definition of "zoning lot" permitted a developer to enter into a long-term lease of contiguous tax lots on the same city block and then purchase and shift unused development rights from one tax lot to another.[23] A long-term lease had to be at least fifty years in duration, with an option to renew that created a total lease of at least seventy-five years.[24] But the seventy-five-year lease posed potential problems, for example, if the lease terminated because a lessee ceased paying the rent or the lessor was foreclosed upon.[25] These situations created uncertainties around the continued use of development rights. To alleviate these concerns, a 1977 amendment to the Zoning Resolution eliminated the lease requirement.[26] Accordingly, the definition of "zoning lot" now includes a tract of land consisting of two or more contiguous tax lots located on

[23] Kruse, *supra* note 16, at 101; Marcus, *supra* note 12, at 873-74.

[24] Marcus, *supra* note 12, at 873-74 (citing N.Y.C., N.Y., ZONING RESOLUTION § 12-10 (1961)).

[25] *Id.* at 874.

[26] David Alan Richards, *Downtown Growth Control Through Development Rights Transfer*, 21 REAL PROP. PROB. & TR. J. 435, 468-70 (1986) (discussing additional concerns that motivated amendment).

a single block, which, at the time of filing for a building permit or certificate of occupancy, is treated as one zoning lot for purposes of compliance with the Zoning Resolution.[27]

B. Landmark Transfers

New York City introduced a development rights transfer program for designated landmarks in 1968.[28] The program sought to compensate landmark property owners for financial losses incurred due to the restrictions imposed by the city's new Landmark Preservation Law.[29] It also provided the city with a way to protect landmarks and restrict redevelopment without paying compensation—an issue of particular concern given Manhattan's high land values.[30] Under the program, landmark owners may transfer unused development rights not only to

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[27] N.Y.C., N.Y., ZONING RESOLUTION § 12-10 (2012) (part (d) under definition of Zoning Lot); *see also* Marc Israel & Caroline G. Harris, *Higher and Higher*, N.Y. L.J., Jan. 16, 2007, at 31 (discussing "basic mechanics of development rights deals"). In certain zoning districts, the ability to use a zoning lot merger to increase building height is restricted by the requirement that a tower occupy some percentage of the merged zoning lot. *See, e.g.*, N.Y.C. ZONING RESOLUTION § 23-633(c)(3) (district R10X: portion of tower above 85 feet must cover minimum of 33% of zoning lot); *id.* § 35-24(d)(3) (district C4X); *id.* § 81-752(c)(1) (Eighth Avenue Corridor); *id.* § 82-36(a)(2) (Special Lincoln Square District). These restrictions seek to prevent the construction of buildings like the Trump World Tower, which obtained development rights from a large number of merged zoning lots in order to build a tower that occupied "only 13 percent of the merged zoning lot." David W. Dunlap, *A Complex Plan's Aim: Simpler Zoning Rules*, N.Y. TIMES, Jan. 30, 2000, at RE1, *available at* http://query.nytimes.com/gst/fullpage.html?res=940DE4DF133CF933A05752C0A9669C8B63 ("Intended to curtail the transfer of development rights, [the 'packing the bulk'] rule is despised by developers."); David W. Dunlap, *Battle Lines Drawn on New Zoning Plan*, N.Y. TIMES, June 4, 2000, at RE1, *available at* http://www.nytimes.com/2000/06/04/realestate/battle-lines-drawn-on-new-zoning-plan.html ("This [requirement] was intended to prevent the harvesting of air rights up and down a block and piling them on a single building site, as was done at Trump World Tower, which occupies only 13 percent of the merged zoning lot.").

[28] The provisions governing landmark transfers are found at section 74-79 of the New York City Zoning Resolution. *See* N.Y.C. ZONING RESOLUTION § 74-79. Eligible landmarks include Landmarks Preservation Commission designated landmarks. except cemeteries, statues, monuments, bridges, or structures within historic districts. An "adjacent [zoning] lot" eligible for receiving development rights from a landmark is defined as one "contiguous to the lot occupied by the landmark . . . structure, . . . one that is across a street and opposite to [such a] lot," or, if the landmark structure is on a corner lot, "one that fronts on the same street intersection as the lot occupied by the landmark . . . ." *Id.* For lots in zoning districts C5-3, C5-5, C6-6, C6-7 or C6-9, an adjacent lot can also mean "a lot contiguous or one that is across a street and opposite another lot or lots that except for the intervention of streets or street intersections, form a series extending to the lot occupied by the landmark . . . ." *Id.* In this case, all such lots must be under common ownership. *See id.*

[29] Kruse, *supra* note 16, at 102.

[30] Norman Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFF. L. REV. 77, 91-92 (1974).

other lots on the same block but also to lots directly across a street or, if the landmark is at a corner, to any of the other corner lots at the same intersection.[31] The ability to transfer development rights beyond the same block came with a limit on the receiving site's ability to increase its existing FAR. Indeed, as originally enacted, a receiving site's FAR could only be increased by twenty percent above the site's maximum FAR before the transfer.[32]

The owner of Grand Central Terminal challenged the landmark law in *Penn Central Transportation Co. v. New York City*.[33] Penn Central, the terminal's owner, alleged that the landmark regulation constituted an uncompensated taking and that its TDRs were inadequate to offset or compensate for the restrictions the landmark rules imposed since no purchasers existed under the then-existing transfer rules.[34] To blunt this claim, the Landmark Preservation Commission adopted two amendments. The first permitted the transfer of TDRs to "*any* site connected to the landmark through a chain of lots under common ownership."[35] The second removed the twenty-percent limit on the increase in FAR at a receiving site, but only for sites in the highest-density commercial districts.[36]

Under Section 74-791 of the current Zoning Resolution, the owners of both the landmark seeking to transfer development rights and the potential receiving lot must submit an application for a special permit in order to make the transfer.[37] Zoning lot mergers, by contrast, can be executed as of right.[38] Moreover, the

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[31] Richards, *supra* note 26, at 447; Stevenson, *supra* note 14, at 1334-35 ("[The 1968] amendment was the first example of 'beyond-the-block' TDR use, drastically changing the concept of, and traditional justifications for, TDRs.").

[32] Kruse, *supra* note 16, at 101 (citing N.Y.C. Planning Comm'n, Rep. CP-20938, at 876 (1969)); Marcus, *supra* note 12, at 879 & n.45.

[33] 438 U.S. 104, 107 (1978).

[34] Kruse, *supra* note 16, at 102.

[35] *Id.*; *see also* Richards, *supra* note 26, at 451 (noting that amendment was "announced October 7, 1969 (the same day the railroad's suit was filed)").

