Transfer of Development Rights
Program for HPC

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
8787 Georgia Avenue • Silver Spring, Maryland 20910-3760

July 23, 1991

MEMORANDUM

TO: Montgomery County Council

FROM: Montgomery County Planning Department

SUBJECT: Creation of a Transfer of Development Rights Program for Historic Resources

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Background

As part of the PHED Committee's review of the potential historic designation of the Montgomery Arms Apartments on the Master Plan for Historic Preservation, an issue was raised by Councilmembers concerning the equities in the owner's long and excellent maintenance and operation of the Montgomery Arms complex, in relation to the County's general policy of supporting growth in CBDs close to transit and other appropriate public facilities. The PHED Committee discussed the possibility of creating a mechanism by which development rights on designated historic properties - particularly those located in Central Business Districts (CBDs) - could be transferred for use on other, non-historic parcels. The Committee's interest was to develop a method of making historic preservation of CBD sites more attractive to property owners.

The PHED Committee requested that an exploration of the potential for successfully creating a transfer of development rights (TDR) program for historic sites be presented at the full Council worksession on the Montgomery Arms designation. This memorandum is intended to provide that information.
In addition, a preliminary paper on issues related to this concept that had been prepared for the PHED Committee by Planning Department staff is included (see Attachment #1).

The results of the Planning Department staff's analysis - in both the preliminary paper and in doing further research - is that a Historic TDR concept is extremely complex and has major land use implications. Creation of a Historic TDR program is not a short term project and would require considerable staff time to study the wide-ranging issues and implications related to the implementation of such a program. All of the alternatives considered by staff have significant problems of both a policy and implementation nature.

Neither the concept nor the body of this memorandum has been discussed by the Planning Board, the Historic Preservation Commission, the Agricultural Preservation Board or any other interested governmental agencies. If Council requests that this issue be added to the Planning Department's work program, planning staff will study the TDR concept in greater detail and brief the Planning Board on this issue. The Board's comments regarding this issue could then be transmitted to the Council. It should be reiterated that this issue is very complex and will require considerable staff time. Approved work priorities will, in all likelihood, need to be changed if this issue is added to the Planning Department's work program.

Historic TDR Program Options

Planning Department staff has coordinated with Council staff and representatives of the Montgomery Arms Apartments to develop three options for the extension of a TDR program to historic sites. The major options discussed by this group are listed below with accompanying issues of concern.

Option #1: Inter-CBD Historic TDRs

Montgomery County has a major land use and planning policy of encouraging high density development in its 4 designated CBDs, near transit stops. The County also has a policy of designating and protecting significant historic sites. It is in CBD areas that these two important public policies most often come into direct conflict. This conflict is exacerbated by the fact that most CBD sites are already moderately built up and there is little vacant land to allow for "clustering" of new construction away from historic properties.

Therefore, Option #1 proposes that only designated historic sites in CBDs would be qualified to participate in a Historic TDR program. This option would allow for density from a designated historic site in a CBD to be transferred within the same CBD or to one of the County's other CBDs. It relates to the public policy issues inherent in all of the County's CBDs and can be accomplished through limiting the zones in which the concept would apply, not the physical land areas.

There are a limited number of historic sites in CBDs. Currently there are a total of 11 individual designated historic sites located within the County's 4 CBDs. If the Montgomery Arms Apartments are designated as historic they would be the 12th site. In addition, there are presently 6 other properties in CBD areas which are identified on the Locational Atlas and these may be reviewed for designation in the future.

Of the existing 11 designated sites, 3 are owned by M-NCPPC as parks (Acorn Park, the Jesup Blair House, the Silver Spring Armory). One site is owned by the Federal government (the Bethesda Post Office). One site is a statue - the Madonna of the Trails in Bethesda. Six sites are privately owned and could potentially

participate in a Historic TDR program: the WTOP Transmitter in Wheaton, the Bethesda Farm Women's Market, the Bethesda Theater (Cinema n' Draft House), the Community Paint and Hardware Store, the Old Silver Spring Post Office, and the Cupola Building at the Falklands Apartments.

The Locational Atlas resources currently identified include the Leland Tudor Shopping Center, the Brooks Photography building, and the C&P Telephone building in Bethesda, as well as the Tastee Diner, the Silver Spring Train Station, and the proposed Silver Spring Historic District in Silver Spring.

Issues of concern related to Option #1 include:

- Analyzing whether there is, in fact, a market for the purchase and use of TDRs in CBD areas is a serious concern, particularly in relation to current APF constraints, significant zoning densities in CBDs at present, and potential CBD downzonings that may be an element of Sector Plan work that is in progress. Specifically, with the expectation of downzonings in CBDs to reduce development potential and with the lack of traffic capacity, could Historic TDRs actually be used on non-historic CBD parcels?

- Deciding the type and density of development which would be transferable. For example, would Historic TDRs in areas with CBD zoning be calculated based on commercial use, office use, or residential use? When/how would that determination made? Once transferred, could Historic TDRs in CBDs be used for additional density to meet any or all of these purposes?

- Determining how the amount of transferable density would be calculated. For example, is transferable density based on standard method or optional method development potential? This is a significant difference - in the case of the Montgomery Arms Apartments, which is zoned CBD-2 and includes 76,555 square feet of land, optional method residential development would allow the existing 129 units to be replaced with 372 units (a differential of 243 units). Standard method on the same site would permit 140 units (a differential of only 11 units). Alternatively, the CBD-2 zone would permit commercial construction on the Montgomery Arms site of 306,220 square feet, while standard method would allow 153,110 square feet of commercial space. Of course, all commercial development would also be regulated by the AGP. Consideration must be given to the long-range land use and traffic implications of a Historic TDR program in CBDs.

- Developing the procedural steps to legally justify and implement the program will require the following:

  1. A planning effort to create a basis for comprehensive rezoning (i.e. an amendment to the Master Plan for Historic Preservation, the Agricultural Preservation Plan, or a new document.)

2. Development of text amendments to create a CBD/TDR sending zone and a CBD/TDR receiving zone, which would address the type and density of development to be transferred.

3. Sector Plan amendments to plan locations of the sending and receiving sites. It should be noted that there are currently three CBD Sector Plans in some stage of progress - thus, this form of implementation would be technically feasible.

4. Sectional Map amendments to map the new CBD/TDR zones.

Option #2: CBD TDRs Integrated with Agricultural TDRs

This option would also propose that only designated historic sites in CBDs would be qualified to participate in a Historic TDR program, as described above. Option #2 would, however, not create new receiving areas in CBDs, but rather would allow TDRs from these historic sites to be added into the existing pool of agricultural TDRs available for sale and use in existing designated TDR receiving areas.

Issues of concern related to Option #2 include:

- Staff has serious concerns regarding the impact of this option on Montgomery County's agricultural preservation efforts and, in particular, the transferable development rights program.

- Option #2 would increase the supply of TDRs and dilute the demand for TDRs. The market implications of this change would be significant and could well undermine the County's ten year old agricultural TDR program.

- A major philosophical drawback of this option is that it moves density out of CBDs and into the rest of the County - thus, defeating the County policy of promoting higher densities of development around transit stops.

Option #3: County-Wide Historic TDRs Integrated with Agricultural TDRs

Option #3 is the most complex in that it would involve allowing the transfer of density from designated historic sites all over the County. Option #3 would, like #2, not create new receiving areas, but rather would allow TDRs from these County-wide historic sites to be added into the existing pool of agricultural TDRs available for sale and use in existing designated TDR receiving areas.

Issues of concern related to Option #3 include:

- This option could involve a large number of properties potentially able to participate in a Historic TDR program. Currently, there are 245 designated sites in Montgomery

County - 14 of which are historic districts. Some historic districts, like Kensington, are quite large with over 200 structures in the district.

- With the number and diversity of designated historic sites in the County, it would become difficult to equitably calculate transferable density. For example, should the density transferred from the Darby Store in Beallsville be calculated in the same way as the density transferred from the Bethesda Theater in downtown Bethesda?

- Decisions would need to made as to whether density transferred from commercially-zoned historic sites would only be allowed to be transferred to other commercial areas or could tie in with residential TDRs. It should be noted that there are presently no TDR receiving areas in commercially-zoned parts of the County.

- If Historic TDRs created under this option were added into the existing pool of agricultural TDRs available for sale and use in existing designated TDR receiving areas, it would - in all likelihood - have a major negative impact on the existing agricultural preservation program. The quantity of potential Historic TDRs under this option could be large and would dilute the existing TDR market.

- The track record that has been created over the last 12 years has included effectively working with owners of historic sites to come up with compromise solutions that allow for the appropriate development of many historic properties. Many historic houses on large farms or tracts have been successfully integrated into new subdivisions of the property, with little economic hardship for the developer. In essence, outside of CBDs, it appears that many conflicts between County land use policies and historic preservation policies can be resolved through negotiation and creative land planning.

Conclusion

All of the Historic TDR program options explored are complex and have major policy, land use, regulatory, and work program implications.

Given the complexity of the issue and the apparent lack of viable alternatives for implementation, the Planning Department recommends that this issue not be pursued further.

If the Council does recommend additional study of the concept of allowing for the transfer of development rights off a tract of land in order to facilitate the preservation of important historic sites, then the Planning Board, Historic Preservation Commission, Agricultural Preservation Board, and other interested governmental agencies must be brought into the process and work program priorities must be revisited.

