THE TRANSFER OF DEVELOPMENT RIGHTS IN CENTER CITY PHILADELPHIA

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CHAPTER ONE: INTRODUCTION

Historic architectural landmarks in Center City Philadelphia have been in the past and continue to be the objects of neglect, improper alteration and demolition. Cognizant of the importance of preserving historic landmarks, the Philadelphia City Planning Commission is currently considering the alteration of the Philadelphia Zoning Code in a manner that would greatly expedite the protection, maintenance, and renovation of historic architecture in Center City Philadelphia. The Planning Commission's proposal would allow owners of locally-designated historic buildings in Center City and owners of selected high-rise development sites in Center City to participate in what is known as a transfer of development rights (TDR) Program.

The proposed TDR Program would permit the unused zoning envelope above locally-certified historic buildings to be sold to developers of high-rise commercial buildings, who would then be eligible to surpass the base floor-area ratio limits permitted by zoning on their high-rise development sites. For every square foot of developable floor area purchased from the owner of the historic building, the developer of the high-rise building would be permitted an additional square foot of floor area above the base floor-area prescribed by zoning. The transfer would be permanent, and the program would be designed to ensure that the sale of developments rights would

finance the renovation and long-term maintenance of affected historic buildings.

TDR implementation would have the significant effect of linking the development of high-rise office buildings, a process which is often the nemesis of historic architecture, with the preservation of selected historic buildings. In so doing, it would have the equally significant effect of balancing the competing and conflicting objectives of several special interest groups, including the residents of Center City, several City governmental agencies, and the development and business community.

TDR implementation would actualize this reconciliation in the following ways.

Residents and affected property owners in Center City would be pleased with the plan because it would not only provide for the continued visual enhancement of Center City, but it would make high-rise developers share in the costs of preserving landmarks. As opposed to the existing Preservation Ordinance, which merely provides for designation and protection of landmark buildings, TDRs would have high-rise developers compensate property owners for the cost of maintaining landmark buildings and for the forgone opportunity of developing property to its highest permitted density. The severability of development rights from a designated building would also make it easier for owners of designated historic buildings to obtain mortgages and other loans, as development

rights could constitute an asset and a form of collateral. Because TDRs would enable private property owners to get cash out of their buildings in both of the above-mentioned ways, it would diminish property owners' objections to designation, which is currently viewed as financially burdensome.

The government of the City of Philadelphia would be pleased with a TDR plan for several reasons. First, it would provide a public amenity at little or no cost to the City, as the City could further the cause of historic preservation without acquiring and maintaining historic buildings. Second, a TDR plan would not diminish the City's tax base. Although historic buildings which had sold their development rights under the plan could not be replaced with buildings that generate greater tax revenue, they would remain on the tax rolls, and the density transferred to new high-rises that were involved in a development rights transfer would permit the taxes to be higher on the new high rise than they would be otherwise.

The City's Historical Commission would find favor with the Plan because TDRs could supplement the existing incentives to retain historic architecture in a part of the city, the core and periphery of the office core, where historic buildings are at great risk of being demolished. The Historical Commission would also find it easier to designate buildings because they could offer financial compensation as an accompaniment to designation, which would expedite the

implementation of the City's Preservation Ordinance.

The Planning Commission would be pleased with the plan because it would divert the floor area in the zoning envelope of historic buildings directly into the office core, where the City's infrastructure of streets, subways, expressway entrances, sewers and sidewalks is large enough to absorb increased development. This would have the effect of strengthening the low-density historic character of Center City neighborhoods and reinforcing as well the fabric of Philadelphia's business district, two principal objectives articulated in the Planning Commission's 1988 Plan for Center City.

The business and development community in Center City would be pleased by the TDR plan because it would enhance the prestige of Center City by securing the maintenance of Center City's historic buildings and by encouraging further high-rise development.

The proposed revision of the zoning code is also in keeping with the national trend toward the use of so-called "incentive zoning" to finance civic improvements by harnessing the forces of high-rise real estate development. Cities such as New York, San Francisco and Denver use incentive zoning to finance historic preservation and the provision of civic amenities such as low-income housing, day care, *et alia*. This method of financing civic improvements has become more important than ever given the reduced role of the federal

government in financing such benevolent enterprises.

Thus, TDR implementation would not only reconcile the competing objectives of several Center City constituencies; it is a concept that has been tested in a handful of circumstances and that has great promise.

However, although the preservation of historic architecture presents exceptional benefits to Philadelphia, there exists doubt in Philadelphia's planning, preservation and business communities that a TDR plan can be successful in Philadelphia. Opponents to the plan contend, inter alia, that TDR plans have a mixed performance record nationally; that the pace of high-rise construction is not fast enough to generate demand for the program; that not enough landmarks in Center City are endangered by high-rise development to necessitate a TDR plan; that the plan would be unpopular with owners of historic buildings because it would prevent them from developing their property to the highest permitted density; that administering a TDR plan would be too costly for the City, which costs would not be justified by the benefits presented by preserving historic landmarks; that existing zoning bonuses and floor-area limits are already too generous, thereby obviating any potential demand for a TDR program; and finally, that existing preservation programs and ordinances offer enough incentive to maintain and renovate historic properties and provide enough control over the maintenance of historic properties to render a TDR program superfluous.

What opponents of the TDR plan do not realize is that, because the TDR concept has been tested nationally, Center City's TDR plan can benefit from the experience in other cites and can be designed to meet the unique character of Center City, in terms of the pace of high-rise development in Center City and in terms of the nature of the threat to historic architecture in Center City. Opponents also do not realize that a TDR plan can be designed to compensate owners of designated historic properties for the forgone development opportunity, so to as satisfy the standards set forth by the United States Constitution. Opponents' contention that existing zoning bonuses and floor-area bonuses would obviate demand for TDRs is true only in the context of the current comprehensive plan for the City. However, TDR implementation would only occur in the context of a revision of the comprehensive plan. Opponents' contention that the benefits of a TDR plan, namely that of preserving locally-designated historic buildings, would not outweigh the costs to the City is wholly misinformed for two reasons. First, the burden for implementing the plan can fall upon not-for-profit preservation organizations in Philadelphia that are well-qualified to assist in the endeavor. Secondly, the benefits of historic preservation are not entirely quantifiable, but not even critics of the TDR concept would disagree that the revitalization of Center City Philadelphia depends to a large extent upon the implementation of a successful historic

preservation initiative. Thus, the minor costs incurred by the City in designing and implementing a TDR plan will be recovered many times over. Finally, a TDR program would not be redundant with existing preservation incentives and ordinances; it would compliment and reinforce such programs.

Thus, whereas the prospect of implementing a TDR program raises challenging financial, legal, planning and administrative issues which must first be resolved before implementation can occur, as the discussion of these issues in the forthcoming chapters demonstrates, its benefits for Philadelphia will render these obstacles insignificant.

THE IMPORTANCE OF PRESERVING CENTER CITY LANDMARKS

Implementing a TDR Program in Center City Philadelphia is an important civic objective because preserving Center City's historic architecture presents innumerable and long-lasting benefits to the City of Philadelphia, its citizens, its businesses and its institutions. These benefits are both economic and cultural, as landmark preservation directs investment into Center City, defines Philadelphia's identity in a positive manner, maintains exalted cultural values, and is a resource for scholarship.

The Economic Benefits of Preserving Center City Historic Buildings

Among the economic benefits resulting from the preservation of historic buildings in Center City Philadelphia is the fact that they draw visitors into the City from the suburbs, from around the nation and from around the world. These visitors bring money into the City, which stimulates the local economy, providing jobs and creating tax revenue.

Independence National Park's 23 historic buildings, for instance, drew 5,362,893 visitors in 1988, according to the Pennsylvania Convention and Visitor's Bureau. (1) Although figures demonstrating how much these particular tourists spent in Philadelphia are not available, the total expenditure by travellers in the City of Philadelphia in 1987 was $2.78 billion, which generated 55,571 jobs, $708 million in payroll

and $22.7 million in local tax receipts.(2) Not all of these benefits can be attributed solely to Philadelphia's architectural heritage, but the relationship between Philadelphia's popularity as a tourist destination and its abundance of restored historic architecture is undeniable and will become even stronger with the advent of the new Convention Center at Twelfth and Market Streets. When this facility is completed, Philadelphia will vaunt its historic character in its attempt to compete with other cities for a share of the billion-dollar, national convention industry. Philadelphia's historic architecture, therefore, is an economic resource.

The benefits of preserving historic architecture are evident not only in the tourist and convention industries, but also in the film industry. Since the establishment of the Philadelphia Film Office in 1985, nine feature films and over thirty television projects have been shot in Philadelphia, resulting in $23 million of economic benefits to the City. (3) Uniquely Philadelphian landmarks such as the Fidelity Bank Building at Broad and Samson Streets, the Union League at Broad and Samson, the Curtis Institute at Eighteenth and Locust Streets, *et alia*, all of which are listed on the National Register of Historic Places, were critical visual elements in several nationally-released motion pictures.

Janet Herrington, Executive Director of the Film Office, notes that much of what draws film directors to Philadelphia

are Center City's historic neighborhoods and landmark buildings, which offer a consistently-historic, urban setting, something found in very few American cities.

The City's efforts to maintain its position as the regional center of finance, law, insurance, architecture and other service and information-based industries also underscores the importance of the City's rich architectural heritage. Historic buildings are valuable economic resources for these industries because they provide an air of prestige, solidity and permanence to the business environment, attributes which cannot be found in the same quantity in any other office market in the Philadelphia metropolitan area.

A final way in which historic buildings constitute an economic resource is that the ambience they create contributes heavily to Center City's high quality of life. Because of Center City's high quality of life, it is one of the few areas of the City that entices taxpaying and wage-earning residents from outside the City to move within the City limits. (4) Attracting new, tax-paying residents has been and will continue to be a critical factor leading to Center City Philadelphia's revitalization. As a result of the City's efforts to promote historic preservation, certain sections of Center City, i.e. Washington Square West and Society Hill, are now among the most desirable residential locations in the region.

The emerging recognition that the aesthetic

characteristics of historic landmarks are in themselves important economic resources is evident in an excerpt from a recent Supreme Court decision, Metromedia, Inc. v. City of San Diego (U.S. 1980).

> "Today, economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future." (5)

The Intangible Benefits of Preserving Center City Landmarks

Economic benefits notwithstanding, the preservation of historic architecture presents intangible benefits to Philadelphia, as well. The design and craftsmanship of historic architecture are among the greatest cultural achievements of and represent the highest standards and loftiest aspirations of 18th, 19th and 20th century Philadelphia and American society. The bulk of Center City's historic architecture dates from a time in the history of the United States when builders, architects, and architectural clients were eager to define and influence the character of our infant nation. By choosing to design and build structures after the fashion of admired cultures and esteemed periods of history, such as that of ancient Greece, ancient Rome or the Gothic period, Americans asserted the supremacy of the ideals of several different cultures in the hope that, in so doing, they would influence the culture of their fellow countrymen and countrywomen. This approach to architectural design passed

largely out of fashion following the First World War. The presence of buildings designed in the era preceding the Great War insures that the ambitious and infectious idealism of the young Nation, which helped to spur the United States into a position of world supremacy, will continue to influence thinking about design, craftsmanship and culture as a whole.

The power of historic architecture in this regard is widely-recognized, as is demonstrated by a quotation of John Costonis from his scholarly work, Law and Aesthetics:

> "environmental resources...enter into the cognitive and emotional lives (of those who experience them) and, ultimately, help shape the identity of individuals, groups and communities." (6)

Historic architecture's usefulness to scholarship is also indicative of its paramount cultural value, and this presents a strong argument for its continued preservation, as well. Historic architecture in Center City is useful for the study not only of architecture, architectural history and historic preservation, but also of history, art, art history, sociology, anthropology, planning and engineering. Thus, the City's architectural resources provide a rich visual environment and field of study for students enrolled in the City's numerous institutions of higher learning.

Conclusion

> "Although landmarks may have national or even international status, their impact is greatest in their host city. They enrich its fabric by adding an aesthetic grace note to the lives of its

> residents. They define its character for non-residents. And they should figure prominently in the city's planning and zoning regime, which, if it is sensitive to urban design values at all will recognize these buildings as precious civic assets." (7)

This quotation from John Costonis's Space Adrift demonstrates that Philadelphia's economic fortunes and its role as a center of culture are dependent on the well being of its historic architecture. It is as though the legacy left to modern day Philadelphia from its halcyon days as an industrial and financial powerhouse illuminates the path to the City's revitalization, and a TDR plan, by furthering the revitalization of Center City, can have a significant and beneficial effect on the future of Philadelphia.

THE TRADITIONAL DIFFICULTIES ASSOCIATED WITH IMPLEMENTING LANDMARK PRESERVATION PROGRAMS UNDERSCORE THE ADVANTAGES OF TDR IMPLEMENTATION

The traditional difficulties associated with implementing landmark preservation programs are economic, political, and administrative in nature. All of these difficulties arise from the fact that, on the one hand, historic preservation is an inherently expensive undertaking and that, on the other hand, it infrequently produces a short-term, financial benefit that dwarfs the initial investment. For this reason, it is not usually an attractive investment proposition. Since members of the private sector cannot financially justify investments in historic preservation, the government has been given the role of safeguarding the nation's landmarks.

For several reasons, however, placing this burden on the government is hardly a solution to the preservation dilemma. First, the government is limited as to the controls it can impose upon private property. Thus, it cannot decree preservation. Second, it is economically unfeasible for the government to acquire landmark buildings on a large scale in order to insure their preservation. The high cost of landmark acquisition is attributable in many cases to landmarks being located in downtown areas, where land prices have escalated sharply in recent years. Landmark acquisition by government also has negative economic consequences that extend beyond initial acquisition costs, as additional expenditures are

needed for maintenance, and government acquisition of landmarks would result in their removal from the tax rolls, which would be deleterious to the budgets of older, financially-troubled cities. Government acquisition programs, therefore, are unsound economic propositions. This may be for the best, however, for the failure of the City of Philadelphia, because of its budget difficulties, to protect the landmarks that it does own from fire and vandalism demonstrates that government ownership can sometimes be the worst fate for a landmark.

Cognizant of the economic unfeasibility of government landmark acquisition, municipalities have attempted to impose the economic burden of preservation on private property owners. As a result, municipal designation programs have met with stiff political opposition. On a general level, landmark preservation through municipal designation generates political opposition because it violates the nation's laissez-faire sensibilities. On a more concrete level, it threatens the profitability of urban real estate investments, undermining the objectives of some the most powerful lobbies within the municipal political arena, namely real estate developers, real estate brokers, and financial institutions. Because municipal designation can reduce the profitability of investments, it furthermore risks raising charges that it constitutes a taking of private property without due compensation in violation of the nation's Constitution. Even when municipalities succeed

in enacting preservation ordinances designed to survive Constitutional challenge and to restrict landmark demolition and alteration, the political battles that rage as a result of historic designation and enforcement continue nonetheless and often cause the city to relax enforcement. The result is that municipal designation programs often fall short of their goals.

Even if there were no political opposition to landmark designation, the administrative problems of historic preservation agencies would still exist. Government landmark preservation offices are often inadequately staffed to perform their objectives. For example, the number of endangered and potentially-endangered landmarks in Philadelphia, which is in the thousands, is daunting when compared to the staffing level at the Philadelphia Historical Commission, which numbers fewer than ten.

The above-mentioned economic and political dilemmas seemed to have been overcome during the early 1980's when the federal government provided a tax credit and other incentives, both of which are described more fully in subsequent chapters, to encourage the renovation of commercial and industrial, income-producing buildings listed on the National Register of Historic Places. Programs dependent on this provision in the Federal tax law suffered under the 1986 Tax Reform Act which reduced these credits, and renovation of historic landmarks has declined precipitously since. Thus, the traditional

shortcoming of existing preservation programs not providing an incentive to renovate and maintain landmark buildings has returned.

Therefore, since landmark preservation programs do not enhance the profitability of real estate investments, unless programs are accompanied by incentives, and since they are politically difficult and costly to implement and enforce, and since acquisition of landmarks is prohibitively expensive, landmark preservation has traditionally been a difficult undertaking.

A TDR plan remedies these traditional difficulties. A TDR plan combines the benefit of erstwhile Federal incentive programs and code enforcement, without the uncertainty of Federal tax credits or the perpetual, day-to-day responsibility associated with municipal ownership.

Whereas the value of Federal tax credits changed frequently due to acts of Congress, the value of development rights fluctuates with the demand for commercial, high-rise real estate; i.e., the per square foot price of TDRs is tied to the per square foot rental price of high-rise office space. Thus, when the financial motivation to demolish buildings is greatest, the dollar value of the development rights will be at its highest level.

Whereas, Federal tax incentives and the City's code enforcement program were run at the taxpayer's expense, a TDR plan could be administered by the privately-financed

Philadelphia Historic Preservation Corporation, as they already enforce facade easement covenants. This would save the City time and money. And part of the proceeds of the sale of development rights could be set aside by PHPC to provide for the long-term maintenance of property, something which existing programs do not provide.

In these ways, the traditional difficulties associated with landmark preservation programs highlight the advantages of TDR implementation. TDRs offer the municipality control without ownership, no diminution of the tax base, they make designation more palatable to property owners, they need not be administered by the city, they are long-term in impact and not subject to the vagaries and fluctuations of the Federal tax code.

ADDRESSING THE PROBLEM OF LANDMARK PRESERVATION IN CENTER CITY PHILADELPHIA: AN OUTLINE OF THE THESIS

It is demonstrated in the previous sections of this chapter both that historic preservation presents several benefits to Center City Philadelphia and that there are numerous difficulties associated with implementing and maintaining municipal landmark preservation programs in light of challenging financial, political and administrative constraints. Subsequent chapters in this thesis explain why TDR implementation constitutes an appropriate solution to the City's preservation dilemma.

The chapter immediately following (Chapter Two) demonstrates that the factors contributing to the demolition of historic buildings in Center City, both those which can be attributed to actions of local and federal government agencies and those which can be attributed to the actions of the private real estate market, can be utilized by a TDR program and transformed into forces that save historic buildings. The same chapter then itemizes, vis-a-vis these causes of demolition, the shortcomings of existing historic preservation programs and describes how TDRs can reinforce the weakened web of existing preservation programs.

The subsequent chapter (Chapter Three) introduces the TDR concept, presents its history and its theoretical benefits and examines its use in other cities' historic preservation initiatives. Its use in these cities reveals the numerous

legal, financial, planning and cultural issues involved in implementing a TDR plan and demonstrates that a TDR will not work if attention is not paid to all of the above-mentioned factors.

Chapter Four discusses the United States Supreme Court's recent stances on the Taking, Due Process and Equal Protection issues so as to determine whether or not a TDR program in Philadelphia would survive a Constitutional challenge. Also considered in this chapter are the anti-trust liability of the City, and the significance of recently enacted Pennsylvania Statutes for TDR implementation. Planning issues related to TDR implementation are also considered in this section.

By reviewing where development rights transfers have already occurred in Center City Philadelphia, Chapter Five suggests locations within Center City that would be most suitable as sending and receiving sites. This same Chapter presents a proposed TDR Program for Philadelphia, describing Program design and administration. Chapter 6 presents the findings and conclusion of this study.

CHAPTER TWO: THE DEMOLITION PROBLEM IN CENTER CITY PHILADELPHIA

CHAPTER INTRODUCTION

Although a number of preservation programs and preservation organizations currently exist in Center City Philadelphia, the demolition problem still threatens the City's historic architectural heritage. To determine why these threats persist, this chapter examines the types and causes of demolition threats and then examines existing preservation programs and their shortcomings. By focusing on these issues, this chapter demonstrates that there is a "window of opportunity" for TDRs to complement existing programs in the longstanding effort to eliminate the demolition threat to historic architecture.

An Overview of Demolition Activity in Center City

The Historical Commission is currently reviewing three demolition permit applications involving seven City-certified structures. One is for 26-30 South 21st Street. The owners of these three nineteenth-century rowhouses propose to erect a high-rise office building on this site. The second is for 1908 Chestnut Street, formerly known as the Boyd Theatre. The owner proposes to replace the existing theatre with a modern theatre of approximately the same size. (8) This proposal has brought the owner in conflict with the Philadelphia Historical

Commission, and this conflict has escalated into a court battle, currently before the Commonwealth Supreme Court, a case known as United Artists Theater Circuit, Inc. v. City of Philadelphia. The third is for a group of three historically-certified, nineteenth century rowhouses at the southeast corner of Ninth and Chestnut Streets. The owners propose demolishing the rear of these buildings and selling a new high-rise building on that site to nearby Thomas Jefferson Medical School. (9)

The outcome of these cases is uncertain, and the record of the Commission and other preservation groups in preventing demolition is mixed. In several cases, the Historical Commission, along with other preservation organizations and citizens groups, have put enough pressure on developers and property owners to prevent a number of demolition proposals. Examples of such cases are Lit Brothers Department Store at Eighth and Market Streets, which has been renovated and become Mellon Independence Center, a mixed-use, office/retail complex; Holy Trinity Church at Rittenhouse Square and Walnut Street, which was almost demolished to make way for a residential high-rise building; the buildings at the northeast corner of 17th and Locust Streets, also threatened by high-rise development; and the Swedenborgian Church at 22nd and Chestnut Streets, which has recently been renovated into offices.

However, there are also numerous examples of cases where

the Historical Commission and allied groups were unable to secure landmark preservation when demolition was proposed. Examples are the Gimbels Department Store building at Eighth and Market Streets, now the site of a grade-level parking lot and the proposed site of a high-rise office building; the McCrae Houses, a series of pre-revolutionary residences on the one hundred block of Sansom Street which were demolished to make way for a grade-level parking lot; the Finneas Meade Antique Store, formerly a nineteenth-century school house at 11th and Pine Streets which has been replaced by a modern commercial, office building; the Victory Building at Tenth and Chestnut Streets, which has been abandoned for at least a decade and faces almost certain demolition; and the north side of the 1600 block of Chestnut Street, whose low-density, late-nineteenth century, historic buildings have been replaced by Liberty Place, a speculative, high-rise office, hotel, and retail complex. (10)

Thus, not only is it clear that demolition threats are alive and well in Center City, it is apparent from the multifaceted nature of these demolition threats that they are generated by several factors which are not currently kept in check.

