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“ZONING IMAGINATION” — DIMENSIONAL ZONING

EUGENE J. MORRIS*

The twentieth century concepts of air rights, landmarks preservation and zoning are currently converging to engender a wholly new form of urban land use regulation — dimensional zoning, i.e., zoning in terms of both space¹ and time.²

Space zoning deals with the technique of transferring zoning or development rights from one site to another, usually in densely occupied urban areas.³ This occurs where the transferor site (having a building underutilizing its maximum zoning potential⁴) conveys to the transferee site (one in process of development) all or a portion of its unused potential zoning capacity, which would otherwise lie fallow. Once it is established that, in this manner, air rights (zoning capacity) can be conveyed independently of the land to which it is appurtenant,⁵ a host of new procedures may develop out of traditional doctrines of common-law conveyancing,⁶ which may then be employed by imaginative developers to increase the utilization of scarce urban space within the framework of existing zoning laws. One such new procedure (which will be discussed later in this article) is where development rights or zoning rights may be transferred, swapped, condemned or leased all over town under government supervision in the form of a “zoning bank”.⁷

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¹ “Space” zoning is defined to mean the transference of zoning air rights from one parcel to another.

² “Time” zoning is defined to mean the establishment of a timetable for the orderly development of a specified area.

³ Burks, *City Wants Air Rights to Hop, Skip and Jump*, N.Y. Times, April 26, 1970, § 8 at 1, col. 1.

⁴ Examples of this are the Appellate Division Court House; the United States Custom House in New York; the Stock Exchange in Chicago.

⁵ *Pearson v. Matheson*, 102 S.C. 377, 86 S.E. 1063 (1915); *R.M. Cobban Realty Co. v. Donlan*, 51 Mont. 58, 149 P. 484 (1915); *Taft v. Washington Mut. Sav. Bank*, 127 Wash. 503, 221 P. 604 (1923).

⁶ *Morris, Air Rights are ‘Fertile Soil,’* 1 THE URBAN LAWYER 247, 261 (1969) [hereinafter *Morris*].

⁷ The “zoning bank,” where unused air rights over buildings are placed in the so-called bank to be sold to developers to increase their zoned floor-area ratio, was first proposed by Professor John Costonis as a way to preserve Chicago landmarks. Costonis & Shlaes, *The Chicago Landmarks Dilemma: A Proposed Legislative Response*, Jan. 6, 1971;

The same imaginative approach may be employed to encompass zoning in time as well as in space. Thus, where it is inappropriate for development to occur at a particular point in time, but where it is well known that development will eventually become appropriate in a manner consistent with the orderly growth of the community, time factors may be introduced into the zoning syndrome and thus foster orderly and controlled growth.⁸

This concept of time zoning has been enacted in the Town of Ramapo, New York, by controlling not only what can be built but when it can be built.⁹ The statute regulating the "time zoning" calls for a system whereby no property can be built upon until it amasses a specified number of points assigned for capital improvements,¹⁰ which consist of sewer lines to the property, sidewalks, drainage capacity, and the like. However, in Ramapo the cost of these improvements plus the real estate taxes, which were recently increased radically, made it economically unfeasible for most developers to construct housing. In order to avoid the abandonment of the property, the new ordinance provided for the creation of a Development Easement Acquisition Commission which allowed developers to bank their land for periods of up to ten years, during which period the developer would receive a 95% tax abatement.¹¹ In this way the Town of Ramapo was able to control the influx of new residents and avoid the strain on public services.

The idea of time zoning is not a new one, and has been proposed as a means of orderly growth for many years.¹² However, the legislation enacted by some of the cities and towns to time their growth has been held to be void as an abuse of power, discriminatory, lacking conformity, etc.¹³ As can be seen in the *Board of County Supervisors of Fairfax County v. Carper*,¹⁴ the legislation affected only one area of the town, while the other area was allowed uncontrolled and unmeted growth.

Costonis & Shlaes, Preservation of Chicago Landmarks Through a Development Rights Banking Program, Dec. 4, 1970 (unpublished memoranda on file at Demov, Morris, Levin & Shein, N.Y., N.Y.).

⁸ In the Matter of Golden v. Planning Board of Town of Ramapo, 167 N.Y.L.J. 95, May 16, 1972, at 1, col. 7; Oser, *Innovator in Suburbs Under Fire*, N.Y. Times, Mar. 28, 1971, § 8, at 1, col. 3.

⁹ *Id.*

¹⁰ Oser, *supra* note 8, at 6, col. 2.

¹¹ *Id.* at 6, col. 6.

¹² Mandelker, Book Review, 61 MICH. L. REV. 628 (1963); Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROB. 298 (1955).

¹³ Board of County Supervisors of Fairfax County v. Carpar, 200 Va. 653, 107 S.E.2d 390 (1959); Albrecht Realty Co. v. Town of New Castle, 8 Misc. 2d 255, 167 N.Y.S.2d 843 (1957).