Attachment #1

HISTORIC PRESERVATION AND THE USE OF TDRs

CURRENT PROVISIONS

The Montgomery County Zoning Ordinance currently includes a section entitled "Historic Site; Density Transfer" (Section 59-A-6.2 - see attachment). This section of the ordinance was created in the early 1970s to facilitate the preservation of the historic Magruder House (near Montgomery Mall). At the time that this section was created, the County did not have a historic preservation program or even a preservation ordinance. The density transfer provision for historic properties has only been used in one instance - the Magruder House project.

The present law is more akin to a clustering option than a true transfer of development rights. As the provisions currently read: when a historic site is located on a large tract of land which is classified in more than one residential zone, this section of the ordinance allows for a transfer of dwelling units from one zone to another in excess of the number of dwelling units otherwise permitted.

The section includes a number of additional requirements which deal with permitted uses and special exceptions, site plan review procedures, and assurances that the total number of dwelling units ultimately constructed will not exceed the total number otherwise permitted by normal zoning.

The Planning Board is given authority to determine if a site is of sufficient historic importance to merit preservation (again, this law was written before the creation of the Master Plan for Historic Preservation or the Historic Preservation Ordinance), to allow dimensional variations on the site that are essential to the preservation of the historic resource, and to review the overall project through the site plan process.

ANALYSIS

The current historic site density transfer provisions of the Zoning Ordinance would not be applicable in a large number of cases. The limitations include: the zoning and size of the land that could qualify for this density transfer, the inability to transfer density off the historic site tract, and the lack of reference to Locational Atlas/Master Plan status for the historic site. These are all features which make the current law difficult to utilize.

Updating and revising the current historic site density transfer provisions of the Zoning Ordinance to make them more applicable to historic properties throughout the County could be beneficial in facilitating the preservation of historic sites and in providing owners with incentives to support preservation.

However, any new program involving TDRs and, in particular, TDR receiving areas, must not adversely affect existing TDR efforts to protect farmland.

There are numerous designated historic sites in the County which could make use of a modified TDR provision. In particular, historic sites in Central Business District areas - such as the Montgomery Arms Apartments, the Bethesda Farm Women's Market, the Bethesda Cinema N' Draft House, and the WTOP Transmitter Building - could derive great benefit from such a program.

Development of a TDR program for historic sites is a land use issue and would need to be discussed by the Planning Board in open session, as well as by the Historic Preservation Commission, the Agricultural Preservation Board, and other interested groups.

ISSUES

If a broad application of the TDR concept for historic preservation is considered, the following issues will need to be addressed:

- Modeling the program after the agricultural preservation TDR program, but structuring it so that it is separate and distinct from the current agricultural preservation effort. For example, should currently designated TDR receiving areas be available for historic preservation TDRs as well as agricultural TDRs? Could this serve to dilute the existing program?

- Deciding if this will be a County-wide effort, or if it will be limited to areas of specific concern - such as designated Central Business Districts or commercially zoned areas only.

- The equity concerns of the historic site owner.

- Deciding the location and zoning of receiving areas. If density is transferred from a property in a Central Business District, should that density remain in the same CBD or may it be distributed elsewhere in the County?

- If the program is enacted County-wide, it would be important to assure that types of uses, as well as density of use, are transferred equitably. For example, residential TDRs should be transferred to residential receiving areas, Central Business District or commercial TDRs should be transferred to commercial areas, etc.

- Development of an implementation strategy.

CONCLUSION

If the concept of allowing for the transfer of development rights off a tract of land in order to facilitate the preservation of important historic sites is found to be desirable, then a

historic preservation TDR program should be crafted to address the issues and not have any adverse impact on the agricultural preservation program. The implementation of such a program is a land use issue and would need to be discussed by the Planning Board in open session, as well as by the Historic Preservation Commission, the Agricultural Preservation Board, and other interested groups. In addition, implementation would require:

- Initiating a Zoning Text Amendment which would update and alter the existing section to make it more broadly applicable throughout the County.

- Adding a new section to the Zoning Ordinance to allow for the transfer of development rights from historic sites to designated receiving areas.

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- Adding a new section to the Zoning Ordinance to allow for the transfer of development rights from historic sites to designated receiving areas.

MARYLAND ENVIRONMENTAL TRUST

Environment the Trust . . . Man the Trustee

July 17, 1991

Carrol Kennedy
MNCPPC
Urban Design Division
8787 Georgia Avenue
Silver Spring, Maryland 20910

Dear Ms. Kennedy:

Enclosed are the materials from the San Francisco Downtown Plan you asked for. I apologize for the delay, but I had difficulty locating this from my home files.

I would welcome the opportunity to meet with you and Gwen when you have had the time to study this material. TDR systems are very complex beasts to try to establish, and very few have worked successfully for urban historic preservation. San Francisco's is working fine according to Dean Macris the Planning Director, but transfers are slow, reflecting the slow-down in the office development market generally in the City [and thus the absorption of TDR's].

I had the pleasure of overseeing and participating in the Sanger Study, lobbying for inclusion of the results into the Downtown Plan ordinance (attached), and building political coalitions for enactment of the legislation (5 to 4 vote) in October 1985.

Best of luck with TDR's in Montgomery County.

Sincerely yours,

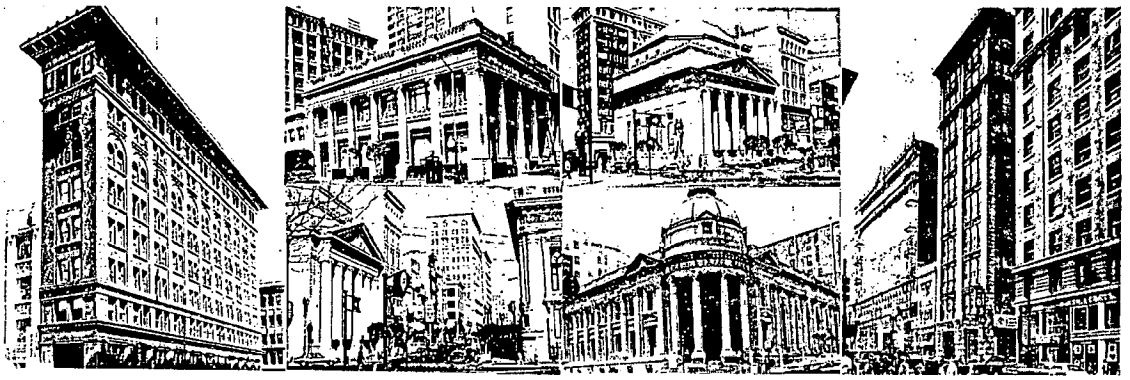
H. Grant Dehart
Director

Enclosures

Suite 322, 275 West Street, Annapolis, Maryland 21401 *(301) 974-5350*

A Preservation Strategy for Downtown San Francisco

EXCERPTS



The Foundation for San Francisco's Architectural Heritage
Prepared by John M. Sanger Associates Inc

property tax rates means that property tax abatements are not available as a means of encouraging preservation, even if they are considered to be useful.

Potential impacts from local financial incentives are widely perceived to be miniscule by comparison to the incentives embodied in Federal income tax law for historic building ownership and rehabilitation, especially since passage of the Economic Recovery Act of 1981.

D. TRANSFER OF DEVELOPMENT RIGHTS

Only two of the cities surveyed (New York and Toronto) have explicit provisions for the transfer of development rights (or transfer of floor area ratio) aimed at the preservation of significant architectural or historic buildings (usually landmarks). **Vancouver B.C.** allows transfers by administrative action, but there are no specific criteria. **Seattle** has a transfer provision somewhat similar to San Francisco's which allows transfers among adjacent sites within the central business district. Seattle is considering revisions to encourage transfers from landmark sites by permitting additional bonus floor area for such transfers. **New York** has made use of transfers, both as a basis upon which to deny permission to demolish or substantially alter a landmark (Grand Central Station and Tudor City) and as an incentive to achieve preservation (Fulton Fish Market area). Due to strict rules on contiguity, in those cases where transfers have actually been effectuated between non-contiguous sites the zoning ordinance has been amended to create a specific set of transferee lots. Thus, almost each transfer has been accomplished on a case-by-case basis. For transfers permitted under the basic law, a special permit must be obtained and this may hamper transfers, along with the rules on contiguity (adjacency or common ownership of a series of lots). In addition, transfers have been inhibited by the ability of developers to achieve zoning lot mergers with little or no Planning Commission review; due to the rules of contiguity for transfers, there are few advantages over zoning lot mergers. In this way, the situation is similar to that in Seattle and San Francisco. Other cities probably permit the same kind of mergers but do not consider them to be transfers.

Toronto provides for transfers from designated historic sites to any other site within 300 feet. However, it has been used only once.

The lack of use is attributed primarily to the weakness of laws protecting historic sites; developers can demolish an historic site, resulting in little incentive to attempt to transfer rights. The Director of Planning in Vancouver, B.C. has used his discretion to effectuate transfers on several occasions; in one case for historic preservation and primarily at the request of developers. Generally, there has been no substantial demand or pressure on historic sites due to the availability of developable land and the economic vitality of historic districts.

Denver has recently adopted new zoning provisions in the downtown area allowing the transfer of development rights from historic properties to non-contiguous sites within the downtown zoning district. Transfers cannot exceed 25% of the basic floor area permitted and the historic building must be renovated before construction on the receiving site. Eight buildings are presently eligible for transfers, however, as yet one has been undertaken.

In short, there is almost no experience with TDRs involving preservation of significant buildings or sites, except in New York. A few successes have been achieved in New York. However, TDRs have been perceived in New York as important more for their psychological and legal value in accomplishing landmark designations and in preventing landmark alterations than as an actual means of removing pressure from historic sites on a widespread basis. They are primarily an adjunct to the regulatory process rather than a substitute for strong regulations. A reading of the Supreme Court decision in the Grand Central case also suggests that they have been important in permitting a constitutionally strong landmark law where the right to build on a landmark site has been denied.