[36] Richards, *supra* note 26, at 451. Richards notes that the original landmark TDR program was introduced by a Planning Commission statement lauding, among its benefits, the city's ability to obtain "new tax revenues from what was previously untaxable." *Id.* at 448 (quoting N.Y.C. Planning Comm'n, Minutes 303 (May 1, 1968)). He describes the 1969 amendment—which was introduced to allow broader transfers from Grand Central and blunt the legal challenge—as "a classic case of spot zoning: an amendment enacted solely for the benefit of one landowner which was not in accordance with a comprehensive plan." *Id.* at 451 (footnote omitted).

[37] *See* N.Y.C., N.Y., ZONING RESOLUTION § 74-791 (2012).

[38] *See* ZONING HANDBOOK, *supra* note 4, at 146 ("A *zoning lot merger* is the joining of two or more adjacent zoning lots into one new zoning lot. Unused development rights may be shifted from one lot to another, as-of-right, only through a zoning lot merger.").

special permit application is subject to New York City's Uniform Land Use Review Process (ULURP).[39] Development rights transfers from landmark sites may only be authorized upon the City Planning Commission's finding that the transfer

> will not unduly increase the bulk of any development or enlargement, density of population or intensity of use in any block to the detriment of the occupants of buildings on the block or nearby blocks, and that any disadvantages to the surrounding area . . . will be more than offset by the advantages of the landmark's preservation to the local community and the City as a whole[.][40]

Separate provisions in the Zoning Resolution provide additional regulations that apply to landmarks in designated areas of the city.[41]

The "procedures for obtaining approval of a proposed [landmark] transfer are complex[,]" to put it mildly.[42] In an article published just four years after the institution of the landmark transfer program, Professor John Costonis argued that a number of the program's characteristics reduce its effectiveness as a preservation technique.[43] In particular, the zoning lot merger provision, which allows transfers as of right,

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[39] *See id.* at 157 ("The Uniform Land Use Review Procedure (ULURP) is the public review process, mandated by the City Charter, for all proposed zoning map amendments, *special permits* and other actions such as site selections and acquisitions for city capital projects and disposition of city property." (emphasis added)).

[40] N.Y.C. ZONING RESOLUTION § 74-792(e)(1). The City Planning Commission also must find that the program proposed in the transfer application for continuous maintenance of the landmark will indeed result in its preservation. *Id.* § 74-792(e)(2). If a government entity (city, state, or federal) owns the landmark, the special permit application must include a plan to provide a major improvement to the area's pedestrian circulation or transportation system. *Id.* § 74-792(e)(3). This requirement serves as an exaction levied by the government "upon the private builder who would utilize the development rights." Richards, *supra* note 26, at 453.

[41] These include, among others, the Special Midtown District, which imposes a maximum FAR for certain zoning lots. *See* N.Y.C. ZONING RESOLUTION § 81-211; the Grand Central Subdistrict, which allows transfers to certain receiving lots without an adjacency requirement and transfers of less than one FAR by certification (rather than requiring a special permit), *see id.* §§ 81-63, 81-634; and the Theater Subdistrict, which allows more distant transfers via a chain of lots under common ownership, *see id.* § 81-747. The transfers allowed under Zoning Resolution section 81-747 are a special form of landmark transfer and are permitted in the Theater Subdistrict, yet they are distinct from the Special Theater Subdistrict TDR program. *Id.* Under section 81-747, transfers can be made to more distant lots than permitted under the standard landmark TDR program, but all intervening lots must be under common ownership. In addition, at least one of the intervening lots must be occupied by a "listed theater[]" or by a use that directly supports the theater business; a covenant must ensure either future use of this type or an improvement to the lot to accommodate pedestrian or vehicular traffic generated by theaters. *Id.*

[42] John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 585 (1972) [hereinafter Costonis, *The Chicago Plan*].

[43] *Id*. at 586-89.

renders the landmark transfer program "useful only when a developer can be found who happens to own a lot located across a street or an intersection from a landmark . . . ."[44] Developers might also obtain more development rights through a zoning lot merger than they can through a landmark transfer, because the latter limits the increase in floor area obtainable through TDRs (except for transfers in high density commercial districts) to twenty percent of the receiving site's existing FAR.[45] Echoing these concerns, an American Planning Association publication from 1987 noted that in the eighteen years since the creation of New York City's landmark TDR program, only approximately a dozen transfers occurred.[46] The authors attributed this to developers' access to easier and more attractive methods for increasing density, including zoning lot mergers and rezonings of the development site.[47] Indeed, the Furman Center's research on TDR transactions between 2003 and 2011 identified only two transfers through the program during that period.[48]

C. Special Transfer Districts

In addition to zoning lot mergers and landmark transfers, New York City has a number of special districts that permit more distant transfers of development rights. These districts are defined geographic areas where specified granting sites are able to transfer development rights to a number of eligible receiving lots. The eligible receiving sites are not limited to lots on the same block or even across the street from the granting site; indeed, eligible receiving sites may be many blocks away from a granting site. Hence these programs potentially expand the market for both potential sellers and buyers of TDRs.

These special transfer districts include, most notably, the South Street Seaport Subdistrict,[49] the Theater Subdistrict,[50] the

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[44] *Id*. at 586-87.

[45] N.Y.C. ZONING RESOLUTION § 74-792(b)(4).

[46] RICHARD J. RODDEWIG & CHERYL A. INGHRAM, AM. PLANNING ASS'N, TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS: TDRS AND THE REAL ESTATE MARKETPLACE 8 (1987); *see also* Richards, *supra* note 26 at 462 ("[T]o this writer's knowledge, only a dozen [landmark] transfers have been processed in eighteen years . . . .").

[47] In conversations with the authors, developers have indicated that because of the special permit requirement they simply do not consider it worthwhile to obtain development rights through the landmark TDR program.

[48] Vicki Been, John Infranca & Josiah Madar, The Market for TDRs in New York City 18-19 (May 25, 2012) (unpublished manuscript) (on file with the *Brooklyn Law Review*).

[49] N.Y.C. ZONING RESOLUTION § 91-60.

[50] *Id.* § 81-70.

Special West Chelsea District,[51] and the Special Hudson Yards District.[52] The Special Hudson Yards District, which includes a complex TDR program,[53] is an important component of the city's efforts to encourage development on the west side of Midtown Manhattan.[54] The city recently announced plans for a proposed rezoning of East Midtown, which would also include a complex TDR program.[55] We discuss several of the special districts below in order to explain how the districts operate and demonstrate the evolving uses of TDRs.

1. Theater Subdistrict

The Theater Subdistrict, a part of the Special Midtown District, permits the transfer of development rights from forty-six "listed theaters," which are named in the Zoning Resolution and include some that are also designated landmarks.[56] With a few exceptions, the listed theaters may transfer development rights to any other lot within the Theater Subdistrict.[57] To execute a transfer, the City Planning Commission must issue either a certification or an authorization, and the owner of the granting site must provide written assurances that the site will continue to be used as a legitimate theater.[58] The theater also must be certified as physically and operationally sound, or a plan must be in place to upgrade it as necessary for its continued use.[59] Transfer through certification, which is a ministerial process, may increase the maximum floor area at a receiving site by no more than twenty percent.[60] These transfers also require a contribution to the Theater Subdistrict Fund,

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[51] *Id.* § 98-00.

