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Transfer Development Rights: A Needed Addition to Historic Preservation in the District of Columbia

Lonny Heselov-Dolin

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TRANSFER DEVELOPMENT RIGHTS: A
NEEDED ADDITION TO HISTORIC
PRESERVATION IN THE
DISTRICT OF COLUMBIA

Buildings and areas with special historic, cultural, or architectural signif-
icance reveal our nation’s historical heritage and commemorate its cul-
tural past. Despite the abundance of protective federal, state, and local
legislation, preservation of America’s architectural landmarks has been
dismally ineffective. Over fifty percent of the 12,000 structures listed in the
1933 Historic American Building Survey have been disfigured or de-
stroyed, usually to provide for more intensive urban development. The
District of Columbia has not escaped the destruction of its own irreplacea-
ble buildings of historical or cultural significance. Effective legislation
must be developed to protect the numerous official landmarks that exist in

1. The public benefit of historic preservation is both educational and aesthetic. As the
Supreme Court has noted, “structures with special historic, cultural, or architectural signifi-
cance enhance the quality of life for all. Not only do these buildings and their workmanship
represent the lessons of the past and embody precious features of our heritage, they serve as

Historic preservation may also serve to benefit a local community economically. Gener-
ally, restoration of early buildings in a neighborhood results in a material increase in both
property values and local tax revenues. Additionally, an increase in tourism is also a
favorable by-product of historic preservation. See generally Note, Land Use Controls in
ginia and the historic Georgetown district in the District of Columbia are examples of met-
ropolitan Washington’s economically successful restored neighborhoods. There has been,
however, an almost complete displacement of the many poor residents of these neighbor-
hoods. See note 32 infra.

2. Recent federal legislation includes the National Historic Preservation Act of 1966.
preserve for the public use historic sites, buildings and objects of national significance for the
inspiration and benefit of the people of the United States.” The Historic Sites Act, 16 U.S.C.
§ 461 (1976). See generally Gray, The Response of Federal Legislation to Historic Preserva-
tion, 36 LAW & CONTEMP. PROB. 314 (1971).

State and local landmarks legislation and programs are reviewed in Brenneman, Historic
Preservation Restrictions: A Sampling of State Statutes, 8 CONN. L. REV. 231 (1976); Costonis,
The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 HARV. L. REV. 574, 580-84 (1972) [hereinafter cited as Costonis, The Chicago Plan]; Ger-
stell, Needed: A Landmark Decision, 8 URB. L. 213 (1976); Wiedl, Historic District Ordini-
cances, 8 CONN. L. REV. 209 (1976); Wilson & Winkler, The Response of State Legislation to

The importance of an effective historic preservation program in the District of Columbia cannot be overemphasized. As the nation's capital, Washington, D.C. is also the nation's showcase to the world. Thus, in an attempt to prevent further dissipation of its historic endowment, the District recently enacted "The Historic Landmark and Historic District Protection Act of 1978" (Historic Protection Act). The Act endeavors to protect, enhance, and perpetuate landmarks and districts representing the city's cultural and architectural history.

Although its goals are ambitious, the District's Historic Protection Act is conceptually akin to legislative plans in other jurisdictions which have failed to adequately preserve historic landmarks. After analyzing the failure of these traditional historic preservation efforts in the United States, this comment will focus on the District of Columbia Act and propose the adoption of a new historic protection plan, incorporating a development guidance technique—transfer of development rights (TDR)—which has been successfully tested in several American cities.

I. HISTORIC PRESERVATION PROGRAMS: THE BASIS FOR FAILURE

The failure of this country's historic preservation programs reflects a fundamental conflict between the economic interests of private property owners and public preservation goals. Preservation of historic landmarks in high land value areas, such as downtown locations, is generally less profitable than redevelopment of office buildings that utilize maximum permissible rental space. Landmark owners often are prohibited from modernizing their structures to increase operational productivity and also


6. For a discussion of this conflict, see Costonis, The Chicago Plan, supra note 2, at 575; Gerstell, supra note 2, at 213-14.

7. Although many restoration projects have been economically successful, see note 1 supra, some historic landmarks are vulnerable to demolition as part of more profitable development schemes. Often a landmark situated in a downtown office area may operate at a loss. In such a case, a new replacement structure offering increased profit through greater rental space and decreased maintenance costs may prove too enticing to overlook. See Costonis, The Chicago Plan, supra note 2, at 579.

8. An example of the negative effects of landmark designation is Chicago's Old Stock Exchange Building. The structure was located in Chicago's Loop, an area of skyscrapers and enormous land values. Designation would have diminished the site's value for the pur-
find it difficult to secure mortgage financing for their encumbered properties. To be effective, municipal zoning ordinances must have the cooperation of landmark owners. Such cooperation can be insured only if the economic burdens of landmark designation are recognized and alleviated. Most preservation ordinances, however, fail to address this problem.

Typical municipal preservation ordinances set forth criteria to be used by city landmark commissions or other municipal bodies for the designation of buildings or areas as historic landmarks. After designation, landmark owners must give prior notice to landmark commissions before alteration or demolition. In some cities the commission has the absolute power to prevent demolition or alteration of a landmark while in others the commission's power is limited to formal requests to legislatures to save the landmark by purchase or condemnation. Another variant prevents the commission from denying alteration or demolition requests until the landmark commission formulates a compromise plan accommodating both the landowner's desires as well as historic preservation objectives.

