

5-1-2014

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Boffard, Brandon Keith, "Transferable Development Rights in New York City" (2014). *Law School Student Scholarship*. 413.
https://scholarship.shu.edu/student_scholarship/413

Transferable Development Rights in New York City

Brandon Boffard

April 23, 2013

INTRODUCTION

The transfer of development rights (TDR) is a municipal land use tool employed in New York City among other locations. It provides an effective and flexible technique for land use control. A TDR is regulation technique that can be used to ensure that the municipality's planning goals are met without causing an unfair financial burden to landowners or restricting needed development.¹ A TDR works by permitting all or part of the unused development capacity of one tract of land to be transferred to a noncontiguous parcel or to land owned by another party.² The unused development rights become a separate property right, which can then be sold to landowners who wish to add density to their lot.³ In essence, a TDR program involves attaching development rights to specified lands desired by a municipality to be kept undeveloped and allowing those rights to be transferred, so that development can occur in another location.⁴

The concept of transferring development rights between properties was first introduced in New York City through a zoning ordinance in 1916.⁵ It allowed landowners to sell their unused development rights to adjacent lots, which then could exceed the new height and setback requirements.⁶ Transferable development rights originally could only be completed through a zoning lot merger, which allowed transfers as-of-right (without the need for approval or

¹ James A. Coon, Local Government Technical Series, Transfer of Development Rights 1-2, N.Y. ST. DEP'T OF ST., (2011).

² *Id.* at 6.

³ *Id.*

⁴ *Id.* at 7.

⁵ Erica Pruetz & Rick Pruetz, *Transfer of Development Rights Turns 40*, 59 PLAN. & ENVTL. L. 3, 3 (2007).

⁶ *Id.*

permitting) but only between adjacent properties.⁷ In 1968, New York City's Landmark Preservation Law was enacted, allowing more flexible transfers across the street but subject to certain restrictions and approvals.⁸ Recognizing deficiencies with the two prior programs, the more modern conception of a TDR is through a program called a special transfer district. Special transfer programs allow transfers from specified granting zones to specified receiving zones, usually within the same neighborhood.⁹

This paper will explore the reason for the shift away from the traditional concepts of a transferable development right to the use of the more complex special transfer districts. In particular, this paper will look at the features of the most recent Special West Chelsea District, the Theater Subdistrict, and the Hudson Yards District. It will examine the beneficial features of these programs, which make them a more desirable land use tool than their predecessors. Moreover, it will examine the efficacy of each program and make policy recommendations for future TDR programs in New York City.

The first section, will examine the foundation and regulatory structure of New York City's TDR programs and explore critical distinctions amongst the programs. This review sets the stage for Parts II and III, which will examine the failures of the original conception of a transferable development right and the consequent shift towards the adoption of the Special Transfer District. Part III, will look at the key features of the recent Special TDR Programs, and highlight the different advantages and disadvantages of each. This paper will conclude by arguing for specific policy recommendations for development rights programs going forward.

⁷ Vicki Been & John Infranca, *Transferable Developments Rights Programs: "Post" Zoning?* 4, 78 BROOK. L. REV. (forthcoming 2013) (NYU Sch. of Law, Public Law Research Paper No. 12-50; NYU Law and Economics Research Paper No. 12-31, Sept. 11, 2012), available at <http://ssrn.com/abstract=2144808>.

⁸ James A. Coon, *supra* note 1, at 3.

⁹ Been & Infranca, *supra* note 7, at 8.

I. TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS IN NEW YORK CITY

In New York City there are three main types of transferable development rights programs. This section will examine the basic features of each type of program and give a historical perspective on how they came about.

A. Zoning Lot Merger

A "zoning lot merger" is achieved by joining two or more adjacent zoning lots into one new zoning lot.¹⁰ Once the zoning lots are merged, the development rights from the merged lots are combined, allowing private owners to freely transfer bulk and density among their tax lots.¹¹ Zoning lot mergers are the most common means of transferring development rights. Private parties may accomplish a zoning merger "as-of-right," without the need for a special permit or other regulatory approval.¹² As a result, the relative ease in the ability to complete the mergers, renders them more cost effective and less time-consuming than alternative methods of TDRs.¹³

The use of zoning lot mergers can be traced to the 1916 New York City Zoning Resolution that sought to restrict building size mainly through height restrictions and setback requirements.¹⁴ However, these limitations only applied when a building occupied more than a quarter of the total lot. As a result, the limitations were vulnerable to interpretations that the total lot footage included any adjacent lots, even if the owners of those lots leased or sold their air

¹⁰ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 12-10 (2012) (zoning lot definition, subsection (d)).

¹¹ Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOK. L. REV. 867, 879 (1984).

¹² Been & Infranca, *supra* note 7, at 4.

¹³ Marc A. Landis, Kevin B. McGrath, & Lonica L. Smith, *Transferring Development Rights in New York City*, N.Y. L.J., Sept. 29, 2008, at 2, available at <http://www.phillipsnizer.com/pdf/Article-NYLJ-RE-TransDevRights-ML-KMc-LS-9-29-08.pdf>.