[52] *Id.* § 93-00.

[53] *See infra* notes 91-96 and accompanying text.

[54] *See East Midtown Study: Overview*, N.Y.C. DEP'T OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/east_midtown/index.shtml (last visited Sept. 10, 2012) [hereinafter *East Midtown Study*].

[55] *See infra* notes 97-102 and accompanying text.

[56] N.Y.C. ZONING RESOLUTION § 81-742 (providing list of theaters); *see also* Kruse, *supra* note 16, at 110-11 (noting that some listed theaters are also landmarks).

[57] N.Y.C. ZONING RESOLUTION § 81-744.

[58] *Id.* § 81-743.

[59] *Id.*

[60] *Id.* § 81-744(a); *see also* Kruse, *supra* note 16, at 115-16 ("[T]he only requirement for such transfers beyond the FAR limit was that the [City Planning Commission] confirm that (1) the TDRs available to the granting site be reduced once the transfer is complete, (2) that the theater owner transferring the TDRs satisfy the requirements regarding the continued use of the property as a legitimate theater, and (3) that a contribution of ten dollars per square foot of transferred floor area be made to the Theater Subdistrict Fund.").

which finances inspection and maintenance of the granting theaters.[61] Additionally, receiving sites within the Eighth Avenue Corridor may use TDRs to gain an additional twenty percent of FAR over the amount they can receive through certification, subject to the City Planning Commission's authorization of the additional FAR.[62] This authorization is discretionary and requires findings that the development (i) relates harmoniously to all structures and open space in its vicinity in terms of scale, location, and access to light and air in the area; and (ii) serves to enhance or reinforce the general purposes of the Theater Subdistrict.[63] To date, eleven transfers have occurred through the Special Theater Subdistrict TDR program,[64] which have involved approximately 450,000 square feet of development rights.

2. Special West Chelsea District

The Special West Chelsea District, which contains the High Line, includes a sophisticated TDR program. The High Line opened to rail traffic in 1933, replacing existing at-grade train tracks.[65] It ran "through the middle of the block between 10th and 11th Avenues, passing either over or through the structures along the way, making deliveries of raw materials, milk and meat directly into warehouses or factories that were built to allow a train to run through them."[66] As the use of rail declined in the post-war period, the High Line fell into disuse and carried its last train in 1980.[67] In the ensuing years, nature reclaimed the elevated tracks, as wildflowers and grasses grew amid its decaying structure.[68] At the same time, the surrounding neighborhood grew in popularity, becoming home to nightclubs, art galleries, and restaurants.[69]

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[61] N.Y.C. ZONING RESOLUTION § 81-744(a). The contribution amount is adjusted over time, and the rate was adjusted in 2006 to $14.91 per square foot transferred. *Id.* § 81-744.

[62] *Id.* § 81-744(b). Because this twenty percent increase also applies to the twenty percent obtained by certification, this allows for a total increase of forty-four percent above the original FAR at the site. *Id.*

[63] *Id.*

[64] Been, Infranca & Madar, *supra* note 48, at 18-19.

[65] Jackson, *supra* note 1.

[66] *Id.*

[67] *Id.*

[68] Editorial, *A Plan for the High Line*, N.Y. TIMES, Aug. 15, 2004, at CY.9, *available at* http://www.nytimes.com/2004/08/15/opinion/opinionspecial/highline.html.

[69] *See About: Neighborhood Info*, HIGH LINE, http://thehighline.org/about/neighborhood-info (last visited Sept. 28, 2012).

In the 1990s, owners of property beneath the elevated rails sought to demolish the High Line structure, which would have enabled them to redevelop their land.[70] Then-Mayor Rudolph Giuliani supported these efforts, but a lawsuit prevented the city from demolishing the High Line before he left office.[71] After Michael Bloomberg was elected mayor in 2001, the city began to support efforts by a group known as Friends of the High Line to transform the structure into an urban park.[72] The property owners below the High Line withdrew their opposition in 2004 and in 2005 the federal Surface Transportation Board issued a "certificate of interim trail use," permitting the tracks to be removed from the national railway grid and enabling the process of transforming it into a park to begin.[73]

The neighborhood around the High Line soon became popular among developers,[74] who recognized the High Line's potential as a unique urban amenity.[75] In the next few years, investors poured an estimated $2 billion into the area surrounding the park.[76] Although development in the area slowed following the downturn in the broader real estate market, the market remained strong compared to other neighborhoods.[77]

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[70] Paul Vitello, *Rusty Railroad Advances on Road to Pristine Park*, N.Y. TIMES (June 15, 2005), http://travel.nytimes.com/2005/06/15/nyregion/15highline.html.

[71] Adam Sternbergh, *The High Line: It Brings Good Things to Life*, N.Y. MAG., Apr. 29, 2007, *available at* http://nymag.com/news/features/31273/.

[72] Vitello, *supra* note 70.

[73] *Id.*

[74] Nicolai Ouroussoff, *On the High Line, Solitude is Pretty Crowded*, N.Y. TIMES, Dec. 24, 2006, *available at* http://www.nytimes.com/2006/12/24/arts/design/24ouro.html ("[T]he High Line risks being devoured by a string of developments, including a dozen or more luxury towers, a new branch of the Whitney Museum of American Art and a Standard Hotel.").

[75] *See* Kate Taylor, *The High Line, a Pioneer Aloft, Inspires Other Cities to Look Up*, N.Y. TIMES, July 15, 2010, at A1 ("Part of the fascination with the High Line, which is operated by the city and the nonprofit Friends group, is that it is more than just a pretty place. The neighborhoods it runs through—the meatpacking district and Chelsea—were already glamorous with many restaurants, bars and art galleries. But the opening of the High Line has made those areas even more of a destination and encouraged the Whitney Museum of American Art to build a museum there."); Claire Wilson, *Turning the High Line into . . . the High Life*, N.Y. TIMES, Dec. 18, 2005, *available at* http://www.nytimes.com/2005/12/18/realestate/18cover.html?pagewanted=all (describing the High Line as "[w]hat some say amounts to Manhattan's biggest land grab since a handful of Native Americans took a few beads in trade for the entire borough . . . .").

[76] Patrick McGeehan, *The High Line Isn't Just a Sight to See; It's Also an Economic Dynamo*, N.Y. TIMES, June 6, 2011, at A18.

[77] Alison Gregor, *In Signs of New Life, Property Deals Below as a Park Runs Above*, N.Y. TIMES, Aug. 11, 2010, at B6.