Given the absence of substantial experience with TDRs for historic preservation, it is not possible to evaluate the likely success or failure of a broad provision for TDRs as a preservation device on the basis of actual use. However, the limited experience of other cities suggests some conclusions: (1) for TDRs to be used, there must be a strong market for intensive development in a limited geographical area characterized by a relative shortage of developable sites (demand side); (2) strong regulations applicable to historic sites must exist to create an incentive to transfer rights from the historic site and there cannot be great deal of uncertainty regarding the owner's ability to redevelop rather than transfer unused floor

area (the supply side); (3) provisions for transfers applicable to all sites work against any set of public priorities in preserving specific buildings or sites; (4) transfers across great distances (from one part of the city to another) appear unlikely; most are likely to occur within the same general area or sub-market; (5) requirements for special permits to effectuate transfers appear to discourage their use if development can occur without special review procedures; and (6) bonuses for building preservation appear to have had some success where the developable site is the same as or adjacent to the site on which preservation is to occur.

E. TRANSFER OF DEVELOPMENT CREDITS

Outside the area of historic preservation, there has been some recent, experience with transfer of development credits* in California. The California Coastal Commission and the State Coastal Conservancy have initiated a program in the Santa Monica Mountains-Malibu area to transfer development potential from undeveloped subdivisions in the mountains to developable areas on the coast. This has been undertaken in the form of transferable development credits (TDC), each credit representing some unit of development permitted by the Coastal Commission. The basis for the program's operation is a requirement imposed by the Commission as a condition of new (primarily residential) development in certain portions of the Coastal Zone. In order to develop, it is necessary to have credits which can be obtained by direct purchase of development rights to subdivision lots or the lots themselves in the mountains or by purchase from the Conservancy. A formula determines the number of credits needed to develop a certain number of new homes of varying size.

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* The term transfer of development credits is commonly used to distinguish situations where underlying land use laws do not automatically grant any "rights" to develop but only allow development where certain objectives or conditions can be met. In such cases, "credits" may be applied to permit development because of actions to reduce development potential elsewhere in furtherance of the required conditions or objectives.

The program has been fairly successful to-date in eliminating the development potential in the old subdivisions by the transfer of credits, deed restrictions on the transfer of properties and the acquisition and consolidation of old lots. Two elements appear to be the key to success: (1) strong and virtually absolute regulatory control by the Commission on development in the entire area in which transfers can occur; and (2) the ability of the Conservancy and a private land trust it created to finance the acquisition of lots and the re-sale of credits to developers. A recent evaluation of the program has led to plans to expand, improve and accelerate the program through the creation of a TDC bank by the Conservancy. Until recently, transfers of credits only occured through private transactions with very few transactions actually taking place as soon as the program was announced, potential sellers escalated asking prices to 10 or 20 times estimated pre-program values. As a result, few buyers were willing or able to obtain credits, even though there was an estimated supply of about 4000 credits and an estimated annual demand for about 200 (plus some backlog demand). Many credits were acquired by brokers with very little likelihood of being able to develop the lots to which credits were attached.

Clearly, a high speculative value was embodied in asking prices due to the uncertainty regarding potential values, publicity surrounding the program and the high values associated with the receiving site ($100,000 per buildable lot compared to original tranferor lot prices of $2-5,000 and subsequent credit prices of $20-50,000). In order to create a market in credits (i.e., to establish prices at which transactions would occur), the Conservancy acquired an initial bank of credits (from tax-deeded lots) and held an auction of options to purchase a limited number of credits. At the auction, the price was bid as high or higher than asking prices for some credits. However, the holding of the auction actually triggered offers of sale for large numbers of credits from owners, due to the threat of continued Conservancy sales. As a result, numerous transactions occurred at price levels substantially below prior asking prices or auction prices and most of the options were not even picked up.

Since that time, and partially due to the Conservancy's acquisition of more credits and willingness to enter the market, private transactions have occurred with more frequency although short-term shortages in supply continue to occur. In addition to the constant

supply problem (or what might be considered an excess demand problem) there is considered to be a continuing problem for potential buyers: the difficulty in meeting the burden of acquiring credits because of the costs (time and expense in dealing with numerous owners), particularly for large developers needing large numbers of credits within a reasonable time to proceed with a project. To reduce these problems, the Conservancy is planning to create a permanent TDC bank as a back-up source of supply, intended both to set a ceiling on market prices and to ensure the adequacy of the supply. To achieve this, the Conservancy has to acquire lots and partially subsidize the re-sale of credits.

At the request of developers, the Coastal Commission and Conservancy are also proposing to create a program of in-lieu fees administered and used by a private land trust. Under this program sought by potential credit users, fees will be paid in return for credits which will then be purchased by the trust or the Conservancy from lot owners. Developers have insisted on this program as a means of reducing the number of transactions necessary to carry out large developments, eliminating short-term supply shortages and standardizing prices.

Important lessons derived from experience with this program are as follows:

1) A transfer program must be able to operate consistently over time, with stability and predictability in terms of price and availability of supply;

2) There must be realistic incentives to buy and to sell credits (one of the problems with sellers in the Santa Monica Mountains is that holding costs are negligible; lots have been owned for decades and values are uncertain). For the seller, this means reasonably negative or uncertain prospects regarding development potential; for the buyer, a regulatory requirement or very strong economic incentive to increase development potential;

3) Credits must be reasonably related to the value of donor sites or donor rights;

4) From a public policy point of view, credits should be tailored to priorities for site preservation; and

5) A real market needs to be created and appears to operate best when similar to a stock exchange or auction house, where actual sellers and buyers come together to negotiate, reducing transaction costs.

In addition, the Conservancy's experience indicates the usefulness of participation by a private land trust in creating a market for credits or rights (along with brokers). A land trust can negotiate purchases on terms highly favorable to sellers through bargain sale provisions (partial tax-exempt gift plus partial sale for consideration). A public agency, like the Conservancy can also utilize this tool and can offer, in addition, condemnation letters (permitting a tax-deferred sale for the seller). As a result, the Conservancy and the trust have been far more successful in acquiring lots or development rights than private buyers.

F. SUMMARY AND CONCLUSIONS

1. Experience of Other Major Cities

Perhaps the primary lessons to be learned from other cities are that every city has its own context for preservation and that no city has been substantially more successful than another due to the use of a particular measure. Success has depended in the main on perceptions regarding the importance of preservation and the resulting political will to pass and administer strong regulations, with accompanying incentives or benefits as necessary. In terms of San Francisco's experience, some comments on measures which have been successful elsewhere will help shape the choice of alternatives to pursue here.

Local tax incentives have only worked, if at all, in cities where the demand for new space and for sites occupied by historic buildings is not substantial. Federal tax incentives are far more important.

Although stronger landmarks laws have been successful elsewhere, they have not generally been successful where strong development pressure exists, except in Washington, due to very strong political support by

the Mayor for preservation. In addition, where landmarks laws are successful in the face of development pressure, they are rarely used to designate more than the most significant buildings in the city, unlike in San Francisco where landmarks have been designated in the past without any clear order of priority and without distinguishing among buildings in accordance with their relative merit. Whether this technique has potential in downtown San Francisco depends on the degree to which past use of landmarks designations vitiates any change in direction now.

The use of special zoning districts to preserve aggregations of significant buildings within areas under pressure (or potentially under pressure in the future) appears to have been a particularly successful technique, at least where transfer of development rights is allowed in New York, or where such a technique fits into an overall plan to shift development in a particular direction for a number of reasons as in New York, Seattle, New Orleans and possibly Portland. Since San Francisco is involved in assessing just such a plan for a broad set of policy reasons, the technique appears to have promise.

Direct financial assistance has been successful at least in one city (Portland) in achieving both preservation and restoration, but only in areas where substantial demand did not exist in any event. In San Francisco, this technique would not appear to address the conditions causing the loss of significant buildings.

Some cities, such as Toronto and Seattle, like San Francisco, are using informal measures and persuasion to increase preservation in the face of development pressure with some success. Since conditions are similar to those in San Francisco, attention should be given to continued use of such techniques.

Transfer of development rights has really only been used for preservation purposes in New York due to the absence of enabling laws in other jurisdictions despite much discussion regarding the concept over the past decade. Even in New York, the enabling law is so restrictive that special zoning amendments have commonly been associated with actual transfers. Other cities are, however, moving in the direction of enacting provisions for transfers and Denver has recently enacted such a provision.

the challenge of any decision. Provision of specific criteria clarifies the fundamental regulatory framework and expectations about what will and will not be approved, while retaining flexibility in applying the criteria to specific situations. This approach has represented a substantial advance beyond the rather hazy policies typically incorporated in city comprehensive plans or the criteria typically included in provisions for conditional use permits in zoning ordinances.

g. Acquisition of Development Rights from Significant Buildings

Although some cities authorize landmarks acquisition in order to prevent demolition (and to justify anti-demolition ordinances), no city has been identified which authorizes purchase or condemnation of development rights over landmarks or other signficant buildings as a means of achieving preservation. However, this technique is being used in other contexts, especially in agricultural lands and open space conservation. Essentially, the technique is the same, irrespective of the objectives. The typical problem is obtaining the funds to make the acquisitions.