¹⁴ Michael B. Kruse, *Constructing the Special Theater Subdistrict: Culture, Politics, and Economics in the Creation of Transferable Development Rights*, 40 URB. L. 91, 100 (2008).

rights to the building's developers.¹⁵ In order to avoid height and setback requirements, property owners had an incentive to enlarge their lots by leasing or purchasing air rights.¹⁶

In 1961 New York City enacted a resolution that applied the concept of floor to area ratio (FAR) as the primary land use control. FAR, which is the predominate means of determining a building's "bulk," "is the ratio of total building floor area to the area of its zoning lot."¹⁷ For example, a building on a 20,000 square foot zoning lot, in a zoning district with a maximum FAR of five, cannot exceed 100,000 square feet of floor area. A zoning lot is a piece of land comprising a single tax lot or multiple adjacent tax lots within a block.¹⁸ If a zoning lot is coterminous with the owner's tax lot, the FAR must be used on that tax lot. When two zoning lots coterminous with two different tax lots are merged to become one zoning lot, the parties are able to freely transfer unused FAR, in terms of buildable square footage, between tax lots.¹⁹

When first introduced in 1961, the Zoning Resolution did not provide a specific development rights transfer mechanism. The then existing definition of a "zoning lot" allowed a developer to enter into a long-term lease of adjacent lots on the same city block and then purchase and allocate any unused development rights from one tax lot to another.²⁰ The short-term attempt to link contiguous tax lots with one another through long-term leases did not work. A long-term lease had to be at least fifty years in duration, which led to an increased likelihood that a lessee could default and the lessor would have to foreclose.²¹ This led to uncertainties in the market for development rights, in response, the 1977 amendment to the Zoning Resolution

¹⁵ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING HANDBOOK, at 148 (2011).

¹⁶ Kruse, *supra* note 19, at 100.

¹⁷ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 12-10 (2006) (part (d) under definition of Zoning Lot).

¹⁸ *Id.*

¹⁹ Been & Infranca, *supra* note 7, at 4.

²⁰ Marcus, *supra* note 11, at 875-876.

²¹ Been & Infranca, *supra* note 7, at 4 (citing Marcus, *supra* note 11, at 875-876).

eliminated the lease requirement, shoring up any uncertainties created in the use of development rights.²² The definition of "zoning lot" now includes "a tract of land consisting of two or more contiguous tax lots located on a single block, which, at the time of filing for a building permit or certificate of occupancy, is treated as one zoning lot for purposes of compliance with the Zoning Resolution."²³

Even though private parties may accomplish a zoning merger "as-of-right," without the need for a special permit or other regulatory approval, there are still area specific zoning restrictions that must be complied with. For instance, in some zoning districts, the ability to use a zoning lot merger to increase buildable height, is limited by the requirement that the development occupy a minimum percentage of the merged lot.²⁴ These restrictions are intended to avoid the development of buildings like Trump World Tower, which accumulated air rights from a number of merged lots to erect a tower that occupied a mere 13 percent of the merged lot.²⁵

B. Landmark Transfers

In 1968, the New York City Planning commission enacted a development rights transfer program for designated landmarks. The regulation recognized that landmarks were endangered by the City's encouragement of builder friendly zoning initiatives coupled with continued pressures to develop.²⁶ The new regulation sought to replace existing programs for landmark

²² David A. Richards, *Downtown Growth Control Through Developments Rights Transfer*, 21 REAL PROP. PROB. & TR. J. 435, 472 (1986).

²³ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 12-10 (2006).

²⁴ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 23-633(c)(3) (2011).

²⁵ David W. Dunlap, *A Complex Plan's Aim: Simpler Zoning Rules*, N.Y. TIMES, Jan. 30, 2000, <http://www.nytimes.com/2000/01/30/realestate/a-complex-plan-s-aim-simpler-zoning-rules.html?pagewanted=all&src=pm>.

²⁶ Note, *Development Rights Transfer In New York City*, 82 YALE L. J. 338, 350 (1972).

preservation, by allowing owners of designated landmark to transfer their unused building capacity to adjacent parcels for development.²⁷ The 1961 Zoning Resolution already permitted the transfer of potential development rights to a contiguous parcel, with the condition that both lots were under the same ownership. However, the law as it stood would render many landmarks useless, thus the 1968 amendment sought to remove many of these restrictions.²⁸ The Zoning Commission broadened the definition of "contiguous" to include lots across the street or intersection from the landmark and by permitting transfers between separately owned zoning lots.²⁹ However, the ability to transfer development rights beyond the same block came with some limitation on how much the receiving site's FAR could be increased. The transferee lot was only permitted a twenty per cent increase in floor to area ratio through the transfer.³⁰

On its face, the Landmark Preservation Law appeared to be both aesthetically and fiscally well thought out. The Commission recognized that older buildings not only enhanced the city's character through their "historical associations and architectural distinction;" they also provided necessary avenues of light and air amid skyscrapers.³¹ The owners of designated landmarks would be compensated for their unused development rights; the buyers of these rights, in return, can acquire additional building capacity; the neighborhood, meanwhile, can retain an essential amenity, a revitalized landmark, as well as new developments in line with the character of the neighborhood; and the City, can benefit by way of new tax revenues from previously untaxable property.³² However, the new law was not without its challenges.

²⁷ Note, *Development Rights Transfer In New York City*, 82 YALE L. J. 338, 350 (1972).

²⁸ *Id.* at 351.

²⁹ *Id.*

³⁰ *Id.* at 349.

³¹ *Id.*

³² *Id.* (citing New York City Planning Commission, Minutes 303 (May 1, 1968)).