According to owners of real estate along the High Line, the park had a clearly positive impact on property values.[78]

The regulations that govern the Special West Chelsea District restrict development of properties under and immediately west of the High Line.[79] These properties form a "High Line Transfer Corridor" and property owners within this "corridor" are authorized to transfer their TDRs.[80] The district is then further divided into designated subareas, and some of these subareas are eligible receiving sites for TDRs. The TDRs enable receiving sites to increase their FAR by between 1.0 and 2.65 FAR, depending upon the subarea.[81] In certain subareas, developers may also obtain additional FAR by contributing to a High Line Improvement Fund or by participating in New York City's Inclusionary Housing Program.[82]

Various other regulations encourage transfers and help to finance the development of the High Line. For example, certain lots must dedicate an easement for an elevator or stairwell that will provide access to the High Line in order to transfer TDRs.[83] Moreover, owners of vacant sites within the High Line Transfer Corridor that have already transferred all of their development rights may be granted an additional 1.0 FAR upon contribution of $50 per square foot to the High Line Improvement Fund.[84] The additional FAR, however, can only be used for a commercial purpose within the High Line Transfer Corridor. These provisions facilitate the Special West Chelsea District's broader goals of establishing the High Line as a vibrant and accessible neighborhood resource.[85] But they also increase the potential costs of transferring development rights. Perhaps as a result, prospective purchasers have complained that too few TDRs are available for sale, that sellers initially

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[78] *Id.*

[79] N.Y.C., N.Y., ZONING RESOLUTION §§ 98-11, 98-52 (2012).

[80] *Id.* § 98-31. To execute a transfer, owners of the granting and receiving sites must provide written notification to the Department of City Planning. *Id.* § 98-33(a).

[81] *Id.* § 98-22 (providing table that sets forth maximum FAR in subareas). In some of the subareas, a developer may obtain additional FAR via inclusionary housing only after she has obtained the maximum allowable TDRs. This requirement further incentivizes the purchase of TDRs. In certain areas, a developer must both purchase TDRs and develop inclusionary housing to reach the maximum permitted FAR. *Id.*

[82] *Id.*

[83] *Id.* §§ 98-33(d), 98-62.

[84] *Id.* § 98-35.

[85] *Id.* § 98-00.

priced their TDRs too high, and that the program's regulations should allow easier transfers.[86]

Despite these complaints, the Furman Center's citywide study of TDRs[87] found records of seventeen transfers through the Special West Chelsea District program between 2003 and 2011. These transfers reallocated approximately 273,000 square feet of development rights.[88] Of the forty eligible grantor lots in the High Line Transfer Corridor, thirty-three appear to have had unused development rights when the program was created and thirteen of these have transferred TDRs.[89] The individual transactions ranged in size from 643 square feet to 55,991 square feet of transferred development rights. During the same period, 157,809 square feet of development rights were transferred through eight zoning lot mergers in the area. Some of these same development rights were later transferred again through the special district TDR program.

Figure 2 below depicts the TDR transactions that have occurred through the Special West Chelsea District program. These transfers have shifted unused bulk from under the High Line to specific blocks where the city seeks to encourage development—most notably at the northern end of the district. These northern blocks include the subareas with the highest permitted maximum FAR.

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[86] *See* Eliot Brown, *Developers Want Easier Access to High Line Air Rights; But Should City Fix Something that Doesn't Look Broken?*, N.Y. OBSERVER (Feb. 13, 2008), http://www.observer.com/2008/developers-want-easier-access-high-line-air-rights-should-city-fix-something-doesn-t-look-broke ("The Real Estate Board of New York, responding to the concerns of multiple developers who were unable to find air rights to buy, has asked the city to consider changes to zoning regulations in West Chelsea that would allow for an easier transfer of those rights."); Gregor, *supra* note 77.

[87] *See* Been, Infranca & Madar, *supra* note 48, at 18-19.

[88] This represents more than one-third of the approximately 765,000 square feet of development rights that we estimate are available for transfer from the eligible granting sites. Authors' conversation with N.Y.C. Dep't of City Planning (Oct. 2012).

[89] The thirteen lots that participated are owned by only six parties. In addition, only nine parties purchased TDRs. Six of the transfers were for a single project, the Avalon West Chelsea, on Block 700. This project used a total of 111,000 square feet of TDRs.

Figure 2: Development rights transfers in the Special West Chelsea District[90]

3. The Special Hudson Yards District

The Special Hudson Yards District, located on the west side of midtown Manhattan, includes a TDR program designed to shape development in specific locations as well as to obtain land for a planned public boulevard and park. To compensate for restrictions on new development in the area planned for the park, known as "Phase 2 Hudson Boulevard and Park," the private owners of property in this area may transfer unused development rights by certification to designated subareas within the district.[91] The prices for these TDRs are determined through private negotiations. The designated receiving subareas each have a maximum permitted FAR increase,[92] which developers can unlock by purchasing TDRs or by

[90] Compiled from Furman Center analysis of data from the New York City Department of Finance's Automated City Register Information System (ACRIS), the New York City Department of City Planning's PLUTO, and the Department of Buildings. *See* Been, Infranca & Madar, *supra* note 48, at 16-18. The demolition permit data included demolition permits issued between 2003 and 2010. The development rights transfer data includes transactions between 2003 and 2011.

[91] N.Y.C. ZONING RESOLUTION § 93-32.

[92] *See id.* §§ 93-21, 93-22 (providing tables specifying allowable FAR increase).

contributing to the Hudson Yards District Improvement Fund in order to receive a bonus.[93]

Purchasers who have "maximized their permitted floor area" through either of these two methods may then purchase additional development rights from the Eastern Rail Yard.[94] The Eastern Rail Yard will make available at least 4.5 million square feet of development rights, which can be transferred to a subset of the receiving sites eligible for TDRs from the Phase 2 grantor sites.[95] A prospective purchaser must apply to purchase these rights. A pricing policy issued in July 2010 set the price at the higher of the current price for the District Improvement Fund bonus or sixty percent of the value, per square foot of land area, of the receiving property. However, the pricing policy is currently being revised and a new policy is scheduled for release in April 2013.[96]

While the specifics of these special district programs differ, the basic elements remain the same: each seeks to loosen the restrictions on the transfer of development rights within the district in order to further the city's goal of encouraging development in the district's other areas. Using complex subdistrict rules, these newly created districts have become increasingly sophisticated at directing the destination and use of TDRs. These rules governing receiving areas look more like traditional upzonings—albeit using private rather than publicly created rights—than attempts to give property owners more flexibility within the neighborhood.

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[93] *Id.* § 93-31. The fund will be used to finance infrastructure improvements including extension of the subway and new parks and open space. *See The Hudson Yards Project: Rezoning*, HUDSON YARDS DEV. CORP., http://www.hydc.org/html/project/rezoning.shtml (last visited July 17, 2012) [hereinafter *Hudson Yards Project: Rezoning*].

[94] N.Y.C. ZONING RESOLUTION § 93-34.

[95] *See Hudson Yards Project: Rezoning*, *supra* note 93.