Some believe this is a mistaken allocation of funds on the grounds that the right to develop to some pre-set FAR does not exist in any event. Under California case law, it is well established that land use regulations are not invalidated because of the mere fact that they result in possible lowering of property values or developer expectations. Numerous cases have upheld downzonings and other restrictions on land development on the theory that, as long as there is a public purpose involved and some use of the land remains, the owner has no right to object. The courts have clearly ruled out the right to object merely on the grounds that development potential was reduced, simply because no land use regulations would be possible under such a constraint. It is due to this legal situation that many believe that compensation should not be offered to owners of significant buildings (or land determined to be of great ecological significance). Thus, the rationale for public acquisition of development rights or any form of compensable regulations is essentially grounded in politics and a sense of what is equitable. It is in this sense that such a technique is suggested since it is clear that many would believe it inequitable to reduce individual owner's property values significanly without offering any means by which the owner might recoup all or a portion of that value. In

effect, development rights transfer possibilities may be seen as an alternative to acquisition of development rights for the same reasons.

One means of funding such a program (which might be related to a prohibition on demolition of some or all significant buildings) would be to impose a "landmarks preservation fee" on new development to fund the purchase of development rights on significant buildings. Such a fee might be subject to a challenge that it violates Proposition 13; whether this would be the case may be settled in connection with the current litigation over San Francisco's transit impact development fee. Given recent City requirements for contributions to housing and public transit, the political feasibility of such an approach appears to be dubious. In addition, there would be some unfairness in imposing such a fee without regard to the impact of proposed new development on significant buildings. If such a fee were to be considered, the extent of the fee should be related to such impacts. This is not discussed further as a method to be pursued, although the need for some public purchase of development rights is discussed in connection with development rights transfer measures.

h. Prohibition Against Demolition or Substantial Alterations to Significant Buildings

Although implied in the possible use of conservation districts or stricter conditional use process, direct control over the demolition or alteration of significant buildings, individually or in groups, constitutes a separate preservation measure. Provided that there is adequate justification, no legal inhibition appears to exist to prevent such controls as long as there is not a "taking" under the Constitution. However, political and equity considerations probably dictate some provisions which would ensure compliance with Constitutional requirements in any event. In a real estate market such as that in San Francisco or New York, the most promising technique for making strict controls and prohibitions equitable and acceptable is by allowing for transfer of development rights. As a result, transfers are seen as a crucial measure if properly structured, to achieve preservation objectives.

2. Incentives and Bonuses

a. Floor Area Bonuses for Preservation

New York is one city which offers a floor area bonus for projects involving the preservation and restoration of landmark buildings. In New York, the bonus can occur if the new development is on the same site as the landmark building. This indicates the normal expectation that a bonus can only be given where the building to be preserved and the new project are on the same site or could be part of the same site. Although this is not essential, provision of a bonus for new development on a site non-contiguous to the source of the bonus in effect requires some legal connection between the two actions to ensure preservation of the building to be retained. As a result where bonuses are discussed for non-contiguous new developments, they are typically associated with development rights transfers.

Provision of a bonus for a new development not contiguous to a building to be preserved would, at minimum, require the granting of an easement or deed restriction ensuring the protection of the significant building. In effect, transfer of development rights is a way of adding an additional bonus as part of the entire strategy since some legal or ownership connection would have to be established between the two sites.

However, it is worth considering the use of conservation bonuses as a means of creating incentives to preserve significant buildings, and possibly to accomplish other objectives in connection with their retention.

The reasonable theory is that there are financial benefits from obtaining additional permitted floor area which will justify special expenditures to preserve an older building. There are few examples of the use of such bonuses since they have rarely been available in any widely useable form. However, they fit within the expectations one would have of all bonus systems: that is, they are likely to encourage the desired action where economic factors make the value of the bonus floor area greater than the cost of obtaining the bonus. In the past, San Francisco's bonus system has worked in an anti-preservation mode since major bonuses were available for plazas which often encouraged the elimination of older buildings where the value of the bonus floor area exceeded the value of the existing space, especially given the low cost of building plazas.

The Department of City Planning has proposed a type of conservation bonus -- called the "retention and restoration allowance". The proposed bonus is to consist of up to 50% of the gross floor area of a retained (and possibly restored) significant building. The bonus could be in addition to or separate from any proposed transfer of development rights (although there would be limits on the maximum floor area for the new development). This bonus would be available only where the Planning Commission determined that it was necessary (presumably economically necessary) to retain and make use of the older building.

There are apparently two primary situations in which such a bonus might prove attractive to a developer. First, where the proposed development is on a site adjacent to a significant building such that the combined lots could be treated as a single zoning site (so that the availability of transfer of development rights was of no significance), the availability of the bonus would encourage retention of the older building and construction only on the other portion of the site. In this case, there would be a greater incentive to retain smaller significant buildings which had some relatively high continuing value, but for the limit on the bonus. Secondly, where the existing significant building already has a high floor area ratio, the bonus would encourage retention where a new building could have much greater economic value (due to higher efficiency or higher quality space). In the second case described, the bonus would primarily encourage retention of the larger historic buildings in downtown, resulting in more protection for a less threatened building than to a smaller, more threatened building.

The potential impacts of such a bonus are discussed further, since the technique appears to have potential to induce desirable preservation decisions, but the economics of typical situations requires more attention.

b. Transfer of Development Rights (TDR)

As previously discussed, transfer of development rights has not been utilized very frequently and broad measures for its use have not been available in any cities. Most experiences with TDRs have occurred in New York. Generally, provisions for TDRs have been viewed as bonus measures; that is, a transfer has been available as an incentive on

the theory that its availability would induce such action without any regulations to effectively require the use of TDRs. This is not generally what has occurred. One reason given is that owners are rarely willing to sell development rights at reasonable values, preferring to speculate on long-term potential redevelopment. Secondly, the economics of development are generally such that newer buildings produce higher revenues than can be obtained from older buildings. As a result, the primary incentive for a transfer exists only where the older building is, for one reason or another, a relatively high yield building compared to a new building. The most obvious case would be where the existing building is built almost to the maximum FAR such that its value is quite high. In such a case, a tranfer of unused FAR may be more valuable than demolition and reconstruction. (On the other hand, TDRs may not be needed in such a situation to preserve the existing building). Other possibilities occur where a new development site has greater potential for a much larger building with superior views and higher revenue yield than the site of an existing building. A recent example in Seattle occurred where the availability of TDRs has permitted the largest and tallest building in the City at a prestige location. However, this occurred in a case with no maximum limits on FAR or maximum height limits.

In theory, principles of land economics suggest that development rights should be worth the same as land to someone interested in a new development. However, free market transfers of development rights have been rare and almost always the result of some public pressure or requirement in order to create a market in development rights, it is necessary to have willing buyers and willing sellers. The willingness of a buyer to purchase development rights hinges on the belief that they will be usable to produce revenue through construction of a larger building than would otherwise be permitted. Other related factors which affect the potential purchase of development rights are: (1) likelihood of favorable regulatory decisions on their use; (2) transactional costs (including the number of owners from which rights might be or have to be negotiated); (3) the perceived value of the additional FAR at a particular potential site; and (4) the cost of the rights. From the seller's perspective, the willingness to sell development rights hinge on: (1) the perceived value of the development rights compared to their retention for use on the same site; (2) perceived effects on the ability to sell the property without such development rights; and (3) the perceived availability of potential buyers and the potential prices offered.

In theory, these are the same considerations in land transactions, but development rights are likely to have an even higher speculative component than most land transactions under market conditions. Reasons for this include the lack of any potential for an immediate return on development rights, whereas vacant land may be usable for parking purposes and existing buildings may have rental potential during a holding period. The speculative component increases where the ability to make use of the rights is uncertain under a particular regulatory system. This is the case where transfers are not automatic and require approval and/or where maximum limits on floor area ratios at receiving sites make uncertain the extent to which development rights will be in demand. As a result, surveys of the available experience with TDRs show little use under uncertain regulatory conditions; most transfers occur only when a specific project has been defined where such rights could be used or where such transfers are required in order to obtain value from a protected building (demolition or to carry out a new development).

As a result, the mere availability of TDRs is not believed to be adequate to protect significant buildings because an active market is not likely to be created. This conclusion seems to be supported by the fact that transfers have almost always occurred where regulatory measures made them especially attractive or essential for new development or as an economic relief valve from restrictive regulation. As a result, the purely voluntary use of TDRs is not discussed further and attention is devoted in the next section to their use in connection with regulatory measures. One example of such a connection is the proposal by the Department of City Planning, but other alternatives are discussed which would generate greater protection for significant buildings and a more active market in TDRs.

c. Financial Assistance

Although some cities provide direct financial assistance for retention and restoration of older buildings, including grants and loans, this approach is not considered viable given the limited funds available to San Francisco for such purposes and the small impact compared to potentially usable Federal tax incentives (including tax credits, special depreciation and deductions for donations or preservation easements) or the contravening impact of high rents for new space.

VI. A PRESERVATION STRATEGY FOR DOWNTOWN SAN FRANCISCO

A. IMPORTANCE OF TDRs TO A PRESERVATION STRATEGY

Despite the lack of widespread experience with TDRs in urban preservation or zoning programs, the evaluation of alternatives in Chapter III, when applied to the criteria for a successful strategy, and economic and political conditions in San Francisco leaves little doubt that incorporation of a program for transfer of development rights or development credits could be the most important single element of a successful preservation strategy. TDRs can simultaneously address three issues of vital economic and political importance; (1) adequate development capacity to support economic growth; (2) response to property owner's reasonable expectations regarding returns from their property vis-a-vis other owners with similar properties; and (3) preservation of significant buildings.