In 1978 the Supreme Court, in *Penn Central Transportation Co. v. New York City*, first addressed a takings claim involving the landmark law.³³ Under New York City's Landmark Preservation Law, Penn Central was prohibited from developing the air space above the terminal, but was given TDRs that would allow development of air space over surrounding properties.³⁴ Penn Central, alleged that the landmark regulation constituted an uncompensated taking, and that its TDRs were worthless to compensate for the restrictions imposed because no purchasers existed under the then-existing transfer rules.³⁵ The Court held that Penn Central had not suffered an unconstitutional taking. However, the Landmark Preservation Commission did adopt two amendments to offset the marketability claims set forth by Penn Central. The first permitted the transfer of TDRs to "any site connected to the landmark through a chain of lots under common ownership."³⁶ The second amendment removed the twenty-percent limit on the increase in FAR at a receiving site, but only for the highest-density commercial districts.³⁷

Under Section 74-791 of the New York City Zoning Resolution, the owners of both landmark transfer sights and the receiving lots must submit an application to the City Planning Commission (CPC) for a permit to allow the transfer.³⁸ In contrast to a zoning lot merger, which can be done as-of-right, the permit application is subject to New York City's Uniform Land Use Review Process (ULURP). As part of the application the applicant must submit a site plan of the granting landmark lot and receiving lot, comprehensive plans for development, a program for continuing maintenance of the landmark, a report from the Landmarks Preservation Commission,

³³ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

³⁴ Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?*, 39 NAT. RESOURCES J. 459, 461-465 (1999).

³⁵ Kruse, *supra* note 19, at 102.

³⁶ *Id.*; see also Richards, *supra* note 22, at 451.

³⁷ Richards, *supra* note 22, at 451.

³⁸ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 74-791.

and any other information required by the CPC.³⁹ This process can be very costly and time-consuming in comparison to the zoning lot merger.

C. Special Transfer Districts

The litigation over Grand Central Terminal's development rights and the complexity involved in the Landmark Preservation Law, led to the development of a new approach to TDRs, called Special Transfer Districts. A special transfer district is a geographic area where contiguity requirements are eliminated and eligible granting districts are able to transfer development rights to specified eligible receiving lots, without the need for the lots to be adjoining.⁴⁰ These programs are more narrowly tailored to achieve specific zoning goals and in theory expand the market for both potential buyers and sellers of TDRs. This relatively new breed of development rights was designed to alleviate the rigidity of zoning by allowing more distant transfers, and to strengthen the market for TDRs.⁴¹

In its most basic form, a "sending district" is defined as one or more designated districts or areas of land in which development rights may be transferred.⁴² On the other hand, a "receiving district," is defined as one or more designated areas of land to which unused development rights from sending districts may be transferred, to increase development by reason of the transfer.⁴³ The designation of "sending districts" and "receiving districts" is enacted as part of the municipal zoning regulations. This requires that the designation of these reciprocal

³⁹ Vicki Been, John Infranca, & Josiah Madar, *The Market for TDRs in New York City* 14-17 (Nov. 1, 2012) (unpublished manuscript) (on file with the Brooklyn Law Review).

⁴⁰ *Id.* at 14.

⁴¹ *Id.*

⁴² CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 91-60 (2004).

⁴³ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 98-31 (1998).

districts will be established according to a comprehensive planning process, which requires the overall land use policy to be in the best interests of the community.⁴⁴

The statutory language granting authority for special transfer districts is very broad, underscoring the importance and forethought required in the development of these sending and receiving districts. In particular, careful analysis must be taken in the designation of the zones for numerous reasons. First, there needs to be a market for development rights in the receiving district.⁴⁵ This requires willing participants to buy and sell unused development capacity, usually with backstops to correct any market inefficiencies. For instance, a well thought out plan will usually include the use of a TDR bank or development fund.⁴⁶ Next, the transfer will result in the increase in density or intensity of development in the receiving zone, which requires municipal resources to support it.⁴⁷ For example, there needs to be adequate transportation, water supply, waste disposal, and fire protection.⁴⁸ Consequently, an environmental impact statement must be prepared for the receiving district in order to account for the potential impact of such development.⁴⁹

Furthermore, Special Transfer Districts must be carefully thought out to account for overlays of existing zoning plans. Zoning districts need not be coterminous with each other, therefore sending and receiving districts may overlap in some instances. Specificity is needed in drafting these new zoning requirements, to understand how existing zoning districts will interact

⁴⁴ James Coon, *supra* note 1, at 6.

⁴⁵ Sarah J. Stevenson, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329, 1331 (1998).

⁴⁶ TDR banks were created to counter some of the difficulties proposed by the use of TDRs. By acting as a middleman between buyer and seller, TDR banks fill a critical timing gap that could be the downfall of a TDR program. Government operated TDR banks resolve valuation and marketability problems by setting minimum purchase prices, guaranteeing loans that use TDRs as collateral, and purchasing TDRs outright. *See* Stevenson, *supra* note 45.

⁴⁷ James Coon, *supra* note 1, at 7.

⁴⁸ *Id.*

⁴⁹ *Id.*

with pre-existing districts.⁵⁰ Lastly, in considering the development of sending and receiving districts, the legislature must evaluate the impact of development on low income housing.⁵¹ There must be a showing of "appropriate equivalence" between lost opportunities for such housing in the sending district and gained opportunities in the receiving district.⁵²

In New York City, the most recognizable special transfer districts include, the South Street Seaport Subdistrict, the Theater Subdistrict, the Special West Chelsea District, and the Hudson Yards District.⁵³ Each of these programs represents a complex TDR program, which reflects the City's evolving efforts to encourage development in targeted locations.