¹⁴ 200 Va. 653, 107 S.E.2d 390 (1959).

The court held that although the rapid population growth had created strains on the city services:

The effect of the amendment has been to permit a person to build on a lot of less than two acres, while denying his neighbor the right to build unless he puts his house on a lot containing a minimum of two acres. It lacks uniformity.¹⁵

This situation is avoided in the Town of Ramapo, since Ramapo does not deny anybody the right to build, in that developers must all meet the requirements of the ordinances equally, i.e., the point system. Once this is met, any developer may commence construction. Of course, the factor in the Town of Ramapo legislation which makes the whole concept feasible is the tax abatement when the land is placed in the bank. During this time developers can utilize their money, otherwise spent on taxes, to meet their capital improvements requirements, and at the same time, help Ramapo control the timing of construction and the growth of the town.

Space zoning, dealing with the transference of air rights is a relatively new concept. The first tentative steps toward opening the door to these radical land use concepts in zoning occurred when an ingenious developer, recognizing that the new building he was contemplating could be much more profitable if it were larger, cast a covetous eye upon an adjacent site with a small building on it, which underutilized its maximum floor area ratio zoning. The developer bought the parcel, leased the building back to the former owner and by merging the two separate zoning lots into one so that the total zoning envelope would encompass the new combined lot, increased the maximum permissible size of his new building. The merging of ownership entitled the new owner to the total of the allowable zoning for the two previously separate lots, as in any assemblage for development purposes.¹⁶ From this conventional practice, it is merely the next logical step to the idea of a "zoning bank" where air rights are traded back and forth by developers (with municipal sanction)¹⁷ much like investors on Wall Street trade futures in commodities.

The intermediate steps in this evolution are already well along in some cities¹⁸ and it is inevitable that the zoning bank will become as

¹⁵ *Id.*, at 659, 107 S.E.2d at 396.

¹⁶ N.Y.C. ZONING RESOLUTION §§ 12-10, 33-11 (1971).

¹⁷ In New York City, an analogous situation occurred, where §§ 74-79 and 74-792 were added to the Zoning Resolution to allow the transfer of air rights from one parcel to another.

¹⁸ The New York Resolution reads:

Transfer of Development Rights from Landmark Sites for the purpose of this sec-

widely accepted in the future as its underlying concepts — air rights conveyancing and landmarks preservation.¹⁹

The most basic of these techniques is the ordinary sale and leaseback where an existing building (frequently a landmark) fails to employ its full zoning rights.²⁰ Under this technique, certain contractual requirements are incorporated into the instruments of conveyance to limit the future use of the property to less than the maximum permitted use under the prevailing zoning; thereafter the unused zoning or development rights may be transferred. For example, if the total floor area allowed under the zoning code for joined lots is 200,000 square feet, and a proposed building will use 150,000 square feet, the original building would be prohibited from being enlarged to more than its existing 50,000 square feet even though the zoning governing the lot on which it stands would allow more. A typical clause in such a sale and leaseback arrangement might read as follows:

Tenant may erect a new building or elevate the existing building on the Demised Premises to a height of not more than 108 feet from curb level provided, however, that in no event shall said new

tion, the term "adjacent lot" shall mean a lot which is contiguous to the lot occupied by the landmark building or one which is across a *street* and opposite to the lot occupied by the landmark building, or, in the case of a *corner* lot, one which fronts on the same *street* intersection as the lot occupied by the landmark building; it shall also mean. . . . a lot contiguous or one which is across a *street* and opposite to another lot or lots which except for the intervention of *streets* or *street* intersections form a series extending to the lot occupied by the landmark building. All such lots shall be in the same ownership (fee ownership or ownership as defined under *zoning* lot in Section 12-10). A "landmark building" shall include any structure designated as a landmark by the Landmarks Preservation Commission and the Board of Estimate pursuant to Chapter 8-A of the New York City Charter and Chapter 8-A of the New York City Administrative Code, but shall not include *public parks*, any structures within *public parks*, or historic districts, those portions of *zoning lots* used for cemetery purposes, statutes, monuments and bridges, [or any structures owned by or on land owned by City, State or Federal governments or their agencies].

Id. § 74-79.

Conditions and Limitations

5. As a condition of permitting such transfers or development rights, the Commission shall make the following findings:

- (a) that the permitted transfer of *floor area* or variations in the front height and setback regulations will not unduly increase the *bulk* of any new development, density of population or intensity of use in any *block*, to the detriment of the occupants of *buildings* on the *block* or nearby *blocks* and
- (b) that the program for continuing maintenance will result in the preservation of the landmark.
- (c) That in the case of landmark sites owned by the City, State or Federal Government, transfer of development rights shall be contingent upon provision by the applicant of a major improvement of the public pedestrian circulation or transportation system in the area.

Id. § 74-792.

¹⁹ Costonis & Shlaes, *The Chicago Landmarks Dilemma; A Proposed Legislative Response*, Jan. 6, 1971; Costonis & Shlaes, *Preservation of Chicago Landmarks through a Development Rights Banking Program*, Dec. 4, 1970.