[96] *See id.* To facilitate the broad Hudson Yards redevelopment, New York City created the Hudson Yards Infrastructure Corporation (HYIC) and Hudson Yards Development Corporation (HYDC). *See About HYDC*, HUDSON YARDS DEV. CORP., http://www.hydc.org/html/about/about.shtml (last visited Oct. 16, 2012); *Mission Statement and Performance Measures*, HUDSON YARDS INFRASTRUCTURE CORP., http://www.nyc.gov/html/hyic/html/about/hyic.shtml (last visited Oct. 16, 2012). HYIC acquired a fifty percent share in the TDRs at the Eastern Rail Yards for $200 million, which HYIC will recoup through the sale of the TDRs. *See* HYIC, FINANCIAL STATEMENTS, YEARS ENDED JUNE 30, 2011 AND 2010, at 3-4, *available at* http://www.nyc.gov/html/hyic/downloads/pdf/hyic_financial_statements_2011.pdf.

4. The Proposed East Midtown Rezoning

The Bloomberg administration recently proposed a rezoning of seventy-eight blocks in East Midtown in an area surrounding Grand Central Terminal.[97] The proposed rezoning seeks to encourage development of more modern office buildings in the area, where the average office building is over seventy years old. When presenting its proposal, the Department of City Planning noted the "limited success" of the Grand Central Subdistrict, which was created in 1992 to allow for easier transfer of landmark development rights in the area. Only one major transfer has occurred through that program since its creation, leaving over a million square feet of development rights on the site of Grand Central Terminal.[98]

Rather than simply upzone the sites where greater density will be allowed, the proposal—as described when this article went to press—will permit owners of those sites to increase maximum FAR as of right. First, owners can receive a bonus in exchange for a contribution to the district improvement fund,[99] which is dedicated to improving pedestrian networks and access to subway stations in the area. Second, owners can further increase the FAR at a site by purchasing landmark TDRs or making an additional contribution to the fund.[100] A special permit process will allow even greater increases in FAR. This process will involve a full

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[97] *East Midtown Study*, *supra* note 54. The proposal was first mentioned, albeit briefly, in Mayor Bloomberg's 2012 State of the City address. *See* Matt Chaban, *The Mayor's Very Big Plans for Midtown East*, N.Y. OBSERVER (Jan. 16, 2012, 3:18 PM), *available at* http://observer.com/2012/01/the-mayors-very-big-plans-for-midtown-east/. In January 2013 the city updated the East Midtown Study presentation. *See* N.Y.C. DEP'T OF CITY PLANNING, EAST MIDTOWN STUDY: UPDATE PRESENTATION (Jan. 29, 2013), *available at* http://www.nyc.gov/html/dcp/pdf/east_midtown/presentation_012913.pdf. This updated proposal did not alter the structure of the TDR program, but did shrink the boundaries of the rezoning slightly, removing portions of three blocks from the proposed rezoning. *Id.* at 15.

[98] *See East Midtown Study*, *supra* note 54.

[99] As of February 2013, the Department of City Planning was recommending that this contribution rate be set at $250 per square foot of development rights. N.Y.C. DEP'T OF CITY PLANNING, EAST MIDTOWN STUDY: UPDATE PRESENTATION II, at 22 (Feb. 28, 2013), *available at* http://www.nyc.gov/html/dcp/pdf/east_midtown/presentation_022813.pdf.

[100] *See* Matt Chaban, *Actually Developers and the City Are Not Competing for Midtown East Development Rights*, N.Y. OBSERVER (July 18, 2012, 5:52 PM), http://observer.com/2012/07/actually-developers-and-the-city-are-not-competing-for-midtown-east-development-rights/; Steve Cuozzo, *Grand Central's Grand Plan*, N.Y. POST (July 17, 2012, 12:50 AM), http://www.nypost.com/p/news/business/realestate/commercial/grand_central_grand_plan_jPGVKtolNBn7V8YYokal4N/0; *see also East Midtown Study*, *supra* note 54.

Uniform Land Use Review Process (ULURP),[101] a design review, and the developer's agreement to create a major public space.[102]

II. THE ORIGINAL CONCEPTION OF TRANSFERABLE DEVELOPMENT RIGHTS

New York City's existing TDR programs owe many of their features to the legal and conceptual frameworks developed in the 1970s and 1980s by legal scholars John Costonis,[103] Norman Marcus,[104] and David Alan Richards.[105] Those scholars viewed TDR programs as a tool to help resolve tensions between development and preservation goals. But, more broadly, they viewed them as part of a general move toward more flexible zoning. They also seemed to view unused development potential as a community resource, rather than as a solely private one—an idea that shaped their proposals for how municipalities could structure the transfer of development rights. Because their views were so fundamental to the design of TDR programs in New York City and across the country, this part explores these theoretical frameworks and considers how New York City's existing TDR programs reflect their ideas.

A. *The Need for Transfer Districts to Correct the Perceived Failure of Landmark TDRs*

The desire to preserve resources—such as historic landmarks, open space, and farmland—in areas facing development pressure has been the principal motivation for TDR proposals both in New York City and elsewhere. TDRs have been used to alleviate the hardships that development restrictions used to preserve those resources impose on their owners.[106] Mitigating or offsetting regulatory burdens is a

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[101] For a description of ULURP, see N.Y.C. DEP'T OF CITY PLANNING, THE UNIFORM LAND USE REVIEW PROCEDURE (ULURP), http://www.nyc.gov/html/dcp/html/luproc/ulpro.shtml (Oct. 16, 2012) [hereinafter UNIFORM LAND USE REVIEW PROCEDURE].

[102] *East Midtown Study*, *supra* note 54.

[103] *See* JOHN J. COSTONIS, SPACE ADRIFT: SAVING URBAN LANDMARKS THROUGH THE CHICAGO PLAN (1974); Costonis, *The Chicago Plan*, *supra* note 42; John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973) [hereinafter Costonis, *Development Rights Transfer*].

[104] *See* Marcus, *supra* note 12; Marcus, *supra* note 30; Norman Marcus, *Air Rights Transfer in New York City*, 36 LAW & CONTEMP. PROBS. 372 (1971).

[105] *See* Richards, *supra* note 26; *Development Rights*, *supra* note 21.