II. PROBLEMATIC DESIGN OF THE ORIGINAL TDR PROGRAMS

The use of Transferable Development Rights is an evolving and imperfect land use tool. In practice, the use of TDRs has been widely accepted by land use planners, market participants, and regulatory bodies alike.⁵⁴ Despite their broad application, TDRs are susceptible to numerous issues associated with transferability, rigidity, marketability, and other costs that reduce their efficacy.⁵⁵ By exploring the purposes underlying the design of the particular TDR programs in New York City, and by exploring the various criticisms of each, this section will help to provide a framework to understanding the municipalities need to development a better TDR scheme.

A. The Failure of Landmark TDRs

The Landmark Zoning Law was a perfect example of what works well in theory may not work well in practice. When properties are tagged as landmarks, property owners are allowed to

⁵⁰ James Coon, *supra* note 1, at 7.

⁵¹ *Id.*

⁵² *Id.*

⁵³ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 91-60 (2004).

⁵⁴ Vicki Been, John Infranca, & Josiah Madar, *supra* note 39, at 25.

⁵⁵ *Id.* at 32.

transfer the authorized unused development capacity of their landmarks to adjacent lots, subject to certain restrictions.⁵⁶ In return, the city has the ability to preserve community resources in a cost effective way. In the case of *Penn Central*, the court found the use of TDRs as just compensation to survive a regulatory takings challenge.⁵⁷ This market-based mechanism for allocating development rights achieves resource protection more efficiently. It effectively allows municipalities to pass off the costs of landmark preservation to market participants, who can now afford them through the creation of valuable unused property rights.⁵⁸ At the same time, the municipalities avoid the obligation to compensate landowners for the deprivation of the market value of their property.⁵⁹ However, the plan has many shortcomings in practice.

First, in order to obtain approval for a transfer, the New York Landmark Commission requires extensive plans to determine whether the materials, plans, design, and scale are compatible with the landmark.⁶⁰ Next, the owners of the landmark and the transferee must appear before the New York Planning Commission for preliminary approval of the transfer.⁶¹ Accompanying this application, site plans for both the sending and receiving lots with a detailed program for continuing maintenance of the landmark, and a report of the Landmark commission detailing the effect of the proposed transfer upon the landmark are required.⁶² If the Planning Commission makes a recommendation, the application then goes before the Board of Estimate, which has final authority to grant or deny the application.⁶³

⁵⁶ John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 585 (1972).

⁵⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

⁵⁸ Andrew J. Miller, *supra* note 34, at 468.

⁵⁹ *Id.* at 470.

⁶⁰ John J. Constonis, *supra* note 56, at 586.

⁶¹ *Id.*

⁶² *Id.* at 588.

⁶³ *Id.* at 589.

The level of bureaucracy involved in the landmark transfer approval process is the first of many pitfalls for this TDR program. On the one hand, zoning lot mergers can be made as-of-right, while the landmark transfer program, although similar, provided no such advantage. Additionally, by limiting development rights transfers to adjacent lots, the program creates a serious restraint on marketability.⁶⁴ Existing zoning schemes, such as the zoning lot merger, already permitted developers to shift unused development potential to contiguous parcels.⁶⁵ Therefore, the plan is only useful in the rare instance where a developer happens to own a lot across a street or an intersection from a landmark.⁶⁶ Similar to the zoning lot merger, this restraint on transferability is a serious downfall, without the added benefit of an optional as-of-right merger. Additionally, the market value of the transfer rights is controlled solely by the variability of construction activity within the immediate vicinity of the landmark.⁶⁷ Thus, the value of the transferable rights may be worthless if no construction is contemplated. This also leads to financial uncertainty, since there is no way to predict the cash flow from the transfer of these rights, which makes the evaluation of the economic burden of landmark ownership an unknown.⁶⁸

In 1972, John Costonis came up with the "Chicago Plan," which was a response to the perceived deficiencies with the New York Landmark Preservation law. In his article, Costonis pointed out that no developers had made use of the landmark TDR programs four years earlier, citing the "inadequate analysis of the economic burdens of landmark ownership," "onerous administrative controls of dubious necessity," and the failure to "adequately insure that

⁶⁴ Costonis, *supra* note 56, at 578.

⁶⁵ See John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L. J. 75, (1973).

⁶⁶ *Id.* at 86.

⁶⁷ *Id.*

⁶⁸ *Id.* at 89.

landmarks of participating landowners will in fact be preserved."⁶⁹ Most importantly, Costonis attributed the adjacency requirement as the key factor for the failure of the landmark TDR program.⁷⁰ Although Costonis's Chicago Plan was never adopted in Chicago, his ideas regarding a better way to preserve urban landmarks, are strikingly similar to New York City's special transfer districts TDR program that was later adopted.

B. The Need for Special Transfer Districts

The Special Transfer District program was developed in response to the many shortcomings of New York City's Landmark TDR program. The adjacency requirement, which severely diminished the marketability of the landmark's development rights, was the principal reason it failed to win support by the real estate industry and landmark owners.⁷¹ Development capacity was loosely dispersed throughout the city on the arbitrary principle of how closely landmarks are in relation to development zones.⁷² The emergence of the special transfer district, like the Chicago Plan, dispensed with the problematic adjacency requirement by permitting transfers to any property within the development rights transfer district in which the landmark is located.⁷³

The development of the special transfer districts also provided other significant benefits over the more primitive TDR schemes. By establishing a plan whereby unused development potential could be transferred across town to specifically designated receiving areas, the rigidity associated with other plans was effectively reduced.⁷⁴ In turn, the marketability of these rights

⁶⁹ Been & Infranca, *supra* note 7, at 14.(citing Costonis, *The Chicago Plan*, *supra* note 56, at 622-623).