²⁰ The New York Appellate Division Court House on Madison Avenue and 25th

building be erected or the existing building elevated to the aforesaid height unless the same is permitted by the zoning laws and all other applicable statutes, laws, ordinances, rules and regulations of the governmental authorities having jurisdiction affecting the Demised Premises in conjunction with the Office Building premises; and complies with any then existing Certificate of Occupancy for said Office Building premises and will not make illegal the use and existence (or, prior to the construction of the proposed Office Building, the proposed use and proposed existence) of all or any portion of said Office Building premises.

One area in which air space utilization has been particularly important is that of the development of highway and railroad rights-of-way.²¹ Grand Central Station and the buildings facing Park Avenue are constructed on the space over the tracks and yards of the Penn-Central Railroad. In Chicago, the Daily News Building, the Merchandise Mart (which was, for a time, the largest office building in the world), and the Prudential Building were all built over railroad rights-of-way.²²

More recently, airspace above highways has also been extensively developed, largely encouraged by the 1961 amendment to the Federal-Aid Highway Act enabling the states or other political subdivisions to use or permit the use of airspace by others "for such purposes as will not impair the full use and safety of the highway."²³ Congress, in recognizing the need of airspace development over highways, enacted the Urban Mass Transportation Act,²⁴ the High Speed Ground Transportation Act²⁵ and the Demonstration Cities and Metropolitan Development Program Act.²⁶ A further amendment to the Federal-Aid Highway Act requiring consideration of the social and economic effects of a highway in relation to its impact on the environment and on the community's urban planning²⁷ gave further impetus to the utilization of highway airspace. Amendments to the Transportation Act²⁸, the Demonstration Cities and Metropolitan Development Program Act²⁹, and the High-Speed Ground Transportation Act³⁰, also take into consider-

Street in New York City recently concluded such an agreement; *See also* Newport Associates, Inc. v. Solow, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1972).

²¹ WRIGHT, *THE LAW OF AIRSPACE* 382 (1968).

²² Morris, *supra* note 6, at 248.

²³ 23 U.S.C. § 111 (1970).

²⁴ 49 U.S.C. §§ 1601-11 (1970).

²⁵ 49 U.S.C. §§ 1631-42 (1970).

²⁶ 42 U.S.C. §§ 3301-74 (1970).

²⁷ 23 U.S.C. § 128(a) (1970).

²⁸ 49 U.S.C. §§ 1603(a), 1607, 1653(g) (1970).

²⁹ 42 U.S.C. §§ 3332, 37 (1970).

³⁰ 49 U.S.C. § 1639 (1970).

ation the comprehensive development plans of the states and municipalities. Thus, in New York four 32-story apartment buildings today stand on top of the approaches to the George Washington Bridge in upper Manhattan.

In utilizing the airspace over a highway or railroad it is seldom necessary to acquire title in fee to the land over which the new structure is placed. Often, it is more advantageous to acquire only an easement instead.³¹ In some states, the purchase of title in fee simple is authorized, but one can obtain only an easement by condemnation.³² In more than ten states, one cannot purchase title in fee simple to air rights and can acquire only an easement either by purchase or by condemnation.³³

Where the obtaining of the highway right-of-way is by a fee title purchase, then the problem of granting air rights to build over or under the highway is of little consequence. The same situation, i.e., a comparatively easy method of granting air rights over public highways, occurs where the city, state or local government takes the right-of-way in condemnation.

A major hurdle to air rights development over highways exists where the right-of-way is obtained only by easement. The underlying fee to the center of the street remains in the adjoining land owner.³⁴ This obviously gives the fee owner the rights to the air space over the right-of-way granted for the highway, street, etc. Where a fee situation is established either by purchase or condemnation, major construction can proceed on these air rights.

An interesting illustration of this is the Bridge Apartments (referred to above) over a two-block section of Interstate 95 at the east end of the George Washington Bridge in New York City.³⁵ The airspace for the buildings (which are completed) sold for over one million dollars.³⁶

³¹ This easement is purely for the support of the air rights structure. The air rights, themselves, are held in fee.

³² An easement by condemnation is where a condemnation takes place to acquire the subjacent supports for the air rights structure.

³³ WRIGHT, *THE LAW OF AIR SPACE* 295, n.40, citing Highway Research Board, Special Report 32 at 9-10. Twenty-eight states acquire both fee titles and easements; one listed only a fee as the interest acquired, and another listed only an easement as the interest acquired; Alaska acquires a fee title to private lands and an easement to public land, according to the answer submitted. The easement was more common than a fee title in acquisitions in Missouri and North Carolina. *Id.* at n.41 (Referring to a questionnaire completed in 31 states).

³⁴ Recent Developments in Airspace Utilization, 5 *REAL PROP. PROB. & TRUST J.* 347, 356 (1970).

³⁵ *Id.* at 357.