The inability of the landmark commission to prevent destruction of landmarks is a major and obvious reason why many historic preservation ordinances have failed; but even ordinances prohibiting landmark demolition or alteration frequently contain loopholes that undermine their effectiveness. One of the widest loopholes is the economic hardship exception. This exception allows landmark owners to alter or demolish their build...
ings if they can prove to the landmark commission that preservation of the landmark will burden them economically. Urban landmark owners have used this loophole to plead that the loss of potential income occurring when downtown landmark sites are not developed to their full economic potential creates economic hardship.\textsuperscript{15}

Subjective and amorphous standards for approving landmark alterations or destruction frequently provide another loophole, especially when the decisionmakers are legislative officers vulnerable to political pressures.\textsuperscript{16} An additional problem is the failure of legislation to preserve the settings of historic structures by regulating adjacent structures.\textsuperscript{17} The special historic, cultural, or architectural value of a landmark is lost if it is surrounded by a mammoth office or industrial complex. The problems underlying these loopholes are poor legislative drafting and a failure to provide landmark commissions with the necessary power needed to effectuate preservation goals.\textsuperscript{18}

\section*{II. THE D.C. HISTORIC PROTECTION ACT}

An examination of the District of Columbia’s Historic Landmark and Historic District Protection Act\textsuperscript{19} pinpoints why municipal zoning ordinances fail to preserve urban landmarks. The D.C. Act calls for the designation of both individual landmarks and entire historic districts.\textsuperscript{20} Actual designation rests with an Historic Preservation Review Board ap-

\textsuperscript{15} For a more lengthy discussion of the “economic hardship exception,” see note 26 and accompanying text infra.
\textsuperscript{16} See text accompanying notes 27-28 infra for a discussion of this loophole.
\textsuperscript{17} One means of preserving an historic setting is to require new structures in an historic district or near a landmark to conform to the existing architectural style. See Wilson & Winkler, supra note 2, at 338.
\textsuperscript{18} For a general overview of the problems existing in state laws dealing with historic preservation, see Wilson & Winkler, supra note 2, at 329.
\textsuperscript{19} Act No. 2-318, 25 D.C. Reg. 6939 (1979). See note 5 supra.
\textsuperscript{20} Id. at § 3(l), 25 D.C. Reg. at 6942. An historic landmark is defined as a: building, structure, object or feature, and its site, or a site (1) listed in the National Register of Historic Places as of the effective date of this act; or (2) listed in the District of Columbia’s inventory of historic sites, or for which application for such listing is pending with the Historic Preservation Review Board . . . and approved for designation within 90 days. Id. An historic district is defined as: an historic district (1) listed in the National Register of Historic Places as of the effective date of this Act; (2) nominated to the National Register by the State Historic Preservation Officer for the District of Columbia; or (3) which the State Historic Preservation Officer has issued a written determination to nominate to the National Register after a public hearing before the Historic Preservation Review Board.

\textit{Id.}
pointed by the mayor's office and confirmed by the D.C. City Council. Designation is mandatory if the historic landmark or district is listed in the National Register of Historic Places, has been nominated to the National Register of State Historic Preservation Office for the District of Columbia, or is listed or is being considered for listing in the District of Columbia's inventory of historic sites. Individual landmarks and designated buildings or structures within an historic district may not be demolished, altered, or subdivided without mayoral approval. Before making his decision, the mayor is usually required to refer applications to the Historic Preservation Review Board. Unless the Review Board advises that the building or structure does not contribute to the historic district or landmark, the mayor must hold a public hearing. Requests to demolish, alter, or subdivide designated landmarks or districts will not be approved unless the mayor finds that approval is "necessary in the public interest," or that the landmark owner will otherwise suffer "unreasonable economic hardship."

Although the D.C. Act commendably provides for the prevention of landmark destruction, it contains many of the same loopholes plaguing other municipal historic preservation statutes. The Act's economic hardship exception could prove to be a major defect in a city with rapidly rising land values. Since the difference in value between the present and potential use of landmark sites in Washington is substantial, landmark owners may be able to argue successfully that forbearance of more profita-

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25. Id. at §§ 5(e), 6(f) & 7(e), 25 D.C. Reg. at 6947, 6950-51 & 6952.

26. The exception provides: [u]nreasonable economic hardship means that failure to issue a permit would amount to a taking of the owner's property without just compensation or, in the case of a low-income owner(s) as determined by the Mayor, failure to issue a permit would place an onerous and excessive financial burden upon such owner(s). Id. at § 3(n), 25 D.C. Reg. at 6944.
ble sale or development of their sites to preserve a landmark equals an economic hardship.

A loophole with even greater potential to thwart the Act's objectives is the public interest exception. This exception permits the mayor to allow alteration or demolition of a landmark if he finds it necessary to allow the construction of a project of "special merit."27 Such a project is "a plan or building having significant benefits to the District of Columbia or to the community by virtue of exemplary architecture, specific features of land planning, or social or other benefits having a priority for community services."28 This amorphous standard might enable landmark owners to obtain approval for destruction of historic sites by pointing to the economic benefits of their desired projects in the form of greater tax revenues and the attraction of more business to the city.