The survey of other cities' experience, analysis of TDR programs in effect and evaluation of the potential impacts of such a program also indicate that the detailed provisions of such a program are critical to its success in preserving significant buildings, as well as addressing the other two key issues mentioned above. Ironically, it appears that provisions which are likely to be most successful from a preservation perspective are also likely to respond more directly to the concerns of developers and property owners as a whole, although some property owners and developers may individually consider themselves adversely affected. An illustration may assist in explaining why this is the case.

Suppose a situation in which TDRs from landmark buildings are offered as a bonus to be used as desired by a developer in connection with a new office building. Assume that the developer can build close to an optimum FAR without the bonus, that restrictions on landmarks are no greater than those which exist today in San Francisco and that the site of the landmark has potential for new development which makes the land worth more without the building on it. In this situation, the developer faces a situation in which he can choose but is not obligated to buy TDRs in order to increase the size of the building that he can build. He is only likely to do this if the price on the TDRs is relatively low compared to his potential returns from additional construction. In the same situation, the owner of the landmark site is faced with the choice

between selling his TDRs and waiting until he can sell the site for redevelopment for another new office building. He is only likely to sell the TDRs if the returns are almost equal to what he thinks he could obtain by selling the site for redevelopment. The third actor in this scenario is likely to be a second developer who is willing to option the landmark site and seek permission to build a new building, which, if permitted, will result in a large return to the property owner. The probable long-term result is demolition of the landmark for a second new office building in addition to the one the first developer is proposing to build because of the discrepancy between what the developer is going to offer (if he offers anything) and what the owner wants and thinks he might obtain.

Now imagine a different situation in which the developer cannot build to an optimum FAR without TDRs and where the owner of a landmark cannot demolish and redevelop the site. Here the situation is likely to be changed since the developer has a substantial reason to buy TDRs, the owner has a major incentive to sell TDRs and the second developer is not going to both to option the lanadmark site for redevelopment at any price. More importanly, the situation facing all owners and all developers as a whole has changed drastically; all developers and all owners now know that no other owner of a landmark can do better than they can do; all developers know that all other developers are facing the same situation. There is less uncertainty about what is permitted and less emphasis on being the one owner or the one developer who can overcome the general tendency against landmark demolition. In this situation, owners of landmarks all have equally valuable development rights (at least within the same zoning district) whereas in the first situation, only owners with properties immediately in demand for redevelopment have property with greater value than others. This means that owners of landmarks within the same district are likely to receive approximately equal prices for their development rights (on a per FAR basis) and are going to have an easier time selling their rights. At the same time, developers will have an easier time buying them and building the development they wish. Compared with the first situation, there is less uncertainty and less speculation. Decisions are less dependent on political maneuvers or discretionary regulatory decisions.

The purpose of the illustration is to show how owners as a group and developers as a group can be more equitably treated with a properly designed and working TDR system than they might otherwise be treated and how clearly defined objectives can be achieved with more certainty for

all parties. To this extent, a TDR program can be seen as reducing the amount of regulatory review and time involved in specific development proposals and substituting for case-by-case review of every situation and the amount of uncertainty, political pressure and expense that creates for everyone involved. This is not to say that regulatory discretion can be eliminated since the City will still have other objectives which it may not be possible to incorporate into objective criteria (such as design) but the scope of what is permitted automatically can be expanded from what it has been in the recent past.

From a preservation perspective, apart from the workability of TDRs in permanently preserving significant buildings, there are other concerns which must be addressed, including the following: (1) assurance that preserved buildings are maintained and not allowed to fall into disrepair and that inappropriate alterations are not made; and (2) assurance that TDRs are transferred to sites where the resulting development is consistent with the very purposes of preservation, including maintenance of the scale and character of areas of significant building concentrations.

B. POTENTIAL DANGERS OF A PURE INCENTIVE APPROACH TO TRANSFER OF DEVELOPMENT RIGHTS AS A PRESERVATION STRATEGY

The survey of other TDR programs and those attempted elsewhere indicate fairly clearly that a TDR program will not operate successfully where TDRs are only provided as discretionary bonuses and their use is solely a function of market-based incentives. This is referred to as the incentive approach. These experiences and analysis of San Francisco's particular circumstances indicate a number of potential dangers in relying upon a purely incentive-based TDR program to preserve historical and architectural resources. Where there is uncertainty regarding the ability to redevelop sites occupied by significant buildings, developable sites are subject to speculative pressures. Where redevelopment potential is solely a function of regulatory discretion, this means that the speculation becomes a matter of expected political or quasi-political expertise.

If demand for development of the particular sites is not high, this may not be a serious problem. In this case, there would be no substantial overall pressure for development of a large number of sites. Where development pressures are high, as in downtown San Francisco, the

situation is quite different. Adoption of a program involving discretionary restrictions on use of sites of significant buildings with TDRs as an incentive to discourage their redevelopment will have two simultaneous impacts. First, all such sites will automatically become somewhat less attractive for purchase than they were previously because of the possibility that they cannot be redeveloped; this will immediately cause a perceived reduction in the available short-term supply of land for new development, causing land values to rise rapidly for those sites on which restrictions do not apply or might not be applied. Or, to put it differently, the value of all land available for development will rise.

Secondly, developers and certain owners will immediately recognize the increased value of land which can be made available for new development. Pressure to obtain development permission for desirable sites will escalate. Although there will be some demand for TDRs which can be used on clearly developable sites, the highest value will attach to those sites in the best locations. Many of these will be the very sites to which restrictions on redevelopment may apply. The highest value will attach to those few sites which are free of such restrictions or can be freed from them through the regulatory process, making them exceptions to the perceived shortage of sites. If a potential developer or owner believes that he can convert such a site to a developable site through the regulatory process, thus making it especially valuable, a very high premium will attach to expertise and success in the regulatory and political process.

This situation will be even further aggravated if use of TDRs is also a function of the regulatory process. In this case, no developer can be assured of being able to use TDRs and will not make advance purchases of TDRs for use at a later date in connection with a site for which development permission has not been obtained. Since there will be no real market for TDRs, owners of significant buildings will have no ability or incentive to sell them and will have an enormous incentive to obtain permission to redevelop them. There will be tremendous pressure on the Planning Commission and elected officials for development approval on certain sites of significant buildings, pressure in many cases even greater than existed prior to adoption of the program.

As a result, at least in the short-term, the program is likely to backfire, increasing the threat to significant buildings in the areas of highest development demand while others are protected or assumed to be

protected. Even in the long-term, lack of success of the TDR program in its inception is likely to result in eventual abandonment of the program or lack of use to any substantial extent.

As demonstrated by other TDR programs, the only means to ensure that a TDR program has a chance of success is to substantially remove the degree of regulatory discretion involved both in the creation of transferable rights and their use. This means that the program cannot operate solely on an incentive basis. Such an approach may pose more dangers for preservation aims than no TDR program at all.

C. A PROPOSED PRESERVATION STRATEGY FOR DOWNTOWN SAN FRANCISCO

The ultimate purpose of this report is to propose an effective strategy for preserving significant buildings in downtown San Francisco. This section proposes such a strategy. Since interest in having such a strategy relates directly to contemplated changes in downtown planning and zoning, the focus of the proposed strategies is on changes in zoning and other land use regulations to enchance prospects for preservation. However, other actions which would assist in preserving and restoring older buildings of historical and architectural value are also included where relevant and complementary. Since many elements of the Planning Department's GDD proposals are considered to provide a basis for a preservation strategy, these are incorporated into the proposed strategy, with modifications believed to be necessary to ensure an effective plan of action as discussed in previous sections.

An initial statement regarding certain assumptions is warranted because such assumptions, in addition to others cited in section III of this report, provide part of the basis of the proposed strategy. First, it is assumed based on evidence available that the major problem of preservation in San Francisco is pressure for more profitable development, not complete lack of utility for existing buildings. Therefore, abandonment of older buildings is not considered a likely occurrence especially given the lower rents than can be offered compared to new space, whether in unrehabilitated or rehabilitated buildings. While certain space users may desire or require floor sizes or spatial configurations which cannot be accommodated in some older buildings, there is no evidence as of yet that there is not demand by other users for such space, particularly from smaller service firms. This implies that preservation is primarily a function of regulations on new

development, not a function of attracting additional, special demand for such space.

Secondly, the corollary assumption to the first cited is that protection of buildings from demolition has the highest priority. While deterioration of older buildings over time is a potential concern and rehabilitation would be desirable to extend their useful lives, without further protection from demolition and redevelopment, such concerns will be moot.

Therefore, any effective strategy must first focus on the differentials between the value of the land for redevelopment and the value of the buildings. Since regulations governing what can be built determine the value for redevelopment, those regulations must be adapted to preservation aims. If adequate protection is achieved, there is then the time and leisure to turn to problems of maintenance and rehabilitation.

Third, while the utility of a building to a potential user is important, its utility to its present occupant or prospective redeveloper is not assumed to be a matter of primary public policy unless there is no other opportunity for an important user to operate within the city such that the city's economic growth would be impaired. Past battles over preservation of certain buildings (especiallys The Fitzhugh and City of Paris buildings) magnified the discrepancy between concern over a particular user's needs and the usefulness of a building for some occupancy. The assumption made here is that a significant building should not be lost unless it is no longer suitable for any purpose or for any type of occupancy for which there is an effective economic demand.