[106] *See supra* note 29 and accompanying text. TDRs also have been advocated as a method for alleviating broader inequities attributed to the vagaries of zoning. On this account, Euclidean zoning and land use regulation can impose differing

particularly important goal of the landmark and Theater Subdistrict TDR programs. At the same time, the perceived shortcomings of New York City's landmark TDR program motivated the development of more complex TDR programs. Writing in 1972, John Costonis noted that no developers had made use of the landmark TDR program adopted four years earlier.[107] He ascribed the program's disuse to "[i]nadequate analysis of the economic burdens of landmark ownership and of the urban design consequences of development rights transfers . . . ," "[o]nerous administrative controls of dubious necessity . . . ," and prospective program participants' skepticism over the program's legality.[108] Costonis attributed the landmark TDR program's "failure" primarily to its adjacency requirement.[109]

In response to these perceived deficiencies, Costonis proposed a "Chicago Plan," which would preserve urban landmarks through designation of "a 'development rights transfer district,' an area within which the unused development rights of landmark sites could be transferred."[110] The district would include recipient sites sufficiently close to the transferor landmarks to enable the low-density landmarks to offset the increased density at recipient sites. The district would also encompass an area with a high concentration of public services, enabling it to adequately absorb increased population and density.[111] Costonis described the Chicago Plan as "an instance of density zoning, which prescribes a maximum

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restrictions on landowners with similar parcels, providing economic benefits to some while preventing economic gain by others. *See* Julian Conrad Juergensmeyer et al., *Transferable Development Rights and Alternatives After* Suitum, 30 URB. LAW. 441, 444 (1998); *see also* Miller, *supra* note 16, at 465 (arguing that TDRs, "by providing compensation to landowners whose land value is severely decreased by zoning regulation . . . . are simultaneously more equitable and more efficient than traditional zoning practices").

[107] Costonis, *The Chicago Plan*, *supra* note 42, at 577-78.

[108] *Id*. at 578.

[109] *Id*. at 594 ("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.").

[110] Costonis, *Development Rights Transfer*, *supra* note 103, at 86; *see also* Costonis, *The Chicago Plan*, *supra* note 42, at 590. Landmark owners within these districts would be allowed to transfer development rights to any other lot within the district, but they could only increase the development capacity at a receiving lot by a maximum of fifteen percent. *See* Costonis, *The Chicago Plan*, *supra* note 42, at 590. Transfers would be accompanied by a requirement that landmark owners maintain the landmark in the future. *Id.* Costonis notes that the fifteen percent figure "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." *Id.* at 590 n.55.

[111] Costonis, *Development Rights Transfer*, *supra* note 103, at 86.

amount of bulk for an area as a whole and permits developers to concentrate or disperse that density on individual lots within the area in accordance with flexible site planning criteria."[112] He analogized this approach to other forms of density zoning, including cluster zoning or planned unit developments, and to flexibility devices such as zoning bonuses.[113] Each of these devices maintains a constant level of overall density while simultaneously permitting greater design flexibility.[114] Marcus also noted these similarities, contending that "[i]f a larger area unit of control is acceptable for developments in single ownership, it should be equally acceptable where ownership in the larger area is fragmented."[115]

Costonis's Chicago Plan was never adopted, but New York City's special district TDR programs embrace the district-wide focus that his proposal embodied. The Theater Subdistrict is most analogous to density zoning, as it allows the transfer of TDRs from the grantor theaters to nearly any other lot within the district's boundaries. By allowing more distant transfers, this feature provides prospective TDR grantors with a measure of increased flexibility. The program, however, draws the boundaries sufficiently narrowly to keep the transfers within the same neighborhood, ensuring that the neighborhood where additional development is allowed is in close proximity to the lower density lot that granted the TDRs.

These special programs also address Costonis's concern that the landmark TDR program could result in the "capricious" scattering of density around the city, based only on the proximity of a proposed development to a source of TDRs.[116] This is particularly true of the West Chelsea TDR program and the Hudson Yards program, which allow the transfer of TDRs a

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[112] *Id.* at 89.

[113] *Id.* at 89, 124; *see also* Costonis, *The Chicago Plan*, *supra* note 42, at 622-23 ("Virtually every major innovation in the land use field over the last fifteen years [including density zoning, special development districts, and development rights transfer districts] rejects the notion that individual lots must serve as the unit of development control."). Marcus similarly compares TDRs to other flexible zoning mechanisms, including "large scale developments," planned unit development, and cluster development. *See* Marcus, *supra* note 30, at 108.

[114] *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES & MATERIALS 329-31 (discussing cluster zoning and planned unit developments), 331-36 (discussing zoning bonuses) (3d ed. 2005).

[115] Marcus, *supra* note 30, at 108 ("It could serve the same planning goal—better development with greater zoning flexibility without increasing density. Perhaps most important, the resulting zoning flexibility could provide the framework necessary to sustain stringent public regulation of areas of critical concern to the environment, such as major public resource areas.").

[116] Costonis, *The Chicago Plan*, *supra* note 42, at 594.

number of blocks away from the grantor site but place a firm limit on the maximum amount of FAR that each eligible receiving site may obtain. This limit differs depending upon the subarea in which a given receiving site is located.[117]

B. The Need to Move Away from Lot-by-Lot Development Control

Although the increasing complexity of the city's special transfer districts has moved those districts away from the original conception of district-wide density zoning, zoning lot mergers continue to function as density zoning at a block level. Norman Marcus argued that the choice of the individual lot as the traditional unit of development control was arbitrary and failed to serve public interests.[118] Uniform controls on all lots were imposed when growth, rather than preservation, was the driving concern of planning. Their goal was "to promote equal opportunity by treating large areas according to uniform regulations."[119] The emphasis on lot-based zoning, he maintained, could impose detrimental uniformity and encourage landowners to develop sites that would better serve society in other ways.[120] He asserted that controls at the block level can achieve density goals as readily as lot-level controls.[121]

Zoning lot mergers instantiate Marcus's ideas by moving away from lot-based zoning and permitting transfers throughout a block. They provide greater flexibility and allow private actors to negotiate the distribution of density within a block.[122] In fact, during the late 1970s, as Marcus and Costonis

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[117] *See supra* note 81 and accompanying text.

[118] Marcus, *supra* note 30, at 108.

[119] *Id.*

[120] *See id.*

[121] Marcus, *supra* note 12, at 878 n.40. Marcus did not express the same concerns as Costonis regarding the landmark transfer program. He did, however, raise concerns regarding the transfer of unused development rights from parcels spaced too widely apart. *See id.* For example, he posited that a transfer between boroughs would result in a TDR program "destroy[ing] any zoning plan within which it operates." *Id.* The concept of regulating density over a broader area, such as a block, is analogous to the "bubble" concept in environmental regulation, which allows for polluters to freely trade permits "allowing a given number of tons of a pollutant to be emitted or discharged in a given air or water basin . . . ." Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 684 (1985).

[122] *See supra* Part I.A (discussing zoning lot mergers). Shifting density controls from the lot level to the block level will not necessarily result in the same overall density in the area subject to regulation. Rather than simply shift the location of development that would otherwise occur, TDRs have the potential to encourage greater actual built density than might occur were transfers not allowed. Richards, *supra*

were writing on TDRs, New York City amended its zoning lot merger process in a way that rendered it even more akin to density zoning. The 1977 amendment to the Zoning Resolution eliminated the requirement that a developer purchase or obtain a seventy-five-year lease for any property from which TDRs were obtained and thereby eased the transfer of density among tax lots on a block.[123]

C. Development Rights as a Community Resource

Costonis asserted that the technique of development rights transfer "stands squarely upon a principle that has been implicit in American land use practice since the *Euclid* decision: The development potential of privately-held land represents, in part, a community asset that government may allocate to enhance the general welfare."[124] This position relies in significant part on the premise that the government creates much of the value in privately held land.[125] TDRs, on this account, enable the government to recoup some of this value for public use by avoiding or discounting potential eminent domain awards.[126]

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note 31, at 437; *see also* Arik Levinson, *Why Oppose TDRs?: Transferable Development Rights Can Increase Overall Development*, 27 REGIONAL SCI. & URB. ECON. 283, 293 (1997) (finding that, in a partial equilibrium model of urban zoning, "total development under a TDR system would be higher than under a uniform height rule"). Of course this should not be surprising, given that TDR programs are justified in part as a method for giving value to development rights that would otherwise go unused.