Other pitfalls of historic preservation ordinances plague the D.C. Act. For example, unless the interior space of a building is designated as an historic landmark, which is rarely done, the mayor's control is limited to the exterior of the structure. Thus a landmark owner can allow his building to decay inside, forcing demolition for health and safety reasons.29 This problem could be averted by broadening the Act's definition of "demolition" to include demolition caused by neglect. To accomplish this goal, the Act could require maintenance of the historic landmark's structural soundness under threat of criminal penalty to the owner. In turn, this requirement could be supported by public policy to protect community health and safety.30

Although uniform and coordinated administration is critical to the success of the statutory scheme for historic preservation, the Act has not received a warm reception from the two federal agencies with control over historic landmarks and districts in the city. Both the United States Commission of Fine Arts and the Pennsylvania Avenue Development Corporation bitterly contested the passage of the law. They may seek judicial exemption from its jurisdiction, claiming it will cause unnecessary and possibly illegal duplication of review.31 In addition, because designation

27. Id. at § 3(j), (k), 25 D.C. Reg. at 6943.
28. Id. at § 3(k), 25 D.C. Reg. at 6943.
29. See Wilson & Winkler, supra note 2, at 337.
30. This suggestion was made by Wilson & Winkler, and is used by the city of New Orleans to regulate its French Quarter. Id. at 337 n.39.
31. J. Carter Brown, head of the Commission of Fine Arts, charged that the Act "raises legal questions regarding possible dilution of the two federal statutes under which the Arts Commission operates." Brown claims to have a legal opinion from the U.S. Department of Justice backing his view. The Pennsylvania Avenue Development Corporation, created to coordinate the development of Pennsylvania Avenue between the White House and the
Transfer Development Rights will almost inevitably result in displacement of the poor, some members of the District of Columbia City Council have also contested the passage of the Act.

Unlike ordinances in other cities, the D.C. Act provides no right of appeal from either an initial designation of landmark status or from a denied request for alterations. The lack of appellate review renders the Act constitutionally suspect as a taking of property without due process. The major problem to overcome before any historic preservation legislation in the District can become effective, however, is the development of an effective means to lessen the economic burden that landmark designation places on landmark owners. One alternative is the incorporation of the new zoning technique known as the transfer of development rights into the new District Historic Protection Act.

III. TDR: TRANSFER OF DEVELOPMENT RIGHTS

Traditional preservation planning techniques assume that the development potential of a site, as determined by its zoning designation, is to be used only on that site. The concept of transfer of development rights


32. Georgetown is representative of the displacement pattern in an historic district. When the neighborhood's historic value was recognized, speculators began offering irresistible prices to homeowners. As speculative activity grew, property values rose further, and many homeowners who were unable to pay the increased property taxes were forced to sell. Additionally, tenants who were unable to match the significantly higher rent demands for restored houses were also forced to relocate. By 1950, most of the original lower income black residents had moved from Georgetown. See Newsom, Blacks and Historic Preservation, 36 LAW & CONTEMP. PROB. 423 (1971). A similar "Georgetown syndrome" has recently developed in the Adams Morgan and Capitol Hill neighborhoods in the city of Washington. See Wash. Post, June 21, 1979, § B, at 1, col. 1.

33. The New York Landmark Preservation Law provides for judicial review after initial designation and following a refusal by the landmark commission to grant a request for alteration. N.Y.C. ADMIN. CODE ch. 8-A (1976). See generally Wilson & Winkler, supra note 2, at 338. The authors recommend that municipal preservation ordinances have the procedural safeguards of "notice to the owner or occupant, opportunity for a hearing or remonstrance, and review by the governing body of the municipality with ultimate resort to the courts." Id.

34. The Supreme Court has suggested that the same constitutional right to judicial review of zoning ordinances also attaches to landmark designation or restriction. Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 132-33 (1978).

35. Most zoning regulations involve a combination of use, bulk, and density restrictions proportional to the size of the lot and appropriate to its location. Bulk restrictions increasingly have taken the form of floor area ratios (F.A.R.) limiting the size of buildings in proportion to the size of the property. The F.A.R. is the total floor area on a particular lot divided by the log square footage. 3 R. ANDERSON, THE AMERICAN LAW OF ZONING § 16, 11 (2d ed. 1976). F.A.R. limitations are generally dictated by what the municipality can or
(TDR)\textsuperscript{36} also measures the development potential of real property by its zoning control but severs the tie between zoned land and its development potential. It permits the development potential of one parcel of land to be transferred to another, where greater density will not be objectionable. TDR thus hurdles the major obstacle stifling traditional preservation ordinances—the landmark owner's economic interest. By allowing the landmark owner to sell the development right attaching to it for economic gain, TDR offers a viable historic preservation tool.\textsuperscript{37}

TDR programs characteristically have four phases. In the first phase, landmark sites are chosen from which development rights can be severed and then transferred. These sites are referred to as "conservation zones" and contain historic landmarks and areas where restricted development is desired.\textsuperscript{38} In the second phase, correlative "transfer zones" are established. These zones are permitted to receive the transferred density or development potential rights severed from parcels of land in the conservation zones.\textsuperscript{39} Only areas that can accommodate added density without damaging either overall city planning goals or the architectural characteristics of the neighborhood will be designated as transfer zones.\textsuperscript{40}

In the third phase, a device to facilitate the actual transfer of rights from conservation wants to support in terms of services to that particular area and by what it determines to be an appropriate density for the area's character. F.A.R. regulations work in the following way: the density permitted for a particular lot is determined by multiplying the area of a lot square footage by the prescribed F.A.R. The resulting product is the number of rentable square feet that may be contained within the building erected on the lot. See generally W. GOODMAN & E. FREUND, PRINCIPLES AND PRACTICES OF URBAN PLANNING, 430 (4th ed. 1968).

In addition to the traditional zoning ordinances which allocate density on a lot-by-lot basis with the same density ceiling imposed on lots of equal size, a second zoning technique labeled density zoning is often used. Under density zoning, a total volume of density is allocated for an entire tract or district and may be concentrated or dispersed over that area in accordance with the developer's plans. See O. HAGMAN, URBAN PLANNING & LAND DEVELOPMENT LAW 456 (1971).