Economic and Governmental Factors Generate Demolition Pressure

The demolition problem in Center City Philadelphia arises because the factors generating pressure for demolition are not

balanced adequately by existing preservation programs. These factors may be broadly categorized as those arising from market forces on the one hand and those arising from government regulation of land use on the other.

The primary market force encouraging demolition is the disparity in profitability between high-income land uses, such as high-rise office space, parking facilities, retail stores, etc., and that of property uses that can be accommodated by historic buildings. Because the potential profit from the former is greater than that obtained from acquiring historic buildings and having them renovated or stabilized, urban commercial real estate speculation and development often entails the demolition of older, less remunerative buildings. (11)

This disparity in profitability is illustrated by comparing the projected return on investment offered by a stabilized or renovated historic building and that of a new, larger or similar-sized building on the same piece of land. (The rate of return on investment is the quotient whose numerator is the property's net annual income (income after vacancy and operating expenses have been taken into account) and whose denominator is the sum of the price of the building plus the cost of bringing it into working order. In other words, ROI = net income/investment.)

For example, an investor purchases three contiguous 20'x 80' parcels with three contiguous, three-story, row houses

massed together on the land. The land is zoned C-4 commercial, and the buildings occupy 80% of the 4800 square foot lot for a total gross floor area of 11,520, representing an FAR of 2.4, a low-density use, when one considers that the C-4 zone allows FARs of 5 without bonuses and 12 with. (12)

Since older structures have less-efficient floor plans than modern buildings and since these rowhouses were built as residences, we will assume that only 75% of the aggregate built area can be rented as office space, as the remainder will consist of party walls, stairs, hallways, entrance overhangs, vestibules, etc. The net rentable area is, therefore, 8640 square feet.

Let us assume that the investor purchases all of these buildings together for $600,000 and incurs an additional $576,000 in renovation expenses, assuming renovation costs of $50 per square foot, a conservative estimate. His total investment in the property is now $1,176,000.

His intended use for the property is office space, and the current market rate for upgraded historic space in that area of the city is $12 per square foot. The per square foot rent multiplied by the net rentable area of 8,640 square feet is $103,680, which is the gross annual income. The investor then factors in occupany at 86.3% (per a 1988 Jackson-Cross survey of Center City vacancy rates) (13) and a loss of 59% of the resultant figure to expenses for annual net income of $36,685.09. (The equation is $103,680 x .863 x .41 =

$36,685.09). Since ROI = net annual income/investment, the projected pre-tax ROI for this project in the first year of operation would be about 3.1%.

Under the existing C-4 zoning for this property, the same investor can substantially increase his rate of return to 6.6 per cent if he demolishes the historic building and maximizes the site's zoning potential, an FAR of 5. For if he demolishes the 11,520 square foot building for $10 per square foot, or $115,200, and builds a new, five-story structure for $100 per square foot, he will incur the following expenses:

acquisition	$600,000
demolition	$115,200
new construction	$2,400,000
TOTAL COST	$3,115,200

Because the new building will have a more efficient floor plan than the old structure, the developer can expect to utilize 80% of his gross floor area for a net rentable area of 19,200 square feet, which he can rent for $25 per square foot, according to the 1988 Jackson-Cross survey cited earlier. This will generate $480,000 in gross annual income. The developer will then factor in 86.3% occupancy and 50% loss of the product of gross income times vacancy to establish a net rentable income of $207,120 annually before taxes. (The 50% loss of income represents the operating costs associated with managing an office building, which is noticeably lower

than that for historic buildings) This represents a pre-tax ROI of 6.6%. (Neither of these scenarios takes into account the effect of annual inflation on ROIs, which in the case of the new office building might raise the ROI several percentage points, depending on the inflation rate.)

Thus, from a purely economic standpoint, newer commercial buildings are superior to historic buildings, and the example above illustrates the key components of this superiority. These components are: 1) the maintenance of older buildings is costlier than that of newer buildings; 2) the net rentable area of landmark buildings is generally less than that of modern structures; 3) and the per square foot rent in historic buildings is usually lower in historic buildings than it is in modern structures. One significant advantage not mentioned above which new buildings have over historic buildings is that the depreciation cast off by new buildings far exceeds that cast off by historic buildings, as the investment in the new construction is greater than that of the renovated historic building. (14) This has great significance for wealthy real estate investors, because if annual depreciation is greater than net income, the excess depreciation can be used to shelter income the owner may receive from other "active" real estate investments.

These factors together conspire to make the return on investment on historic buildings lower than that of newer structures.

However, it is when these market forces are intermeshed with government regulation of land use, in the form of zoning designations and zoning incentives, that the threat to historic architecture is most potent. Zoning designations that permit tall buildings in Center City's commercial districts, together with incentives in the zoning code that promote high-rise development, inadvertently encourage the demolition of low-density (often historic) buildings.

For instance, the C-4 and C-5 commercial zoning districts place approximately 15 million square feet of developable floor area in the zoning envelopes above city-certified historic buildings in Center City, thereby creating both the opportunity and the incentive for the demolition of hundreds of structures, as the ROI scenario above demonstrates. (15)

The zoning code of Philadelphia makes high-density development feasible and attractive to property owners in other ways, too. According to a 1985 Philadelphia City Planning Commission study of Center City zoning, the current bonus program encourages the construction of high-rise buildings along wide streets by granting additional floor area at a rate of 5% of the lot area for each additional foot of street width for every street over sixty in width. Because of this, a developer could conceivably build 100% more gross floor area than that normally allowed by zoning if the street is 80' wide or greater.

The advantage of this code provision from a planning

standpoint is quite apparent:

> "The authors of the current code wrote the code to encourage the placement of tall buildings along the widest streets, as this maximizes the amount of light and air available to building occupants and as these streets handle the increased traffic better than narrow streets." (16)

However, the disadvantage is that, because the widest streets abut both low-density districts and high-density districts, the zoning code provision encourages high-density development to impinge upon traditionally low-density areas. An example where such an outcome occurred is when the Liberty Place development displaced the low-density buildings along the entire north side of the 1600 block of Chestnut Street. (17)

This incentive program will, therefore, continue to result in the demolition of low-density, historic buildings along the fringe of the high-rise corridor. (18)

Another way in which the Philadelphia Zoning Code encourages the demolition of historic buildings is that it requires developers, who wish to build high-rise buildings, to acquire several small parcels and to demolish diminutive structures on these parcel. In the C-5 and C-4 zoning districts, properties are assigned floor-area limits, which determine the buildable square footage for each parcel. Developers may exceed floor-area limits by including within their project plazas, arcades and open spaces. This has the effect of forcing the developer to acquire more land than he

actually needs to build a high-rise structure. (19)

Thus,

> "The introduction of the zoning bonus system has brought development on small lots to a standstill and hastened the amalgamation of smaller holdings into land assemblies of [40,000 sf] sufficient size---usually a quarter block or more---to exploit the bonuses." (20)

Since Philadelphia lots were originally subdivided from twelve to twenty feet in width and from forty to eighty feet in depth, developers have had to acquire numerous small parcels, which contain small historic buildings, to amass enough land to take advantage of the floor-area bonuses in the code. The Commerce Square development at 22nd and Market Streets and One Liberty Place at 17th and Market Streets are only two examples in an office core which provides several others.

Thus, both market forces and government regulation of land are responsible for the demolition problem in Center City.

CURRENT PROGRAMS AND THEIR SHORTCOMINGS

Existing preservation programs in Philadelphia do not fully counter the forces bringing about demolition. The existing preservation programs are the Philadelphia Historical Commission's power to review all alteration and demolition permit applications and to block proposed demolitions of City certified buildings; the federal government's Investment Tax Credit for the qualified rehabilitation of national register properties; the Philadelphia Historic Preservation Corporation's facade easement program; the low-density residential zoning that prevails in most of Center City; and height controls along several Center City streets.

These programs and codes have been effective in preserving a great number of Philadelphia landmarks, but the efficacy of some of them has diminished in recent years and, in other cases, has always been in question.

The Philadelphia Historical Commission's Preservation Ordinance

The Philadelphia Historical Commission was created in 1955 to further the preservation of historic landmarks and was the first such commission in the United States to have city-wide jurisdiction. Although a powerful preservation agency since its founding, its powers were greatly expanded on April 1, 1985 when the Mayor and City Council enacted into law an amendment to the Philadelphia Code, known as Section

14-2007, which empowers the Historical Commission to designate individual buildings and districts of buildings that possess historic and/or architectural significance. (21)

Section 14-2007 of the Philadelphia Code provides that when a permit application is filed with the Department of Licenses and Inspections to alter or demolish an historically-certified building, structure, site or object or a buildings, structure, site or object within an historic district, the Department of Licenses and Inspections (L & I) will forward the application to the Historical Commission for review. Before L & I may issue a permit to alter or demolish the historic building or to construct, alter or demolish a buildings within an historic district, the applicant must submit plans and specifications for the proposed work to the Historical Commission.

In cases where the owner wishes to demolish the building, and claims that the building cannot "be used for any purpose for which it is or may be reasonably adapted," or where a permit application for an alteration is based, "in whole or in part," on financial hardship, the owner must submit financial data to the Historical Commission such as property acquisition costs, the assessed value of the land and improvements, the property's cash flow, operating expenses, taxes, debt service, etc., and the Historical Commission may require the owner to conduct a study to determine whether or not the building "has or may have alternate uses consistent

with preservation." (22)

Within sixty days after receipt by the Historical Commission of the permit application, the Commission must determine whether or not it has any objections to the proposed alteration or demolition. If the Commission has no objection, L & I grants a permit. If the Commission has an objection, L & I denies the application for the permit. The Historical Commission may also postpone its decision for a period of up to six months.

The Historical Commission can direct L & I to issue a permit if it deems the proposed activity to be necessary to the public interest or if the Commission finds that the building "cannot be used for any purpose for which it is or may be reasonably adapted," based on the owner's presentation of an argument that the

> "sale of the property is impracticable, that commercial rental cannot provide a reasonable rate of return and that other potential uses of the property are foreclosed." (23)

L & I may also not issue permits for demolition or alterations of or construction within any individual building, structure or site which is being considered for designation or any building structure or site within a proposed historic district without the consent of the Philadelphia Historical Commission.

Although the powers granted to the Commission seem comprehensive, Section 14-2007 has not been effective in

preventing demolition in several cases. The demerits of the Philadelphia Historical Commission's powers granted in Section 14-2007 are illustrated in the following case.

The Loomis Peanut Butter factory, a red-brick, 19th-century, multi-story building on Delaware Avenue just south of the Benjamin Franklin Bridge, was demolished under the terms of this appeal process when its owners demonstrated to the Commission that it would have been uneconomical to restore the property. Once the site of a distinctive, historic building that was significant in commemorating the industrial development of Philadelphia's Delaware River waterfront, the site of the former factory is now occupied by a Comfort Inn, a national, budget hotel chain which built its standard, prefabricated building on the site, one whose height, materials and color do not conform with the existing urban fabric.

A second case where Section 14-2007 did not prevent demolition demonstrates that not only can demolition be accomplished through the appeal process, but also that the Historical Commission will permit designated buildings, or buildings under consideration for designation, to be demolished if they perceive that not allowing demolition would meet with stiff political opposition. A case in point is that of the Bulletin Building, a turn-of-the-century, terra-cotta, Beaux Arts building that until 1985 graced the northeast corner of Juniper and Filbert Streets, opposite City

Hall. The site, under consideration for designation, was acquired by the City for the construction of the Criminal Justice Center. Since the City of Philadelphia, itself, wanted to demolish the building, the Historical Commission felt compelled to grant the permit application, especially since its power to stay demolitions was only recently granted by City Council.

These cases demonstrate that although the Historical Commission has the right to delay the demolition of designated buildings, political and economic realities override this privilege, and the consequence is that historic buildings continue to be demolished.

An added shortcoming to the Historical Commission's power is that it is understaffed to carry out the task of designating and monitoring all of the endangered historic buildings in this city. Finally, the power of the Historical Commission to block demolitions of designated buildings is not completely effective because, although it can preserve endangered buildings from the demolition threats at the time of the proposed demolition, it in no way remedies the conditions that prompted the owners to submit the demolition application in the first place; i. e., the law presents an obstacle to the property owner's proposed exploitation of the property but does not present an incentive to the property owner to preserve or renovate the building, and therein lies one of the most significant shortcomings of this current

historic preservation program.

The Investment Tax Credit for Historic Preservation

The distinction between regulations and incentive programs drawn in the paragraph immediately preceding is important because it was its incentive to property owners and investors to renovate buildings that made the Investment Tax Credit for Qualified Rehabilitations of Historic Buildings the success that it was. In the period between 1982 and 1985, the halcyon years of the tax credit, the Investment Tax Credit (ITC) stimulated "an estimated $8.8 billion of investment in more than 11,700 historic buildings" nationally. (24) Many of the buildings renovated under the provisions of the ITC were in downtown areas of the nation's older, industrial cities, such as Chicago, Pittsburgh, St. Louis, Cleveland and, notably, Philadelphia.

The ITC is an example of a federal program which used financial incentives to lure private-sector investment into the renovation of historic buildings, thereby reversing the previously-existing situation where the private sector was often the nemesis of historic buildings.

The history of the ITC begins, significantly, at the nation's Bicentennial, when the Internal Revenue Code provided incentives to encourage private investors to transform historic buildings into income-producing, commercial and residential properties. The incentives were a 1) five-year

amortization of the cost of rehabilitation; 2) 19-year, accelerated depreciation; and 3) a 10% ITC for the rehabilitation of buildings deemed either contributing or significant to National Register Districts or buildings that were listed individually on the National Register of Historic Places. (25) Known as the Tax Reform Act of 1976, this program also denied the right to deduct demolition costs incurred in real estate development projects which involved the demolition of historic buildings. The right to use accelerated depreciation was also denied for such projects.

Although the Tax Reform Act of 1976 was further strengthened and amended by the Revenue Act of 1977 and the Tax Treatment Extension Act of 1980, federal historic preservation policy was completely transformed by the Economic Tax Recovery Act of 1981 (ERTA). This act, amended by the Tax Reform Act of 1984, replaced the earlier preservation tax incentive with a 25% ITC for "the substantial rehabilitation of certified historic commercial, industrial or rental residential buildings." (26) Under the provisions of ERTA, the 25% ITC could be combined with an 18-year cost recovery period for the adjusted basis of the historic property. (Adjusted basis refers to the "price of the property plus any acquisition expenses plus capital improvements less any depreciation already taken." (27))

In order to qualify for the tax credit, the rehabilitation had to be undertaken under the terms of the

Secretary of the Interior's Guidelines, which prescribed the manner in which the building was to be renovated and the manner in which the existing building, the proposed alteration, and the finished product were to be documented. The application for tax credits had to be submitted to and approved by both the State Historic Preservation Officer and the National Park Service, both of which acted on behalf of the Secretary of the Interior in interpreting the Secretary's Guidelines in either granting or denying the tax credits. This review process took several months.

Under the provisions of ERTA, non-certified buildings that were substantially renovated could also qualify for a 15% ITC for 30-39 year-old buildings and for a 20% ITC for 40+ year-old buildings. These buildings could only be used for industrial or commercial purposes but these lesser credits were not available for rehabilitation of certified, historic buildings; i.e., the standards for rehabilitating the "non-historic" buildings were not as strict as those for historically-certified ones.

Under the terms of ERTA, investors needed only to have a passive interest in the project; i.e., they could claim the credit without actually participating in its management or in the development process. (28) Equally important was the fact that syndicators of historic rehabilitations could raise capital for such projects by pooling the investment dollars of persons with incomes over $250,000, who were in need of tax

shelters and who did not derive their primary incomes from real estate. (29) Therefore, professional athletes, physicians, attorneys, corporate executives and others outside of the real estate profession could invest in certified rehabilitations, claim a credit, and participate in the rejuvenation of Philadelphia's decaying neighborhoods.

The importance of dove-tailing incentives for historic preservation into mundane, mainstream American preoccupations, such as reducing income taxes, cannot be overemphasized; the more preservationists align their strategies with the demands of the private marketplace, their more their cause will be advanced.

Because of the provisions of ERTA and the fact that Philadelphia had an abundance of underutilized and inexpensive National Register properties, numerous historic buildings in Philadelphia were rehabilitated under the provisions of this act in the years between 1981 and 1986. The relatively low cost of real estate in Philadelphia when compared to that of other major cities is important, as the 25% ITC applied only to the costs of rehabilitation and not to the costs of acquiring the building. Therefore, cities, such as Philadelphia, St. Louis, Pittsburgh, Baltimore and Cleveland, with notoriously undynamic real estate markets and sizeable inventories of underutilized commercial and industrial buildings, were ideal cities for ITC renovations. In contrast, cities such as San Francisco, New York and Boston, because of

the high cost of property acquisition, were not cities where the ITC alone could justify the purchase and renovation of older structures. (30) As a result, Philadelphia ranked first nationally for dollars invested for the period of 1982-84 with $400,400,000 invested in the rehabilitation of historic buildings and fourth nationally for the number of buildings renovated, which was 166 for that period. (31)

In addition, a June 1988 report by the National Trust for Historic Preservation estimates that Philadelphia benefitted from ERTA because 2,070 housing units were renovated, $413 million in new earnings were generated, at least 17,870 jobs were created and the gross output from sales and general business increased $1.39 billion. (32)

Examples of Philadelphia landmark buildings that were renovated under the provisions of ERTA, or where ERTA acted as an incentive in the renovation of a Philadelphia landmark, are Lit Brothers Department Store at Seventh and Market Streets, the Curtis Building on Independence Square, the Reading Terminal Headhouse at 12th and Market Streets, the Packard Motor Car Company on North Broad Street, the former Wills Eye Hospital at 16th and Spring Garden Streets, numerous underutilized industrial "loft" buildings in Olde City and many other Center City landmarks. This resulted in the virtual transformation of certain areas such as Olde City and Spring Garden from dilapidated neighborhoods into attractive, upscale residential and commercial areas. It also resulted

in the displacement of small, light-industrial businesses from Olde City and of low-income residents from Center City and Spring Garden, and this paradox of contrasting benefits and disadvantages must be taken into account when assessing the ITC as a preservation technique; it was a tax credit for the affluent which resulted in the displacement of many low-income families from their homes.

In April 1986, however, the ERTA of 1981 was drastically altered. The three-tiered credit (25% for certified, historic rehabilitations, 20% for 40+ year-old buildings and 15% for 30+ year-old buildings) was replaced with a two-tier credit for qualified expenditures, a 20% ITC for certified, historic buildings and 10% for non-residential buildings that were originally placed in service before 1936. (33) In addition, the depreciation schedule was changed from "accelerated" over 19 years to "straight-line" over 31.5 years for non-residential real property and 27.5 years for residential real properties.

Furthermore, the 1986 Tax Reform Act provides that

> "rehabilitation expenditures will not qualify for the credit unless at least 75% of the existing external walls are retained (including at least 50% as external walls), and at least 75% of the building's internal framework is retained." (34)

Under prior the prior law, a building could be completely gutted as long as 75% of the external walls were retained. (35) Additionally, a "passive-loss provision" in the 1986 Act reversed the provision of the Tax Reform Act of 1984 that

allowed the use of passive credits and losses to offset all income. ("Passive" income is that which one receives from businesses "in which a taxpayer does not materially participate."). (36)

The 1986 Act stipulates that the ITC can only be taken against income generated by "passive" investments, thus severely restricting the "pool" of investors that can participate in ITC projects to those with substantial "passive" interests in real estate. Not only was the type of income (active income) excluded from being offset, but other provisions of the act related to the passive-income provision had the effect that

> "syndicators will now be offering lower vale shares, $25,000 and less, to a larger group of investors with gross annual incomes (less than) $250,000 instead of the high share value, $50,000 and greater, to a limited group of high-income investors." (37)

The Tax Reform Act of 1986 affected historic preservation syndications through more subtle changes, as well. Besides reducing the ITC, abolishing accelerated depreciation, and altering the passive loss provision, the 1986 Tax Reform Act eliminated preferential tax treatment for capital gains. Capital gains refers to profits derived from the sale of assets (i. e., capital assets) that do not generate ordinary income. For example, whereas a physician derives "ordinary" income practicing medicine, a physician's share in an historic preservation syndication is an example of a capital asset.

Capital gains taxes are only paid when such assets are sold for a profit. Previous to 1986, capital gains were taxed at 60 per cent of their value. The Tax Reform Act of 1986 increased the rate of taxation on capital gains to 100%. Thus, since capital gains and ordinary income are now taxed at equal rates by the Internal Revenue Service, the 1986 Tax Reform Act eliminated one of the many tax benefits of investing in historic preservation syndications and contributed to the decline of such syndications.

Finally, the Tax Reform Act of 1986 reduced marginal tax rates. Marginal tax rates determine the percentage of one's income that is subject to taxation by the Internal Revenue Service. The effect of reducing marginal tax rates was to diminish the necessity investors felt to protect their income by participating in such tax shelters as investments in historic preservation syndications. (38)

Thus, the Tax Reform Act of 1986 had the overall effect of making a project's return on investment and risk the predominant factors in making real estate decisions.

Furthermore, all of these amendments to the tax laws together had the effect of making it much more complicated to acquire the money required to rehabilitate buildings, and as a result of these changes, the rehabilitation of certified historic buildings has declined 40% in the United States since the enactment of the Tax Reform Act of 1986. (39) The more important result from the standpoint of preservation is that

the incentive to preserve historic buildings is substantially reduced, and the incentive to demolish historic buildings is enhanced. Therein lies the principal shortcoming of the Investment Tax Credit for Historic Preservation.

However, there is another shortcoming of the federal historic preservation initiative, which has much relevance to the ITC. Although being listed on the National Register of Historic Places qualifies buildings for tax act rehabilitations, the fact that a building is listed on or eligible for listing provides only limited protection. First, it does not protect structures from private sector demolition. Secondly, the National Register only protects listed structures from demolition by the Federal Government or from construction activity which is funded by the Federal Government and undertaken by state, local or county governments, to the extent that it requires federal agencies to perform a thorough review (known as a "Section 106 Review") of issues involved in demolition and of alternatives to demolition. After such review, if the government determines that the benefits of demolishing the historic structure outweigh the losses, the historic structure may be demolished.