They key elements of the proposed downtown preservation strategy are as follows, each of which is discussed at greater length below:

- Controls on significant buildings, including prohibition against the demolition or significant alteration of the highest rated buildings, including landmarks in the C-3 districts;

- Creation of conservation districts similar to those proposed in GDD which will qualify as certifiable local historic districts for tax purposes, including controls on significant buildings and new construction;

- Provision for transfer of development rights solely from designated significant buildings and automatic right to use such rights on eligible transferee sites in the same zoning district or in a designated special development district up to maximum permissible FAR and maximum achievable FAR under height and bulk limits;

- Provision for additional TDR bonus based on the unused FAR on the site for restoration/rehabilitation of a significant building in accordance with standards established by the Secretary of the Interior;

- Sponsorship of a land trust to acquire and ensure a market in TDRs;

- City authority to issue Marks Act bonds for rehabilitation of significant buildings (citywide) upon a showing that such financing is necessary;

- Solicitation of certification of conservation districts as approved local historic districts for tax act purposes.

1. Controls on Significant Buildings

As discussed previously, preservation of significant buildings can only be assured by direct regulation of demolition and substantial alterations. Such regulations can then become the basis for a workable transfer of development rights program to ensure equitable treatment among owners and a shift of development to those locations where it is desired and can be accommodated without the loss of significant resources, unacceptable changes in the scale of the retail and financial districts and overcrowding.

The proposed controls would have several components to ensure the protection of buildings from demolition or alterations which are the equivalent of demolition in terms of the loss of architectural and historic significance.

a. Demolition or Significant Alteration of the Highest-Rated Buildings

Demolition would not be allowed for those buildings included in a list as constituting the most significant buildings in the C-3 districts. For purposes of this study, such a list is assumed to include all buildings rated "A" or "B" in the Heritage survey, and included on the list of architecturally and/or historically significant buildings adopted by the Planning Commission. The number of properties subject to this prohibition may be altered by refinement of those "B" rated buildings and buildings rated in the Department of City Planning survey, but not in the Heritage survey to eliminate some which are not considered to deserve such absolute protection for architectural merit. The list may also be expanded to include areas which have only recently been surveyed through the expanded survey undertaken by Heritage of the remainder of the C-3 districts not surveyed previously. The conclusions reached in this report regarding the adequacy of the land supply to support new development and the reasonableness of supply-demand relationships is based on absolute protection for all buildings included in the DCP list before the expanded survey. If some were to be deleted or some added, modifications of the analysis would be required but it does not appear that the conclusions would be subject to much change.

Demolition and significant alteration would be defined as the destruction of all or any substantial part of a building's exterior walls or exterior ornamentation, including the roof and walls surrounding any usable interior courtyard, or of any substantial portion of the building's interior structural elements or significant interior spaces accessible to the public. The definition should not discourage or eliminate the possibility of interior remodeling to make the building more usable for modern office or retail purposes but should prevent effective demolition of all but the exterior shell of the building. The intent is to preserve buildings, not just facades.

Whether a demolition or significant alteration were proposed would be determined by the Planning Commission on the recommendations of the Landmarks Preservation Advisory Board.

b. Eligibility for Transfer of Unused FAR

The sites of all buildings subject to the prohibition against demolition or significant alteration would become eligible transferor sites for

purposes of tranferring unused FAR (as determined by the basic permissible FAR in the zoning district) to eligible transferee sites (see below).

c. Code Compliance and Restoration Bonus

It is not proposed that restoration or rehabilitation be a condition of eligibility for transfer of unused FAR from sites of designated significant buildings. The theory is that, given the prohibition against demolition and redevelopment, the owner of such a building should then be allowed to sell his unused FAR without regard to whether or not the building has been rehabilitated to some standard which must be determined by the Planning Commission. Such a restriction would, it is believed, severly hamper the ability to create a market in TDRs and would require advance determination regarding whether a building met rehabilitation requirements prior to a transfer.

In the alternative, it is proposed that rights be subject to transfer from a significant building provided that the building has been in compliance with building codes applicable to its current use and occupancy, as demonstrated by issuance of a valid permit of occupancy. In addition, the building should have been brought into compliance by restoration and stabilization of its exterior features.

In addition, it is proposed that an incentive be created to restore and rehabilitate such buildings by means of offering a discretionary bonus TDR transfer similar to the restoration allowance proposed in GDD. An owner of a significant building could qualify for the bonus transfer by rehabilitating an eligible building such that it is brought into compliance with current codes, including necessary seismic upgrading of both facades and interiors which would extend the useful life of the building and enhance its ability to withstand future deterioration or destruction. Once compliance was certified, the additional rights could be sold. This provides an incentive which can be evaluated by the building owner in the context of the market for TDRs which is expected to arise under the proposed prohibition on demolition and permitted transfers. In connection with tax incentives which currently exist for such rehabilitations, the extra bonus should make rehabilitation attractive to such owners.

In order to ensure that rehabilitation is encouraged which is consistent with the preservation of the architectural and historical character of

significant buildings, rehabilitation would be required to comply with the same criteria (Standards for Rehabilitation) used by the Secretary of the Interior to certify rehabilitations as qualifying for special tax benefits (see Appendix C). Since most owners would want to qualify in any event, this should not impose any special additional burden and should ensure maintenance of certified local historic district status for the conservation districts described below, maintaining the eligibility of other owners for favorable tax treatment.

The bonus transfer for restoration should be based on the amount of unused FAR subject to transfer under the normal TDR program. It appears that the bonus should be limited to a maximum of 25% of the unused FAR on the site or 25% of the floor area of the building, whichever is higher. It would be subject to specific determination by the Planning Commission based on information presented by the applicant which demonstrates that the bonus is necessary in order to make rehabilitation economically feasible (taking into account available Federal tax incentives and sale of TDRs). Such a determination could be made where rehabilitation costs exceed the increase in building value resulting from rehabilitation or where the price which can be obtained for transferable rights without the bonus plus the estimated value of the building after rehabilitation will total less than the value of the site if cleared for redevelopment.

The proposed bonus for rehabilitation is structured so that a building owner can apply for it in the context of his rehabilitation plans and independent of any possible sale of the normal TDRs from the site. Sale of TDRs, whether under the normal provisions or under the bonus provisions, would not have to be linked to any specific development proposal on another site. Together with the provisions for TDRs discussed below and the restrictions on demolitions, this structure would contribute to a free, active market in TDRs.

d. Recording of Permanent Reduction in Development Potential and Maintenance Agreement in the City's Favor Upon Transfer

Any sale or transfer of development rights from an eligible building would be conditioned upon recording of deed restrictions permanently

restricting the development potential of the transferor site by the quantity of development rights sold or transferred.*

In order to avoid deterioration of designated buildings to an unsafe or unrehabilitable condition through neglect, a covenant of maintenance running with the land in favor of the City would also be required under which the owner (or future owners) of the building would agree to maintain the building in sound, good condition suitable for use and occupancy over its reasonable useful life (with a possible minimum of 40 years) and to rebuild or restore such building to the extent feasible in the event of partial destruction by causes beyond the control of the owner (fire, flood, earthquake, war, etc.). Since enforcement of a maintenance convenant recorded in favor of the city would be difficult, the Planning Code should provide for an automatic reduction in permitted development potential on the site of a significant building from which a transfer has occurred to one-half the actual floor area of the significant building in the event that it is demolished without authorization or in the event that the Planning Commission in authorizing demolition as provided below, makes a finding that demolition is required due to continued lack of maintenance and repair on the part of the owner.

e. Permission for Demolition or Significant Alteration under Special Circumstances

Since certain events could occur which make preservation of a historic building economically or physically infeasible, some relief is required to account for such situations. It is proposed that the Planning Commission, on advice of the Landmarks Preservation Advisory Board, and the Bureau of Building Inspection, be allowed to permit the demolition or alteration of a significant building in the event that the building is rendered unsafe and unoccupiable or infeasible for rehabilitation for occupancy due to fire, earthquake, flood or similar circumstances, or by reason of deterioration having occurred prior to the date of the ordinance, with provisions for TDRs and the restoration bonus. The burden of proof would be on the applicant for demolition.

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* At present, the Planning Code only restricts the transfer for the useful life of the building; continuation of such restriction would be consistent with the intent to shift development permanently to new areas and sites.

2. Conservation Districts

The two conservation districts proposed in GDD are also proposed to be included in the recommended preservation strategy. However, the rules and regulations for such conservation districts are proposed to be strengthened to make it possible to obtain certification as local historic districts. Such certification would enable all rated buildings within the districts to obtain favorable tax treatment for qualifying rehabilitation expenditures, enhancing the potential for rehabilitation and maintenance of these buildings. Although the boundaries of the proposed conservation districts are somewhat greater than those of the districts identified in Splendid Survivors as tentatively eligible for National Register status, it is believed that the boundaries would not constitute a serious problem for certification so long as they do not include extensive additional area without recognizable contributing buildings. The expanded survey of the C-3 districts conducted by Heritage indicates that this test could be met and that some minor additional extension of the boundaries in the Tenderloin could be warranted.

The primary purpose of the conservation districts would be (1) to ensure that new construction is harmonious in scale and design with the concentration of older buildings which make the districts areas of special character and significance, (2) to provide an additional incentive for TDRs to be sold or transferred from buildings in these districts to other sites in connection with the proposed special development districts, (3) to provide protection to the extent feasible for lower rated contributory buildings ("C" rated) consistent with the higher priority attached to higher rated buildings, and (4) to extend to owners of significant buildings the tax benefits available for rehabilitation which can be obtained faster and more easily by individual owners if they are part of a certified district than if they must apply for National Register status individually. It should also be pointed out that non-significant buildings (non-contributory in National Register terms) would have to apply for de-certification to avoid a tax penalty for demolition (consisting of required capitalization of any demolition expense). However, through assistance by the City or Heritage, de-certifications could be applied for on a mass basis for buildings which are not rated and would not be contributory to the district, removing that cloud from the outset.

a. Conditional Use Permit Required for All New Construction to Determine Consistency of Scale and Design with the Architectural and Historic Character of the District

It is proposed that a conditional use permit be required for all new construction in the conservation district solely with respect to the consistency of the scale and design of the building with the historical and architectural character of the surrounding significant buildings and the district as a whole. Such review is required to maintain the integrity of the districts and their eligibility as certified local historic districts.