40. Id. See also Schnidman, supra note 37, at 12, for a discussion of transfer zone requirements.
zones to transfer zones must be established. Finally, standards must be devised to determine what compensation landmark owners are to receive for their losses.

The legal concept underlying TDR is that title to property is not a singular right, but rather a bundle of numerous transferable rights in a piece of property. In America, ownership rights have traditionally evolved from the land itself, or "up from the bottom." Development restrictions have been considered limitations imposed by the government on the right to build. In contrast, the TDR is a "down from the top" concept that considers rights of ownership to evolve from governmental zoning decisions about the apportionment of densities in a community.

A. Legal Antecedents of TDR

TDR is not an entirely new concept. It has precursors in early American transportation systems, dam rights acts, major drainage and irrigation projects, and oil and gas production regulations. In the mid 1800's, the use of eminent domain by state-selected private corporations to plan, construct, and maintain private toll roads was commonplace. This practice established the precedent that led to the private sale and transfer of develop-

41. Numerous devices exist to facilitate the transfer of rights from conservation zones to transfer zones. Some techniques only permit transfers between private landowners. Others allow only the government to transfer development rights. A third scheme allows the government to make a transfer only after a private landowner refuses. See Costonis, The Accommodation Power, supra note 38, at 1062-63.

42. Id. at 1063.

43. Rose, The Transfer of Development Rights: An Interim Review of an Evolving Concept, in TRANSFER OF DEVELOPMENT RIGHTS 3 (J. Rose ed. 1975). TDR is a departure from traditional property concepts. It assumes that a transferable real property interest does not have to be uniquely located in space and that ownership does not always entail dominion over a particular piece of earth. See Case Comment, 90 HARV. L. REV. 637, 640-42 (1977). Unlike the sale of subsoil rights, see note 52 infra, a sale of development rights does not involve the transfer of anything located in space.

44. Schnidman, supra note 37, at 12.

45. Id. This "down from the top" theory is also evident in cluster and Planned Unit Development (PUD) zoning concepts. See note 52 infra. TDR permits the transfer of the unused density potential of land to noncontiguous land owned by others. See Merriam, supra note 37, at 81-82. TDR also envisions a community cluster or PUD whereby the overall density in the area stays the same while the location of the density within the community PUD shifts. Schnidman, supra note 37, at 12. For a general introduction to clustering and PUD, see note 52 infra.

46. For a discussion of these four early American legal precedents to TDR, see Carmichael, Transferable Development Rights as a Basis for Land Use Control, 2 FLA. ST. U.L. REV. 34, 53-99 (1974).

47. To facilitate the construction, maintenance and control of their toll roads and turnpikes, the colonies and early states empowered private corporations to acquire rights-of-way after payment of compensation to the landowner. Public necessity, use, and ratification by
development rights in order to accommodate the public’s need for transportation. Milldam Acts permitted a private owner of land watered by a stream to create rights in himself by erecting a dam to harness water power; but in exchange for this privilege, the dam owner was required to compensate downstream land owners for loss of irrigation. The courts upheld such legislation as a reasonable exercise of police power under the doctrine of “correlative rights.” Similarly, the American drainage and irrigation projects of the 1800’s permitted qualified owners within a designated district to operate water projects, set boundaries, and charge area landowners a fee in proportion to the benefit received. In addition, early twentieth century gas and oil regulations providing for pooling and utilization of output provide precedent for TDR. Pooling regulations required owners of property containing gas or oil fields to share their resources with neighbors. The equalization of development rights of each landowner in mutual gas and oil pools resulted in the curtailment of each owner’s development potential.

Also providing close analogies to TDR are more recent density transfer techniques, including planned unit development (PUD), clustering, and air rights transfers. These techniques commonly view density as a severable custom prevented direct challenge of the use of eminent domain authority by these private companies. Id. at 53-54.


49. Carmichael, supra note 46, at 58-66. The doctrine of “correlative rights” refers to the rights of individual owners that arise from their mutual relationship to a common resource. Id.

50. Through the use of these drainage and irrigation projects, individual owners retained ownership and use of affected lands. The services obtained by owners within the drainage and irrigation districts were assessed and a commensurate charge was levied on the owner to the extent of the benefit received by him. Carmichael, supra note 46, at 76-77.

51. For a lengthy discussion of early American oil and gas production regulations, see id. at 77-97. For a summary of the legal doctrines underlying oil and gas regulations which provide a basis for the use of development rights transfers, see id. at 97-99.

52. A planned unit development (PUD) is an innovative means of regulating a residential or industrial development project in which local density regulations apply to the project as a whole rather than to its individual lots. 5 J. ROHAN, ZONING AND LAND USE CONTROLS § 32.01[1] (1978). Typically, the technique permits clusters of high density, but PUD is more than merely a technique for clustering densities to create open space. A departure from traditional lot-by-lot regulation, PUD contemplates the planned development of an entire tract and is well suited to multiple use development projects. Specific plans are usually developed within a broad legislative mandate after meetings between a local zoning board and the interested developer. Benefits to the community from PUD uses include the saving of building costs, the preservation of open space, and the reduction of the ancillary costs of urban sprawl. 5 COUNCIL EVNT'L QUAL. ANN. REP. 51-54 (1974), excerptis reprinted in J. BEUSCHER, R. WRIGHT, & GITELMAN, LAND USE 506 (2d ed. 1976). See generally
right in land which can be transferred to and concentrated in other tracts of land. The TDR concept also has been used by numerous legislative bodies and sanctioned by the courts to further government acquisition of use rights in private tracts of land.\textsuperscript{53} These takings have facilitated the installation of utility poles,\textsuperscript{54} prohibited the construction of certain classes of buildings in residential areas,\textsuperscript{55} and preserved open space.\textsuperscript{56} As in TDR, these acquisitions restrict or prohibit an owner's right to develop part of his land in return for compensation. In contrast to TDR, however, they involve only partial fee acquisition and therefore do not strip the land owner of any other rights of ownership.