³⁶ White, *George Washington Bridge Airspace: A Case Study*, 34 *APPRAISAL J.* 35 (January 1966).

In certain instances easements are granted for the airspace and, although the underlying fee may be vested in a municipality, the easement creates many problems for the air rights developer. Montefiore Hospital in New York was faced with such a problem, since although the City of New York was willing to grant them an easement to build an airspace structure above the surface of Bainbridge Avenue in the Bronx, the easement was not mortgageable due to the City's right to regain control and cancel the easement at will without compensation.³⁷ Special legislation was enacted by the State Legislature granting Montefiore an easement, which if taken in condemnation just compensation would have to be paid by the City;³⁸ i.e., a "quasi" condemnation, since, in reality the City would be condemning its own property — the airspace over the City street.

The same result may be accomplished by the conveyance of a leasehold with a leaseback where the zoning ordinance defines a zoning lot to include a long-term lease as in the New York Zoning Resolution, Section 12-10³⁹, which provides for a 75-year lease as follows:

For the purposes of this definition, ownership of a zoning lot shall be deemed to include a lease of not less than 50 years duration, with an option to renew such lease so as to provide a total lease of not less than 75 years duration.⁴⁰

In these cases the building on the leased parcel is subleased back to the original owner. This is usually for a nominal sum such as one dollar annually. It must be recognized that the sale and leaseback or the lease and subleaseback techniques do not involve the sale or lease of air rights at all — they constitute conveyances of an absolute estate in the land itself.⁴¹

Another technique, which has recently been allowed by the Building Department of the City of New York and sanctioned by the New York Court of Appeals on May 2, 1972, involved the owner of the adjacent parcel obtaining a long term lease and crediting the unused floor area ratio of the leasehold to the new building being constructed

³⁷ N.Y.C. CHARTER ch. 14 § 374 (1969).

³⁸ L. 1971, ch. 278, at 382, eff. May 18, 1971 (McKinney 1971); *But see* L. 1971, ch. 1002, at —, eff. July 2, 1971 (McKinney 1971), where the New York State Legislature has authorized the outright conveyance of air rights over streets.

³⁹ N.Y.C. ZONING RESOLUTION § 12-10 (1971); *See* Newport Associates, Inc. v. Solow, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1972).

⁴⁰ *Id.*

⁴¹ The technique is one of selling the adjoining lot with its structures to a developer who needs the air space. He now has a complete zoning envelope and is entitled to construct a structure with an increased floor area ratio. The developer then leases back the structure to the seller of the air space. In New York this can now also be done by a lessee of the adjoining parcel as well as by the owner.

on the adjacent fee-owned parcels.⁴² The Court held that where several contiguous lots are in single ownership they may be treated as a "zoning lot" for the purpose of floor area ratio computation and that long term leasehold interests constitute ownership.⁴³ In states recognizing air rights for zoning purposes there can, of course, be an absolute conveyance of the air rights in fee or by lease.⁴⁴

This technique for the transfer of zoning or development rights has found one of its most useful functions (in a purely coincidental manner) in making landmark preservation effective⁴⁵ under circumstances where it would otherwise be overwhelmed by the pressures of land cost escalation and urban expansion.⁴⁶ Thus, where a privately-owned landmark finds itself in the path of rapidly-spiraling land prices (as most of them necessarily are, otherwise they would not ordinarily require protection), the owner is subjected to increasing pressure to sell at a substantial profit⁴⁷ and thus destroy the effectiveness of the landmarks preservation concept.⁴⁸ Because of constitutional limitations, landmarks statutes cannot compel preservation of privately-owned landmarks where the owner can show that the property is incapable of realizing an adequate return (usually defined in the statute)⁴⁹ and where municipal priorities do not permit the expenditure of scarce funds for the acquisition of the landmark by the municipality by purchase or condemnation⁵⁰ or through the device of a preservation easement.

These economic exigencies have prevented the preservation of many outstanding landmarks, such as the old New York Metropolitan

⁴² *Newport Associates, Inc. v. Solow*, — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1972).

⁴³ Prior to the Court of Appeals decision in *Newport v. Solow* it was thought that an absolute conveyance in fee was necessary to convey the zoning benefit. See *In re Brausa*, 140 N.Y.L.J. 108 (1968).

⁴⁴ Federal Aid Highway Act of 1961, 23 U.S.C. § 111 (1970). See also Crawford, *Some Legal Aspects of Air Rights and Land Use*, 25 FED. B.J. 167 (1965).

CAL. CIV. CODE § 659 (Deering 1971); COLO. REV. STAT. ANN. § 118-12-1 (1963); N.J. REV. STAT. § 46:3-19 (1940).

⁴⁵ Realty, Sept. 29, 1970. Amster Yard, a New York City landmark, was preserved by the transferring of its air space to an adjoining parcel of land.