The PHPC Facade Easement Program

The third current historic preservation program affecting historically-designated buildings in Center City Philadelphia

is the Philadelphia Historic Preservation Corporation's (PHPC) facade easement program, a program which has enjoyed great success in recent years.

Although the Tax Reform Act of 1986 eliminated many of the tax incentives for rehabilitating certified, historic buildings, the charitable contribution deduction for the donation of a historic preservation easement is still available to property owners under the provisions of the 1980 Tax Treatment Extension Act, an act that clearly established this deduction for historic preservation purposes. Under the provisions of this act, the donor of a facade easement may enjoy a one-time income, gift, estate or real property tax deduction in return rehabilitating, maintaining, and promising never to demolish.

An owner of a historic property may enjoy this deduction when he conveys the facade of the structure to a qualified, non-profit, or government, donee organization. The Philadelphia Historic Preservation Corporation acts as the donee organization in Philadelphia. The easement restricts change or destruction of the facade by the donor or any future owner of the property, and the transaction is known as a recorded facade easement.

In order to qualify as a charitable deduction, the easement must be donated on a facade of a property listed on the National Register of Historic Places or certified by the Secretary of Interior as a "contributing" or "significant"

structure within a National Register District or within a local historic district; the easement must be given in perpetuity, i.e. run with the land; it must be "exclusively for conservation purposes;" (40) and any mortgagee of the subject property must subordinate its mortgage rights to the enforcement rights of the donee organization. The donor of a facade easement relinquishes the right to exploit all development rights within the zoning envelope above his/her historic building, but unforseen events, such as a destructive fire or an eminent domain proceeding may extinguish the easement.

The donor also makes a monetary donation to the donee organization, which also qualifies as a charitable deduction. These monies are set aside to fund the enforcement of the easement. It is these donations that fund PHPC, the organization which specifies the restoration and maintenance requirements for the building, restricts modifications to the facade of the building, and enforces the easement covenants.

The value of the charitable contribution, a subject which pertains to the value of development rights in TDR programs, is the "fair market value (FMV) of the perpetual conservation restriction at the time of the contribution," (41) i.e., the difference between the FMV of the property before and after the encumbrance of the easement. The easement value depends on the nature of the restriction, the nature and location of the property, and its development potential. For a

single-family residence, where the use is likely to remain constant, the value of the easement is generally 7.5 per cent or less of the fair market value of the subject property. (42) On commercial properties, the value of the easement is frequently about 10% of market value and open space easements may have values of greater than 10%. (A New York Times article on the subject states that easements are generally 3-7 per cent of market value.) (43) A qualified appraiser, independent of PHPC, determines the value of the donation by preparing an appraisal.

The income approach to value, used by appraisers in the valuation of real estate, is considered most applicable for determining the value of the preservation restriction for income-producing properties since it most accurately measures loss in income and/or increased expenses, and the sales comparison approach to value is considered most appropriate for determining the value of facade easement donations on residential properties. (44)

A separate report documents the property's physical condition and architectural detail, serving as a reference for future easement enforcement.

The tax consequences of the donation of a facade easement depend upon the property owner's particular tax situation in relation to the value of the easement donated. Therefore, at the 28 per cent income level, the deduction is worth $0.28 for each dollar of the donated easement's value. The value of the

easement increases as taxable income increases. (45)

There were 129 facade easement donations in Philadelphia from 1979 to the end of 1991, 82 of which were in Center City. (46) Furthermore, Philadelphia possesses "well over 4,000 structures on the National Register of Historic Places which are potentially eligible for the easement program." (47) In its peak year, 1983, PHPC received twenty-six facade easements. Since then, there has been a steady decrease of donations, with only three having occurred in 1988.

This diminution in use may be explained by the fact that facade easement donations were frequently given on properties that were undergoing certified rehabilitations, and the declining use of the Investment Tax Credit following the Tax Reform Act of 1986 has consequently reduced the use of the facade easement program.(48) Other factors related to the 1986 Tax Reform have adversely affected the rate at which easements are currently being donated to PHPC. First, the Tax Reform Act of 1986 gradually reduced marginal tax rates year by year, resulting in less demand for tax shelters. Also, easements can bring down taxable income so much that property owners have to spread the deduction over several years, which is thought to complicate the donation from the investor's standpoint. Thirdly, changing tax laws deter investors from using programs, such as PHPC's, because changes in the laws create uncertainty as to the easement's value. (49)

Thus,

> "The uncertainty of easement value and [furthermore], until 1986, the lack of clear IRS regulation, has kept many investors away from the program." (50)

Furthermore,

> "all owners of eligible properties may not find the tax benefits sufficient to offset the perpetual economic burdens imposed by a facade easement." (51)

A related problem with facade easement donations is their regulation. Although PHPC vigorously regulates the condition of donated facades, it is unlikely, given that the overhead costs incurred by staffing PHPC, that this monitoring can continue indefinitely. (52)

Therefore, although the PHPC facade easement program has ensured the preservation of many of Center City historic buildings, it is an incentive that is vulnerable to changes in the ever-fluctuating tax code. Therein lies the shortcoming of the PHPC facade easement program.

Zoning and Height Controls

The remaining drawbacks of existing programs and codes have mostly to do with zoning and height controls.

Although, zoning and height controls do safeguard many historic buildings from high-rise encroachment, zoning may create an incentive for high-rise development to encroach upon traditionally low-density areas. Whereas zoning is restrictive, its height controls have the limitation that they may be appealed, and developers will spare no expense in

attempting to obtain zoning variances for high-density development or any other land use where it is not normally permitted if the potential gain warrants the attempt. Furthermore, downzoning historic buildings that are currently zoned for high-density uses would be very unpopular with property owners and might make the city vulnerable to legal action. Finally, "spot" zoning, which would zone historically-significant buildings in high-rise commercial zones for low-density uses, is illegal.

Thus, because existing codes and programs do not balance market forces and government regulations, the demolition problem persists.

CONCLUSION: THE SHORTCOMINGS OF EXISTING PROGRAMS UNDERSCORE BENEFITS OF TDR IMPLEMENTATION

Existing programs do not and can not be expected to address all preservation dilemmas of the present day. These programs do to some extent counteract the presence of the demolition problem, but this chapter has demonstrated that a "gap" exists within this framework, leaving certain aspects of the demolition problem unaddressed.

The Transfer of Development Rights is the ideal program to complement existing preservation programs for several reasons. First, it will safeguard designated buildings in perpetuity from demolition. Second, it presents an economic incentive to owners of designated buildings. Third, it will provide funding for the long-term maintenance of designated buildings. Fourth, its implementation can be undertaken by existing preservation organizations. Finally, TDRs would not be vulnerable to the changing of tax laws.

CHAPTER THREE: THE CONCEPT OF THE TRANSFER OF DEVELOPMENT RIGHTS AND ITS CURRENT APPLICATION IN URBAN HISTORIC PRESERVATION INITIATIVES

INTRODUCTION TO TDRs

Transfer of Development Rights programs are currently implemented in a small number of communities in the United States as a means of protecting a variety of resources, including agricultural soils, wilderness, open space and, as is proposed herein, historic architecture. Whether designed to protect the natural or the built environment, different TDR programs are always alike in that they involve the transfer of unutilized development potential from one property (the "sending site"), which retains its original density, to another property (the "receiving site"), where development is allowed to occur to an extent that exceeds limits normally prescribed by zoning.

Urban Historic Preservation Programs

In TDR programs designed to preserve urban, historic architecture, the development potential permitted by zoning above historic structures is transferred to receiving sites where high-rise development is proposed. The amount of development potential that may be transferred to a receiving site is computed first by determining the size of the sending site's "zoning envelope." The zoning envelope is the maximum

permitted gross floor area; it is computed by multiplying the area of the property by the floor-area ratio (FAR), which is prescribed by the zoning ordinance. In Philadelphia, for example, the C-4 and C-5 commercial zones have base FARs of 5 and 12, respectively. Thus, zoning envelopes may contain hundreds of thousands of square feet of gross floor area if the lot size is large enough.

Once the amount of gross floor area permitted in the zoning envelope is determined, the gross floor area of the sending site's existing historic structure is subtracted from this figure, yielding the development potential which may be transferred.

The purchaser of the development rights, i.e., the owner of the receiving site, then computes the as-of-right FAR permitted on his property and to that figure adds the gross floor area to be severed from the sending site. This determines the total gross floor area which he may now construct on the receiving site. Municipalities usually limit the number of development rights that may be transferred to any given site, thereby limiting the overall development potential of the receiving site. Once the transfer of gross floor area has occurred in a historic TDR program, a restrictive covenant is publicly recorded, prohibiting any future use of the transferred development potential on the sending site. This restriction runs with the land.

With respect to the above-mentioned aspects of the TDR

process, urban, historic TDR programs do not differ much from one another. However, they may differ in several other respects. For instance, TDR programs differ with respect to the number of administrative bodies that must approve the transfer. In some cities, the transfer process involves planning, historical and other commissions, and in other cities, only the planning commission is involved. Second, TDR programs may be either mandatory, thereby restricting development on all potential sending sites, or they may be voluntary, allowing the marketplace to first match a buyer and seller of the development rights before burdening the sending site with a land-use restriction. Third, in some programs, development rights "banks" are established to insure that sellers can always sell their remaining development potential and that purchasers can always buy additional gross floor area. TDR banks have the added advantage of lessening the likelihood of legal action being taken against TDR programs, as they insure that designated properties will be able to sell their development rights at a fairly constant value. Other programs do not have banks at all. Fourth, certain TDR programs only allow transfers of gross floor area to adjacent sites, whereas others only permit transfers between non-adjacent sites. Lastly, programs differ in terms of how historic buildings are selected for involvement within a TDR program. Some programs involve all locally designated buildings, both those that exist within local historic

districts and those that are individually-certified. Other programs only involve individually-certified, locally-designated buildings.

The Theoretical Premises for and Benefits of TDR Implementation

The theoretical premise upon which TDR plans are implemented is that they will actualize several major urban planning objectives. Foremost among them are that they will: 1) decrease the likelihood of high-rise development displacing low-density historic buildings in and along the periphery of the urban office core; and 2) provide for the long-term maintenance of historic buildings. In theory, TDR programs not only accomplish these goals, but also pass the cost of landmark preservation on to well-financed high-rise developers in a way that will be lucrative for developers; developers will pay owners of historic buildings for their development rights because they will enable them to build larger, and hence more lucrative, structures. Likewise, owners of historic buildings will be motivated to sell their development rights because they will, in so doing, receive partial financial compensation for landmark designation.

Other theoretical benefits of the transfer of development rights from historic buildings to high-rise development sites are that they not only reduce the burden of landmark designation by offering financial compensation, but also, the

money gained from the sale of development rights can be managed so as to provide for the continued maintenance of the historic building, which, as the previous chapter demonstrates, will have higher maintenance costs and lower rental rates than newer buildings. TDR programs, thus, make the prospect of maintaining an historic building competitive with that of demolishing it and replacing it with new construction. In addition, the transfer of development rights from historic buildings may lower the taxes on designated historic buildings, thereby further increasing their positive cash flow.

Another theoretical benefit of TDRs that accrues to the entire host city is that they balance densities throughout the city, as historic, low-rise areas retain their character and identity and high-rise, commercial areas continued to be developed as such. Thus,

> "TDRs differ from traditional density bonus programs in that they do not increase a city's net density. Transfer programs do not create new space; they redistribute space that has already been authorized." (53)

Finally, TDR programs not only provide the benefit of balancing urban densities, but also the renovation and maintenance of historic buildings would balance new construction stylistically and historically.

The Philadelphia TDR Proposal

It is with these benefits in mind that the Philadelphia

City Planning Commission has proposed the implementation of a TDR plan in Center City Philadelphia. The Planning Commission's proposal is that the transfer of development rights from historic buildings, along with the provisions of such civic amenities as subway entrances, fountains, plazas, cross-block concourses, etc., should join the list of amenities which would entitle developers to surpass base FARs in the C-4 and C-5 commercial districts to prescribed maximum FARs.

The Philadelphia Zoning Code currently allows developers to exceed the base floor-area ratios in Center City's high-rise commercial zoning districts by as much as 360 per cent without the purchase of development rights from historic buildings or the provision of the above-mentioned amenities. The base FARs of 12 in the C-5 zoning district and 5 in C-4 may be increased to 20 to 22 in C-5 and 13 to 17 in C-4 for buildings that are constructed away from streets and lot lines, both at and above street level, and for buildings constructed with street-level arcades.

It is to Philadelphia's advantage that several municipalities have already enacted TDR plans, as these existing plans have tested the TDR concept in a variety of circumstances. Examples of cities that have implemented TDR programs designed to protect historically-significant sites or buildings are New York, San Francisco, and Denver. In contrast, cities and counties which have implemented TDR

programs in order to protect environmentally-sensitive sites are Burlington County, New Jersey; Collier County, Florida; Santa Monica, California; Montgomery County, Maryland; and a handful of municipalities within Pennsylvania. Further illustrating the creativity with which TDRs can be implemented to influence land-use decisions is Seattle's TDR plan, which encourages the retention and rehabilitation of low- and moderate-income housing.

This chapter will focus on the TDR programs implemented in American cities that are similar to that proposed by the Philadelphia City Planning Commission and explain how existing plans could be modified to suit the Philadelphia marketplace and political arena. The first plan to be considered is that of New York City.

The New York City TDR Plan

A 1968 amendment to the New York City zoning ordinance permits transfers of development rights from locally-designated, individually-certified landmark buildings to adjacent lots on the same city block, to lots across the street, or to lots diagonally across an intersection, provided that such lots are owned by the same party. (54) The unbuilt floor area that may be transferred is then determined first by multiplying the floor-area ratio (FAR) by the lot area. The floor area already occupied by the landmark is then subtracted from this figure. Transfers may be made either to

one or to several different adjacent lots until the authorized floor area of the landmark lot is exhausted. When a transfer of excess density occurs, it is permanent and runs with the title of the land.

In 1969, the New York City Planning Commission amended its TDR program, redefining "adjacent sites." This amendment permits transfers of development rights from landmarks to any lot in a chain of adjacent, common ownership, provided that the first link in the chain is contiguous to or across the street from the landmark property. (55)

The New York TDR plan is designed to ensure both preservation of the sending site and responsible development on the receiving site. To insure this, the plan has a lengthy review procedure.

First the New York City Planning Commission must approve the type of development that will take place, reviewing the suitability of the materials, design, scale and location. Then, the landmark owners and receiving site owners must apply to the Planning Commission for preliminary review of the proposed transfer. Following this, the parties involved must submit site plans for the proposed development of the adjoining lot, a report detailing the future, ongoing maintenance of the landmark, and a report to the Landmarks Commission describing the foreseeable effects of the proposed transfer upon the landmark. The estimated costs of maintaining the landmark are evaluated by the city when it reviews the

price of development rights to be transferred, and the Commission has the legal authority to reject the transfer if the proposed price is insufficient to maintain the landmark. (56)

During the review process, the Planning Commission must determine what detrimental effects, if any, the transfer might have on the occupants of the buildings in the vicinity of the receiving lot, particularly in terms of overbuilding and design compatibility. The Planning Commission must also determine whether the proposed maintenance program for the landmark will, in fact, result in preservation.

After the Planning Commission reviews the application, the Board of Estimate reviews the proposed transfer. The Board of Estimate has ultimate authority to grant or deny the transfer. If the proposed transfer is approved, the owner of the landmark building must donate a preservation and conservation easement to insure compliance with the maintenance agreement.

Whereas sending sites may transfer all of their unused development rights, the floor area of the receiving site cannot be more than 20% greater than the amount to which it is entitled by zoning prior to the transfer, although "no ceiling is set for lots in high-density commercial zones." (57)

In addition, the Planning Commission has the power to condition the approval of the transfer upon the developer's

provision of an amenity. New York has further amended the TDR plan to require that when development rights are transferred from lots under city, state or federal ownership, amenities that improve the pedestrian circulation or transportation systems in the areas of the receiving site must be included in the high-rise development. (58)

Assessments of the success of the New York Plan are offered by several writers. Roddewig states, that

> "New York City's TDR program has been among the most active in the country, yet during the eighteen years that the TDR mechanism has been in effect, there have been only a dozen transfers from the nearly 700 landmark structures in New York City." (59)

Both Roddewig and Costonis offer explanations as to why the New York City Plan is operating at the rate of twelve transfers over eighteen years. Roddewig states that because New York City allows developers to obtain additional height through zoning lot mergers, "which is as-of-right and not subject to a review process," and since developers can simply attempt to increase density by applying for a height or bulk variance, which may require only zoning and planning board approval, they are understandably reluctant to attempt first to utilize the TDR plan before exhausting both of these two comparatively straight-forward and well-tested procedures.(60)

Costonis cites certain other aspects of the New York City Plan which, he claims, prevent its being used more frequently.

First among these defects is "the absence of a rational incentive structure for inducing landowners to agree to preserve their landmarks." (61)

> "By limiting development rights transfers to adjacent lots, the program imposes severe restraints upon the potential market for these rights. Existing zoning in New York and other cities already permits developers to shift unused floor area to contiguous parcels. Hence, the plan is useful only when a developer can be found who happens to own a lot located across a street or an intersection from a landmark or when a landmark owner who owns a series of lots that connect with the landmark lot desires to build on one or more of these lots." (62)

Secondly, the value of the development rights is "controlled wholly by the vagaries of construction activity within the immediate vicinity of the landmark." (63) Thus, the development rights from any given site may command a premium if that site adjoins the property of a projected skyscraper but may be worthless if no construction is proposed on an adjacent lot.

Costonis's third criticism of the New York TDR Plan is that it does not insure that TDRs will offset the losses sustained by the landmark owner, such as those associated with "physical and functional obsolescence, assemblage value, impairment of mortgageability, and feasibility of renovation." (64)

Costonis points out, lastly, several items, namely: that the New York Plan fails to provide supplementary funding for those cases in which development rights do not promise full

compensation; that the approvals by the planning commission must be preceded by landmark designation, which owners, realtors and developers generally oppose; that it depends on the voluntary participation of landmark owners; and that, because it places new high-rise development next to historic, low-density buildings, the results may lessen the "visual enjoyment of the landmark." (65) Finally, the New York Plan does not indicate what measures should be taken should there be a rise in FAR in the landmark's zoning district subsequent to the development rights transfer.

Despite these criticisms, the New York TDR Plan does contain some sensible features. New York limits participation in the development rights transfer program only to landmarks that are individually-designated and has not extended the plan to historic buildings within historic districts. The reason for this is that the New York City Planning Commission feels that extending the TDR plan to include transfers from sites within historic districts would create an abundance of available development rights in a market with a "very low demand," (66) thereby possibly decreasing the value of development rights citywide and diminishing the effectiveness of TDRs as a preservation device.

Also, despite these criticism, New York's TDR plan has been implemented very creatively much to the benefit of the City. An example of the creative manner in which the New York TDR plan has been used is the 1969 case where the Appellate

Division Courthouse, a City-owned landmark, was adjacent to the site of a proposed 500,000 square foot office tower, a density 100,000 square feet in excess of the permitted FAR for that site.

> "To aid the builder, the City took advantage of its power to lease municipally-owned buildings for up to ninety-nine years. The developer leased the courthouse for fifty years with a twenty-five year renewal option; he then subleased it back to the city, reserving the one hundred thousand square feet he needed for his office project. Since the developer now had a lease for seventy-five years, he was deemed to be the owner of the courthouse lot and could combine it with his own to produce more floor space under the district's FAR." (67)

Another example of the creative manner in which New York has utilized its TDR Plan is the case of South Street Seaport in Manhattan. In this case, the City enacted a special zoning ordinance, designating both a preservation zone, the Seaport District, and a redevelopment zone within a historic district. The redevelopment zone, at the time of its creation, consisted of street-level parking lots. Excess development rights were shifted from the preservation area to the area designated for new development. In exchange for writing off delinquent mortgages, a number of banks received the development rights from historic buildings, thereby enabling owners of buildings in the Seaport District to qualify for loans to renovate their properties. The banks held their development rights in a TDR "bank" and sold the rights for new construction in the redevelopment zones. As a result, the historically-renovated area developed into a tourist attraction and several major

office buildings were constructed in the receiving zone with TDRs from the "bank." (68)

Penn Central Transportation Company v. City of New York, U.S. 104 (1978) also illustrates the manner in which New York's TDR Plan has promoted landmark preservation. Because the landmark designation of Grand Central Station was accompanied by an allowance that the owners could transfer development rights to other properties, the U.S. Supreme Court ruled against a taking in this case. (See Chapter Four) Because of TDRs, landmark designation of commercial, high-rise properties in New York City was made feasible and, in the eyes of the Courts, constitutional.

Therefore, despite the drawbacks of New York's TDR Plan, it has undoubtedly benefitted the City.

The New York TDR Plan is also extremely useful as an example of what Philadelphia should and should not do in the enactment of its own TDR plan. For instance, the adjacency restriction of the New York Plan constitutes one of its weaknesses. If the plan permitted only those transfers from historic buildings to non-adjacent, high-rise districts, it would obviate the need for Planning Commission review of the effects of the new, high-rise structure on the landmark and the landmark neighborhood, thereby simplifying the developer's approval process and the City's involvement in the project. The effect would be to make the prosect of participating in a TDR program more enticing than it currently is in New York.

The requirement that the transfer be contingent upon the furnishing of proof that the transfer will provide enough funds to preserve the landmark should also be incorporated into the Philadelphia plan, as should the requirement that a legally-binding maintenance plan be publicly recorded.

The threefold review process involving the Landmarks Commission, the Planning Commission and the Board of Estimate is too cumbersome. A transfer of development rights in Philadelphia should not be as complicated as that. A transfer could occur subject to the approval of the Zoning Board of Adjustment, as advised by the Philadelphia City Planning Commission and the Philadelphia Historical Commission.