IV. EXPERIENCE WITH TDR PROGRAMS

A. The Unsuccessful British Experience

In 1947, the British Town and Country Planning Act (T.C. Act)\textsuperscript{57} assumed the entire development rights of all undeveloped land in England, leaving owners with all remaining rights of ownership except the right to build or change present use.\textsuperscript{58} Precedent for such nationalization of development rights can be found in a 1909 planning statute which created a

Merriam, supra note 37, at 86-87. See also Kristof, Planned Unit Development: New Term and Public Policy in Frontiers of Planned Unit Development 62-74 (R. Burchell ed. 1973) (planned unit development); W. Goodman & E. Freund, supra note 35, at 478, 480.

The severance and sale of air rights has gained general acceptance. Railroads, for example, can sell the right to construct a building over their tracts. See Schnidman, supra note 36, at 343-45. The value of air rights is well illustrated by the recent sale by the Museum of Modern Art in New York of its air rights to construct a forty-four story apartment tower over the museum. N.Y. Times, June 10, 1979 § 1, at 1, col. 3.

53. In acquiring use rights, the government takes less than a fee simple interest. The courts have generally recognized the power of eminent domain over rights of use. See Rose, Open Space, supra note 13, at 471.


55. Rose, Open Space, supra note 13, at 471, (citing State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 174 N.W. 885 (1919)).


57. Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 51. See Rose, Open Space, supra note 13, at 467-68; Merriam, supra note 37, at 88-89 for a discussion of this Act.

58. As one commentator noted:

Indeed, after July 1, 1948, ownership of land carries with it nothing more than the bare right to go on using it for its existing purpose. The owner has no right to develop it, that is to say, he has no right to build on it and no right to change its use.

Rose, Open Space, supra note 13, at 496 n.3, (quoting D. Heap, An Outline of Planning Law 12 (1963)).
national system for town planning based upon the assumption that government regulation of private lands would provide the most effective means for development. The legislation was the result of three British government reports concerned with land use problems caused by heavy concentrations of industry and population. The reports recommended that the public welfare should take precedent over private land use rights. They proposed that a national land use plan be drawn up to allow government control of land without government acquisition through the separation of the development rights from the land and their transfer to the public. Landowners were compensated for the value of their severed development rights at the time of the government taking. If an owner wanted to develop his land, he was required to repurchase his development right from the government. The selling price of the right was the estimated increase in value that the development right would add to the purchaser's land.

The TDR system under the British T.C. Act was not an effective one. Development came almost to a standstill after its enactment. Refusing to accept the fact that their rights to develop their land had been publicly acquired, owners refused to sell their land at less than its unencumbered pre-1947 value. Buyers, however, who were required to pay the government for the privilege of development, refused to pay the prices the sellers demanded for their encumbered land. This conflict, which destroyed the marketability of the land, resulted in the repeal of the T.C. Act and subsequent revisions in 1971.

The unsuccessful British experiment provides an important lesson for subsequent TDR development plans. A mandatory full scale TDR system must be based on a full understanding of the realities of the real estate market and the private landowner's concern about all the inherent rights of ownership. Without such an understanding, the costs of a full scale TDR system will outweigh any potential benefit such a system will provide. It would also be a mistake, however, to condemn the use of TDR

59. For a detailed discussion of the British experience, see Merriam, supra note 37, at 88-89; Rose, Open Space, supra note 13, at 467-70.
60. The Barlow, Othwatt, and Scott reports are discussed in Rose Open Space, supra note 13, at 468-69.
61. Id.
62. Id. This fund contained the initial sum of 300 million pounds. 10 & 11 Geo. 6, c. 51, §§ 20, 50, sched. 4 (1947).
63. Id. at §§ 69, 70 (1947). See Rose, Open Space, supra note 13, at 469.
64. M. Clawson & P. Hall, Planning and Urban Growth 163 (1973); Rose, Open Space, supra note 13, at 469.
66. See Merriam, supra note 37, at 89.
as a land use concept because of its failure in Britain. The United States has had a limited but successful experience with the TDR concept. An analysis of these experiences can provide the means to increase TDR's effectiveness in solving land planning problems such as historic preservation.

B. New York City TDR Plans

New York City became the first American city to apply a TDR program for the preservation of urban landmarks when it enacted the Landmarks Preservation Law of 1965. While it restricts landmark development, the New York law provides landmark owners both an opportunity for economic profit and the freedom to develop their land through uses not inconsistent with preservation goals. Like the Historic Protection Act of the District of Columbia, the New York Act designates landmarks and requires owners to obtain advance permission before structurally altering landmark sites. In contrast to the D.C. Act, however, landmark designation under the New York Act does not necessarily destroy the potential economic gain an owner could recoup from his property. The New York law preserves a landmark owner's opportunity for profit by permitting the sale of development rights to designated transfer zones for compensation.