Where new construction does not involve construction on the site of a significant building (one subject to demolition/alteration controls) or any alteration of a significant building, a conditional use permit would be granted unless the Planning Commission determined that the proposed construction was inconsistent in scale or design with the architectural and historical character of the district or detracted from the architectural or historical character of an adjacent significant building.

Where new construction partially or wholly involves the site of a contributory building and involves a proposed demolition or alteration of a substantial portion or all of a contributory building not subject to the prohibition against demolition or significant alteration*, the applicant would have to demonstrate, and the Planning Commission would have to make findings for issuance of a conditional use permit on advice of the Landmarks Preservation Advisory Board, as follows:

(1) retention of all or a substantial portion of the building is not economically feasible or, in the case of a partial retention, would not result in a quality of design consistent with that in the district; or

(2) retention of the building or a substantial portion of it would be detrimental to the economic feasibility of retaining other designated buildings within the district of equal or greater merit

* These would be "C" rated or contributory buildings or any other buildings not included in the list of most highly rated buildings subject to demolition controls in clusters as defined in GDD.

which are part of the proposed project or achievement of more harmonious design relationships between proposed new construction and adjacent significant or contributory buildings; and

(3) the proposed demolition or substantial alteration, including new construction, would not erode the character of the district so as to jeopardize its eligibility for certification or continued certification as a local historic district.

Where alterations are proposed to a significant or contributory building, which involve changes in the facade or significant exterior features or in significant interior features not otherwise regulated, a conditional use permit would be required and the applicant would have to demonstrate and the Planning Commission would have to find, on advice of the Landmarks Preservation Advisory Board, as follows:

(1) that such alterations as affected significant exterior and interior features were consistent with the historic and architectural character of the building determined by the City on the basis of the Standards for Rehabilitation adopted by the Secretary of the Interior for certifying rehabilitation of certified historic structures (Appendix C);

(2) that such alterations would not erode the character of the district so as to jeopardize its eligibility for certification or continued certification as a local historic district; and

(3) that such alterations are in keeping with continued occupancy of the building and the commercial vitality of the district.

b. Prohibition Against Use of TDR Bonuses on Sites of Contributory Buildings within Conservation Districts Except in Special Circumstances

While TDR bonuses could not be used on sites of significant buildings wherever located in the C-3 districts, they would also not be allowed on sites of contributory buildings in conservation districts unless it was demonstrated, in addition to the findings required for a conditional use permit as indicated above, that use of such bonuses would result in the preservation and restoration of other contributory buildings or more highly rated buildings in the conservation district.

3. Transfer of Development Rights and Special Development Districts

It is proposed that unused floor area as defined by basic permitted floor area on the site of a significant building be allowed to be sold or transferred for use on any eligible transferee site and that such unused floor area be allowed to be used on such transferee site or sites without limitation and without special approval provided there is compliance with other zoning regulations. Eligible transferee sites would consist of (1) sites within the same zoning district not occupied by a significant building or, if within a conservation district, the site of a contributory building except as provided in the previous section; and (2) sites within special development districts designated for purposes of accommodating growth to be diverted from the conservation districts.

It is also proposed, to make such transfers more attractive, to delete current provisions allowing for transfer of one-half of unused floor area from sites not occupied by significant buildings to adjacent buildings unless such other building is a contributory building within a conservation district and the result of such transfer is to preserve and rehabilitate such contributory building.

It is intended that unused floor area or development rights could be sold openly and used on any eligible site when desired or banked for purposes of attaching them to a site when needed. Continuing transfers could be made so long as they were to eligible transferee sites and subject to any present or future maximum floor area ratios or height and bulk limits which would apply to such sites. In effect, there would be a pool of development credits which could be sold and traded. Additional bonus transfers could be obtained as described for the rehabilitation of significant buildings and could be used in the same manner.

The special development districts would be as described in GDD and the provisions allowing use of floor area ratios otherwise applicable in the C-3-O district would be incorporated for use of unused floor area ratio transferred from significant buildings in conservation districts. Transfers could occur without approval providing the requirements for recordation of a reduction in development potential and maintenance covenants were met. In order to encourage transfers and expedite the process, the City Attorney would prepare approved forms for transfers and recordations for use by owners in advance of need or desire.

4. City Support of a Land Trust to Trade in TDRs

In order to increase the likelihood and ease of using TDRs for preservation of significant buildings, the city should encourage the creation of a land trust or action by an organization such as the Trust for Public Lands to create a market in TDRs. Such an organization would attempt to obtain an initial "bank" of TDRs by soliciting donation of development rights from sites of significant buildings where owners would derive tax benefits from such donations or bargain sales to such organizations. It could also solicit contributions for the purpose of purchasing TDRs. With an initial bank of TDRs, the land trust would be able to offer rights for sale and enhance the possibility of establishing a market price for rights. Although the proposed strategy embodies those elements which are believed most likely to create a true market in TDRs, the existence of a bank of TDRs and a trust willing to enter the market would reduce the possibility of developers' being unable to purchase rights and enhance the creation of a real market. A trust could hold an auction of rights or options to them as was undertaken by the State Coastal Conservancy in its program in order to get a market started.

The City might also aid in the formation and activity of the trust, if necessary, by lending Community Development funds or other monies available to it for purposes of enabling the trust to make initial acquisitions, or it could make a deposit with a bank which was willing to lend on favorable terms against such a deposit. It is not recommended that the City actually spend money to purchase rights or engage in the banking of rights itself because of the legal and administrative difficulties, as well as the financial burden, which the City would face in undertaking such activity.

5. City Authority to Issue Marks Historical Rehabilitation Act Bonds

Under the Marks Act, the City could create a program to issue tax-exempt mortgage-backed revenue bonds for rehabilitation of historical buildings. The City may create such a program on a citywide basis or for particular areas. The City could either begin the program on a citywide basis with criteria established to give priority to landmarks and any other buildings which are threatened, or could begin the program in the downtown area or in proposed conservation districts on a pilot basis. Obviously, the existence of such financing would be very

attractive to those interested in rehabilitating older buildings and, in combination with Federal tax benefits, the retention and rehabilitation of historic buildings would be a very attractive alternative to redevelopment. A Marks Act bond program could be administered either by a city agency or by the Redevelopment Agency (without being limited to redevelopment project areas).

The major advantage of this program is that virtually all financial negotiations occur directly between the potential borrower and his bank or other lender. Once the borrower has found a lender willing to make a tax-exempt loan, the City processes the paper necessary to ensure that the project meets its criteria and to create the sale of a tax-exempt bond. The bank or other lender almost always administers the loan. Loans can be for construction or a combination of construction and take-out loans for terms up to 20 years. Interest rates are reported at 60% to 70% of prime.

There is one serious limitation on the use of Marks Act bonds under Federal income tax law: limitations on the amount of bonds which can be issued with the interest being tax-exempt. Marks Act bonds would be considered industrial development revenue bonds. As such, the amount of such bonds are generally limited to $1,000,000 (the first small issue exemption) although there are certain circumstances under which bonds of up to $10,000,000 may be exempt from taxation of the interest (second small issue exemption). For smaller buildings in the downtown area, even the smaller amounts permitted may be attractive where such bonds can be combined with other financing or where rehabilitation costs are not major costs. For larger buildings and major rehabilitation efforts, unless the rules governing the $10,000,000 exempt issues can be met, Marks Act bonds are not likely to be usable. The rules for meeting the second exemption requirements are very complex; essentially, they are intended to prevent the issuance of tax-exempt bonds for the benefit of persons who are engaged in substantial development in the jurisdiction by making ineligible those who have expended the difference between $10,000,000 and the cost of the project to which the bond relates on other capital projects in the City for three years before and after the bond issue. Such a provision would obviously substantially restrict the number of developers or owners who would qualify, although many building owners who do not own or who have not improved other property could qualify.

The second limitation on the ability to issue such bonds is present in Section 7.300 of the San Francisco charter. This section was amended in 1977 to require voter approval of all new revenue bond issues. Apparently, a Marks Act bond would be considered a revenue bond under the charter section since it is analogous to Marks-Foran Residential Rehabilitation Bonds which are specifically exempted from the voter-approval requirement. As a result, voter approval of a charter amendment or of such bond issues would be required. This would be the first step in using Marks Act bonds; a charter amendment should be sought to exempt such bonds for the same reasons that Marks-Foran Act bonds are exempt.