⁷⁰ Costonis, *supra* Note 56, at 622-623.

⁷¹ *Id.*

⁷² Been & Infranca, *supra* note 7, at 15.(citing Costonis, *The Chicago Plan*, *supra* note 56, at 622-623).

⁷³ *Id.*

⁷⁴ *Id.* at 17.

were effectively increased, earning favor with prospective TDR grantors in large part because of the increased flexibility. These special programs also addressed concerns expressed by Costonis over the "capricious scattering of density around the city," since the proximity of a proposed development would only be in relation to a source of TDRs.⁷⁵ However, the drawing of boundaries that were sufficiently thought out to benefit neighborhoods in need of lower density corrected this hazard.⁷⁶

The implementation of special transfer districts represents a significant improvement over the landmark transfer program. However, they are still an imperfect tool. As Vicki Been pointed out recently in her comprehensive study of what she called the "post zoning" era of TDRs in New York City, the complexity involved in sub-districting threatens to undermine the flexibility that TDRs are meant to provide.⁷⁷ Essentially what she is getting at, is that stated purpose behind the special transfer districts are more arbitrary than say a landmark preservation program. This lack of clarity combined with the municipality requirements that are narrowly tailored to each specific plan, threatens the predictability and ease in which they can be utilized.

Additionally, approval of a transfer from a sending to a receiving zone by a zoning body is often a prerequisite to a final sale.⁷⁸ These transactions are usually time consuming and costly. The local zoning body usually requires transactions to be duly recorded with the municipality that monitors these transactions.⁷⁹ Another significant issue with special transfer districts is one of timing and speculative valuation. The transaction costs can be high for both buyers and sellers

⁷⁵ Been & Infranca, *supra* note 7, at 15-18 (*citing* Costonis, *The Chicago Plan*, *supra* note 56, at 622-623).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Stevenson, *Banking on TDRs*, *supra* note 45, at 1359-1362.

⁷⁹ *Id.*

that are at the mercy of administrative efficiency.⁸⁰ Municipalities must determine how to allocate the TDRs, approve appropriate parties, and record the transactions.⁸¹ On the other hand, landowners must find buyers for their TDRs, engage in negotiations over valuation, and prepare compliance documents.⁸²

III. NEW YORK CITY'S MOST RECENT TDR PROGRAMS

In New York City, the most recognizable special transfer districts include, the South Street Seaport Subdistrict, the Theater Subdistrict, the Special West Chelsea District, and the Hudson Yards District.⁸³ By analyzing some of the key features of these programs and the evolution of the City's use of these TDRs, we can understand what attributes of the existing plans are successful.

A. Special TDR Programs

South Street Seaport

New York City enacted its first special TDR program in 1972, to preserve several blocks of historic, two-hundred-year-old buildings in an area directly south of the Brooklyn Bridge.⁸⁴ This area, surrounding the Fulton Street Fish Market was prime for development due to the rising land values in Manhattan.⁸⁵ Recognizing the historic nature of the neighborhood, the City enacted a special transfer district in order to accomplish both preservation and development

⁸⁰ Stevenson, *Banking on TDRs*, *supra* note 45, at 1359-1362.

⁸¹ *Id.*

⁸² *Id.*

⁸³ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 91-60.

⁸⁴ Stevenson, *supra* note 45, at 1345-1347.

⁸⁵ *Id.*

goals.⁸⁶ The owners of historic properties in the preservation areas (sending districts) were allowed to convey their development rights to either a middleman or directly to a receiving lot.⁸⁷

A key feature of the South Street Seaport program was the use of TDR Banks. The TDR banks were third party intermediaries, comprised mainly of commercial banks, that held existing mortgages on the historic buildings and facilitated a market for these TDRs.⁸⁸ The use of the TDR banks was instrumental to the City's plan, by providing historic buildings immediate financial relief, without the timing issues related to other zoning plans.⁸⁹ Property owners who had buyers at the outset of the program could sell those rights directly; those that could not sold their rights to the TDR banks.⁹⁰ This arrangement facilitated a market for the owners of the development rights, since the banks essentially freed owners of the landmark buildings of their mortgage debt in exchange for the TDRs.⁹¹ When the banks sold the development rights, they usually recouped a return on their investment making it beneficial for both parties involved.⁹²

The South Street Seaport TDR program was considered a success. The majority of participating banks made a profit on the TDRs they sold, and the program accomplished its goals of preserving and developing its participating lots.⁹³

Theater Subdistrict

The Theater Subdistrict was created pursuant to the 1998 zoning regulation to preserve and enhance the cultural, theatrical and entertainment showcase in the area known as the theater

⁸⁶ Stevenson, *supra* note 45, at 1344.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1346

⁸⁹ Joseph Stinson, *Transferring Development Rights: Purpose, Problems, and Prospectus in New York*, 17 Pace L. Rev. 319, 340 (1996).

⁹⁰ *Id.* at 330.

⁹¹ *Id.*

⁹² Stevenson, *supra* note 45, at 1344.