Most importantly, the transfer of development rights must only be introduced into the Center City high-rise development process as a part of a comprehensive reform of the zoning code, unlike what happened in New York, where existing FAR bonus programs made TDRs superfluous from the developer's standpoint. The purchase of development rights from an individually-certified, historic building should be the most attractive performance bonus available in terms of cost to the developer and in terms of the difficulty/ease of the approval process.

Lastly, the provision in the New York plan that only individually- and locally-certified landmark buildings are eligible for density transfers should be emulated because it would limit the supply of development rights in the Center

City real estate market, which, because Philadelphia's real estate market is less dynamic than Manhattan's, would keep the value of the development rights as high as possible in order to finance the preservation of the landmark site.

The San Francisco TDR Plan

San Francisco's TDR plan is couched in a comprehensive height-restriction program known as the Downtown Plan of October 1985, which is replete with legal devices designed to stem the growth of high-rise office buildings, preserve historic buildings, improve design restrictions on new construction and require developers to provide amenities commensurate with the size of their developments. (69)

Specifically, the Downtown Plan lowers base FAR limits, improves height and setback limitations, and mandates the preservation of 251 historically-significant buildings and also of buildings that are less historically-significant but contribute to the historic and architectural character of downtown San Francisco. (70)

The plan permits the transfer of unused development rights from significant and contributing buildings to receiving lots, provided that the landmark lot abuts the receiving lot for a distance of not less than 25 feet along a side or rear lot line or provided that the landmark lot is separated from the transfer lot by only a street or alley. If both the landmark lot and the transferee lot are owned by

the same party, bulk may be distributed within the lot as the owner pleases. (71)

The amount of development rights that may be transferred from a sending lot to a receiving lot is limited by the zoning of the receiving lot. For instance, lots designated C-3-O and C-3-O (SD), zoning designations whose base FAR limits are nine and six, respectively, may not exceed an FAR of eighteen. The gross floor area in three other commercial zones, C-3-R, C-3-G and C-3-S, where the base FAR limits are six, six and five, may not exceed an FAR of twelve. (72)

Since, it is only through the transfer of developments rights from an historic building, from open space, or from the inclusion of housing within the new building that a developer can achieve maximum density, the incentive for developers to use the TDR Plan in San Francisco is exceedingly strong.

The transfer of development rights from a sending lot permanently reduces the development potential of that lot by the amount of development rights transferred. TDR eligibility is determined by the zoning administrator upon request by the property owner. The zoning administrator either approves or disapproves of the transfer, depending on the availability of development rights on the landmark site.

Development rights from a single lot may be transferred as a group to a single receiving lot or in separate, or even fractional, increments to several receiving lots. Development rights may be transferred either directly from the original

owner to another site or to secondary purchasers who might hold them indefinitely. (73)

In order to ensure the marketability of development rights, the City identified receiving sites and calculated the total number of transfers the area could handle.

The fact that only one transfer has occurred in the four years since the plan's adoption may be attributed to the City's almost simultaneous enactment of a three-year limit on high-rise development which permitted only 950,000 square feet of new high rise construction each year. A planning measure known as Proposition M, passed in 1986, further restricted growth to 475,000 square feet for the next 11 to 15 years. This will depress the market for development rights even more, and the lesson of the San Francisco Plan is, therefore, that TDR plans are ineffectual in markets without high-rise development and in cities that do not coordinate their land-use policies.

Although the restrictions on high-rise development imposed by the Downtown Plan of 1985 has stifled the demand for transferable development rights in San Francisco, the Plan has some noteworthy features, which a Philadelphia TDR plan should contain.

First, although a futile action given subsequent legislation, the introduction of TDRs was accompanied by a revision of the entire zoning code, unlike in New York. Had growth control measures not been passed, this would have

placed TDRs on an equal footing with other zoning incentives. Another noteworthy feature of the Downtown Plan is that it allows development rights to "float" indefinitely, which means that the renovation and perpetual maintenance of a historic building does not have to depend upon a particular high-rise development project's need for development rights. Therefore, in times of weak demand for TDRs, investors may purchase development rights from historic buildings, allowing the preservation of architecturally-significant buildings to get underway even at times when no new office buildings are proposed.

The adjacency restriction in the San Francisco plan constitutes one its weaknesses, as this has the potential for placing high-rise buildings next to low-density historic buildings, thereby impairing the visual enjoyment of the landmark site and further offsetting San Francisco's community objective of preserving scale in historic areas.

The Denver TDR Plan

Denver adopted its historic preservation TDR plan in 1979 as a component of its more comprehensive plan to integrate the preservation of the City's centrally-located historic fabric with the proposed construction of a new mixed-used, commercial development, known as the Seventeenth Street Mall. The Plan was not, however, accompanied by either downzoning or by historic district designation. The Plan is voluntary, and

owner consent is sought before historic designation occurs. The Denver Planning Commission attributes this choice on the part of the community not to have mandatory historic designation of properties or mandatory participation in the TDR program to a perception that a mandatory program would offend the sensibilities of Denverites, who prefer to keep government regulation of private property to a minimum. (74)

The Denver TDR ordinance restricts sending sites "only to landmark buildings individually designated by the Denver Landmarks Commission." (75) Before a development rights transfer can transpire, the building must be rehabilitated to the standards of the Denver Landmarks Commission. When the transfer does occur, the sending site's development rights are calculated by subtracting the landmark buildings's density from the base FAR allowed by zoning.

The receiving site cannot increase its density to more than 2.5:1 beyond the base zoning, and the landmark can make no more than four transfers. Although all future development on the sending site is permanently reduced by the number of development rights sold, no requirement is imposed on the owner of the historic building to ensure its long-term maintenance. In the event that the building is destroyed by a fire, the FAR of any successive development on the lot is restricted to the density in force after the transfer.

In the downtown TDR area, approximately 2.7 million square feet of unused density exists above eligible,

designated landmarks and thirteen million square feet of density could be made available if buildings identified by the Denver Planning Commission as "potential landmarks" are also counted. (76)

Because of Denver's infamously-high office vacancy rates, the new construction that was intended to create a demand for development rights never materialized. Because of this, in the four years since Denver's ordinance was enacted, only one transfer has occurred, a transfer of 60,000 square feet for about $15 per square foot. (77)

The Denver TDR plan has been credited with providing landmark owners with options they did not have before, despite the weak Denver market for development rights. For example, property owners have used their development rights as collateral for rehabilitation construction loans. In addition, the introduction of a TDR program has made landmark designation more palatable to property owners in a city whose citizens revere property rights. (78)

Conclusion

Existing programs offer several lessons for the authors of Philadelphia's TDR plan. The first lesson is that TDR implementation should accompany a comprehensive reform of the zoning code to insure that TDRs more attractive to developers than other zoning incentives are as methods of attaining additional gross floor area. The second lesson is that

Philadelphia should limit the number of landmark properties that can participate in the TDR plan to those that are designated by the Philadelphia Historical Commission and which are individually listed on the National Register of Historic Places. Thirdly, Philadelphia's plan should establish sending and receiving zones in different neighborhoods within Center City rather than establishing a plan that mandates transfers to adjacent lots. This will deflect bulk away from traditionally low-density areas into high-density zones that can accommodate high-rise development. Fourth, experience with TDRs in other cities seems to indicate the desirability of limiting by some percentage or ratio the amount of development that is permitted on the receiving site. Fifth, development rights should be able to "float" indefinitely, thereby permitting transfers to occur in times of weak demand. Sixth, TDR transfers should be approved subject to the public recording of a legally-binding document that describes the maintenance plan for the historic building whose development rights have been sold. Lastly, the municipal organization that approves the transfer should require that the funds raised by the transfer be sufficient to maintain the landmark in perpetuity.

DEVELOPMENT RIGHTS TRANSFERS IN CENTER CITY HAVE ALREADY OCCURRED WITHOUT THE TDR PLAN

Even though Philadelphia has no transfer of development rights program or formal zoning lot merger program, development rights transfers in Center City Philadelphia have occurred in at least three cases, due to the creativity of real estate developers and their attorneys. In a fourth case, an agreement was reached between two neighboring property owners that in effect, but not in fact, permitted one of the property owners to "borrow" the other's air space. The transfers occurred at Broad and Locust between the low-density Academy of Music and Academy House, an adjacent, high-rise residential building; (79) at Sixteenth and Locust Streets between a nineteen-story, 102,600 square foot building under construction at 1525-29 Locust Street and the adjacent building at the northeast corner of Locust and Sixteenth Streets (1535 Locust Street), a four-story, 1928, Art Deco building (80); and at Eighteenth Street and the Benjamin Franklin Parkway between the Four Season's Hotel and the Cigna Insurance Company's high-rise, office tower. (81) The "borrowing" of air rights occurred between 1500 Locust Street, a high-rise residential building and its immediate neighbor to the west, 1516 Locust Street, a three-story building. (82)

These transfer-of-development-rights cases are not documented by zoning hearing transcripts, and information about these cases is withheld from the public by those who

participated in the negotiations. However, interviews with members of the Center City real estate development community and the City Planning Commission reveal that development transfers at 1525-29 Locust Street, at Academy House (1429 Locust Street) and at the Four Seasons Hotel/Cigna Insurance tower were all sanctioned by the Zoning Board of Adjustment. In the cases of the Four Seasons and the Academy of Music, one ownership entity owned both parcels of land involved in the transfer, but this was not the case for the transfer at 1525 Locust Street. (83)

The case that is best documented by the Zoning Board of Adjustment is the one that is in effect, but not in fact, a "borrowing" of air rights. It occurred in 1969 between a narrow, three-story office building at 1516 Locust Street and its immediate neighbor to the east, the lot designated as 1500-14 Locust Street, once a paved parking lot, now the site of a thirty-eight story, mixed-use building with apartments, a parking garage, and retail stores, all known as 1500 Locust Street.

The owner of 1500 Locust Street, whose property is zoned C-5 commercial, proposed the construction of a thirty-eight story, six-hundred unit apartment building with a 378-space parking garage and ground-floor retail space on his property.

The proposed structure greatly exceeded the density limits set forth in the Philadelphia Zoning Code for C-5 Commercial zones. For instance, whereas the zoning code

permitted a gross floor area of 1200% of the lot area, or 279,360 square feet of building in this case, the developer proposed constructing a gross floor area of 2826%, or 670,000 square feet of gross floor area. (84) The proposed development also exceeded the requirement for a rear yard to be sized 10% of the lot.

There were strong arguments both for and against the granting of a variance. Arguments against the proposed tower centered on the tower's enormous bulk. It was perceived that such an increase in bulk at this intersection could diminish sunlight, overburden the streets and municipal utilities, and crowd the neighborhood with new residents. The positive aspects of the plan were that it would generate substantial tax ratables, that it was a continuation of the nearby high-rise development (i.e., that a high-rise at this location was contextual), that it would attract new residents to the area, which was in the city's best interest, and that it brought these residents close to their jobs, thereby reducing the air pollution and traffic arising from commuting office workers. Furthermore, the city possessed sufficient water and sewer capacity to service the building, thereby negating the argument that the infrastructure would be overburdened. Thus, the primary negative argument of merit was that the building was too massive.

This objection was allayed by two factors that insured that air and light would always penetrate the neighborhood

despite the construction of the tower. First, a street lay behind the building which insured a permanent passage for air and light. Secondly, the developers negotiated a restrictive covenant that limited development on the adjacent property, 1516 Locust Street. The agreement stipulates first that the owner of 1516 Locust will never build on his property above five stories or eighty-two feet in height; secondly that the owner of 1516 Locust agrees to have his side windows blocked up at the expense of the developer of 1500 Locust and thirdly that if he builds a fourth and fifth floor, it will run up against the party wall, not have any windows and not restrict the developers of 1500 Locust from building in excess of thirty stories. The Agreement also provides that, whereas the developer of 1500 Locust would pay to block up the windows at 1516 Locust, the owner of 1516 Locust would pay for all interior finish work required as a result of this alteration and that the liability for any damage done to 1516 Locust as a result of the work, would fall upon the owner of 1500 Locust. The agreement concludes by stating, "It is agreed that this restriction shall act as a Restrictive Covenant to run with the land." (85)

Another factor besides the restrictive covenant was also influential in the decision of the Philadelphia Zoning Board of Adjustment to grant the height variance. This factor is a traffic engineer's report on the impact of this development on traffic in the neighborhood. The report found that Locust

Street's actual traffic volume of 415 vehicles per hour represented 38% of the Street's capacity of 1,083 vehicles per hour. If the apartment were to add 100 cars during morning rush hour, it would only increase utilization to 48% of capacity on Locust Street. Similarly, on 15th Street, utilization at the time of the study was 652 vehicles per hour out of a capacity of 883, a rate of 74%. The traffic engineer concluded that "it cannot be said that the apartment building will cause a congested traffic condition on either Locust or Fifteenth Street." (86)

On April 23, 1969, the ZBA, in consideration of the restrictive covenant and traffic study, granted a variance to the developers of 1500 Locust Street, permitting construction of a thirty-eight story building. The variance uses the phrase "acquisition of air rights" to describe the nature of the agreement between the property owners. (87) Thus, although the proposed development surpasses FAR limits set forth in the Philadelphia Zoning Code, the project was nonetheless found to be consistent with the comprehensive plan for Philadelphia and with general economic development policy. (88)

The 1500 Locust Street variance is important because it indicates a willingness on the part of the City to treat several, adjacent, separately-owned parcels as a single unit of density rather than as separate and unconnected units of density. Therefore, the ZBA will be receptive to development on certain parcels exceeding FAR limits so long as development

on adjacent or nearby properties remains below the permitted FAR. The approval of the 1500 Locust proposal is significant for other reasons, too. First, it recognized air rights as an interest in property that is severable from the property. Secondly, it demonstrates that the developers are willing to buy air rights to balance densities within the urban fabric in order to make their proposals palatable to the Zoning Board of Adjustment. (89) Finally, it is significant because it shows that the owner of a diminutive building with valuable superadjacent development potential was willing to restrict development on his property in perpetuity.

Conclusion

It is noteworthy that these high-density, high-rise developments have occurred west of Broad Street in an area of Center City that offers prestigious office and residential addresses and which offers a diversity of cultural and commercial amenities, such as proximity to City Hall, the City's office core and the Academy of Music. That developers were inventive enough to facilitate development rights transfers when no TDR plan was enacted and that they chose to build above densities prescribed by the zoning ordinance demonstrates that a demand exists for development rights in Center City Philadelphia in the area west of Broad Street. This is, therefore, one of Center City's appropriate locations for both sending sites and receiving areas, as it is

neighborhood where such transfers have already transpired.

CHAPTER FOUR: CONSTITUTIONAL, STATUTORY, AND PLANNING ISSUES PRESENTED BY TDR IMPLEMENTATION

INTRODUCTION

The previous chapters demonstrate that a TDR Program is necessary to promote historic preservation in Philadelphia and that it would benefit the City in several ways. First, it would preserve historic architecture. Second, it would preserve the scale and density of entire historic neighborhoods. Third, it would reinforce the prestige of the office core by promoting high-rise development. Furthermore, it would accomplish all of this without burdening the City's budget and without any reliance upon federal tax incentives.

This chapter, in contrast, demonstrates that the above-mentioned benefits can only be secured if the TDR Program is both designed and implemented so as to survive Constitutional challenges, conform with state law, and avoid negative planning consequences.

CONSTITUTIONAL ISSUES:

THE TAKING ISSUE

The primary Constitutional problem associated with TDR implementation is that the courts may find that a municipal TDR program violates a section of the Fifth Amendment of the United States Constitution known as the "Taking Clause." This clause limits government regulation of private property,

stating "private property [shall not] be taken for public use without just compensation." (90)

Though the Fifth Amendment seems clear enough, the Constitution's Tenth Amendment also reserves "police powers" for the state. The term "police power" refers to "the power to regulate human conduct-[sic]without any compensable taking of property-[sic]in order to protect public health, safety, morals or general welfare." (91) (The operative phrase here is "without any compensable taking of property;" governments are entitled to compensate property owners for property acquisition by using the power of eminent domain.) Thus, the Fifth Amendment limits the government's police powers., ensuring that the state only interferes with private property rights when regulation advances legitimate state interests.

Some types of police power regulation are so well accepted, or have such an insubstantial economic impact that they almost never give rise to a taking issue challenge. Examples are electrical codes, off-street parking requirements, and impervious surface restrictions.

Other types of regulation, however, frequently create such large reductions in property values that they stimulate taking claims. Examples are those restricting mining, regulation for the preservation of open space, regulations that seek to eliminate existing uses, regulations of flood-prone areas, wetlands, estuarine and beach lands, and a variety of regulatory deterrents to urban growth. (92)

As TDR programs will certainly restrict the development potential of selected landmark properties without compensating owners for the full value of their properties' development potential, it is possible that a transfer of development rights program may give rise to a taking issue challenge. Thus, the first major constitutional question regarding TDRs is whether they will compensate owners of historically-designated properties to an extent great enough to withstand a taking issue challenge.

The forthcoming discussion of the Supreme Court case of Penn Central v. New York indicates that a loss in the value of property, such as that arising from landmark designation associated with a TDR program, does not necessarily constitute a taking.

Penn Central Transportation Company v. City of New York , U.S. 104 (1978)

In this Supreme Court case, the appellants were the Penn Central Railroad, owners of Grand Central Station in Manhattan. The Penn Central Railroad argued that New York City's landmark preservation program, which permits the sale of air rights from designated landmarks, did not offer sufficient financial compensation for the restrictions imposed on high-rise development above Grand Central Station. The Landmarks Commission denied permission for Penn Central's lessee to construct a multi-story office building above Grand

Central Station, an historically-designated landmark. Penn Central filed suit against New York City because the lessee/developer would have paid $3 million annually to Penn Central for the right to build and operate this office building, and the ruling of the Landmarks Commission eliminated this potential income stream. (93)

In its argument against the landmark law, Penn Central stated three principal arguments. The first is that the Landmark Law diminished the property value of Grand Central Station, as it

> "... deprived them of any gainful use of their 'air rights' above the terminal and that, irrespective of the value of the remainder of their parcel, the city had 'taken' their right to the superadjacent air space, thus entitling them to 'just compensation' measured by the fair market value of these air rights." (94)

Penn Central's second argument is that the landmark law interferes with the investment-backed expectations of the property owners, which predated landmark designation. Its third argument is that the "government, acting in an enterprise capacity, has appropriated part of the property for some strictly governmental purpose." (95)

In repudiation of the appellant's first claim, which relates to the diminution of the value of Grand Central Station, Brennan, expressing the opinion of the Court, pointed out that mere diminution of property value does not result in a taking. To substantiate this statement, Brennan notes that a seventy-five per cent diminution of property value resulted

from the contested zoning code in Euclid v.Ambler Realty Co., 272 U.S. 365 (1926), and a 92.5 per cent diminution of property values occurred in Haddacheck v. Sebastian, 239 U.S. 394 (1915). Both of these Supreme Court cases involved land-use legislation, and both cases upheld regulatory statutes and dismissed appellants' charges that takings had occurred. (96) The Supreme Court notes that legal scholars have attempted to determine the extent of loss in land values that is allowed to occur as a result of regulation without it being determined a taking, but such attempts at quantification have not yet yielded a consistent ratio of the loss of value as compared with the value of the land prior to the enactment of the legislation.

With regard to the second charge, that the ordinance "sabotaged the owner's investment-backed expectations," the Court noted that a previous case, Welch v. Swasey, 214 U.S. 91 (1909), "...disposed of any contention that the full use of air rights is so bound up with the investment-backed expectations of appellants that Government deprivation of these air rights...constitutes a 'taking.'" (97)

The Supreme Court next dismissed outright the appellant's third claim, that the Landmark Law exploits appellant's parcel for the City's purposes and that it "facilitates [and] arises from... entrepreneurial operations of the City." (98)

The Court then determined under what circumstances the interference with the appellant's property would have been of

such magnitude that an eminent domain proceeding with compensation should have occurred to achieve the City's objectives. The Supreme Court determined that an eminent domain proceeding would only have been necessary if the Landmark Law had interfered with the present use of the terminal, which the court considered to be Penn Central's primary expectation concerning the use of the parcel.

After dismissing the appellants three principal takings contentions, the Court presented additional arguments in defense of the New York City Landmark Preservation Ordinance and in defense of the Transfer of Development Rights Plan.

Supreme Court Justice Brennan, expressing the opinion of the Court, writes that

> "...there was no 'taking' because the Preservation Law had not transferred control of the property to the city, but only restricted appellants' exploitation of it; and that...(1) the same use of the terminal was permitted as before; (2) the appellants had not shown that they could not earn a reasonable return on their investment in the Terminal itself; (3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area must realistically be imputed to the Terminal; and (4) the development rights above the Terminal, which were made transferable to numerous sites in the vicinity provided significant compensation for loss of rights above the Terminal itself." (99)

Justice Brennan stated also that jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. Instead, the Supreme Court focusses both

on the character of the action and on the nature and the extent of the interference with rights in the parcel as a whole. (100)

The character of the action and the nature of the interference in Penn Central do not substantiate taking issue claims because, as Brennan points out, the Supreme Court has recognized that states and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.

In its concluding remarks, the Court stated that it was important to the outcome of this case that the Landmark Law in New York prohibits only that construction above the terminal which is inappropriate in terms of scale, material and character. It does not prohibit "any construction above the terminal." (101) Finally, the "ability to use these (air) rights [had] not been abrogated," because the development rights were transferable to at least eight parcels in the vicinity of the terminal, and the air rights of the terminal are valuable.