[123] *See supra* note 26. At the same time, under New York's zoning lot merger provision, development rights cannot be freely exchanged between any two lot owners within a block. The granting and receiving lots must either be directly adjacent or they must obtain the agreement of all intervening lots to enter into a single zoning lot merger. If the city wished to grant even greater flexibility to owners of TDRs—moving the zoning lot merger process closer to density zoning—it could remove the requirement that intervening lots enter into a zoning lot merger. Instead, any two lots on a block could be allowed to negotiate a transfer, which would include the placement of a permanent restriction on the grantor lot equivalent to the amount of development rights transferred. Such a change would remove the limited veto (and concomitant strategic bargaining opportunities) afforded to intervening lots by the current zoning lot merger process.

[124] Costonis, *Development Rights Transfer*, *supra* note 103, at 85, 127 ("The central argument advanced in this article is that the development potential of private property is in part a community asset allocable to serve the community's needs. As implemented under development rights transfer this principle vastly expands government's economic and planning leverage over private land use decisions. Concomitantly, it places the leadership and administrative burden for resource protection more squarely on government's shoulders.").

[125] *See id.* at 97-98.

[126] *Id.* at 99 ("By regarding the development potential of private property as in part a community resource, on the other hand, development rights transfer enables government to share in the gains occasioned by rising land values. Eminent domain awards paid to owners of protected resources will be discounted to eliminate windfalls attributable to governmental rather than private initiative. Marginal downward revisions

III. ARE NEW YORK CITY'S NEWEST TDR PROGRAMS *POST*-ZONING?

What are planners, land use lawyers, and property owners to make of New York City's newer transferrable development rights programs? Are they improving upon a promising way of moving beyond the rigidities of traditional zoning schemes, or are they burdening what could have been a more flexible scheme with the same complexities and restrictions that mark traditional zoning ordinances? The answers to these questions will vary somewhat depending on the TDR program one considers.

This final part seeks to identify a few key themes reflected in the city's evolving use of TDRs. First, the complex subdistricting threatens to undermine the flexibility that TDRs promised. Second, narrower definitions and greater restrictions on receiving sites have a number of potential virtues: they may promote more careful planning of a district's future development, allow more transparent public review of potential future development sites, provide greater predictability regarding the location and intensity of as-of-right development; and serve to standardize the exactions imposed upon purchasers. Third, these TDR programs cast new light on long-standing controversies regarding the value of TDRs and their role in providing compensation for development restrictions.[127] The newer programs establish a limited number of receiving sites within larger areas typically marked by development

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in the development potential of lands within transfer districts will afford the funds required by these awards; these revisions will be proportioned to what land economists have long regarded as the 'unearned increment' in the value of private property.").

[127] In *Penn Central*, Justice Brennan considered TDRs relevant to the question of a regulation's impact and whether it constituted a taking. 438 U.S. 104, 137 (1978). In dissent, Chief Justice Rehnquist rejected this view, arguing that TDRs were only of relevance to the question of compensation. *Id.* at 150 (Rehnquist, C.J., dissenting). This debate continued at the Court in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). There, the petitioner property owner challenged development restrictions that included the grant of "certain allegedly valuable 'Transferable Development Rights.'" *Id.* at 728. Focusing on the claim's ripeness, a majority of the Court declined to address the relevance of TDRs to the issues of whether a taking had occurred or whether just compensation had been provided. *Id.* In a concurrence, Justice Scalia staked the position that TDRs have no relevance to the takings question (and whether the claim is therefore ripe for judicial review) but instead simply constituted a form of compensation and should be considered in that light. *Id.* at 747-50 (Scalia, J., concurring in part and concurring in judgment). Accordingly, Scalia deemed irrelevant the majority's discussion of whether the defendant had reached a final decision on the salability of the TDRs and "whether [their] value . . . must be known." *Id.* at 745.

pressure and a demand for increased density. They then require potential developers who seek to achieve maximum permitted FAR to purchase TDRs on the private market. In so doing, these regulations strengthen the market for these TDRs and better ensure that they have a reasonable value. In this final part we explore each of these points in turn.

A. *Newer TDR Programs May Be Too Rigid and Complex to Qualify as Flexible "Post-Zoning"*

TDRs allow property owners to avoid the strictures of existing zoning by buying TDRs on the private market rather than seeking regulatory changes that would allow greater density on the site. Although the landmark TDR program imposes special permitting requirements on the transfers, the more recent special district programs allow many transfers to be made as of right. This less onerous process is coupled, however, with specifications that limit the volume and destination of development rights.

The Special West Chelsea District, for example, allows transfers as of right, requiring only that parties submit a written notice of intent to transfer. However, the West Chelsea District also identified specific sites to which these rights could be transferred and placed limits on the number of TDRs a receiving site could obtain. These limits are tailored to foster an urban form that accords with the general purposes of the district, which include "ensur[ing] that the form and use of new buildings relates to and enhances neighborhood character and the High Line open space" and "creat[ing] and provid[ing] a transition to the lower-scale Chelsea Historic District."[128] Accordingly, although private-market actors are provided some flexibility with regard to where TDRs may be moved, this freedom is carefully circumscribed within a detailed plan for the receiving sites. In some ways, the Special Theater Subdistrict, which allows an initial as-of-right transfer to any site within a broad geographic area, is more akin to density zoning than the Special West Chelsea District.[129] However, unlike the Special West Chelsea District, a special permit is still required for a purchaser to obtain the maximum permitted FAR increase at a development site.

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[128] N.Y.C., N.Y., ZONING RESOLUTION § 98-00(e)-(f) (2012).

[129] *See supra* notes 56-64 and accompanying text.