⁹³ *Id.*

district.⁹⁴ As part of the plan, forty-six specifically listed theaters were allowed to transfer unused development rights to any other lot within the Theater Subdistrict.⁹⁵ In order to execute a transfer, the owner of a granting site must provide written assurances that the site will continue to be used as a theater, and the City Planning Commission must issue a certification.⁹⁶ The theater must also be certified as physically and operationally sound, or a plan must be proposed to comply with the requirements for continued use.⁹⁷

The Theater Subdistrict TDR program allowed development rights to be transferred anywhere within the Theater Subdistrict, subject to a FAR limitation.⁹⁸ Transfer through a certification would only be allowed in cases where the floor to area ratio at the receiving site was increased by no more than twenty percent. However, receiving sites within the Eighth Avenue Corridor (designated area along eighth avenue in midtown) may use the TDRs to gain an additional twenty percent of FAR above that allowed by certification, subject to a discretionary allowance by the City Planning Commission.⁹⁹ Another unique feature of this program was the mandatory contribution to the Theater Subdistrict Fund, which is used to finance inspection and maintenance of the granting theaters.¹⁰⁰

To date, of the 46 specifically listed theaters in the Theater Subdistrict, only eleven transfers have take place through the Theater Subdistrict TDR program.¹⁰¹ Whether this program can be considered a success is relative. According to a comprehensive set of data compiled by the Furman Center for Real Estate and Urban Policy, between 2003 and 2011, only two transfers

⁹⁴ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 81-742.

⁹⁵ *Id.*

⁹⁶ Been & Infranca, *supra* note 7, at 8-9 (*citing* CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 81-743).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 81-744.

¹⁰⁰ *Id.*

¹⁰¹ Been, Infranca, & Madar, *The Market for TDRs in New York City*, *supra* note 39, at 26-27.

occurred through the landmark TDR program, compared to eleven transfers through the Theater transfer program and seventeen made use of the West Chelsea Program.¹⁰² One of the distinguishing factors that can account for the disparity between the landmark transfer program and the theater subdistrict program, is the transaction costs involved. While the landmark TDR program requires a special permit for all transfers, the Theater Subdistrict program, only requires authorization from the City for transfers that increase the FAR at the recipient site more than 20%.¹⁰³ Similar to as-of-right zoning lot mergers, market participants prefer having the means of transferring development rights with lower transactions costs.

On the other hand, the disparity between the Theater Subdistrict and the Special West Chelsea District, which will be discussed in more detail below, can be attributed to the predictability involved.¹⁰⁴ In Theater Subdistrict Program, development rights can be transferred to anywhere within the theater subdistrict.¹⁰⁵ Therefore, the predictability of the increased density at any specific site is uncertain, making it difficult for stakeholders to understand the net effect of the proposed rezoning. However, the inclusion of an improvement fund, which is involved in the Special Theater, Hudson Yards, and Special West Chelsea District, is an additional cost but one that is standardized and thus attributes to predictability.¹⁰⁶ An improvement fund is a fund that takes contributions by participants in a given program and uses the proceeds to offset the impact of the development on a given area. In some instances, the use of a fund is required, while in other times it is a flexible device whereby developers who have

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Been & Infranca, *Post Zoning*, *supra* note 7, at 16-17.

¹⁰⁵ *Id.*

¹⁰⁶ Pruetz & Pruetz, *supra* note 4, at 8.

exceeded the maximum allowable FAR, can make a contribution to obtain additional building capacity.¹⁰⁷

Special West Chelsea District

The Special West Chelsea District is the area bounded by Tenth and Eleventh Avenues from West 30th Street south to West 16th Street.¹⁰⁸ After the High Line rail train discontinued service in 1980, the area between 10th and 11th avenues consisted of decaying buildings and overgrowth of flowers and grass.¹⁰⁹ In 2001, the city began efforts to develop the Special West Chelsea District. It sought to provide renewed residential and commercial development, facilitate the former High Line rail as an open space, and enhance the neighborhood's thriving art gallery district.¹¹⁰

As part of the plan, regulation restricted development of properties immediately west of the High Line, known as the "High Line Transfer Corridor."¹¹¹ The owners of property in this corridor were allowed to transfer their TDRs to designated subareas.¹¹² The Special West Chelsea District was a complex development plan that allowed receiving sites to increase their FAR between 1.0 and 2.65 depending on the particular subarea.¹¹³ In some instances, developers could increase their FAR by contributing to a High Line Improvement Fund or by participation in New York City's Inclusionary Housing Program.¹¹⁴

¹⁰⁷ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 98-22.

¹⁰⁸ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 81-744(a).

¹⁰⁹ Been & Infranca, *Post Zoning*, *supra* note 7, at 9.

¹¹⁰ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. §§ 98-11, 98-52 (2012).

¹¹¹ Been & Infranca, *Post Zoning*, *supra* note 7, at 10.

¹¹² CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 98-31.

¹¹³ *Id.* § 98-22 (providing table that sets forth maximum Far in subareas).