The underlying premise of the New York TDR system is that the value of any given parcel of land in the city is directly related to the density or intensity of development permitted under the applicable zoning law. Since landmarks often have an excess of authorized but unbuilt floor area, a landmark owner has a valuable commodity to sell, thereby mitigating any potential economic loss due to landmark designation. Moreover, once these development rights are sold, the value of the remaining fee simple in the land is proportionally reduced. Subsequent purchasers can buy

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70. NEW YORK, N.Y., ZONING RESOLUTION art. VII, ch. 4, §§ 74-79, 74-791 to 793 (1971). For a detailed discussion of how a landmark owner in New York City can obtain approval for the transfer of development rights, see Costonis *The Chicago Plan*, supra note 2, at 585-86.
71. A concise summary of the use of a TDR scheme in New York City is provided in Rose, *Open Space*, supra note 13, at 473.
72. Id. See also Merriam, *supra* note 37, at 80-82; Schnidman, *supra* note 37, at 12.
only the reduced fee simple and are barred from developing the landmark parcel. This system should nullify any economic incentive to the landmark owner to destroy his landmark and redevelop the property in a more profitable manner. In addition, the owner is compensated for any economic loss caused by the development restriction on the property.

The importance of the New York Act as a demonstration of TDR's viability as a land use technique lies not in its design nor in its success. For example, only two historic structures in New York have been saved by the Act so far. The Act is significant, however, because in *Penn Central Transportation Co. v. City of New York* it provided a means for the courts to implicitly validate TDR as a constitutional exercise of state police power.

### C. Penn Central

Grand Central Station is a magnificent French beaux arts style structure owned by the Penn Central Transportation Company and its affiliates. In 1967, the New York Landmark Preservation Commission (Commission) designated Grand Central a "landmark" over the objections of its owners. The following year, in an effort to increase its revenues, Grand Central entered into an agreement with a British developer who planned to construct a multistory office building over the terminal. The Commission, however, would not grant permission to construct the highrise. Penn Central and the developer filed suit in the New York Supreme Court, claiming that the application of the Landmarks Preservation Law in their case was an unconstitutional taking of property without the due process requirement of just compensation.

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76. *Id.* at 115.
77. The Commission summarized its reasons for denying approval of one of the submitted plans in the following statement: "To protect a landmark one does not tear it down. To perpetuate its architectural features, one does not strip them off." *Id.* at 116.
78. *Id.*
After appeals in the state courts of New York, the United States Supreme Court affirmed the validity of the New York City Act in *Penn Central Transportation Co. v. City of New York.* By reasoning that the development restrictions imposed by the New York Act on Grand Central did not interfere with rights in the parcel as a whole, the Court implicitly sanctioned TDR. The Court noted that the Act did not deny owners the use of all pre-existing air rights in the property. Thus, it found that no "taking" had occurred. The Court noted that while landmark designation forestalled the owners of Grand Central from developing all their pre-existing air rights, those rights remained valuable to the owners of the terminal because the Act allowed their sale to at least eight parcels of land in the vicinity of the terminal. The Court found that the property’s transferable development rights were valuable assets; therefore, the New York Act’s interference with Grand Central was not of sufficient magnitude to require "an exercise of eminent domain and compensation to sustain it." The Court did not consider, however, whether TDR would constitute "just compensation" if a "taking" had occurred. Its analysis examined only the extent that TDR mitigated the loss of potential income to landmark owners. Significantly, TDR rights were analyzed by the Court only to determine if a "taking" had been effected.

The Court also rebuffed a due process challenge to the Commission’s power to designate landmark status and to restrict alteration of landmarks. Noting that landmark owners received the right of judicial review after all Commission decisions, the Court explained that there was no basis to conclude that the courts could not identify “arbitrary or discriminatory action

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79. See Penn Cent. Transp. Co. v. City of New York, 50 App. Div. 2d 265, 377 N.Y.S.2d 20 (1975), aff’d, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977). The Appellate Court held that historic preservation was a legitimate public purpose and that the application of the Landmark Preservation Law to the preservation of Grand Central was valid unless it would deprive the owner of all beneficial use of his property. The court implicitly upheld the TDR provision in the New York Act, suggesting that Penn Central could have obtained profitable compensation by transferring the unused development rights over the terminal. 50 App. Div. at 271-72; 377 N.Y.S.2d at 28-29.

81. Id. at 129.
82. Id. at 135.
83. Id. at 137.
84. Id. at 136-37 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
in the context of landmark regulation.” Because of the decision’s limitations, *Penn Central’s* precedential value to justify TDR is questionable. In an article published before the Court rendered its opinion, Justice Breitel, author of the New York State Court of Appeals decision in *Penn Central*, warned against attributing too much importance to the decision as a legal justification for the use of TDR. He considered TDR a novel land use technique that should be tested for its constitutional validity on a case-to-case basis until it becomes generally accepted. The Supreme Court may have gone further than Justice Breitel expected, however, because implicit in the Court’s threshold analysis of the transferability of TDR before ruling on whether a “taking” had occurred is at least tentative endorsement of the constitutional viability of the TDR concept. Thus, there is a basis for interpreting the Court’s opinion as a constitutional validation of TDR.