⁴⁶ King, *12th-Hour Drive is Made For a Chicago Landmark*, N.Y. Times, Oct. 15, 1971, at 28, col. 2. The Sullivan Stock Exchange in Chicago is a 13-story landmark structure sitting on a piece of land zoned for a 43-story commercial structure.

⁴⁷ Realty, Sept. 29, 1970; Burk, *City Wants Air Rights to Hop, Skip and Jump*, N.Y. Times, April 26, 1970, § 8, at 9, col. 4.

⁴⁸ King, *12th-Hour Drive is Made For a Chicago Landmark*, N.Y. Times, Oct. 15, 1971, at 28, col. 3-4.

⁴⁹ N.Y.C. CHARTER AND ADMINISTRATIVE CODE, ch. 8-A § 207-1.0(c), (q) (1971).

⁵⁰ *Down Comes a Masterpiece*, LIFE, Nov. 5, 1971 at 40. Further, where a city condemns, it also loses taxes and must pay maintenance and repair expenses out of its own budget, which many cities can ill afford, many of them being on the verge of bankruptcy.

Opera House⁵¹ and the Manhattan Club⁵², in New York. In Chicago a similar situation still exists even after the enactment of the Chicago Landmarks Ordinance. The inadequacy of Chicago's statute is evidenced by the loss of the Stock Exchange Building.⁵³

The approach to zoning or development rights offers a new method of buttressing the preservation safeguards which have legal sanction in existing landmarks preservation statutes. "Thus far, the courts have been receptive to historic preservation laws, sustaining them against constitutional challenge in language of approbation."⁵⁴ So long as the statutes have remained a means of achieving legitimate ends, the courts have upheld them.⁵⁵

The Constitution imposes 14th Amendment due process limits here. You cannot take away a man's property for other than a public purpose, and then only with just compensation, and after due process. Landmarks legislation must take care to provide for this. Thus, the owner must be compensated in some way — through subsidy, tax abatement, the right to sell his unused air space — for his otherwise increasingly uneconomical property. This can be accomplished by recognizing the economic factor in landmarks preservation, and effectuating the transfer of zoning or development rights at prices commensurate with then current fair market values.⁵⁶ In a parcel subject to high land values, the payment for these rights can be substantial and can serve to counteract the influence which has thus far led to landmark destruction.⁵⁷ Thus, ownership and preservation of the landmark makes economic sense.⁵⁸

The same technique can be applied to landmarks owned by the government (or to any government-owned facility that does not utilize its maximum development rights), thereby allowing the public treasury to acquire some of the benefits to be realized from land values which

⁵¹ *Keystone v. Moerdler*, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966).

⁵² *Manhattan Club v. Landmarks Preservation Comm.* 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. N.Y. County 1966).

⁵³ N.Y. Times, Oct. 23, 1971, at 32, col. 3 (editorial); *The Disposable Sullivans*, Time Magazine (The Nation), Nov. 1, 1971.

⁵⁴ Comment, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708, 732 (1963).

⁵⁵ *Id.*, citing *Whitty v. City of New Orleans*, Civil No. 6367, E.D. La., October 21, 1951, *appeal dismissed as moot*, 276 F.2d 51 (5th Cir. 1960); *City of New Orleans v. Levy*, 223 La. 14, 64 So. 2d 798 (1953); *City of New Orleans v. Pergament*, 198 La. 852, 5 So. 2d 129 (1941); *Levin v. Clark*, Equity No. 3295, Philadelphia C. P., Oct. 14, 1955.

⁵⁶ *Burks, City Wants Air Rights to Hop, Skip and Jump*, N.Y. Times, April 26, 1970, § 8, at 1, col. 1; *Sher, "Air Rights" Lease, Zoning*, 164 N.Y.L.J. 71, Oct. 9, 1970 at 4, col. 3 [hereinafter *Sher*].

⁵⁷ N.Y. Times, May 30, 1970, at 22, col. 1 (editorial).

⁵⁸ N.Y. Times, Oct. 23, 1971, at 32, col. 3 (editorial).

are inflating.⁵⁹ Likewise, conveyance of development rights can assist in the preservation of open land and green spaces in and about metropolitan areas, which are disappearing at a rapid rate.⁶⁰ After all, land constitutes a fixed commodity; its value inevitably goes up; and the factory that produced the land has long since closed down. The only way to produce more space is to build up into the air as we are doing under our newly evolving air rights concepts of urban development.⁶¹

There are two interesting illustrations of how this is being accomplished in New York City.

The first instance deals with the Appellate Division Courthouse, a landmark building on Madison Avenue and East 25th Street in Manhattan. An owner of adjacent land sought to build an office building of 500,000 square feet floor area. The zoning law would not permit him to exceed 400,000 square feet on his lot. The then zoning law forbade the transfer to him outright of air rights above the courthouse, because it was a city-owned landmark.⁶² The solution was for the City to lease to him for a seventy-five year period the courthouse and the land on which it stands.⁶³ For this the City will be paid a substantial rental averaging \$46,000 per year.⁶⁴ Since, as noted above, the Zoning Resolution defines ownership of a zoning lot as ownership in fee simple or simply as possession of a seventy-five year leasehold, he is enabled to combine his two lots, one held in fee and one by lease, into one lot large enough so that he might build 500,000 square feet of floor area.