The first of these two concluding remarks in Penn Central does not appear to support Philadelphia's TDR plan, which would disallow all construction above designated, historic buildings. However, the Opinion in Penn Central later states that government may compel a property owner to leave a portion of his land vacant where building would be harmful to the use

and enjoyment of other land. (102)

> "...it has been held unconstitutional to compel an owner, without compensation, to leave his land vacant in order to save the land for future public purchase, but it is within constitutional power to compel an owner to leave a portion of his land vacant where building would be harmful to the use and enjoyment of other land." (103)

The Supreme Court then defined what constitutes a taking. They stated that,

> "An ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. (104)

Finally, the Supreme Court also states that the restrictions imposed by the New York City Landmarks Commission were,

> "...substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site, but afford appellants the opportunity to further enhance [sic] not only the terminal site proper but also other properties." (105)

Penn Central Conclusion

The important lessons from Penn Central for Philadelphia, as it considers whether or not to implement TDRs, are several: 1) diminution of property value does not constitute a taking; 2) deprivation of air rights does not interfere with investment-backed expectations of property owners; 3) development rights provide significant compensation for loss of air rights; 4) the use of the property at the time of

historic designation must be allowed to continue in order for a taking not to occur; 5) this use must generate a reasonable rate of return on the investment; 6) cities may enact land use restrictions to preserve desirable aesthetic features; 7) jurisprudence does not divide parcels into discrete segments and rule that a taking has occurred if rights in one segment have been entirely abrogated (instead, jurisprudence focusses on the nature and the extent of the interference with rights in the parcel as a whole); 8) TDR programs do not transfer control of property to the municipality or facilitate entrepreneurial operations of the city; and 9) taking claims based on that supposition are false. Thus, in Penn Central the Supreme Court ruled favorably toward a properly-designed TDR program as against a taking claim.

However, decisions by the Supreme Court in late 1987 indicate that the court has become more conservative since the 1978 Penn Central decision. Whereas the Court that heard Penn Central seems to have been sympathetic to government regulation of private property, even when the case involved a sizeable diminution of property value, the Supreme Court of the last few years has come down quite forcibly on the side of private property owners and against government regulation of land in two of the three recent taking cases presented here.

The three cases are Keystone Bituminous Coal Association v. DeBenedictus (107 S. Ct. 1232 (1987)), Nollan v. California

Coastal Commission (107 S. Ct. 3141 (1987)), and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles (107 S. Ct. 2378 (1987)). They are referred to as Keystone, Nollan, and First English, respectively.

Keystone

In Keystone, the Supreme Court rejected a claim by an association of mine owners that Pennsylvania's 1966 Bituminous Mine subsidence and Land Conservation Act affected a taking. The Act authorizes the Pennsylvania Department of Environmental Resources (DER) to enforce and implement regulations designed to prevent or minimize mine subsidence. The Act prohibits mining that causes subsidence damage to public buildings, non-commercial buildings generally used by the public, buildings used for human habitation, and cemeteries. DER requires coal mining companies to leave 50% of the coal in place underneath such buildings and properties.

The Act also authorizes DER to revoke mining permits if the removal of coal damages a structure or area protected by the Act, and it provides further remedies by the Commonwealth of Pennsylvania in the event that subsidence occurs underneath any of the buildings or sites protected by the Act.

The mine owners alleged in Keystone that the Act as implemented by the 50% rule constituted a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments. They assert that Pennsylvania

recognizes three separate estates in land: the mineral estate, the surface estate, and the support estate. The title to approximately 90% of the coal that is or will be mined by the petitioners in western Pennsylvania was severed from the surface in the period between 1890 and 1920. Because of this, the petitioners argue that a separate, recognized interest in realty, the support estate, had been entirely destroyed by the passage of the Act.

In making this particular claim, petitioners argued that the Supreme Court generally considers a taking to have occurred if a separate and recognized interest in real estate is rendered completely unusable because of government regulation. A majority of the Court rejected this argument, and held that no taking occurs if only a portion of a parcel of property is taken without compensation.

In Keystone, the Supreme Court determined that petitioners were denied use of less than 2% of their coal reserves; that this 2% could not be deemed a "separate parcel of property" [regardless of the Commonwealth of Pennsylvania's recognition of it as such]; and that a taking claim arising from this argument must fail.

> "Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate. Petitioners therefore argue that even if comparable legislation in another State would not constitute a taking, the Subsidence Act has that consequence because it entirely destroys the value of their unique support estate. It is clear, however, that our takings jurisprudence forecloses reliance on

> such legalistic distinctions within a bundle of property rights. For example, in Penn Central, the Court rejected the argument that the "air rights" above the terminal constituted a separate segment of property for Takings Clause purposes. Likewise in Andrus v. Allard, we viewed the right to sell property as just one element of the owner's property interest. In neither case did the result turn on whether state law allowed the separate sale of the segment of property." (106)

Thus, even though the Commonwealth of Pennsylvania as of 1990 recognizes development rights as a separate interest in realty, that fact does not cause a taking to occur if development rights above a designated historic building are appropriated by a TDR program for use on another parcel, provided that compensation accompanies the transfer.

Pointing again to the fact that only 2% of petitioners' coal reserves were deemed "taken" by the Subsidence Act, the Supreme Court rejected another argument presented by the petitioners, namely that the Subsidence Act rendered their coal mining commercially impracticable and that the Act interfered with their "investment-backed expectations."

> "There is no showing [in Keystone] that petitioners' reasonable 'investment-backed expectations' have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by [the Subsidence Act]." (107)

Among petitioners' most strategic arguments is their claim that the Subsidence Act is invalid because it resembles the Commonwealth of Pennsylvania's 1920 Kohler Act, legislation also designed to prevent mine subsidence. The Kohler Act was struck down as unconstitutional in Pennsylvania

Coal v. Mahon (260 U. S. 393 (1922)), a landmark Supreme Court decision written by Justice Holmes.

The Supreme Court of 1987, however, distinguished Pennsylvania Coal to legitimize the Subsidence Act. Stating that the Kohler Act failed because it promoted the private interests of an individual property owner instead of the health or safety of the citizens of Pennsylvania, and claiming in addition that the Kohler Act made it "commercially impracticable" for the Pennsylvania Coal Company to mine certain coal, the Supreme Court of 1987 stated that legislation can effect a taking if it does not "substantially advance legitimate state interests." (108)

Whereas, in the eyes of the Court, Pennsylvania Coal merely involved a balancing of the private economic interests of coal companies against the private interests of surface owners, Keystone, in the eyes of the court, involved legislation designed to promote important public interests by minimizing subsidence in certain areas. The Court states that, because the Commonwealth of Pennsylvania acted to prevent what it perceived to be a threat to the public welfare, the character of the government action "leans heavily against a taking." (109) Thus, "...the nature of the State's action is critical in taking analyses." (110)

The Supreme Court states further that,

> "...all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community...,"

and

> "...one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." (111)

<u>Keystone</u> Conclusion

In conclusion, the Supreme Court upheld the Subsidence Act because it did not destroy a separate, recognized interest in realty; because it did not render the petitioner's coal mining commercially impracticable; because it did not materially affect the petitioner's investment-backed expectations; and because the nature of the state's action was attuned to promoting health and safety and to preventing a threat to public welfare, which are all legitimate state interests.

Perhaps the most important finding in <u>Keystone</u> from the standpoint of TDR implementation is the Supreme Court's apparent stance that a taking would not occur if a TDR program were to diminish the value of development rights by appropriating them for use on another parcel, even though development rights are recognized by Pennsylvania as a separate interest in realty.

The outcome of <u>Keystone</u> would suggest that the Court is strongly in favor of upholding legislation that promotes public health, safety, and welfare even when the legislation

meets with opposition from powerful private property interests. However, two more recent cases, Nollan v. California Coastal Commission (107 S. Ct. 3141 (1987)) and First English Evangelical Lutheran Church v. County of Los Angeles (107 S. Ct. 2378 (1987)), indicate that today's Supreme Court is very much in favor of preserving the privileges of private property at the expense of public health, safety, and welfare.

Nollan

In Nollan, the Supreme Court ruled that the California Coastal Commission violated the Fifth Amendment of the United States Constitution when it conditioned granting a building permit to a shoreline property owner, the Nollans, upon their publicly recording a deed restriction that would permanently reserve for the public a right-of-way along the beach. The Nollans intended to replace an existing bungalow with a larger residence on this site, and the conflict arose when they applied for a building permit.

The legislation from which this conflict ultimately stems was the 1976 California Coastal Act, which requires that the permit for constructing a new coastal house, whose floor area, height, or bulk exceeds that of the previous structure by 10% or more, be conditioned on the grant of public access over the property along the beach. The Act authorizes the California Coastal Commission to impose these public access

conditions. The Act only applies, however, where, in the opinion of the Commission, the proposed development will have an "adverse impact" on public access to the sea.

The Commission interpreted "adverse impact" to include the creation of psychological barriers to the use of the beach and the creation of visual barriers to seeing the ocean, both of which, they claimed, the new house would constitute. The Commission asserted that a walkway would mitigate such negative effects and also alleviate congestion on the beach.

When they received notice of the access requirement, the Nollans took the case to court. It was received unfavorably by the California courts and appealed to the Supreme Court.

The Supreme Court ruled that the actions of the Commission violated the Taking Clause of the Constitution of the United States for several reasons. First, the Court determined that a "permanent physical occupation" by the government occurred in this case.

> "We think a 'permanent physical occupation' has occurred, for the purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that real property may continuously be traversed, even though no particular individual is permitted presentation himself permanently upon the premises." (112)

They state that a taking is always found even when such an occupation "achieves an important public benefit or only has minimal economic impact on the owner." (113)

In addition, the Supreme Court found that the Coastal Commission's access requirement fails the takings analysis

because it "utterly fails to further the end advanced as the justification for the [access condition]." The Court argued in substantiation of this claim, that the walkway would not increase the public view of the ocean.

Since the access requirement would accomplish none of the legitimate state interests it purported to further, there existed in Nollan a "lack of nexus between the condition and the original purpose of the building restriction." (114)

> "The lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some governmental purpose, but without payment of compensation." (115)

In closing, the Court argues that

> "California is free to advance its 'comprehensive program' if it wishes, by using its power of eminent domain for this 'public purpose,' ... but if it wants an easement across the Nollans' property, it must pay for it." (116)

Nollan Conclusion

Nollan, therefore, demonstrates that the current Supreme Court is determining that legislation constitutes a taking in the following cases: 1) if the regulation fails to further the end advanced as its justification; and 2) if the regulation constitutes a permanent physical occupation of property by the government. Nollan does not indicated in any way that deprivation of the use of air rights would constitute a permanent physical occupation of private property in the eyes

of the court.

First English

The final Supreme Court "taking issue" case to be considered here is First English. In this case, the Supreme Court reversed an earlier decision by the California Court of Appeals. The Supreme Court found that the Fifth and Fourteenth Amendments to the United States Constitution require compensation for "temporary" takings; i.e., for the period between the time a land owner claims that his property has been "taken" by land-use regulation and the time that it is determined that the regulation constitutes a taking of private property without just compensation.

The conflict which the First English decision resolved arose in 1979, when the County of Los Angeles, California adopted an interim ordinance banning persons from constructing, reconstructing, placing or enlarging any building or structure within a flood hazard zone in Mill Creek Canyon. The ordinance was drafted after a devastating flood occurred in Mill Creek Canyon in 1978, destroying property in its path, including Lutherglen, a retreat center and recreational area for handicapped children owned and operated by First English Evangelical Lutheran Church of Glendale, California.

Among the claims filed by the Church in its suit was their contention that the ordinance denied the Church "all use

of Lutherglen." (117) Another claim sought to recover from the Flood District in inverse condemnation.

Both the California Superior Court and the California Court of Appeals rejected the appellant's allegations concerning the ordinance.

The United States Supreme Court remanded to the California Courts the question as to whether the "ordinance at issue actually denied appellant all use of its property" or whether the County's actions were "insulated as a part of the State's authority to enact safety regulations." (118) The Supreme Court then set about determining whether the Just Compensation Clause requires the government to pay for "temporary" regulatory takings. In this context, the phrase "temporary regulatory takings" describes situations where land-use restrictions, such as those imposed on Lutherglen, are lifted after a victorious challenge eliminates the restriction.

In reversing the decision of the California courts, the Supreme Court cites several cases which "reflect the fact that 'temporary' takings...are not different in kind from permanent takings," (119) for which the Constitution clearly requires compensation.

"'Nothing in the Just Compensation Clause suggests that "takings" must be permanent and irreversible.'" (120)

Furthermore,

> "Invalidation of the ordinance or its successor ordinance after this period of time, though

> converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." (121)

Thus, the Court held that,

> "...the Los Angeles County ordinance...denied appellant all use of its property for a considerable period of years, and we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." (122)

<u>First English</u> Conclusion

<u>First English</u> establishes that compensation is required for the period between the time a land owner claims that his property has been taken by land-use regulation and the time that it is determined that the regulation constitutes a taking of private property without just compensation.

Justice Stevens notes in his dissenting opinion, that

> "The policy implication of today's decisions are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and that might give rise to a damage action." (123)

The outcome of <u>First English</u> does not seem to bode well for the proposed TDR plan in Philadelphia. However, the National Trust for Historic Preservation, in its August 1987 newsletter, commented that,

> "The significance of <u>First English</u> relates to the fact that it expands the remedies available for governmental actions determined to constitute uncompensated 'takings' of private property for public use. Consequently, it is likely to provide additional incentives for challenges to all types of land use regulation. Nonetheless, it is essential to recognize that the case does not in any manner change the law as to what types of actions

> constitute 'takings' of private property. Because preservation ordinances have consistently been upheld by the courts (including the United States Supreme Court) against takings challenges, the First English decision should not discourage local governments from enacting or applying such controls." (124)

Thus, although the decision does uphold compensation for "temporary" takings, First English does not increase the likelihood that regulatory action will be construed by the courts to be a taking. Indeed, First English indicates that the Court has not backed away from the rule laid down in the Penn Central decision. For the Opinion of the Court in First English clearly states that its decision relates only to the case in which "all use of property" is denied. This in no way reverses the doctrine established in Penn Central that denial of use of a portion of a property does not amount to a taking. Since TDRs will only deny use of a portion of property and will provide limited compensation for this deprivation, the First English decision should not discourage Philadelphia from implementing a TDR plan.

United Artists Theater Circuit Inc. v. City of Philadelphia, No. 48 E.D.. Appear Docket 1990, PA Sup. Ct., July 10, 1991)

In United Artists, the Pennsylvania Supreme Court, reversing a lower court decision, found that application of Philadelphia's Preservation Ordinance caused an unconstitutional taking of private property without just compensation in violation of the Pennsylvania Constitution.

It is important to note that the United States Constitution was not at issue in this case.

In United Artists, the Philadelphia Historical Commission designated the Boyd Theatre (1908 Chestnut) as an historic building over the objections of the owner. At the designation hearing, the City presented testimony that the Boyd Theater was an important example of art deco architecture by a major Philadelphia architectural firm and represented a significant phase in cultural history.

The owner introduced evidence that a historic designation meant that the owners could not alter or demolish the building or change the property, either inside of out without the consent of the Historical Commission, as the Preservation Ordinance stipulates that designated buildings that are places of public assembly require a formal commission review of proposed interior alterations.

Since rendering its controversial decision, the Court has been asked to review its decision and has held a subsequent hearing to review the arguments presented by each side on the taking issue.

The Court was requested by many concerned parties to review its decision because of the potentially far reaching implications of their decision. United Artists affects preservation laws only in Pennsylvania, where its impact is immediate and significant, yet, in Philadelphia, the status of approximately 13,000 designated structures remains

uncertain. In addition, within days of the decision, the Historical Commission received applications by a single landlord for three demolition permits on the same downtown block. Furthermore, five pending historic district nominations in Philadelphia were postponed indefinitely as a result of this case.

At the writing of this paper, the final decision of the Court is still forthcoming.

Taking Issue Conclusions

Whereas United Artists seems to indicate otherwise, the previous taking issue cases indicate that the courts will not rule against TDR programs if taking issue challenges are raised so long as certain conditions are met. These conditions are: 1) the use of property at the time of historic designation must be allowed to continue after the new regulation is imposed; 2) the landmark preservation program must allow designated historic buildings to generate a reasonable rate of return; 3) this program must not transfer control of the property to the city; 4) it must not result in a permanent physical occupation of the property; 5) the program must not fail to further the end advanced as the qualification of the condition; and 6) the program must not deny all use of the historically-designated property.

In addition, certain takings "caveats" must be kept in mind by the authors of Philadelphia's TDR program, namely: 1)

legislation can effect a taking if it does not substantially advance legitimate state interests; and 2) legislation fails the takings analysis if it utterly fails to further the end advanced as the justification for the regulation.

Finally, TDR proponents may defend their programs with certain statements from the preceding Supreme Court cases: 1) the sale of development rights provides significant compensation for the loss of air rights; 2) the full use of air rights is not bound up with the investment-backed expectations of property owners; 3) air rights above a building do not constitutes a separate segment of property for Taking Clause purposes; 4) diminution of property value does not effect a taking; 5) the nature of state action is critical in takings analyses, and landmark preservation has repeatedly been upheld as a legitimate state interest; 6) states and cities may enact land-use restrictions to enhance the quality of life by preserving the character and desirable aesthetic features of a city; and 7) TDR programs do not arise from or advance entrepreneurial operations of a city, nor do they transfer control of property to the municipality.

THE DUE PROCESS ISSUE

The second Constitutional restraint on the police power regulation of private property is the Fourteenth Amendment's Due Process Clause. The Due Process Clause provides that,

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law." (125)

The Due Process Clause is relevant to the subject of TDR implementation because New York City's TDR program has been challenged before the Supreme Court on due process grounds in Penn Central (cited earlier) and in Fred F. French Investing Company v. the City of New York, (429, U. S. 990 1976). Although the due process challenges in Penn Central were dismissed, they were upheld in the latter case. Furthermore, the Court in Fred F. French indicated how TDR programs might avert due process challenges. Thus, knowledge of due process requirements is essential for successful TDR implementation.

During the century since the drafting of this amendment and its inclusion in the Constitution, the courts have clarified and defined the role of the Due Process Clause. The courts have defined it as that which "protects the property owner from arbitrary, capricious and unreasonable government action." (126) Such violative government actions have also been described as "improperly motivated, unfairly conducted, or unnecessarily protracted government decision making." (127) More specifically, the courts have stated that regulations

can be challenged on due process grounds if they obviously benefit a narrow segment of the population rather than the community as a whole. (128)

Certain Supreme Court cases established guidelines for determining whether or not police power regulation of private property exceeds due process limitations. For example, the Opinion in Lawton v. Steele, U. S. 133 (1984) articulated what is now considered a classic, three-part test for constitutional due-process. This test requires that the public interest justify the interference with land use, that the means adopted are reasonably necessary to accomplish that purpose, and that the means are not unduly oppressive on the property owner. (129)

In deciding due process cases, the Supreme Court distinguishes between substantive and procedural due process. Substantive due process pertains to the legitimacy and substance of a statute and tests whether a legitimate public interest is served by the statute. Procedural due process, on the other hand, requires that certain procedures are followed before the property interest or right can be taken away from an individual. The Supreme Court case of Goldberg v. Kelly lists a number of the elements of procedural due process, such as 1) notice; 2) the opportunity to testify present witnesses and cross-examine opposing witnesses; 3) an impartial tribunal; 4) a reasoned decision with findings of fact and conclusions of law; and 5) an appeal. Due process is violated

even if only one of these elements is absent from government action.

The Supreme Court cases in which due process challenges have been raised against New York City's TDR programs are described below.

Penn Central

The Penn Central case previously cited in this chapter's Taking Issue section was one in which several due process objections were presented. The appellants in Penn Central raised due process objections to the landmark designation of their property, claiming that the controls imposed upon them by the Landmarks Commission apply only to individuals who own selected properties and that the landmark designation is " 'arbitrary and a matter of taste....'" " ...,thus unavoidably singling out individual landowners for disparate and unfair treatment." (130)

To this charge, the Supreme Court stated,

> "...without merit is the...argument that the decision to designate a structure as a landmark 'is inevitably arbitrary or at least subjective because it is basically a matter of taste.'" (131)

Even if it were arbitrary, the Opinion stated, the Penn Central Railroad had a chance to appeal the landmark designation of Grand Central Station and a right to judicial review of any Landmarks Commission decision. (132) Thus, the Landmarks Commission provided Penn Central with notice of the

pending landmarks designation, a chance to appeal the designation, and the opportunity for judicial review. Because of this, the possibility of a procedural due process violation was eliminated.

Furthermore,

> "We find no merit in it.... It is true, as appellants emphasize, that both historic district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or 'reverse spot,' zoning: that is, a land use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan." (133)

Furthermore, the Court could not conclude that the owners of the Terminal had "in no sense been benefitted by the Landmark Law," (134) as landmark preservation benefits all New Yorkers and all structures, "both economically and by improving the quality of life in the City as a whole." (135)

> "Doubtless appellants believe they are more burdened than benefitted by the law, but that must have been true too of the property owners in [several other similar Supreme Court cases, namely] Miller, Haddacheck, Euclid and Goldblatt." (136)

Penn Central Conclusion

Thus, when one applies the tests stated earlier in Lawton

v. Steele, due process was not violated in Penn Central. The public interest justified the interference with land use; the means adopted were reasonably necessary to accomplish that purpose; and the means were not unduly oppressive on the property owner. Furthermore, if one applies the test stated in Goldberg v. Kelly to Penn Central, the elements of procedural due process were present in the actions of the Landmarks Commission. They provided notice of the pending landmark designation, an opportunity for appeal (defense), an opportunity for tribunal, and a decision.

No Due Process challenges were upheld in Penn Central, but they were in the next case considered here.

Fred F. French V. City of New York

Though potentially one of the most important Supreme Court case involving TDRs and constitutional due process requirements, Fred F. French Investing Company v. the City of New York, (350 N.E.2d 381 (N.Y. 1976)) holds forth a view subsequently rejected by the United States Supreme Court in First English.

Conclusions

The lesson of this due process case for Philadelphia is that it may be necessary for Philadelphia to incorporate a TDR "bank" into its TDR program if it is to survive constitutional due process challenges. The design of a TDR bank will be

considered in the ensuing chapter, and the ramifications of operating a TDR bank are considered in this current chapter in the section, which discusses the anti-trust liability of the City.