Unlike earlier forms of TDRs, including the zoning lot merger and to some extent the Special Theater Subdistrict, the newer programs—particularly West Chelsea and Hudson Yards—are more than a form of density zoning that creates a space where developers can freely select the location and intensity of development. Instead, these programs more carefully direct the form and intensity of permissible development in a way that reflects the goals (and structure) of more traditional zoning. In this sense TDRs have moved away from a simple mechanism that permits buyers to escape the strictures of existing zoning and toward a complex system of upzonings (and downzonings), where the right to develop to the maximum permitted FAR depends upon the use of TDRs purchased on the private market.[130]

B. The More Rigid Regulation of Eligible Receiving Sites May Provide Advantages

Although zoning lot mergers do not alter the total density on a block, they leave uncertain precisely where permitted density will be situated within a block. Similarly, the Theater TDR program allowed development rights to be transferred anywhere within the Theater Subdistrict, although it limited the permissible increase in FAR at a receiving site. This left the likelihood of increased density at any specific site highly uncertain, which may have affected the likelihood that neighbors would oppose the program.[131] Newer TDR programs, by specifying both the parcels that can receive TDRs and the amount of FAR they can obtain, more carefully constrict the permitted density at a parcel. In so doing, they promote greater predictability.[132]

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[130] As noted above, under the proposed East Midtown rezoning, a developer can receive additional FAR first through a contribution to a district improvement fund. A developer can then gain additional FAR through the purchase of TDRs or through an additional contribution to the district improvement fund. *See supra* note 100 and accompanying text.

[131] This uncertainty most likely reduced opposition. However, it may be that the uncertainty over where the TDRs would be deployed increased the likelihood of neighborhood opposition because every resident or owner had to worry that the lot next door would receive the TDRs. Generally speaking, however, the greater the certainty of denser development nearby, the greater the likelihood that neighbors will oppose whatever tool is providing that density.

[132] Norman Marcus argued for the importance of ensuring predictability when structuring a TDR program. He emphasized the need to relate TDRs to a "well-considered plan" and rejected long-distance transfers of development rights due to concerns about the potential negative impact on the "predictability and collective security" that zoning provides. *See* Marcus, *supra* note 12; Norman Marcus,

That predictability may affect the nature of the public's participation in debates over proposed TDR programs. Each proposal triggers a public review process in which stakeholders can present challenges to the proposed changes in allowable density. By providing greater specificity about where the TDRs may be used, the newer programs give stakeholders a clearer understanding of what would be allowed and where.[133] That clarity likely encourages those property owners and residents who live near areas designated as potential recipients of the TDRs to participate actively in the public review. Of course, these increases remain speculative and, to some extent, less likely than they would be if the city were simply to upzone an area (given that a developer must still find a willing seller of TDRs). As such, allowing increased density through TDRs rather than a simple upzoning may decrease the likelihood of strong opposition to a proposal.

Like the TDR programs in the Special Theater, Special Hudson Yards, and Special West Chelsea Districts, the East Midtown proposal includes an improvement fund. Developers contribute to these funds to either obtain the right to purchase TDRs or to obtain additional development capacity in lieu of, or in addition to, purchasing TDRs.[134] These improvement funds serve to further the goals of the special district by providing infrastructure or other benefits. Essentially, these funds operate as an exaction for developers.[135] Rather than allowing it to depend upon negotiations between a developer and the city, however, the funds standardize this exaction. Some of the programs also allow for an in-kind-contribution in place of a monetary contribution. The Hudson Yards District, for example,

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Transferable Development Rights: A Current Appraisal, 1 PROB. & PROP., Mar./Apr. 1987, at 40, 42.

[133] These programs are part of proposals that are subject to review through the ULURP process, which includes a public hearing. *See* UNIFORM LAND USE REVIEW PROCEDURE, *supra* note 101; *see also* N.Y.C. Dep't of City Planning, *West Chelsea Zoning Proposal*, NYC.GOV, http://www.nyc.gov/html/dcp/html/westchelsea/westchelsea3a.shtml (last visited Oct. 16, 2012) (noting city council approval of three ULURP applications related to proposal); N.Y.C. Dep't of City Planning, *Hudson Yards Original Proposal as Adopted*, http://www.nyc.gov/html/dcp/html/hyards/proposal.shtml (last visited Oct. 16, 2012) (discussing ULURP applications).

[134] *See, e.g.*, N.Y.C., N.Y., ZONING RESOLUTION § 81-744(a)(5) (2012) (discussing Theater Subdistrict Fund's contribution requirement in conjunction with transfer by certification); *id.* § 98-35(c) (discussing High Line Improvement Fund); *id.* § 98-262(c) (discussing increases in FAR in exchange for contributions to West Chelsea Affordable Housing Fund).

[135] *See generally* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177 (2006) (discussing history and evolving uses of exactions and development impact fees).

accepts the improvement of a granting site as a public park in lieu of a cash contribution.[136] The High Line Improvement Fund allows a property owner to reduce her contribution if she provides structural remediation for the segment of the High Line above her property.[137] The TDR programs accordingly regularize and standardize the price developers must pay to offset the impacts their developments will have on the community and again bring greater transparency to the process.

C. Newer TDR Programs Have the Potential to Render TDRs More Valuable

Finally, the newer programs strengthen the demand for TDRs. The West Chelsea, Hudson Yards, and proposed East Midtown programs are located in areas with significant demand for new residential and commercial space. These TDR programs operate in conjunction with broader policies that encourage and channel this demand.[138] In the High Line area, for instance, the preservation of a unique urban resource has increased the area's desirability. To further encourage the purchase of TDRs by certain recipient sites, the West Chelsea program requires developers to purchase TDRs before they can obtain additional FAR through the city's inclusionary housing bonus program.[139] In Hudson Yards, the city will only allow a developer to purchase TDRs from the Eastern Rail Yard after a private-market purchase of TDRs from the designated grantor sites.[140] Similarly, the proposal for East Midtown will allow the largest sites to pursue a special permit for additional FAR only after they have already obtained the maximum FAR available through TDRs or through a contribution to the designated improvement fund.[141] In contrast with the earlier zoning lot merger and landmark TDR programs, these newer programs both increase the value of TDRs to property owners burdened with restrictions and serve to further very specific planning goals.

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[136] N.Y.C. ZONING RESOLUTION § 93-32(b).

[137] *Id.* § 98-25.

[138] *See supra* Part I.C (discussing programs).

[139] *See supra* notes 81-82 and accompanying text.

[140] *See supra* note 94 and accompanying text.

[141] *See East Midtown Study*, *supra* note 54; *see also* Matt Chaban, *How About Another Empire State Building or Two? City Outlines Mega Midtown East Rezoning*, N.Y. OBSERVER, July 12, 2012, http://observer.com/2012/07/how-about-another-empire-state-building-or-two-city-outlines-mega-midtown-east-rezoning/.

CONCLUSION

New York City's TDR programs have come a long way from the zoning lot mergers that approximated block-level density zoning. TDRs now play a starring role in some of the city's most ambitious rezonings. This enhanced role, however, has been accompanied by careful restrictions on the sites that can receive the transfers. The creative tool that enabled New York City developers to seemingly escape restrictive zoning and build towering structures like the Trump World Tower[142] has been reined back into the confines of traditional zoning principles. While the latest evolution of TDR programs has advantages, the reduction in flexibility these newer programs impose will likely render them ineligible for "post-zoning" status, regardless of how that concept might be defined.

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[142] *See* Dunlap, *supra* note 27.