At the same time, he subleased back to the City, at no rental, the courthouse itself, and unused excess air space over 100,000 square feet of floor area.⁶⁵ The lease also provided that if the two zoning lots are not combined, after application by the tenant to the Department of Buildings, the tenant may abrogate the lease.⁶⁶ Thus, while not expressly leasing air rights, the same practical result is achieved.

⁵⁹ Burks, *City Wants Air Rights to Hop, Skip and Jump*, N.Y. Times, April 26, 1970, § 8, at 1, col. 1; N.Y. Times, May 30, 1970, at 22, col. 1 (editorial).

⁶⁰ *Id.* Sher, *supra* note 56, at 4, col. 3.

⁶¹ Morris, *Air Rights: Fertile Fields*, 163 N.Y.L.J. 72, at 1, col. 4; April 15, 1970, at 1, col. 4; N.Y. Educ. Law §§ 450-471 (McKinney Supp. 1969), which establishes the New York City Educational Construction Fund, providing for the use of air rights in connection with school construction. It is a state agency with independent financing, which purchases land for schools and then sells or leases the air rights above the school for either commercial, residential or manufacturing uses, depending on the district; see Liebman, *Development of Air Rights*, 160 N.Y.L.J. 96, Nov. 15, 1968, at 1, col. 4.

⁶² N.Y.C. ZONING RESOLUTION §§ 74-79, 74-792.

⁶³ Enabling resolution of the Board of Estimate enacted October 23, 1969 (Cal. No. 67).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Sher, at 4, col. 2.

The enabling resolution of the Board of Estimate⁶⁷ stated, in part, as follows:

1. The lease shall be for the entire courthouse premises, including land and buildings, for a term of seventy-five years⁶⁸
2. That simultaneously therewith a sublease of the courthouse building and unused excess airspace over 100,000 square feet of floor area shall be made to the City for a term of seventy-four years and 364 days, without rental.
3. That the minimum rental for the lease shall be \$35,000 per annum for the first ten years, \$40,000 per annum for the next fifteen years, and \$50,000 per annum for the remaining fifty years.
4. That the successful bidder pay full real estate taxes arising out of the utilization of the leased air space whether the same is reflected by separate tax lot or incorporated in the taxes to be paid on a newly constructed building.
5. That the successful bidder comply with all legal requirements with respect to the maintenance and preservation of the existing courthouse building as a landmark building.

The lease itself provides that the Tenant "shall not obtain more than one hundred thousand (100,000) square feet of floor area from the zoning lot of the Demised Premises."⁶⁹

The second illustration concerns the old United States Custom House at Bowling Green in New York. A developer wished to put up a 50-story office building across the street at No. 1 Broadway. The zoning law would have restricted him severely without the transfer of air rights from the Custom House. However, the Custom House was federal property, and the Zoning Resolution forbade the transfer of air rights from government property.⁷⁰ The Zoning Resolution was, consequently, changed.⁷¹ It already had permitted the transfer of air rights from privately-owned landmarks by special permit of the City Planning

⁶⁷ Enabling resolution of the Board of Estimate of The City of New York, adopted October 23, 1969 (Cal. No. 67).

⁶⁸ This seventy-five year lease provision raises a novel problem. What happens when the seventy-five year term expires? Modern skyscrapers are generally built to last more than seventy-five years. At that time, the building will become an illegal building in violation of the zoning of the lot on which it stands. It seems unlikely that courts will be prepared to order the partial demolition of major urban buildings. Three possibilities exist: first, the lease could be renewed; second, a variance could be applied for; or third, and perhaps most logically, the courts might deem a building in this predicament to be a valid non-conforming use upon expiration of the leasehold. Real estate lawyers have criticized the use of the leasehold technique for this reason and prefer the employment of an easement which successfully avoids the problem.

⁶⁹ Sher, at 4, col. 2.

⁷⁰ N.Y.C. ZONING RESOLUTION §§ 74-79, 74-792, as amended, 74-792(5)(c), May 13, 1970 (Cal. No. 20, CPS-211651).

⁷¹ N.Y.C. ZONING RESOLUTION §§ 74-79, 74-792.

Commission and the Board of Estimate provided that the bulk of any new development and the density of population of any block would not be adversely affected, and the program for continuing maintenance would result in the preservation of the landmark.⁷² Now, the same procedure is authorized for government-owned landmarks with the further proviso that the applicant would be required to provide "a major improvement of the public pedestrian circulation or transportation system in the area."⁷³

It should be noted that this does not involve contiguous lots, but lots separated from each other by a city street. In the Custom House illustration it is only one small step from going across the street to allow the zoning or development rights to jump a block or many blocks or, eventually, clear across town;⁷⁴ which leads us simply and logically to the zoning bank which has been proposed in Chicago.