The due process lessons of Penn Central for Philadelphia are that landmark laws that single out historic properties for inclusion in TDR programs are not like discriminatory, or "reverse spot" zoning. Because Philadelphia's TDR Program will be part of a comprehensive plan to preserve historic structures throughout Philadelphia, it will not arbitrarily single-out parcels for "different, less favorable treatment than...neighboring ones." (141)

In addition, Penn Central demonstrated that the owners of designated, landmark properties are somewhat benefitted by landmark laws, as "landmark preservation benefits all [citizens] and all structures, both economically and by improving the quality of life in the City as a whole." (142)

For the reasons presented in the preceding two paragraphs, it is likely that the Supreme Court would rule that a properly-designed TDR plan in Philadelphia would not fall short of Constitutional due process requirements.

Finally, a Philadelphia TDR plan will not exceed due process limitations on the police power if the public interest justifies the interference with land use, if the means adopted are reasonably necessary to accomplish the goals of historic preservation, and if the means are not unduly oppressive on

the property owners. In addition to these substantive issues, the TDR program must also possess the elements of procedural due process, namely notice, defense, tribunal, and decision.

EQUAL PROTECTION OF THE LAWS

The third Constitutional restraint on government regulation of private property is the guarantee extended by the Fourteenth Amendment, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This section, known as the "Equal Protection" Clause, guarantees that all persons similarly situated will be treated alike. (143)

In essence, equal protection jurisprudence asks if it is rational to treat different classes of persons differently. By determining what class is harmed by the legislation, what public purpose is being served by the law, and what characteristic of the disadvantaged class justifies disparate treatment, equal protection scrutiny decides whether the statute has a rational basis and whether

> "...an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." (144)

Equal protection scrutiny occurs at three levels, which, ranked from highest to lowest, are, "strict scrutiny," "heightened scrutiny," and "rational basis scrutiny."

When a statute classifies by race, alienage, or national origin, these factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are subjected to the "strict scrutiny" of the courts and will be sustained only if they are

suitably tailored to serve a compelling state interest. (145)

Legislative cases based on gender call for a "heightened" standard of review, as this factor generally provides no sensible ground for differential treatment.

The following citation defines the third level of equal protection scrutiny, known as "rational basis."

> "The lesson of [Massachusetts Board of Retirement v. Murgia, 427 U. S. 307, 313 (1976)] is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for separation of powers, to closely scrutinize legislative choices as to whether, how and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." (146)

This excerpt helps define the third level of scrutiny, known as "rational basis" scrutiny, in which the court must ask of the statute under scrutiny if the classification it imposes bears a rational relationship to a legitimate state interest.

Conclusion

This third and lowest level of equal protection scrutiny is the level at which landmark legislation is reviewed when brought before the courts. Since historic preservation has repeatedly been upheld as a legitimate state interest and since zoning has as well, it follows that a zoning ordinance that classifies properties in terms of historic and

architectural significance and which treats these properties differently from other properties would bear a rational relationship to the legitimate state interest of preserving architectural landmarks.

THE PENNSYLVANIA CODE INDICATES THE MANNER IN WHICH IMPLEMENTATION OF A TDR PROGRAM IN PHILADELPHIA MUST OCCUR

The Philadelphia Home Rule Charter (Title 351 of the Pennsylvania Code) prescribes the manner in which an amendment to the zoning ordinance must occur. The Charter states that all such revisions of the zoning ordinance must receive approval from the Philadelphia City Planning Commision before the City Council can enact a proposed alteration of the ordinance, such as TDR implementation. (150)

The Charter provides, furthermore, that the Council may amend the zoning code if the Planning Commission fails to act on the proposed amendment within a statutorily-prescribed period of time. The Charter stresses that Council is the only body within the government of the City of Philadelphia which can amend the code; the Planning Commission has no such power of its own. (151)

Thus, nothing inherent in the laws of the Commonwealth of Pennsylvania or in the Philadelphia Home Rule Charter interferes with TDR implementation. And since TDR implementation is recommended by the Philadelphia City Planning Commision in the 1988 Plan for Center City, TDR implementation will depend on the approval of the Philadelphia City Council.

THE ANTI-TRUST LIABILITY OF THE CITY LIMITS THE ROLE OF THE MUNICIPAL TDR BANK

Although the TDR bank, discussed briefly in this chapter's Due Process section, may ward off due process challenges, two planning experts warn that improper design of municipal TDR banks may lead to anti-trust suits against the City of Philadelphia. For instance, Rahenkamp, in his Analysis of Historic Preservation Techniques for Center City Philadelphia, states that "...municipalities are not exempt from antitrust liability;" (152) and Roddewig, in Transferable Development Rights Programs: TDRs and the Real Estate Marketplace, goes further, posing the question of whether the "...creation, acquisition, and disposition of TDRs by units of state or local government[s] [are] subject to...antitrust laws."

Illustrating how a municipal TDR bank might violate anti-trust laws, Roddewig states that,

> "For a landowner whose project might not please government officials, TDRs might be 'unavailable' or priced so high as to prevent purchase. For a developer whose project satisfies governmental bodies, although possibly condemned by the citizenry, TDRs might be readily available at bargain basement prices. At present, no adequate safeguards exist to prevent the government from running roughshod over the rights of individuals and communities through the combination of its regulatory and monetary powers." (153)

Both Rahenkamp and Roddewig's statements indicate that Philadelphia's TDR program should be designed so as,

> "...not to create any suspicion that government-owned property, government-held TDRs, or

government-favored individuals are being given noncompetitive [sic] advantages." (154)

Furthermore,

> "If the city created a mandatory system through which all buyers and sellers had to operate, this may [sic] be construed as a restraint of trade. Developers should be free to compete for the purchase of air rights and sellers free to sell to whomever they choose, subject to program parameters regarding the sending and receiving of development rights." (155)

Thus, since TDR banks are necessary in order to ward off due process challenges and since banks with exclusive controls of development rights transactions risk violating anti-trust laws, development rights transferrers must have the option to sell their air rights at any time to a municipal bank. However, it must not be a requirement that they do so, and they must also be free to sell their rights on the open market. Likewise, buyers of development rights should have access to both private and public channels for development rights acquisition.

TDR IMPLEMENTATION RAISES SEVERAL PLANNING ISSUES

Several planning issues must be addressed before TDR implementation can occur, as TDRs have the potential for creating several negative planning effects in the area surrounding receiving sites. Center City's receiving sites, more fully described in the ensuing chapter, will lie along Market Street, Arch Street, John F. Kennedy Boulevard, and above the rail yards at Thirtieth Street Station. By introducing additional height and bulk to these areas, TDRs may visit such negative effects as the following: overcrowding that diminishes the penetration of light and air to the street; traffic congestion on streets, sidewalks, and public transportation; air pollution; and increased refuse. Fortunately, Philadelphia's transportation infrastructure and existing development patterns diminish these negative planning effects.

For example, as to diminution of light and air, two of the streets in Philadelphia's TDR receiving zones, Market Street and JFK Boulevard, are one hundred feet wide and, therefore, possess sufficient width to permit penetration of air and light to the street and sidewalk regardless of the bulk and height of development on receiving sites.

Secondly, as to traffic congestion, Center City's receiving sites are easily accessible to regional, limited-access highways. Highway access together with wide streets will disperse the escalating traffic volume resulting from

increased development.

Thirdly, also with regard traffic congestion, the receiving sites' access to mass transportation will minimize the automotive-traffic impact of new high-rise development by offering alternatives to automotive commuting.

Finally, with regard to traffic congestion, the fact that Center City's housing stock lies within walking distance of the office core means that many office workers in new high-rise developments will be enticed to forgo commuting and will live in one of Center City's many affordable, residential neighborhoods, thereby minimizing the automotive-traffic impact of new development.

The efficiency of traffic patterns in Center City, the availability of mass transportation, and the availability of nearby housing for office workers will also minimize air pollution by ushering traffic in and out of the city in an effective manner and by offering alternatives to automotive travel.

As for increased refuse in the vicinity of receiving sites, this may be one of the necessary costs of fostering high-rise development. However, in general, the receiving areas possess sufficient infrastructure capacity and services to accommodate the effects of increased development that would accompany development rights transfers.

An additional planning consideration related to TDR implementation is whether or not the TDR program should

permit development rights transfers between adjacent parcels of land. Since allowing this to occur would require that complicated design procedures be established to minimize the negative aesthetic effects of such a transfer on historic landmarks, it is preferable to allow transfers only to non-adjacent sites so that historic sites cannot be compromised in any way.

The third major planning issue related to TDR implementation is that TDRs must be integrated with the zoning code of Philadelphia. The purpose of this is to eliminate the risk of other zoning bonuses being available to developers that offer the same floor area awards but at a lower price than that of TDRs. This issue can be resolved easily if TDR implementation occurs simultaneously with an overall revision of the zoning code, such that TDRs are on an superior footing as compared with other bonuses. Such is the proposal of the Philadelphia City Planning Commision.

Finally, TDR critics contend that existing height limitations may be so generous that developers will have no incentive to use TDRs, thereby rendering the TDR program superfluous. However, when market conditions are favorable, it is worthwhile for developers to exceed height limits. For as the square footage of a development project increases, several things happen; the per-square-foot development costs decrease, the cash flow potential increases, and the return on investment increases. Thus, economics will tend to

motivate developers to surpass as-of-right height limits.

CHAPTER CONCLUSION

This chapter has demonstrated that Philadelphia's TDR Program can survive constitutional challenges, conform with state law, and avoid negative planning consequences, provided that the following conditions are met: 1) landmark designation must not interfere with the present use of the landmark; 2) the TDR Program and associated landmark preservation ordinance must permit the landmark to generate a reasonable rate of return; 3) the TDR Program must secure the long-term preservation of the landmark, i.e. further the end advanced as the regulation's justification; 4) the Program must provide notice, defence, tribunal, and decision to affected property owners when landmark designation is pending; 5) a TDR bank must be established, but private development rights transactions must also be permitted; 6) the TDR Program must conform with all of the preceding state and city regulations regarding the alteration of the zoning code and the administration of the program; 7) the TDR Program must not transfer control of the property to the municipality or facilitate entrepreneurial operations of the municipality or constitute; 8) the TDR Program must not create a permanent physical occupation of the subject property; and 9) the TDR Program must be implemented in conjunction with an overall revision of the Philadelphia Zoning Code.

CHAPTER FIVE: PROPOSAL FOR A TDR PROGRAM AND SELECTION OF SENDING AND RECEIVING SITES

INTRODUCTION

As a remedy to recurring demolition, improper alteration, and neglect to historic resources in Center City, a Transfer of Development Rights Program should be implemented as part of the proposed revision of Philadelphia's Zoning Code. This chapter articulates the proposed TDR Program's overall objectives and then specifies Program design components that will advance Program goals.

OBJECTIVES OF THE PROPOSED TDR PROGRAM

The objectives of implementing the proposed TDR Program may be categorized as preservation, aesthetic, financial, planning, and legal.

The preservation objective is to safeguard in perpetuity selected, historic, architectural resources located in the central business district of Philadelphia from demolition, neglect, and improper alteration. The aesthetic objective is to divert high-rise development away from areas where it will diminish the visual enjoyment of low-density, historic architecture.

The financial objectives number in three. The first is to create and continually to fund an endowment with the proceeds of development rights sales to provide for the long-

term maintenance of historic, architectural landmarks. The second financial objective is to relieve landmark owners of the financial burdens of landmark maintenance by these means. The third is for Program implementation to place minimal, and preferably no, financial burdens on the City of Philadelphia.

As for planning objectives, one is to divert high-rise, commercial development from historic, low-density areas, where the transit infrastructure is unsuitable for high-rise development, to areas where transit and other infrastructure are sufficient to accommodate increased density. The second planning objective is to integrate the TDR Program into a comprehensive revision of the Philadelphia zoning code.

The legal objectives are to accomplish Program goals without interfering with Constitutionally-guaranteed rights of property owners, to accomplish Program goals without violating anti-trust legislation, and to implement the TDR Program in adherence with procedures set forth in the Statutes of the Commonwealth of Pennsylvania governing the implementation of municipal land-use regulations.

PROPER TDR PROGRAM DESIGN WILL PROMOTE PROGRAM OBJECTIVES

The Philadelphia TDR Program will only realize the ten above-listed objectives if the Program is properly designed. The principal components of a properly-designed TDR Program number in eight. They are: 1) exclusive sending-site selection criteria that select for inclusion in the Program properties that are both architecturally- and historically-significant and endangered by demolition; 2) receiving-site selection criteria that select properties unencumbered by landmarks and located (a) where additional FAR is of considerable financial value and (b) where it is desirable from a planning and aesthetic standpoint; 3) integration of the TDR Program with the proposed revisions to the Philadelphia Zoning Code, as set forth in the 1988 Plan for Center City; 4) a TDR bank to purchase development rights at times when a rapid, private transaction is not feasible; 5) administration by the Philadelphia Historic Preservation Corporation to enforce transaction approval standards and preservation covenants and to ensure that funds generated from development rights sales are properly managed for long-term asset protection and growth; and 6) active participation by members of the real estate profession in promoting the sale of development rights; 7)compliance with Commonwealth of Pennsylvania Statues that regulate the enactment of land-use regulations; 8) additional Program provisions that ensure that (a) the proposed TDR Program does not violate the United States Constitution and

(b) also ensures that TDR's are preferred over other available methods by developers as a means to surpass base FARs.

These eight Program features will facilitate the transfer process. In turn, the transfer process will unleash the numerous benefits discussed throughout this paper for the City of Philadelphia, for its residents, and for its rich, architectural heritage.

TDR PROGRAM DESIGN COMPONENT NUMBER ONE: EXCLUSIVE SENDING SITE SELECTION CRITERIA

Among the most critical elements of a successfully-designed Program is the selection process for sending sites. Sending sites are landmarks from which development rights may be severed.

Philadelphia's TDR Program will be engineered such that the number of properties eligible to become sending sites will be limited to those properties possessing certain distinguishing characteristics: 1) location within the area bounded on the north by the properties along the north side of Callowhill Street and by the westward projection of its path were it to meet the Schuylkill River, on the east by the Delaware River, on the south by the properties along the south side of Locust Street, and on the west by the Schuylkill River; 2) location in either a C-4 or a C-5 Commercial Zone; 3) listing as "significant" or individual listing on the National Register of Historic Places; and 4) listing on the Philadelphia Register of Historic Places.

By limiting sending site status to such properties, important Program objectives are realized. First, several historically- and architecturally-significant landmarks are selected as sending sites, as is demonstrated on page 133. Secondly, the number of participating properties is kept to a manageable level, which limits the supply of development rights, thereby sustaining development rights prices.

Exceptions to Sending-Site Selection Criteria

Exceptions to the proposed Sending Site Selection Criteria are as follows.

First, buildings whose owners had granted facade easements to the Philadelphia Historic Preservation Corporation would be ineligible for air rights transfers under the rules of the facade easement program.

Secondly, the Program would permit exceptions to criterion Number 2, relating to zoning classification, if the other three criteria were met and development threatened the landmark. This provision reflects the fact that high-rise development pressure has in the past endangered landmark buildings outside of the traditional boundaries of the high-rise core of the central business district.

Third, the Program would permit exceptions to Numbers 3 and 4, relating to landmark status, in the event that development threatened the landmark and in the event that the endangered landmark were 1) eligible for listing on the National Register of Historic Places, either individually or as "significant," and 2) eligible for listing on the Philadelphia Register of Historic Places.

RATIONALE FOR SENDING SITE CRITERIA

These sending-site selection criteria have been set forth because they will expedite TDR Program goals. For instance, Selection Criterion # 1, pertaining to Program boundaries, ensures that the Program focuses on the area where the land-use conflict between high- and low-density real estate uses has occurred in the past and where it is likely to occur in the future. Indeed, the boundaries set forth enclose an area where each of the endangered landmarks discussed in Chapter Two is located and, furthermore, where each informal TDR transaction described in Chapter Three has occurred.

Selection Criterion # 2, relating to sending site zoning classification, advances Program goals in the following manner. The C-4 and C-5 zoning classifications exert development pressure on landmark buildings by permitting more floor area on the landmark parcel than the landmark itself possesses. This encourages demolition of the landmark and replacement with a higher-density, more-remunerative structure. Whereas other zoning classifications may permit greater density on landmark parcels than what currently exists, the contrast between the permitted and the existing density is nowhere more severe than in the C-4 and C-5 zones.

In addition, including in the Program only those properties that meet other Program criteria and that are zoned C-4 and C-5 helps to minimize the supply of development rights. This will maintain prices for development rights at

levels that will both provide the financial resources to fund landmark maintenance and that will partially compensate landmark owners for foregone development opportunities. In this way, this criterion transforms the heretofore preservation liability of excess zoning potential into an asset that can provide for the continued maintenance of the property.

Site Selection Criteria Numbers 3 and 4, which require that sending sites be listed as "significant" or individually-listed on the National Register of Historic Places and listed on the Philadelphia Register of Historic Places, further minimize the availability of development rights for sale at any given time in the real estate market. This criterion also ensures that the most architecturally- and historically-significant landmarks, as determined objectively by historic surveys commissioned by the Philadelphia Historical Commission, are given priority for protection.

In addition, the exceptions to the selection criteria presented above introduce an element of flexibility into the Program. They permit the TDR process to occur if exceptional development circumstances endanger a landmark which does not automatically qualify as a sending site.

Finally, as a whole, the sending site criteria advance Program goals because they select some of Center City's most prominent landmarks. Examples, but not an exclusive list, of buildings that are located within the boundaries of Callowhill

Street, the Delaware River, Locust Street and the Schuylkill River; that are zoned either C-4 or C-5; that are listed as "significant" or individually-listed on the National Register of Historic Places; that are listed on the Philadelphia Register of Historic Places; and that have not donated facade easements to PHPC are:

1) The Rittenhouse Club, 1811 Walnut St;
2) The Swedenborgian Church, 2129 Chestnut (Now Graduate Health Systems, Inc.);
3) The Drexel/Van Rensselaer Mansion (Now Urban Outfitters), 1800 Walnut Street;
4) 1031 Chestnut Street;
5) The Reading Railroad Terminal and Headhouse at 12th & Market Streets;
6) Lits Brother Department Store (Now Mellon Independence Center) occupying the north side of the 700 block of Market Street;
7) PSFS Bank, 700 Block of Walnut Street;
8) The Union League, 140 South Broad Street through to 15th Street;
9) The Drexel Building, 15th & Walnut Streets;
10) the Arch Street Methodist Church, Broad & Arch Streets;
11) Girard Bank, Broad & Chestnut Streets; and
12) Arch Street Presbyterian Church, 1724 Arch Street.

(Source: Philadelphia Historical Commission)

This list is merely representative and not exhaustive, but listed on it are some of Center City Philadelphia's most notable historic landmarks. Thus, the proposed selection criteria for sending sites advance the preservation, aesthetic, financial, and planning objectives stated earlier in this chapter.

TDR PROGRAM DESIGN COMPONENT NUMBER TWO: NUMEROUS POTENTIAL RECEIVING SITES LOCATED ALONG CENTER CITY'S HIGH-RISE DEVELOPMENT CORRIDORS

Receiving sites are development parcels whose permitted gross floor area may be increased through the transfer of development rights from a historic, sending site. The proper selection of receiving sites is, like the selection of sending sites, an important component of the design of the proposed TDR Program, as it will generate demand from developers for the development rights above historic buildings.

The objective of the Program, with respect to receiving sites, is to create a greater FAR capacity within Program receiving sites than that possessed by sending sites. The resulting imbalance will generate demand and sustain price levels for development rights. The process that will generate this demand is as follows.

When the commercial real estate market in the central business district of a large city exhibits demand for office space, retail space, hotels, and other commercial space, developers respond by attempting to secure as many development parcels as is possible in areas where maximum rentable square footage is attainable and where maximum rent per square foot is attainable. In Center City Philadelphia, high-rise developers look to C-5 sites along Market Street, JFK Boulevard, and, to some extent, along Arch Street for such development sites.

If the receiving sites for the TDR Program are located in such areas, i. e., where maximum FAR is permitted and where maximum per square foot rent is attainable, developers will be enticed to propose high-rise developments on these lots so that they may take advantage of the Program's FAR incentives; the Program, as a component of the revised Code's zoning bonus system, will enable these developers to exceed base FARs and, thereby generate demand for development rights.

Philadelphia's TDR Program receiving sites will lie, therefore, within the central business district of Philadelphia and will consist of those properties which are 1) zoned C-5 and 2) located along Market Street from the 7th Street to the Schuylkill River, along JFK Boulevard, along Arch Street from Thirteenth Street to the Schuylkill River, and above the railroad yards servicing 30th Street Station between Market and Spring Garden Streets.

RATIONALE FOR SELECTION OF RECEIVING AREAS

The reason these areas are proposed as receiving sites is 1) that zoning is predominantly C-5 along these streets and in the areas indicated; 2) Market Street and JFK Boulevard are currently the high-rise corridors of the city; 3) Arch Street possesses high-rise development potential in certain areas and is adjacent to existing high-rise corridors 4) Market Street, JFK Boulevard, and Arch Street are all sufficiently wide to permit light and air to reach the street, even with the addition of more high-rise buildings along their flanks; 5) they are serviced by an existing infrastructure of utilities with capacity for increased utilization, and by an infrastructure of subways, trolleys, buses, regional passenger rail, and expressways; 6) Market Street, JFK Boulevard, and segments of Arch Street are desirable commercial addresses in the Philadelphia region that command premium office and retail rents; i.e., additional square footage generated by development rights transfers from historic buildings would be readily absorbed by commercial tenants at these locations, provided market/economic conditions were favorable; 7) compared with other Center City streets, a small number of the city's endangered, historic resources are located along Market Street, JFK Boulevard is unencumbered by low-density, historic buildings, and the few historic buildings within these proposed receiving areas are generally of sufficient bulk, and/or height, that they are not visually compromised by high-

rise development; i.e., John Wanamaker's Department Store, the PSFS Tower, Reading Terminal; 8) developers in the past have utilized the current zoning bonus system for development along these streets to achieve greater floor area than the base FAR of 12 permitted by C-5 zoning, and it is conceivable that future, similar developments, could utilize the TDR Program for similar purposes; 9) by restricting air rights transfers to properties along Market Street west of 7th Street, Independence Mall is compromised to a minimal degree by potential increases in bulk and height resulting from the TDR program; 10) by restricting transfers along Arch Street to Properties west of Thirteenth, the vulnerable social fabric of Chinatown and valuable landmarks along Arch Street east of Thirteenth Street are left unthreatened by development; (11) the railroad yards serving 30th Street Station between Market and Spring Garden Streets are a logical location for the reception of development rights because they lie in the path of the westwardly-expanding, high-rise corridor, they are well-serviced by a variety of mass transit, Gerald Hines Interests of Houston, a real estate development firm, has proposed developing this area with high-rise commercial buildings, building high-rise structures there would constitute a visual improvement over its current state, and this concept is endorsed by the City Planning Commission in the <u>1988 Plan for Center City</u>; and, finally, (12) continued high-rise development for all of the receiving sites proposed

herein is endorsed by the Plan. (156)

Thus, the delineation of sending sites and receiving areas as stated above secures the preservation, aesthetic, planning, and financial objectives stated in the Introduction of this chapter. It diverts high-rise, commercial development away from historic, low-density areas to areas where sufficient infrastructure exists to accommodate increased density and where said development will not diminish the visual enjoyment of historic resources. Moreover, delineation of sending sites as described above creates an abundance of property owners eligible to receive the comparatively-limited number of development rights available from historic structures. Thus, the price of development is sustained at levels that will finance the costs of the long-term landmark preservation.