¹¹⁴ *Id.* In some of the subareas, a developer may obtain additional FAR via inclusionary housing only after she has obtained the maximum allowable TDRs. Although this is beyond the scope of the paper, in certain

The Special West Chelsea program had several other distinct features. For instance, eligibility to transfer a TDR required the dedication of an easement for an elevator or stairwell to provide access to the corridor.¹¹⁵ Additionally, the program provided alternatives to sites that remained vacant due to the transfer of all of their development capacity.¹¹⁶ Contribution to the High Line Improvement Fund allowed properties owners to purchase additional FAR.¹¹⁷ However, the FAR was limited to use for a commercial purpose within the High Line Corridor.¹¹⁸

The Special West Chelsea TDR Program has been successful for the most part, due to its narrowly tailored plan to achieve its goals in revitalizing the High Line Corridor. It provides flexibility for property owners by creating several avenues for increasing FAR. However, the program is not without its faults. Purchasers have complained that the number of TDRs are limited and that sellers priced their TDRs to high.¹¹⁹ Additionally, participants complained that the program's regulations were costly and should have created an easier means to conduct transfers.¹²⁰

Special Hudson Yards District

The Special Hudson Yards district is the most recent development transfer program in New York. It was adopted by the City Council in 2005, and is not projected to be completed for

subareas, a developer must purchase both TDRs and develop inclusionary housing to reach the maximum permitted FAR.

¹¹⁵ *Id.* §§ 98-33(d), 98-62.

¹¹⁶ *Id.* § 98-35.

¹¹⁷ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 98-00.

¹¹⁸ *Id.*

¹¹⁹ Eliot Brown, *Developers Want Easier Access to High Line Air Rights; But Should City Fix Something that Doesn't Look Broken?*, N.Y. OBSERVER, Feb. 13, 2008, <http://www.observer.com/2008/developers-want-easier-access-high-line-air-rights-but-should-city-fix-something-that-doesnt-look-broken/>.

¹²⁰ *Id.*

at least another decade.¹²¹ According to the New York City Department of City Planning, the Hudson Yards development was created in response to the rising demand for housing and office space in Manhattan.¹²² It is anticipated that there will be an influx of 440,000 new workers, requiring an additional 111 million square feet of space to accommodate this additional demand by 2025.¹²³ Hudson Yards is considered one of the last underdeveloped areas in Manhattan, composed of the area bounded by West 42nd Street, Eighth Avenue to the Hudson River.¹²⁴ The mission statement of this development is to provide additional job opportunities and housing in the area.¹²⁵

The Hudson Yards development project is one of the most complex TDR schemes to date. It is divided into multiple phases to account for the different initiatives involved in the plan.¹²⁶ For example, Phase 2, seeks to obtain land for a public boulevard and park, while another seeks to direct commercial and residential development in specially allocated areas.¹²⁷ "Phase 2 Hudson Boulevard and Park," allows private owners of property restricted in this area, to transfer unused development rights by certification to designated subareas within the district.¹²⁸ The prices for these TDRs are established through private transactions.¹²⁹ Similar to the Special West Chelsea District, developers have the option to purchase TDRs privately or make a contribution to the to the Hudson Yards District Improvement Fund to receive a bonus.¹³⁰

¹²¹ David M. Levitt, *Related Nears Tenant Deals as Hudson Yards Breaks Ground*, BLOOMBERG NEWS, Dec. 4, 2012, 3:36 PM, <http://www.bloomberg.com/news/2012-12-04/related-nears-tenant-deals-as-hudson-yards-breaks-ground.html>.

¹²² CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 93-32.

¹²³ *Id.* §§ 93-21, 93-22.

¹²⁴ *Id.*

¹²⁵ *Id.* § 93-31.

¹²⁶ *Id.*

¹²⁷ *Id.* §§ 93-21, 93-22.

¹²⁸ Been & Infranca, *supra* note 7, at 8-9 (citing CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 93-31).

¹²⁹ *Id.*

¹³⁰ *Id.*

Additional features of this program that are worth mentioning include the restriction on the maximum increase of FAR, nearly identical to the Special West Chelsea District.¹³¹ Another similarity exists, by means of an alternative to purchasing additional development rights, when FAR is maxed out. In the Hudson Yards program, developers who have maxed out their permitted floor area can purchase additional rights from the Eastern Rail Yard.¹³² However, a developer must apply for these additional rights, and the price is set at sixty percent of the appraised value per square foot of the receiving parcel.¹³³

IV. POLICY RECOMMENDATIONS

The Furman Center for Real Estate and Urban Policy at New York University recently compiled one of the most complete data sets involving development rights transfers in New York City. The research study analyzed 410 total development rights transfers in New York City between the period of January 1, 2003 and December 31, 2011.¹³⁴ The study produced some interesting findings with regard to the preferred mechanisms for transferring development rights in New York City and the effectiveness of these TDR programs. The research showed that of the 410 transactions that occurred between this period, the vast majority, 320 transaction, were arms-length zoning lot mergers between unrelated parties.¹³⁵ Fifty-seven transactions were zoning lot mergers between related parties and eleven transfers occurred via the Special Theater Subdistrict program.¹³⁶ Additionally, seventeen transfers occurred through the West Chelsea District

¹³¹ CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. §§ 98-11, 98-52 (2012).

¹³² *Id.* § 93-31.

¹³³ Been & Infranca, *Post Zoning?*, *supra* note 7, at 8-9 (citing CITY OF NEW YORK, DEP'T OF CITY PLAN., ZONING RES. § 93-31).

¹³⁴ Vicki Been, John Infranca, & Josiah Madar, *The Market for TDRs in New York City*, *supra* note 39, at 17-24.

¹³⁵ *Id.* at 22.