The zoning bank, which has been proposed in Chicago by Professor John J. Costonis of the University of Illinois College of Law at Champaign, envisages the designation of certain areas, containing within their borders landmarks whose preservation is desired, as "preservation districts."⁷⁵ The City would then set up a "development rights bank." Development rights would be measured in square footage. The "bank" would receive development rights as a result of transfer to the bank of development rights over publicly-owned landmarks, donation by private owners of landmarks (the donation being tax deductible), and condemnation or purchase by the City of a "preservation easement" on a privately-owned landmark. This easement would obligate the owner to refrain from destruction or unauthorized alteration of the landmark.

The City could sell development rights in the bank, but only within the same "preservation district," and with use, height and density districts of the same general character. Proceeds of these sales would be used to establish a revolving fund to finance the acquisition by purchase or condemnation of development rights for the bank. A portion of these funds might also be used for operating subsidies, which, together with reduced assessments (because of the development rights having been separated from the property), would enable the landmark

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Burks, *City Wants Air Rights to Hop, Skip and Jump*, N.Y. Times, April 26, 1970, § 8, at 1, col. 9; Elliott, *The Development of Downtown Manhattan*, 26 THE RECORD 833, 838 (Dec. 1971).

⁷⁵ Costonis & Shlaes, *Preservation of Chicago Landmarks Through a Development Rights Banking Program*, Dec. 4, 1970.

to remain economically viable.⁷⁶ Alternatively, instead of the City's acquiring and selling the development rights of a newly-designated landmark, it would permit the owner to sell the rights within the established limitations.⁷⁷

Although the Zoning Bank as proposed to Chicago by Costonis is oriented toward landmarks and is limited in area to particular districts, there is no legal or logical reason why it should not be broadened to encompass all underutilized sites located in developing core areas for transfer to wherever the rights might effectively be employed, including street, highway and railroad rights-of-way as well.⁷⁸ In any such proposal, of course, control by the appropriate governmental planning agency is essential to avoid the emasculation of zoning controls and distorted developments which are not consistent with the overall comprehensive plan.⁷⁹

Zoning purists would argue that this approach constitutes zoning "tricksterism" and in terms of traditional learning in the field of zoning, it is guilty of the charge.⁸⁰ But it does preserve the overall density controls established by conventional zoning and merely redistributes allowed densities in a more controlled and less fortuitous manner.⁸¹ With the advent of more intensive and diversified use of air space in real estate development (viz., our many new multiple use buildings rising over 50 stories in height and the newest trend in New York and Chicago to build over 100 stories)⁸², there is more technological ability

⁷⁶ *Id.* Letter from John J. Costonis to Eugene J. Morris, April 13, 1970, on file at Demov, Morris, Levin & Shein, N.Y., N.Y.

⁷⁷ Letter from John J. Costonis to Eugene J. Morris, May 6, 1970, on file at Demov, Morris, Levin & Shein, N.Y., N.Y.

⁷⁸ Examples of street, highway and railroad rights of way are abundant in the highly urbanized areas of the country. In New York City, Montefiore Hospital and Maimonides Hospital have extensions spanning city streets; the Bridge Apartments over the approach to the George Washington Bridge; and the many buildings built along Park Avenue in New York City over the Grand Central railroad right of way.

⁷⁹ Very few states have any statutory controls for the utilization of air space. In New York City, the Zoning Resolution §§ 74-79 and 74-792 detail the utilization of air space. In Chicago, the proposal of Professor Costonis for a zoning bank, is still pending. The only situation where there is a possibility of a Uniform statute is in the form of a draft bill, prepared by the Bureau of Public Roads. *See* Recent Developments in Airspace Utilization, 5 REAL PROP. PROB. & TRUST J. 347, 361 (1970).

⁸⁰ Mrs. Beverly Moss Spatt, the respected "maverick" ex-member of the City Planning Commission, dissented vehemently from the New York Zoning Resolution, concerning transferring of air rights. She said she did not believe the City should be "selling" zoning rights to accomplish the transfer of unused landmark air rights. Commenting on the requirement that the beneficiary of such a transfer must effect a major transportation improvement in the area, she said, "I do not believe that zoning is the tool to solve the City's fiscal crisis." *As quoted in* Sher, at 4, col. 3.

⁸¹ N.Y.C. ZONING RESOLUTION §§ 74-79, 74-792; the proposed "zoning bank" in Chicago; Sher, at 4, col. 3.

⁸² World Trade Center in New York, and Hancock and Sears Buildings in Chicago.

to use the additional flexibility to permit more logical planning and redevelopment of our urban areas. To add a new arrow to the quiver of the increasingly complex field of city planning does not in any way impair existing procedures, but instead augments them into a more sophisticated set of tools to deal with a situation which the pressures of modern civilization are rendering more difficult every day. As we have seen repeatedly throughout the history of our laws — what is *legerdemain* one day easily becomes accepted as a part of the fabric of the law when its utility and effectiveness are established.