Both sending and receiving sites are, therefore, selected to promote the greatest level of activity of development rights transfer. The sending sites are located where development is proposed but where it is undesirable, and the receiving sites are located where development is undertaken on a monumental scale and where further high-rise development will visually complement existing buildings.

TDR PROGRAM DESIGN COMPONENT NUMBER THREE: INTEGRATION OF THE TDR PROGRAM INTO THE COMPREHENSIVE REFORM OF PHILADELPHIA'S ZONING CODE

The sustained buying and selling of development rights will be initiated and perpetuated not only through proper sending and receiving site selection. Integrating the TDR Plan with the zoning code of Philadelphia will also motivate owners of sending and receiving sites to participate in the Program and, thereby stimulate transfer activity. This section sets forth the manner in which the TDR Program should be integrated into the Code and sets forth as well further rationale for such action.

The <u>1988 Plan For Center City</u> recommends revisions to the Philadelphia Zoning Code. The present code's objective is to

> ...ensure adequate light and air to adjacent buildings and the street, and to foster the creation of open space at the sidewalk as a means of accommodating the increase in pedestrians generated by large buildings. It promotes these objectives by giving developers bonuses that permit the construction of additional floor space--in excess of the base amount allowed--if certain public amenities are provided as part of the building's design. These amenities include setbacks from sidewalks, arcades and open space. Under this bonus system, designers and developers are given great flexibility in selecting the amenities they will provide in exchanges for additional floor area. (157)

The result of the present code is that new high-rise buildings often do not contribute amenities to Center City, save poorly-located plazas, arcades, and open spaces that are

"of marginal benefit to the public." (158)

The _Plan_ recommends revisions to the C-4 and C-5 classifications in the Zoning Code that would maintain the level of density currently permitted in these two classifications, but that would modify the current system so that

> ...instead of choosing among a variety of bonuses, as they do now, developers would be required to meet a set of mandatory performance standards for those aspects of building design that should be regulated in the public interest." (159)

These proposed mandatory performance standards, as set forth in the _1988 Plan for Center City,_ provide that developers who seek to increase their FAR beyond the base FAR limits of 5 in C-4 and 12 in C-5 would 1) have property fronting on two streets of widths 40′ or greater, 2) provide a "critical mass" of continuous public spaces in at least 30% of the site, 3) provide a fine-arts amenity, 4) provide direct access to sub-surface transit, where the proposed building lies over said transit, 5) provide retail space (for buildings over 300,000 square feet), 6) diminish as they rise, and 7) provide for loading areas and truck docks that are enclosed by the proposed building. (160)

The manner in which TDRs will be successfully integrated into the revised Zoning Code is as follows. The _Plan_ proposes that for C-5 sites located along Market Street and along JFK Boulevard, additional floor area beyond the base FAR of 12 and

up to a maximum of 24, would be permitted if the developer provides the above-listed mandatory performance standards and provides, as well, "Extraordinary Public Amenities." (161)

Examples of such amenities include public observations levels at the tops of buildings, mid-block pedestrian connections between major streets, permanent live-performance or gallery space, and preservation of historic structures. Providing one or a combination of these amenities would be required in addition to providing the seven mandatory amenities discussed above, were the developer to qualify for an FAR greater than 12 and up to 24. (162)

TDRs are exceptionally well positioned vis-a-vis these other extraordinary public amenities to be utilized by developers as a means of maximizing FAR. Because each of the other amenities listed is maintenance-intensive, adds to the construction cost of the project, decreases net rentable area, complicates building security, possibly adds to public liability insurance, and generally constitutes an ongoing obligation for the building owner, TDRs are the most economical of these amenities. TDRs require no perpetual maintenance for the owner of the receiving site; they do not present public visitors into the common areas of the high-rise buildings; and they do not decrease net rentable floor area. In essence, TDRs provide for high-rise developers an opportunity to increase FAR, an opportunity to garner social and political support for their high-rise projects by

rendering an amenity unto the public, and no perpetual obligations regarding that amenity thereafter.

Rationale for Integrating TDRs into the Proposed Zoning Code Revisions

Integrating TDRs with the proposed revision of the Philadelphia Zoning Code is not only important from the standpoint of making the Program profitable for its participants. It is also desirable, given the findings of Penn Central v. City of New York, U.S. 104 (1978), discussed in Chapter Four. This Supreme Court case demonstrates that Philadelphia's TDR Program may risk violating the Equal Protection Clause of the Constitution's Fourteenth Amendment if it is not part of a comprehensive plan to preserve historic structures throughout Philadelphia. If the Program is integrated into a comprehensive plan, it will not "arbitrarily single-out parcels for different, less-favorable treatment than...neighboring ones," (163) i.e., violate Equal Protection rights of property owners.

Rahenkamp, in Analysis of Historic Preservation Techniques for Center City Philadelphia, also presents the argument that the TDR Program must be integrated into a comprehensive plan.

> On a legal basis it appears that a TDR program could be established in Philadelphia so long as the sending and receiving districts are set forth in the Comprehensive Plan. Such action should alleviate any problem with floating zones, which are not authorized under the Pennsylvania Zoning Enabling

Act (sic?). (164)

Thus, the integration of the proposed TDR Program into the comprehensive plan of the City, i.e., into its Zoning Code, is necessary, both from the standpoint of the Program's financial success and its legality.

TDR PROGRAM DESIGN COMPONENT NUMBER FOUR: THE TRANSFER OF DEVELOPMENT RIGHTS BANK

Fred F. French Investing Company v. City of New York, (350 N.E.2d 381 (N.Y. 1976)), discussed in Chapter Four, is another Supreme Court case that is relevant to the design of Philadelphia's TDR Program. The zoning amendment referenced in Fred F. French was struck down and found violative of due process restrictions because it imposed a "contingency-ridden arrangement" on the appellant property owner. The development rights granted to the owners of Tudor Park became a "double abstraction," whose monetary actualization was subject to "the exigencies of the market and the contingencies and exigencies of administrative action." (165)

The inference drawn from the case is that if the property owners had been compensated immediately for the loss of their development rights, rather than having their compensation be subject both to the contingent approvals of administrative agencies and to the contingencies of the market place, no due process violations would have been found. Indeed, the property owners would not have been motivated to file suit.

Therefore, in order to safeguard against violating property owners' rights as guaranteed by the United States Constitution, and in order to quell property owner's objections to designation, a TDR Bank will be established as a component of the TDR Program. The function of the Bank will be to purchase development rights from owners of sending sites

at times when the demand for development rights from developers is weak or absent, and at times when approval processes for proposed developments are drawn out over long periods of time.

When the development approvals are finally obtained, the developer will purchase the necessary development rights from the TDR bank, replenishing its financial resources so that it might facilitate more transfers. In the intervening period, the owner of the historically-designated site will have been compensated in part for the deprivation of the sending site's development potential.

A TDR Bank is an important component of the Program for reasons other than its bringing the Program into compliance with the Constitution. Establishing and operating a TDR bank is good business practice, as it sends a message to the business community that the authors of the Program recognize the financial agenda of the property-owning constituency in Center City. Since property owners will be deprived of their superadjacent development potential at the moment of designation and at the moment the TDR transaction is ratified and then burdened in perpetuity with maintenance, their timely reimbursement for these sacrifices adds respectability to the plan from a business standpoint, which will certainly expedite the approval of the Program by its City Council.

However, Chapter Four also established that if Philadelphia created a mandatory system through which buyers

and sellers were required to operate, it might be construed as a restraint of trade and violative of federal anti-trust legislation. Therefore, whereas participants in the Philadelphia TDR Program will have the option at any time to sell their development rights to the municipal TDR bank, they will also have the option of selling development rights on the open market without the services of the TDR bank.

TDR PROGRAM DESIGN COMPONENT NUMBER FIVE: ADMINISTRATION OF THE TDR PROGRAM BY THE PHILADELPHIA HISTORIC PRESERVATION CORPORATION

In order that the government of the City of Philadelphia not be burdened financially by the implementation of the TDR Program, the administration of the TDR Program must be entrusted with compensation to the Philadelphia Historic Preservation Corporation (PHPC).

PHPC's role in the proposed program would be to ensure the following:

1) that proposed transfers involve only properties eligible as sending and receiving sites;
2) that each development rights transaction be contingent upon its generating sufficient funds to ensure the long-term preservation of the participating landmark structure;
3) that the owners of sending sites publicly record deed restrictions prohibiting any development super-adjacent to the subject landmark, which deed restrictions will run with the land;
4) that the covenants of the deed restriction placed on the title of the sending site are upheld;
5) that the proceeds of development rights sales were entrusted to a respected financial management firm, such that these funds will provide for the costs of landmark maintenance in perpetuity; and

6) that a TDR bank be established and operated by PHPC.

PHPC's role will not extend to that of ensuring that the preservation covenants placed upon the sending site are upheld. This is the role of the Philadelphia Historical Commission.

For its responsibility in the TDR process, PHPC will receive an annual fee, part of the dividend from the fund set up to maintain the landmark, and an initial fee from both buyer and seller of development rights upon settlement of each transaction.

Rationale

PHPC should administer the program because: 1) the city government cannot afford the financial burden of administering a TDR program; 2) PHPC is experience in the management of a successful facade easement program that has received donations from numerous Center City landmarks, and TDRs are very similar in nature, both in terms of the initial transaction and in terms of the long-term enforcement of preservation covenants; and 3) landmark owners, due to their profit-motive sensibilities, cannot be entrusted with the task of enforcing covenants that compromise the future development potential of their sending site properties.

Entrusting the TDR Program to PHPC both advances not only Program administrative goals, but also financial and legal

goals, the most significant of which is placing no or minimal financial burden on the City.

TDR PROGRAM DESIGN COMPONENT NUMBER SIX: THE REAL ESTATE BROKERAGE COMMUNITY AND TDRS

The real estate brokerage community must be permitted to broker the sale of development rights as they now broker leases and land and building transactions. The sale of development rights poses no greater challenge to the real estate community than the leasing of commercial space and the selling of land and buildings, and the participation of brokers in the Program will accelerate its acceptance in the business community and considerably enliven the Program. Therefore, the real estate industry should be permitted to list the availability of development rights, to establish prices for development rights, to represent the interests of both buyers and sellers during negotiations, and to profit from the Program through commissions on sales of development rights. Transactions proposed and brokered by members of the real estate community must be sanctioned by the Philadelphia Historic Preservation Commission, however.

PHPC Will be Guaranteed a Three Per Cent Commission on Each Transaction of Development Rights

The real estate brokerage community and PHPC can work together successfully to promote the TDR Program if certain rules are set forth at the outset of the Program, determining the rates of compensation for Program participation. This section sets forth such guidelines.

If the Philadelphia Historic Preservation Corporation sells development rights owned by one property owner to a second party without the assistance of a real estate broker, it will receive a six per cent commission on that sale. If an individual property owner sells development rights without the assistance of PHPC, PHPC will receive a three per cent commission on that sale. If a single real estate broker orchestrates the sale of development rights from seller to buyer, PHPC receives a three per cent commission, and the broker receives a three per cent commission. If a broker and PHPC each represent parties in the sale of development rights, they each receive three per cent of the sale. If a broker cooperates with another broker in the sale of development rights, they each receive 1.5 per cent of the proceeds of the sale as their commission, and PHPC receives 3 per cent of the proceeds of the sale.

This aspect of the Program is designed to generate operating income for PHPC such that it can administer the TDR Program and further the objective of not burdening the City with the administration of the TDR Plan. It is also designed to entice members of the real estate community to participate in the Program, by offering attractive financial incentives to do so.

TDR PROGRAM DESIGN COMPONENT NUMBER SEVEN: ENSURING THAT THE TDR PROGRAM COMPLIES WITH COMMONWEALTH OF PENNSYLVANIA REGULATIONS FOR THE ENACTMENT OF LAND-USE REGULATIONS

Compliance with Commonwealth of Pennsylvania Statutes and the Pennsylvania Code is a necessary component of TDR Implementation. Compliance with applicable Pennsylvania Statutes consists of the following:

(a) ensuring that development rights are conveyed by a deed duly recorded in The Recorder of Deeds Office in Philadelphia's City Hall; (166)

(b) ensuring that "The recorder of deeds shall not accept for recording any such instrument of conveyance unless there is endorsed thereon the approval of the municipal governing body having zoning or planned residential development jurisdiction over the land within which the development rights are to be conveyed, dated not more than 60 days prior to the recording." (167)

(c) ensuring that no development rights are transferred beyond the boundaries of the City of Philadelphia. (168)

Whereas the laws of the Commonwealth ensure the legality of TDRs in Philadelphia, the <u>Philadelphia Home Rule Charter</u> (Title 351 of the <u>Pennsylvania Code</u>) prescribes the manner in which an amendment to the zoning ordinance must occur. The <u>Charter</u> states that all such revisions of the zoning ordinance

must receive approval from the Philadelphia City Planning Commision before the City Council can enact a proposed alteration of the ordinance. (169)

The _Charter_ provides, furthermore, that the Council may amend the zoning code if the Planning Commission fails to act on the proposed amendment within a statutorily-prescribed period of time. The _Charter_ stresses that Council is the only body within the government of the City of Philadelphia which can amend the code; the Planning Commission has no such power of its own. (170)

TDR PROGRAM DESIGN COMPONENT NUMBER EIGHT: ADDITIONAL TDR PROGRAM PROVISIONS

The previous chapters, including those discussing constitutionality and legal issues associated with TDRs, and other chapters, established certain additional provisions that should not be absent from Philadelphia's TDR program. They are as follows:

First, the use of the sending site at the time of historic designation must be allowed to continue in order that a taking not occur. This use must generate a reasonable rate of return.

Second, historic designation and the accompanying deprivation of development potential must not be imposed on the owner of the sending site without the elements of Due Process being present, namely notice, defense, tribunal and decision; property owners should have the opportunity to appeal historic designation and participation in the TDR Program.

Third, the Philadelphia TDR Program should not permit adjacency transfers. This is implicit in the design of the Philadelphia TDR Program, though not explicitly stated, and is a feature that distinguishes it from the New York TDR Plan. As opposed to New York's Plan, the Philadelphia Program's sending and receiving sites are set forth to avoid the visual juxtaposition of high- and low-density uses. However, similar to other TDR programs, including New York's, Philadelphia's

Program will permit transfers to be made to either one or to several different parcels until the authorized FAR of the landmark lot is exhausted.

Fourth, the TDR Program must include other provisions to ensure that TDRs are the most enticing means to increase FAR in the revised Zoning Code. Although TDRs enjoy innate advantages over the other "extraordinary public amenities" listed in the 1988 Plan for Center City, one further provision could insure that development rights were preferred over other amenities as a means of obtaining maximum FAR, namely accelerating the review process for high-rise developments that participate in the TDR program.

Accelerating the review process will entice developers to purchase development rights. Because it will present financial benefits to developers by hastening the occupancy of the proposed high-rise buildings, accelerating the review process will thereby hasten the arrival of the day when positive cash-flow begins and when negative cash-flow, resulting from carrying large projects through the approval process, ceases.

Fifth, the Program will also promote participation by offering preferential tax treatment for those property owners who have relinquished their rights to superadjacent development.

Thus, TDRs, through innate advantages and by offering accelerated review processes and preferential tax treatment

for sending site owners, will be the method of choice for developers who wish to increase their FAR from 12 up to 24.

THE TRANSFER PROCESS

The transfer process need not be described in detail, as it approximates the sale of commercial land in almost every manner. It deviates from typical commercial real estate transactions, however, in that it must be approved by PHPC. PHPC's principal function in the process is to ensure that the cash value of the sale of development rights will net enough money to maintain the landmark in perpetuity and to ensure that a deed restriction that runs with the title of the sending site is publicly recorded in City Hall.

CONCLUSION: THE PROPOSED TDR PROGRAM DESIGN SUITS THE CHARACTER OF THE CENTER CITY PHILADELPHIA REAL ESTATE MARKET AND THE CHARACTER OF THE CURRENT PRESERVATION DILEMMA IN CENTER CITY

The proposed Transfer of Development Rights Program described in this chapter presents a realistic method for reaching the ten objectives stated in the Introduction of this chapter.

The preservation objective, that of safeguarding landmarks in the urban core in perpetuity, will be achieved by 1) drawing sending site boundaries that encompass historic areas within or adjacent to the central business district; 2) by offering financial compensation to landmark owners that will constitute a financially-attractive alternatives to demolition, neglect, and improper alteration; and 3) by enforcing the Program's preservation restrictions and deed covenants that will enjoin demolition, improper alteration, and neglect.

The aesthetic objective, that of diverting high-rise development where it will not diminish the visual enjoyment of historic architecture, is accomplished by 1) establishing sending site boundaries that enclose an area where the bulk of landmarks with excess development potential exist and 2) by establishing receiving zones a) where increased density will not displace landmark structures and b) where existing landmarks are of such size and stature that high-rise

construction will not compromise them.

The three financial objectives articulated in the Introduction of this Chapter will be realized because the Program raises cash through development rights sales to: 1) create a maintenance endowment for each landmark; and 2) reimburse PHPC for the administration of the Program, thereby relieving the City of any potential financial burdens.

The planning objectives are met through: 1) establishing Program boundaries that divert high-rise development to areas with sufficient infrastructure to absorb development; and 2) through integrating the TDR Program into the zoning, planning, and administrative framework of the City, thereby eliminating the possibility that the Program conflicts with other zoning and preservation measures adopted by the City.

Finally, legal objectives are realized by integrating the Program into the zoning code, by creating a TDR Bank, and by permitting transfers to occur without the TDR Bank's involvement.

CHAPTER SIX: FINDINGS AND CONCLUSIONS

INTRODUCTION

Implementing a Transfer of Development Rights Program in Center City Philadelphia is necessary, feasible, and desirable. It is necessary in order to reconcile the Philadelphia Historical Commission with owners of commercially-zoned landmarks. Reconciliation between these parties is essential to the continued designation and preservation of historic landmarks in Center City. As previous chapters have demonstrated, implementation is feasible from administrative, financial, planning, and legal standpoints. Implementation is desirable for several reasons, among them that it transforms the heretofore liability of excess zoning into a financial asset for landmark protection, and it will also improve the commercial environment and the quality of life in Center City, as well.

Chapter Six elaborates upon these findings and sets forth, as well, predictions and conclusions as to the effect of the current economic and political climates on the proposed TDR Program.

TDR IMPLEMENTATION IS NECESSARY

TDR implementation is necessary for several reasons. First, it is necessary to reconcile landmark owners with the

Philadelphia Historical Commission.

Existing preservation legislation enforced by the Philadelphia Historical Commission places restrictions on the alteration and demolition of designated landmarks but offers no compensation for this inconvenience. Disputes arising from this legislation have taken the form of litigation, which, if successful, may overturn the Commission's powers of designation, thereby denying the City of its only means of protecting landmarks. Furthermore, lawsuits against the City arising from the Historical Commission's designation activity place Philadelphia in a position of possible liability for millions of dollars in damages.

TDRs offer owners of designated landmarks financial compensation to offset the effects of designation. Because of this, landmark owners in C-4 and C-5 zoning districts of Center City, where temptation to demolish landmarks is greatest, will no longer have reason to challenge historic designation by bringing suit against the City. In addition, the City will be able to maintain control over the fate of landmarks within its boundaries.

TDR implementation is also necessary if investment in historic buildings in Center City is to resume. TDR implementation will revive interest in investing in historic buildings by equalizing the financial standing of landmarks as real estate investments with that of new commercial buildings. As Chapter Two demonstrates, investment dollars in

real estate since the Tax Reform Act of 1986 have tended towards high-income/high-efficiency, new construction and away from historic structures. This has occurred because returns-on-investment for historic buildings, under current tax law, are inferior when compared to those of newer commercial structures, as maintenance costs tend to be higher for landmarks than they are for newer structures and because historic buildings also tend to have lower per-square-foot rents than newer structures, as well as lower net-to-gross ratios of rentable space.

TDR Implementation can equalize the financial standings of landmarks and newer structures because the financial proceeds resulting from the sale of development rights will provide for the continued maintenance of sending-site landmarks. If the proceeds are managed properly, it is conceivable that they may not only fund landmark maintenance, but also compensate for inferior landmark cash-flow.

TDR implementation is also necessary because it guarantees two important gains for historic buildings that may not otherwise occur if a landmark is involved in an informal transfer. First, TDR implementation guarantees that the transfer be contingent upon its generating sufficient funds to finance the landmark's renovation or to endow the maintenance of the building in perpetuity. This has not occurred to date in any of the informal transfers in Center City. Secondly, TDR implementation guarantees that adjacency

transfers will not occur. Adjacency transfers have occurred as a result of informal transfers, as with Academy House and the Academy of Music and with 1500 Locust and 1515 Locust Street. The former transfer substantially diminished the public's visual enjoyment of the historic Academy of Music.