D. The Chicago Plan and Academic Revision of the New York Preservation Law

Professor John J. Costonis, a critic of the New York Landmark Preservation Act, has formulated a revised TDR preservation scheme known as the “Chicago Plan.” Unlike the New York Act, his approach provides compensation to landmark owners for actual losses suffered. Compensation more definitively negates any claim of taking without due process. To ensure a steady market in which TDR’s can be transferred, the yet to be enacted Chicago Plan establishes numerous transfer districts in downtown areas where landmarks are usually located. The Chicago Plan permits transfers to lots in the entire transfer district, not only to adjacent properties as under the New York Act. These transfer zones are not limited to downtown areas and can be located in noncontiguous zones of potential growth. Receiving lots in transfer districts are permitted to increase

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86. *Id.* at 133. For a discussion of the importance of this judicial review, see Breitel, *A Judicial Review of Transferable Development Rights*, 30 *LAND USE L. & ZONING DIG.* 5 (1978).


88. The Court by implication recognized that TDR’s are valuable assets that could be analyzed to determine if fair compensation had taken place and to determine if a “taking” had occurred in landmark preservation cases. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137 (1978).

89. A detailed account of the Chicago Plan is found in J. Costonis, *Space Adrift*, * supra note* 74. For a comparison of the New York City approach and the Chicago Plan, see Costonis, *The Chicago Plan, supra note* 2, at 590.

their density only up to a fixed percentage figure.\footnote{91}{J. Costonis, Space Adrift, supra note 74, at 50-51, 60.}

The most innovative feature of the Chicago Plan is its use of development rights banks to ensure greater fairness in allocating the economic burdens of landmark owners. Under this system, an owner who rejects the transfer option can require the city to take the unused development right by condemnation and purchase. These acquisitions are funded by a development bank that sustains itself on profits received from resale of development rights.\footnote{92}{Id. at 40.} To keep itself afloat, the bank will not only condemn and sell development rights from stubborn owners, but also solicit and sell donated development rights from privately and publicly owned landmarks.\footnote{93}{Id at 105-06. See also Costonis, Development Rights Transfer, supra note 36, at 87. Although "The Chicago Plan" is not part of the law of New York, the Court of Appeals of New York has commented favorably on the proposal. See Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 598, 350 N.E.2d 381, 388, 385 N.Y.S.2d 5, 12, appeal dismissed, 429 U.S. 990 (1976). The court was impressed with the plan’s straightforward use of eminent domain because it allows instant and just financial compensation for an owner’s development rights.}

Costonis argues that the bank’s solvency can be sustained through this revolving fund created by the sale of these pooled rights.\footnote{94}{J. Costonis, Space Adrift, supra note 74, at 105-06.}

The Chicago Plan was not enacted because its supporters could not overcome political forces fearful of change.\footnote{95}{For an analysis of the Chicago Plan’s failure, see Costonis, The Chicago Plan: A Case Study of the Gulf Between Law and Social Change in Law and the City 18, 22-25 (1975) [hereinafter cited as Costonis, A Case Study].}

The failure of the Chicago Plan, however, does not undermine its importance as a TDR proposal. The Plan provides a ready market for the transfer of development rights. This market ensures that severed development rights can be sold to mitigate the financial burden on property owners caused by landmark designation. Compensation should negate any claim of a taking without due process. Thus, the Chicago Plan is an important step toward the development of a large scale legal landmark preservation program based on the TDR concept.

III. TDR USE IN THE DISTRICT OF COLUMBIA

A. Past Encounters

The concept of TDR is not alien to the District of Columbia. In 1971, residents of the historic Georgetown district desired to restore the waterfront bordering the neighborhood.\footnote{96}{See Von Eckardt, Getting Charm and Height, Wash. Post, Feb. 27, 1971, § C, at 1,} To accomplish this goal, they ad-
vanced a TDR proposal designed to prevent the deterioration of the waterfront into an industrial slum, to forestall the development of large buildings on the waterfront, and to foster the efficiency of Washington's new Metro subway system by removing the ten-story height limitation imposed by Congress on the city in 1910. To maintain low density on the waterfront, the Georgetowners urged that presently unused waterfront development rights be transferred to the downtown Metro subway transfer district. Funds generated from the sale of TDR's would be used to restore the waterfront. The plan distributed density from the historic waterfront district under stringent rules to prevent the urban design problems that would result from transferring severed densities to the characteristically low density main Georgetown neighborhood. For undocumented reasons, however, neither this plan, nor a more complex one developed by Martin J. Rody of the National Capital Planning Commission was ever implemented. The failure of these TDR programs, like many others, was probably the result of the inability of planners to overcome political forces that discourage efforts to "surmount the status quo."

Not all of the District's encounters with TDR's have been unsuccessful. In 1976, the owners of several adjoining lots transferred development rights from one building owner to another in order to create a Planned Unit Development (PUD) under Article 75 of the D.C. zoning regulations. The proposed PUD was to encompass both existing and yet undeveloped buildings. Without a transfer of the development rights from existing developed parcels to the undeveloped parcels, the PUD would have violated the floor area ratio (F.A.R.) requirements of the D.C. Zoning Regulations. In order to meet the F.A.R. restrictions, the owners proposed that development rights be transferred from the Columbia Historical Society's Heurich Mansion to the lot where the proposed new building would be constructed. Such a transfer would have left the aggre-

col. 5. The waterfront proposal is also discussed in Costonis, The Chicago Plan, supra note 2, at 596 n.74 and Costonis, Development Rights Transfer, supra note 36, at 90.
101. Id. at 552. For a discussion of the PUD technique, see note 54 supra.
102. Id. The purpose of the PUD provision is "to allow for the development of flexible and creative residential, institutional, commercial, and urban renewal projects, or conservation thereof, that will facilitate attractive and efficient planning and design within each zoning district." Id. For a discussion of the use of F.A.R.'s, see note 34 supra.
gate density of all the planned and existing buildings within the level required by the zoning regulations. It also would have benefitted not only the developers, but also the Columbia Historical Society and the residents of the city. The income derived by the Columbia Historical Society from the sale of its development rights would have assured its continued operation. Significantly, the city would have benefitted by the preservation of the Heurich Mansion, an historic landmark, enabling the developers to proceed with their project.