It has also been suggested that there is no need for a complicated technique like the zoning bank when the same result can be accomplished by presently available procedures for upzoning⁸³, variances⁸⁴ and zoning bonuses.⁸⁵ But this position overlooks the fact that these techniques increase overall zoning densities whereas the zoning bank does not — it merely redistributes it.⁸⁶ Thus, an entirely different planning function is dealt with in the zoning bank which is not available under any of the other urban zoning techniques. It is more akin to the floating zone⁸⁷ used in rural and subdivision planning and, like it, offers a flexibility not found in conventional rigid zoning patterns.⁸⁸ Moreover, the statutory standards for each of these techniques for varying the zoning governing a site or an area are based upon different considerations and factors.

The zoning bank is governed by the criteria that:

⁸³ "Upzoning" is the act of changing the zoning classification of an area from a given density or a given floor-area ratio to one of higher density or a higher floor-area ratio, N.Y.C. ZONING RESOLUTION §§ 73-60 to 73-70.

⁸⁴ "A variance is an authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance. It is a right granted by a board of adjustment pursuant to power vested . . . by statute . . . and is a form of administrative relief from the . . . strict application of zoning regulation." 2 ANDERSON, *AMERICAN LAW OF ZONING* § 14.02 at 593 (1968).

⁸⁵ "Zoning bonuses" are special increments of floor-area ratio above the normal maximum for an area given to a building in return for specified deeds, e.g., backing the building away from the lot line, and providing for pedestrian malls and fountains. Examples of this are the Lincoln Square and Theatre Districts, as well as the recently approved Fifth Avenue Special District, where buildings will be of multiple use, *i.e.*, commercial and residential combined in a single structure. N.Y.C. ZONING RESOLUTION §§ 81-00 to 81-06, 82-00 to 82-11.

⁸⁶ Costonis & Shlaes, *Preservation of Chicago Landmarks Through a Development Rights Banking Program*, Dec. 4, 1970.

⁸⁷ "[A] technique where a particular category of uses was identified in the text of a zoning ordinance but no equivalent area was found on the map. Given the 'right' proposal put forward by the 'right' developer, this textual reference would descend from the firmament and settle on the lucky owner's land." Babcock, *THE ZONING GAME, MUNICIPAL PRACTICES AND POLICIES* 8 (1966).

⁸⁸ *Miss Porters' School, Inc. v. Town Plan and Zoning Comm'n of the Town of Framington*, 151 Conn. 425, 198 A.2d 707 (1964); *Eves v. Zoning Bd. of Adjustment of Lower Gwynedd Township*, 401 Pa. 211, 164 A.2d 7 (1960).

- a) all transfers must be within the same preservation district;
- b) all transfers must be between use, height and density districts of the same general character; and
- c) a flexible ceiling on the amount of density allowed on any transferred area over and above the normal density for that area has been proposed by the author of the concept.⁸⁹

The transfer of zoning or development rights has also been criticized as constituting spot zoning.⁹⁰ Spot zoning is defined as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners."⁹¹

The transferring of air space in New York under the Zoning Resolution, and the contemplated "zoning bank" legislation in Chicago confer no special zone to the detriment of the owner's neighbors. The New York and Chicago statutes do not envision selling air rights from a landmark to a two-acre plot in the suburbs for the erection of a 40-story office tower.

The transferring of airspace is occurring in specified density districts, to avoid any cries of spot zoning. Even if, however, the airspace were transferred to an area of different density, this would still not constitute spot zoning if it were done in conformance with a comprehensive plan.⁹² However, this objection seems moot, since the contemplation of both the New York statute and the proposed Chicago statute envisions only the preservation of landmarks and/or a place to continue urban growth — i.e., building up.

⁸⁹ Costonis & Shlaes, *Preservation of Chicago Landmarks Through a Development Rights Banking Program*, Dec. 4, 1970.

⁹⁰ *Harris v. City of Piedmont*, 5 Cal. App. 2d 146, 42 P.2d 356 (1935); *People v. Cohen*, 272 N.Y. 319, 5 N.E.2d 835 (1936); *Cassel v. Mayor & City Council of Baltimore*, 73 A.2d 486. For example, ex-Commissioner Spatt, referring to the lease of air rights over the Appellate Division Courthouse, said, "This leasing is accomplished without referring the matter to the Planning Commission and, in actuality, makes today's text change meaningless and superfluous. Leasing and selling air rights in such ad hoc manner is nothing but spot zoning. It can only lead to an unplanned future—to chaos." *As quoted in Sher*, at 4, col. 3.

⁹¹ *Rogers v. Village of Tarrytown*, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951).

⁹² *Shepard v. Village of Skaneateles*, 300 N.Y. 115, 89 N.E.2d 619 (1949); *Nappi v. LaGuardia*, 295 N.Y. 652, 64 N.E.2d 716 (1945); *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704 (1943).