Lastly, with regard to informal transfers, TDR implementation is necessary because, whereas some informal transfers have occurred in advance of Program implementation, many more transfers might occur were a Program available, as implementation would promote the concept actively in the business and real estate communities.

TDR Implementation is also necessary for the fulfillment of the Philadelphia City Planning Commission's 1988 Plan for Center City. The Plan envisions revitalizing Philadelphia by both encouraging growth and by reinforcing the historic fabric of the City. TDRs present a method by which growth and preservation can coincide and reinforce one another.

Also if the Plan is to succeed in its objective to balance densities throughout the City, then the TDR Program as proposed in this thesis must be implemented.

Finally, the unifying reason as to why TDR Program implementation is necessary is that it holds forth the possibility of sustaining the preservation movement in a time when it lacks a mechanism to carry out its mission.

TDR IMPLEMENTATION IS FEASIBLE

The second finding of this thesis is that implementing a TDR Program is feasible. Despite numerous obstacles and potential pitfalls, implementation can be accomplished to the satisfaction of constitutional standards, and it is feasible from planning, financial, and administrative standpoints, as well.

One of the factors that contributes most to the feasibility of the proposed TDR Program is that its design responds to the shortcomings of previously-enacted TDR Programs in other major U.S. cities.

For instance, New York's TDR Program is very difficult to utilize, as it permits only adjacency transfers and transfers within continuous chains of property ownership, and the New York City zoning ordinance permits too many alternate methods besides TDRs for developers to increase FAR. San Francisco, on the other hand, enacted strict height limitations soon after the implementation of its TDR Program, obviating TDRs in that city. As for the modest performance of Denver's TDR Program, that city's real estate crash rendered its TDR program almost unusable.

Philadelphia's proposed TDR Program avoids these shortcomings in several ways. In response to the shortcomings of the New York TDR program, Philadelphia's Program, as proposed herein, would only be implemented in concert with a comprehensive and complementary revision of the zoning code,

which will ensure that TDRs are a favored method of developers for maximizing FAR. Philadelphia's TDR Program would also not permit adjacency transfers. By doing so, Program financial feasibility is furthered, as costly review processes before the Planning and Historical Commissions would not be needed as they are in New York, as no risk exists that high-rise buildings will tower over landmarks.

In response to shortcomings in the San Francisco TDR Program, Philadelphia's Program would, as mentioned above, only be implemented in concert with a comprehensive revision of the Philadelphia Zoning Code. Thus, Philadelphia's TDR Program would not suffer the fate of San Francisco's Plan, where height limits and annual square footage limits were placed on new construction soon after its enactment.

With respect to the economic circumstances that negatively affected the Denver TDR Program, Philadelphia's Program will be implemented in a region of this Nation which is economically diversified and not generally subjected to extreme economic fluctuations, as are the rule in economies such as Denver's. Downturns in the local construction and real estate segments of the economy do occur in Philadelphia, as we are presently witnessing, but they are generally not as severe as those experienced by cities, such as Denver, that are predominantly dependent upon a few key industries.

The feasibility of TDR implementation is also promoted by factors available in the Philadelphia real estate market,

namely the desired imbalance between an overwhelming number of potential high-rise development sites (especially when 30th Street Station is taken into account) and a significant, but limited, number of landmarks meeting all of the sending-site selection criteria set forth in the previous chapter. This imbalance is a prerequisite for program success, as a greater number of receiving than sending sites ensures that prices for development rights will be high enough to 1) encourage landmark owner participation in the Program and 2) generate sufficient funds to ensure preservation of the sending site.

Besides responding correctly to the shortcomings of other Cities' TDR Program designs, the proposed TDR Program in Philadelphia is feasible from Constitutional standpoints, as well.

Constitutional Feasibility: The Taking Issues

Philadelphia's TDR Program, as proposed herein, is feasible from the standpoint of requirements set forth in the Takings Clause of the U.S. Constitution. The manner in which TDRs avert takings claims is many fold.

First, TDRs present a method of providing compensation to owners of designated properties. In fact, United Artists presents an example of how the implementation of a TDR Program might avert taking claims by offering compensation to owners of designated properties. Had just compensation been provided to the owners of 1908 Chestnut Street, they might not have

filed suit against the City. The owners had sought a demolition permit as early as 1987. Had their development rights been saleable, they may have found several parties interested in purchasing these rights, as the late 1980s was a period of significant high-rise development and real estate speculation in Center City. Being able to sell their development rights may have changed the balance sheets for 1908 Chestnut, such that the owners may have found preservation of be a money-making proposition.

Since the Takings Clause prohibits deprivation of private property without just compensation, the payment of an amount of cash to landmark owners that represents the value of their development rights on a similarly-zoned parcel in the commercial core of Philadelphia is just compensation. (See pp. 179-180)

Second, TDRs do not constitute a taking because, from the standpoint of the Supreme Court, they do not interfere with a landmark owner's investment-backed expectations. Whereas the Court recognizes that TDRs do interfere with the full use of air rights, the Court has ruled, nonetheless, that the full use of air rights is not bound up with investment-backed expectations.

Third, TDRs do not interfere with the present use of the property. A taking would occur only in the case where designation interfered with the present use of a landmark property.

Fourth, even though Pennsylvania recognizes air rights as a separate interest in real estate, their appropriation for use on another property does not constitute a taking, per Supreme Court rulings.

Fifth, because the nature of the state's action is critical in takings cases, TDR implementation passes another takings feasibility test. In the case of TDRs, the nature of the state's action is attuned to promoting legitimate state interests, namely enhancing the quality of life by preserving the character and desirable aesthetic features of a city. Furthermore, landmark preservation has repeatedly been upheld by the courts as a legitimate state interest.

Sixth, a permanent physical occupation of property is another indication of a taking, and none of the cases discussed in this paper indicates that the proposed Program's acquisition of air rights would be considered by the courts to be a permanent physical occupation of property.

Lastly, TDRs promise to achieve the end advanced as the justification for the deprivation of development potential, thereby passing another takings feasibility test.

Thus, feasibility from the standpoint of the Constitution's Takings Clause is assured.

Constitutional Feasibility: The Due Process Issue

Philadelphia's TDR Program, as proposed herein, is feasible from the standpoint of requirements set forth in the

Due Process Clause of the U.S. Constitution. TDR Program implementation is feasible from a due process standpoint, in part, because the elements of due process, namely notice, defense, tribunal, and decision, are present in the Historical Commission's process of nominating and certifying buildings as historic. Listing on the Register is also one of several prerequisites for landmark participation in the TDR Program. Since the Historical Commission, in its designation process, satisfies the due process requirements set forth above, the TDR Program benefits from this.

The Program passes due process scrutiny for other reasons, as well. For example, the process of landmark designation is not arbitrary in Philadelphia; it is a part of the City's comprehensive plan. Secondly, the public interest justifies the interference in land use that is carried out by the TDR Program; historic preservation presents economic as well as cultural benefits to cities. Thirdly, the means adopted (depriving landmark owners of superadjacent development potential and paying them cash to maintain their landmarks) are reasonably necessary to accomplish the goals of historic preservation. Fourthly, these means are not unduly oppressive on the property owner; the present use of landmarks is permitted to continue, and financial compensation is provided for loss of development potential.

Lastly, and perhaps most critical, since Philadelphia's proposed TDR Program includes provisions for a TDR bank,

potential due process violations are avoided, as the bank will ensure timely compensation to sending site owners.

Constitutional Feasibility: The Equal Protection Issue

Philadelphia's TDR Program, as proposed herein, is feasible from the standpoint of requirements set forth in the Equal Protection Clause of the U.S. Constitution.

The reason for this is that historic preservation has repeatedly been upheld as a legitimate state interest and since zoning has as well, it follows that a zoning ordinance that classifies properties in terms of historic and architectural significance, and which treats these properties differently from other properties, bears a rational relationship to the legitimate state interest of preserving architectural landmarks. It is likely, therefore, that the proposed TDR Program would not be found violative of equal protection guarantees.

The Pennsylvania Code Indicates the Manner in which Implementation of a TDR Program in Philadelphia Must Occur

The Philadelphia Home Rule Charter, discussed in Chapter Four, prescribes the manner in which a TDR Program may be implemented in the City of Philadelphia. The Charter states that all such revisions of the zoning ordinance must receive approval from the Philadelphia City Planning Commission before the City Council can enact a proposed alteration of the

ordinance, such as TDR implementation.

TDR Implementation is Feasible from a Planning Standpoint

The planning feasibility of the proposed TDR Program presupposes a simultaneous and comprehensive revision of the Philadelphia Zoning Code in accordance with reforms set forth in the 1988 Plan for Center City. Comprehensive reform as envisioned by the Plan would promote the planning feasibility of TDRs by ensuring that they are utilized to the greatest extent possible, which will, likewise, promote the Plan's objective of balancing preservation with growth. An example of an aspect of comprehensive reform of the Code is the elimination of Zoning Lot Mergers, as this method of surpassing base FARs competes with the Transfer of Development Rights.

In addition to this proposed revision to the zoning code, there are factors already in existence that promote the planning feasibility of the proposed TDR Program. Two such factors are sufficient infrastructure capacity to accommodate high density development in receiving site areas and numerous potential sending and receiving sites, which will fuel Program transfer activity.

As to a comprehensive reform of the Zoning Code, including TDRs into such reform would position TDRs favorably vis-a-vis alternate zoning amenities, such that TDRs would be the most expeditious and the most financially-compelling

method of maximizing FAR. Comprehensive reform would also ensure that TDRs would not be rendered ineffectual as they are in New York and San Francisco. In the former case, TDRs are very difficult to utilize, and numerous other zoning amenities are both easier to utilize and also yield the same result as TDRs. In the latter case, San Francisco enacted height restrictions soon after adopting a TDR plan, thereby obviating TDRs.

The planning feasibility of TDRs is no where more apparent, however, than in a discussion of the Program's relationship to Center City's infrastructure. Increases in density in the high-rise district of Center City resulting from the Program can be accommodated by the existing infrastructure of sidewalks, streets, expressways, regional rail, subways, trolleys, buses, and sewers and other utilities.

Likewise, as TDRs will increase density in the high-rise section of Center City, so will they proportionately stabilize the density in historic sections of the commercial core of Philadelphia. Both are objectives of the Plan, in which TDRs play an essential role, and the stabilization of density in Center City's historic areas bears a rational relationship to the infrastructure capacity of these traditionally-low density areas.

TDRs are feasible from a planning standpoint, as well, because low-density, historic buildings with excess

development potential abound in Center City. Chapter Five lists fourteen such sites, which are merely representative. Moreover, numerous high-rise development sites still exist in Center City, including but not limited to the entirety of the Thirtieth Street Station Yards, the 1700 block of JFK Boulevard (north side) and several sites along Market Street in the 800, 900, 1000, 1100, 2100, 2200, and 2300 blocks along the south side, and in the 2100 and the 2200 block along the north side.

Finally, TDRs are feasible from a planning standpoint because, as it is mentioned above and in Chapter Four, TDR Programs are sanctioned for implementation by Statutes of the Commonwealth of Pennsylvania. Furthermore, the proposed Program can be implemented in the traditional manner in which the zoning ordinance is amended, i.e., through approval by City Council.

TDR Implementation is Feasible from a Financial Standpoint

TDR implementation is financially feasible because the Program will generate sufficient funds to establish maintenance endowments for historic buildings. These maintenance endowments will appreciate in value as buildings age, providing for landmark preservation in perpetuity. TDRs also offer financial compensation to the administrative organization that will oversee TDR transactions, the Philadelphia Historic Preservation Corporation. This, in

turn, promotes Program financial feasibility because it eliminates the need for City involvement, which is too expensive for the City government at this time.

TDR Implementation is Feasible from an Administrative Standpoint

TDR implementation is administratively feasible because the day-to-day administration of the Program will be undertaken by the Philadelphia Historic Preservation Corporation. PHPC has relevant past experience in running programs of a similar nature. Particularly relevant is its experience in working with facade easement transactions over the past several years. Their undertaking Program administration will ensure that the budget of the City of Philadelphia will remain unburdened by the Program's operation, and this is the essence of Program administrative feasibility.

TDR IMPLEMENTATION IS DESIRABLE

The third finding of this thesis is that TDR implementation is desirable. TDRs are desirable because they will help preserve Philadelphia's architectural heritage, which has tremendous cultural, educational, and economic value.

TDRs' capacity to protect the City's architectural heritage derives principally from the financial benefits that the Program presents. These financial benefits include the transformation of the heretofore liability of excess zoning into a financial asset that promotes landmark protection; the distribution of the cost of preservation among many constituencies; easing of the conflict between landmark owners and the Historical Commission; and compensation for the shortcomings of existing preservation legislation.

Aside from these financial considerations, TDRs are desired by both real estate developers and owners of low-density, historic structures; they are desirable because they will generally improve the commercial environment and the quality of life in Center City; and they will not only facilitate preservation, but also the development of the urban skyline, which is an important civic asset.

TDRs Preserve Philadelphia's Architectural Heritage

Implementing a TDR program in Center City Philadelphia is a desirable civic objective because it will facilitate the

preservation of Center City's architectural heritage. The preservation of Philadelphia's historic architecture presents innumerable and long-lasting benefits to the City, its citizens, its businesses and its institutions. These benefits are both economic and cultural, as landmark preservation directs investment into Center City, defines Philadelphia's identity in a positive manner, maintains exalted cultural values, and is a resource for scholarship.

Among the economic benefits resulting from TDR implementation will be the continued and enhanced appeal of the City to tourists. The preservation of historic buildings in Center City Philadelphia draws millions of visitors into Center City, who bring money into the City, which stimulates the local economy, provides jobs and creates tax revenue.

Among the cultural benefits resulting from TDR implementation would be maintaining the presence in Philadelphia of buildings designed in the era preceding the World War I. This insures that the ambitious and infectious idealism expressed in the designs of this era will continue to influence thinking about design, craftsmanship, and culture as a whole.

Historic architecture's usefulness to scholarship is also indicative of its paramount cultural value, and this presents a strong argument for the desirability of TDR implementation. Historic architecture in Center City is useful for the study not only of architecture, architectural history and historic

preservation, but also of history, art, art history, sociology, anthropology, planning, and engineering. Thus, the City's architectural resources provide a rich visual environment and field of study for students enrolled in the City's numerous institutions of higher learning.

TDRs Transform a Preservation Liability into a Financial Resource

Under current zoning, excess development potential is the curse of commercially-zoned landmarks in Center City. TDRs are desirable because they will transform the temptation to demolish or irrevocably alter landmarks, the natural by-products of existing zoning, into the desire to preserve.

Financial compensation for landmark designation will improve the financial balance sheets of historic architecture, as the money gained from the sale of development rights can be managed by a reputable financial institution so as to provide for, or at the very least, contribute to in perpetuity the maintenance of historic buildings, which have higher maintenance costs, lower rental rates, and lower net-to-gross ratios of rentable space than newer buildings. TDR programs, thus, make the prospect of maintaining an historic building competitive with that of demolishing it and replacing it with new construction.

In addition, the transfer of development rights from historic buildings may lower the taxes on designated historic

buildings, thereby further increasing their positive cash flow.

TDRs Present a Method by which the Costs of Preservation are Shared by Several Constituencies

TDRs are desirable because they ensure that the financial burdens of preservation are shared among many different interest groups, including developers, the landmark owner, and the City.

Developers will pay the lion's share of the cost of preserving landmarks that participate in the process. The dollar amount that developers will pay for development rights will depend on the value of commercial office space at the time of the transaction, but certain guidelines may be set forth to estimate dollar (in 1991 dollars) amounts that might be transacted. The following table computes the estimated value of one gross square foot of development potential to a high-rise developer.

Gross SF		Net-to-Gross Ratio		$ Rent Per SF		Ex-pen-ses		Occu-pan-cy		Per SF Value of Development Rights			10-Year Value
1	X	.8	X	25	X	.5	X	.863	=	$8.63	X 10	=	$86.3
1	X	.8	X	20	X	.5	X	.863	=	$6.90	X 10	=	$69.0
1	X	.8	X	15	X	.5	X	.863	=	$5.18	X 10	=	$51.8

This table makes several assumptions, which are consistent with those used in Chapter Two. The table assumes that:

- the owner of development rights will sell them to a developer of Class-A office space:
- the net-to-gross ratios in the office building will be 80%;
- the Rent Per-Square-Foot will range from $15-25;
- operating expenses (taxes, insurance, common area maintenance, etc.) will equal 50% of gross income;
- the occupancy rate will be 86.3%;
- the saleable value of one gross square foot of commercial office space is equal to its cash-flow value over a period of ten years.

Based on these estimates of the value of one square foot of development potential, an owner of 10,000 square feet of excess development potential could sell them for anywhere from $518,000 up to $863,000. Owner of 20,000 square feet of development potential could sell them for over one million dollars. Of course, it behooves owners of sending sites to sell their development potential at times when the speculative real estate market is most active, as profits will be greatest at these times.

Thus, because the sale of development rights can generate substantial sums of cash, the cost of preserving landmarks will be born to a large extent by developers, as the monies raised from such transfers could be managed for long-term asset protection and used as building endowments for perpetual building maintenance, or they could pay for a substantial

renovation of the landmark at the time of the transfer.

Owners of historic buildings will still pay part of the cost of preservation, however. Even with such sums paid to them as are illustrated above, they will reap smaller profits through a TDR Program than they would if they demolished their diminutive landmarks and constructed high-rise office buildings with maximum FARs.

The City of Philadelphia and its taxpayers will also continue to pay for preservation to the extent that the Historical Commission must be staffed. Even though the TDR Program will be administered by the Philadelphia Historic Preservation Corporation, at no cost to taxpayers, the Historical Commission will still designate landmarks throughout the City and will enforce preservation covenants.

However, the TDR Program spreads the burden of preservation from two parties, the Historical Commission and the landmark owner, to several parties, namely the Commission, the landmark owners, PHPC, and the developer. Therein lies a very desirable feature of this Program.

TDRs will ease the Conflict between the Philadelphia Historical Commission and Landmark Owners

As is demonstrated in previous sections, TDRs present a method by which the Historical Commission may designate historic buildings with the assurance that affected landmark owners will be promptly and substantially compensated for

deprivation of air rights, as is illustrated in the preceding pages.

Since the effect of the TDR Program will be to improve the cash position of landmark owners, relations between the Commission and property owners should improve as a result.

TDRs Compensate for the Shortcomings of Existing Preservation Legislation

TDRs are also desirable because they compensate for the shortcomings of existing preservation legislation. Not only is existing legislation inadequate to remedy current preservation dilemmas facing historic properties in Center City, but the City's Preservation Ordinance presents restrictions on landmark alteration and demolition only, and the federal tax credits, which offer both restrictions and incentives, have been difficult to utilize ever since the Tax Reform Act of 1986. Therefore, the balance between restrictions and incentives, which existed for a short period prior to 1986, may be restored through the implementation of TDRs. Not only can TDRs restore this balance, but the TDR Program can be sustained without reliance on ever-fluctuating federal tax laws.

Developers and Landmark Owners have sought Transfer Transactions in the Past

Parties involved with high rise real estate development

and owners of low-density landmarks have demonstrated through past actions that the implementation of a TDR Program is desirable. The list of Center City's informal transfers presented Chapter Three already needs amendment, as Thirtieth Street has been renovated by Gerald Hines Interests as the trade-off for their future, proposed development of the air rights above Amtrack's railroad yards. Furthermore, Arch Street Presbyterian Church, at 17th and Arch, in the midst of new high-rise development, has offered its development rights for sale to certain developers, in an attempt to raise funds to repair the badly-decayed, historic structure.

TDRs will improve the Commercial Environment and the Residential Quality of Life in Center City

The City's efforts to maintain its position as the regional center of finance, law, insurance, architecture, and other service-and information-based industries also underscores the importance of implementing a TDR Program. Historic buildings are valuable economic resources for these industries because they provide an air of prestige, solidity, and permanence which cannot be found in the same quantity in any other office market in the Philadelphia metropolitan area.

Additionally, historic buildings contribute substantially to Center City's high residential quality of life. Because of its high quality of life, it is one of the few areas of the City that entices taxpaying and wage-earning residents from

outside Philadelphia to move within the City limits. Attracting new, tax-paying residents has been and will continue to be a critical factor leading to Center City Philadelphia's continued revitalization.

Thus, by preserving the historic character of Center City, TDR implementation will contribute to the maintenance and improvement of the City's quality of life and business environment.

TDRs will facilitate the Development of the Urban Skyline

TDRs are desirable because they advance not only the cause of historic preservation, but also promote the development of another civic assets, the urban skyline. TDR implementation will enrich the urban skyline by permitting developers to build to FARs that exceed base FARs. This will result in the continued construction of buildings that exceed Philadelphia's traditional height limits, thereby further enriching the fabric of Center City, its quality of life, and its aesthetic appeal to the business community.

CONCLUDING REMARKS

At the writing of this thesis, the very existence of the Philadelphia Historical Commission is imperiled. The owners of 1908 Chestnut Street have successfully brought suit against the City for the restrictions placed on alterations to and demolition of the historic, art-deco movie house standing at that address. Not only has the state Supreme Court ruled that the City's process of designating properties results in a taking by the standards of the Pennsylvania Constitution, but also the damages that the City will owe the claimants may be as high as $12 million, and the designation status of approximately 13,000 designated structures within Philadelphia remains uncertain.

In addition, the demolition of the three rowhouses at the southeast corner of Ninth and Chestnut Streets is occurring at this moment; the owner of both the Victory Building at the northwest corner of the same intersection and of the PFSF Bank at 7th and Walnut Streets is also pressing for approval of pending demolition permits at this time; and a demolition fence now encloses the historic structures at the southwest corner of Seventh and Walnut Streets.

Clearly, the Historical Commission's coercive preservation legislation is inadequate to address the preservation problem in Center City, where commercial property values are as high as they are in any part of the City.

Although their effectiveness and ability to compensate

landmark owners will vary according to economic climates, TDRs represent a solution that is fair to landmark owners, that is voluntary, that will disengage the Historical Commission from these bitter disputes, and that will sustain the preservation movement at a time when its very existence is imperiled and when it lacks a mechanism to carry out its mission.

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