¹³⁶ *Id.*

Program, two through the Landmark Transfer Program, and four others by unspecified special transfer mechanisms.¹³⁷

The data compiled by the Furman Institute, coupled with an understanding of the basic features of the various TDR programs, brings to light some significant findings. First, developers prefer methods of transferring development rights that involve less regulatory compliance and in turn, less expense. According to the Furman Center study, the overwhelming majority of transactions occurred through arms-length zoning lot mergers, which can be done as-of-right, without any special permitting and regulatory compliance.¹³⁸ The as-of-right merger is a beneficial feature since it reduces the time and costs associated with compliance measures, which appear to dissuade developers from using them all together. This idea is reinforced by the data comparing the use of landmark TDR Program's to other programs. The landmark TDR program has only been utilized twice over the eight year period of the study, as opposed to 320 times with the zoning lot merger, and 28 by way of Special Transfer Districts.¹³⁹ This discrepancy can be attributed to the fact that the Landmark program requires a special permit for all transfers, while the Theater Subdistrict program only requires a permit in limited circumstances, and the zoning lot merger requires no approval at all.¹⁴⁰

Recently, Special Transfer TDR programs in New York have substantially reduced the circumstances where regulatory approval is required to complete a transfer. In turn, there has been a corresponding increase in the number of transactions occurring by way of these newer programs.¹⁴¹ In fact, some special transfer programs such as the Special Theater Subdistrict,

¹³⁷ *Id.*

¹³⁸ Vicki Been, John Infranca, & Josiah Madar, *supra* note 39, at 30-31.

¹³⁹ *Id.* at 22.

¹⁴⁰ *Id.* at 24-25.

¹⁴¹ *Id.* at 30-31.

allow zoning lot mergers to occur in designated areas of the districts without the need for special permitting. This allows developers to freely select the location and intensity of their developments throughout the district.¹⁴² From a policy perspective, it seems logical to assume that programs allowing a combination of transferring density by way of special TDRs, while including the beneficial tool of an as-of-right merger, would win favor with developers.

Analysis of the data also suggests that TDR programs that increase predictability and transparency, are correlated with an increase in the volume of TDR transactions. A key feature of the more recent Special Transfer Districts, is the more careful planning and exact allocation of development rights to particular lots.¹⁴³ The newer TDR programs are more carefully planned out at a district-wide level, and therefore landowners can predict the effect of the zoning on particular lots. Unlike, the Theater Subdistrict, where density could be arbitrarily dispersed throughout the district, the newer TDR programs create a more "harmonious relationship of new developments to nearby structures and open space."¹⁴⁴ The developers can better predict how density will be dispersed throughout the district, which helps facilitate a more cohesive program. However, the more careful planning of these zoning districts runs the risk of adding complexity to the programs, which can correlate to higher compliance expenses. A well thought out program needs to not only account for predictability and transparency, but a way to offset rigidity.

A successful TDR program must also be flexible. The newer special transfer district programs have certain flexibility features that strengthen the demand for TDRs and increase participation in these programs. For example, special transfer districts include inclusionary housing bonus programs whereby a developer who has exceeded the maximum allowable FAR

¹⁴² Joseph Stinson, *Transferring Development Rights: Purpose, Problems, and Prospectus in New York*, 17 Pace L. Rev. 319, 340 (1996).

¹⁴³ Been & Infranca, *Post Zoning?*, *supra* note 7, at 15-16.

¹⁴⁴ Vicki Been, John Infranca, & Josiah Madar, *supra* note 39, at 30-33.

can obtain additional building capacity by contributing to a fund.¹⁴⁵ To better strengthen the market for these TDRs, a developer must initially purchase their TDRs from the private market before getting any additional allowances by the city.¹⁴⁶ The ability to obtain additional FAR through a discretionary grant of permission, adds to flexibility of these programs. It gives developers an alternative when their projects would otherwise be stalled by not having any additional building capacity. Moreover, by requiring developers to first purchase from the private market, or by creating a TDR Bank, these newer TDR programs strengthen the market for TDRs and render the programs much more effective.

CONCLUSION

The rules and regulations pertaining to transferable development rights are often detailed and complex. New York City's Municipalities are constantly reinventing their land use policies and agendas to adapt to the many variables that weigh on their decision-making. To add to the confusion, there is no uniformity on how these transactions are recorded, and the implementation of transferable development rights programs are notoriously difficult to map. The approval of these programs usually take place over a number of years and the effectiveness of these programs are not known, in some instances, until decades later. This paper, by no means, is an attempt to completely understand a land use tool in which only a hand full of land use experts fully understand. Rather, it is meant to serve as an overview of the evolution and implementation of a land use tool that has helped shape the landscape of arguably one of the greatest cities in the world.

¹⁴⁵ Joseph Stinson, *Supra* note 142, at 329-330.

¹⁴⁶ Been & Infranca, *Post Zoning?*, *supra* note 7, at 18-19.

With the above in mind, there are a few ideas that can conclude the focus of this paper. Developers prefer transferable development rights transactions that reduce regulatory compliance, create less expense, foster less uncertainty, and that are less time consuming. The research by the Furman Institute showing the transactions between 2003 and 2011, reinforces this idea, since zoning lot mergers, which can be done "as-of-right", are the predominant method of transferring unused capacity. Moreover, the newer special transfer districts were utilized more than the traditional landmark transfer program, due to the increased predictability and transparency of these programs. Programs that increase the predictability of which parcels have development rights for sale, which development sites can increase FAR, and what types of transfer will be allowed- are correlated with increase in both volume of the TDR transactions and price paid for development rights. Going forward, municipalities need to avoid a one-size fits all approach to implementing transferable development rights programs. Successful programs will ultimately depend on a narrowly-tailored plan, that incorporates a combination of features from several types of these existing programs, while being careful to avoid any unnecessary rigidity.