The Dupont Circle Citizens Association opposed the proposed development and brought an action to halt the transfer. They argued that the D.C. zoning statute did not permit a transfer of development rights within a PUD. In *Dupont Circle Citizens Association v. District of Columbia Zoning Commission*, however, the D.C. Court of Appeals disagreed. Noting that the District of Columbia Code empowers the Zoning Commission with broad authority to promulgate and enforce regulations, the court held that the zoning regulations inherently provided for the transfer of development rights. The Court noted that the language of Regulation 7501.39 does not require the lots within a PUD to be of uniform size. Under the same regulation, buildings within the PUD can be of different heights and can contain varying numbers of occupants. In relation to this uniformity requirement, Regulation 7501.246 requires that “[t]he floor areas of all buildings shall not exceed the aggregate of the floor area ratio as permitted in the several districts included within the project area . . . .” The court concluded that a reading of these two regulations together permitted TDR’s as natural components of the District’s PUD zoning regulations.

The court’s stand on two related issues in *Dupont Circle* boosted the future prospects for broad scale use of TDR to preserve historic landmarks in the District. Prior to the court’s decision, the Zoning Commission’s statutory power to accomplish historic preservation was unclear. The Court of Appeals determined that the D.C. Zoning Act vested the Commission with the power to promote through its zoning activities both the general welfare as well as the orderly planning and development of the nation’s

103. *Dupont Circle*, 355 A.2d at 552.
104. Id. at 552-53.
105. Id. at 550.
106. The court stated that “[t]he very nature of the Planned Unit Development concept as promulgated by the Zoning Commission . . . suggests that a transfer of development rights from one building to another must have been contemplated as one that was both feasible and appropriate in the development of such a plan.” Id. at 556-57.
107. Quoted in id. at 557.
108. Id.
109. Id. at 556-58.
capital. After concluding that historic preservation promoted the general welfare, the court held that the Commission had reasonably exercised its statutory power in authorizing the transfer and sale of development rights.

In a case of first impression, the court held that the uniformity requirements of the D.C. Zoning Act, demanding uniformity for each class or kind of building throughout each zoning district, were not violated by PUD regulations permitting diversification in the use, size, type, and location of buildings in each zoning district. The court reasoned that diversification within a PUD is allowed because the uniformity requirements do not demand that all buildings within a zone must be of the same character. Thus, similar to the operation of a TDR scheme, each building's zoning limitation as defined by its allowable floor area ratios was permitted to be redistributed within the PUD zoning district.

B. Future Adaptations

The District's Historic Protection Act's potential to prevent the destruction of historic landmarks in the District should not be overemphasized, but likewise, the numerous flaws in the Act must not be overlooked. The District's commitment to protect its historic landmarks cannot be supported by legislation replete with loopholes. The Act's "economic hardship" and "public interest" exceptions need to be more narrowly drawn and the final decision about their applicability should not be placed with the mayor but with an independent review board less susceptible to political pressure. More importantly, the economic burden that landmark designation places on owners must be relieved by new legislation if historic preservation in the District is to become effective. The addition of a TDR scheme into the present scheme could alleviate economic hardship through compensation to landmark owners who are denied the ability to develop their property.

Precedent for the use of TDR's in the District can be found in existing zoning regulations covering PUD's and in Dupont Circle. Any TDR program, however, should be more specific than this precedent. Legislation should also reflect the Supreme Court's sanction of TDR in Penn Central. Drafters should provide adequate transfer zones within the District and

110. Id. See also D.C. CODE ANN. § 5-413 (1973).
111. Dupont Circle, 355 A.2d at 558.
112. The statute provides that "[a]ll regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts." D.C. CODE ANN. § 5-413 (1973).
113. Dupont Circle, 355 A.2d at 559.
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judicial review of administrative decisions. To alleviate further the risk of constitutional challenges, drafters should consider the inclusion of a development rights bank in the TDR scheme as a means to guarantee compensation to owners for the actual losses sustained by landmark designation.

IV. CONCLUSION

Transfer of development rights offers a viable alternative to more traditional landmark preservation plans. TDR's can adequately compensate landmark owners for loss of development potential from the forced preservation of their property. Past experiences with TDR programs aimed at historic preservation have shown they are not always successful; but planners armed with the hindsight afforded them by the New York Preservation Law and the Chicago Plan should be able to incorporate a successful TDR scheme into the D.C. Historic Protection Act.

The District of Columbia offers an excellent setting for the development of a comprehensive TDR plan. As the nation's capital, the city holds a wealth of historic districts and landmarks. Large scale urban development is either in progress or in the planning stage in many areas of the District. These areas should become transfer districts designed to receive TDR's from historic landmarks. Under a well devised TDR scheme, not only can the historical character of the city be saved but the scheme itself could be of financial benefit to a landmark owner. An analogous TDR concept has already been endorsed by the D.C. courts in Dupont Circle. Although the case was limited to voluntary transfer of development rights, the D.C. Court of Appeals gave the concept its tacit approval. This precedent, bolstered by the Supreme Court's validation of a TDR program under the New York Preservation Law in Penn Central, provides a legal foundation for the development of a successful TDR program that could serve as a model for other cities throughout the country.

Lonny Heselov-Dolin