6. Solicit Certification of the Proposed Conservation Districts as Local Historic Districts for Tax Act Purposes or Nomination of Such Districts as National Register Districts

It is proposed that the City, after revisions to the Planning Code to create the conservation districts as proposed, solicit certification of the relevant Planning Code sections and the proposed districts for purposes of establishing that such districts are certified local historic districts. Such certification would make owners of contributory buildings to the districts (significant and contributory in local terms) eligible for favorable tax treatment on qualifying rehabilitation expenditures and for donation of conservation or facade easements. Since recent tax code amendments create the most favorable possible treatment for qualifying rehabilitation of certified historic structures, this has become a major incentive. However, there are two impacts on property owners of certifying the Planning Code sections creating such districts which should be mentioned. First, if a building is not a contributory building, certification of its non-contributory status must be sought to avoid any demolition expenditures being disallowed as deductible expenses and to qualify for credits available for older, non-historic buildings. Secondly, if rehabilitation is undertaken on a contributory building which is not in conformance with the Secretary of the Interior's Standards for Rehabilitation and not deemed a qualifying rehabilitation, then no investment tax credit would be available. The first impact is relatively easy to deal with as long as property owners know that they must seek de-certification. The City or Heritage could assist in the process of seeking certification that certain buildings are non-contributory en masse at the time the certification the districts were sought. The second limitation is

intended to prevent unsatisfactory rehabilitations of historic buildings and to preserve the qualifying status of the district and benefits to owners of contributory buildings, it is consistent with the proposal that alterations permitted in the conservation districts be reviewed and approved by the Planning Commission, on advice of the Landmarks Preservation Advisory Board, for conformance with those standards.

Certification of the City's Planning Code sections and districts can be sought directly by the City. The alternative process is to solicit direct designation of such districts or the parts of them identified in Splendid Survivors as National Register Districts. The latter course requires the consent of the owners of at least 50% of the property. While tax benefits may be sufficient to induce owner support, especially if local controls are as proposed, such a course of action obviously requires a great deal of organization and much greater time in obtaining certification.

7. Seek Relief from Regulations Penalizing Rehabilitation of Historic Buildings

Stringent requirements for building modifications to meet seismic requirements, accommodate handicapped access, provide specific forms of life safety improvements and other changes are typically triggered by rehabilitation of an older building. This fact often makes rehabilitation economically infeasible or unattractive by comparison with new construction. In some instances, it may be physically impossible, without extreme modifications to the building, to meet certain requirements. Efforts should be made, after investigations beyond the scope of this report, to modify local codes or, if necessary, seek changes in state requirements, to reduce or eliminate such requirements in those circumstances where they cannot feasibly be met.

EXCERPTS

DOWNTOWN PLAN

An ordinance of the

City and County of San Francisco

Effective October 17, 1985

Office of the Clerk
Board of Supervisors

GRANT DEHART

pursuant to the provisions of Section 309, may be located on a mezzanine level;

13. An interior space provided as an open space feature in accordance with th requirements of Section 138;

14. Floor area in C-3 districts devoted to child care facilities provided that:

(A) Allowable indoor space is no more or no less than 3,000 square feet an no more than 6,000 square feet; and

(B) The facilities are made available rent free; and

(C) Adequate outdoor space is provided adjacent, or easily accessible, t the facility. Spaces such as atriums, rooftops or public parks may be used if they mee licensing requirements for child care facilities; and

(D) The space is used for child care for the life of the building as long a there is a demonstrated need. No change in use shall occur without a finding by the City Planning Commission that there is a lack of need for child care and that the space will be used for a facility described in subsection 15 below dealing with cultural, educational, recreational, religious, or social service facilities;

15. Floor area in C-3 districts permanently devoted to cultural, educational, recreational, religious or social service facilities available to the general public at no cost or at a fee covering actual operating expenses, provided that such facilities are:

(A) Owned and operated by a nonprofit corporation or institution, or

(B) Are made available rent free for occupancy only by nonprofit corporations or institutions for such functions; and

16. In C-3 districts, floor space used for short-term parking and aisles incidental thereto when required pursuant to Section 309 in order to replace short-term parking spaces displaced by the building or buildings.

SEC. 102.19. Principal Facades. Exterior walls of a building which are adjacent to or front on a public street, park, or plaza.

SEC. 102.20. Story. That portion of a building, except a mezzanine as defined in the Building Code, included between the surface of any floor and the surface of the next floor above it, or if there is not floor above it, then the space between the surface of the floor and the ceiling next above it.

SEC. 102.21. Story, Ground. The lowest story of a building, other than a basement or cellar as defined in the Building Code.

SEC. 102.22. Street. A right-of-way, 30 feet or more in width, permanently dedicated to common and general use by the public, including any avenue, drive, boulevard, or similar way, but not including any freeway or highway without a general right of access for abutting properties.

SEC. 102.23. Structure. Anything constructed or erected which requires fixed location on the ground or attachment to something having fixed location on the ground.

SEC. 102.24. Structural Alterations. Any change in the supporting members of a building, such as bearing walls, columns, beams or girders.

SEC. 102.25. Use. The purpose for which land or a structure, or both, are designed, constructed, arranged, or intended, or for which they are occupied or maintained, let or leased.

SEC. 123. MAXIMUM FLOOR AREA RATIO.

(a) The limits upon the floor area ratio of buildings, as defined by this Code, shall be as stated in this section and Sections 124 through 128. The maximum floor area ratio for any building or development shall be equal to the sum of the basic floor area ratio for the

district, as set forth in Section 124 plus any premiums and floor area transfers which are applicable to such building or development under Sections 125, 127 and 128 and as restricted by the provisions of Sections 123(c) and (d) and 124(b) and (j).

(b) No building or structure or part thereof shall be permitted to exceed, except as stated in Sections 172 and 188 of this Code, the floor area ratio limits herein set forth for the district in which it is located.

(c) The amount of TDR that may be transferred to a development lot, as allowed by Section 128, is limited as follows: (1) The gross floor area of a structure on a lot in the C-3-O and C-3-O (SD) districts may not exceed a floor area ratio of 18:1 (2) The gross floor area of a structure on a lot in the C-3-R, C-3-G and C-3-S districts may not exceed a floor area ratio that is one and a half times the basic floor area limit for the district as provided in Section 124.

(d) The gross floor area of a structure on a lot on which is or has been located a Significant or Contributory Building may not exceed the basic floor area ratio limits stated in Section 124 except as provided in Section 128(c)(2).

SEC. 124. BASIC FLOOR AREA RATIO.

(a) Except as provided in Subsections (b), (c) and (e) of this section, the basic floor area ratio limits specified in the following table shall apply to each building or development in the districts indicated.

TABLE 1
Basic Floor Area Ratio Limits

District	Basic Floor Area Ratio Limit
RH-1(D), RH-1, RH-1(S), RH-2, RH-3, RM-1, RM-2	1.8 to 1
RM-3	3.6 to 1
RM-4	4.8 to 1
RC-1, RC-2	1.8 to 1
RC-3	3.6 to 1
RC-4	4.8 to 1
C-1, C-2	3.6 to 1
C-3-O	9.0 to 1
C-3-R	6.0 to 1
C-3-G	6.0 to 1
C-3-S	5.0 to 1
C-3-O (SD)	6.0 to 1
C-M	9.0 to 1
M-1, M-2	5.0 to 1

(b) In R districts, the above floor area ratio limits shall not apply to dwellings.

(c) In a C-2 district the basic floor area ratio limit shall be 4.8 to 1 for a lot which is nearer to an RM-4 or RC-4 district than to any other R district, and 10.0 to 1 for a lot which is nearer to a C-3 district than to any R district. The distance to the nearest R district or C-3 district shall be measured from the midpoint of the front line, or from a point directly across the street therefrom, whichever gives the greatest ratio.

(d) In the Automotive Special Use District, as described in Section 237 of this Code, the basic floor area ratio limit shall be 10.0 to 1.

(e) In the Northern Waterfront Special Use Districts, as described in Sections 240 through 240.3 of this Code, the basic floor area ratio limit in any C district shall be 5.0 to 1.

(f) For buildings in C-3-G and C-3-S districts other than those designated as Significant or Contributory pursuant to Article 11 of this Code, additional square footage above that permitted by the base floor area ratio limits set forth above may be approved for construction of dwellings on the site of the building affordable for 20 years to

households whose incomes are within 150 percent of the median income as defined herein in accordance with the conditional use procedures and criteria as provided in Section 303 of this code.

1. Any dwelling approved for construction under this provision shall be deemed a designated unit as defined below. Prior to the issuance by the Superintendent of the Bureau of Building Inspection (Superintendent) of a site or building permit to construct any designated unit subject to this Section, the permit applicant shall notify the Director of Planning and the Director of Property in writing whether the unit will be an owned or rental unit as defined in Section 313(a) of this Code.

2. Within 60 days after the issuance by the Superintendent of a site or building permit for construction of any unit intended to be an owned unit, the Director of Planning shall notify the City Engineer in writing identifying the intended owned unit, and the Director of Property shall appraise the fair market value of such unit as of the date of the appraisal, applying accepted valuation methods, and deliver a written appraisal of the unit to the Director of Planning and the permit applicant. The permit applicant shall supply all information to the Director of Property necessary to appraise the unit, including all plans and specifications.

3. Each designated unit shall be subject to the provisions of Sections 313(i) of this Code. For purposes of this Subsection and the application of Section 313(i) of this Code to designated units constructed pursuant to this Subsection, the definitions set forth in Section 313(a) shall apply, with the exception of the following definitions, which shall supersede the definitions of the terms set forth in Section 313(a):

(A) "Base price" shall mean 3.25 times the median income for a family of four (4) persons for the County of San Francisco as set forth in California Administrative Code Section 6932 on the date on which a housing unit is sold.

(B) "Base rent" shall mean .45 times the median income for the County of San Francisco as set forth in California Administrative Code Section 6932 for a family of a size equivalent to the number of persons residing in a household renting a designated unit.

(C) "Designated unit" shall mean a housing unit identified and reported to the Director by the sponsor of an office development project subject to this Subsection as a unit that shall be affordable to households of low or moderate income for 20 years.

(D) "Household of low or moderate income" shall mean a household composed of one or more persons with a combined annual net income for all adult members which does not exceed 150% of the qualifying limit for a median income family of a size equivalent to the number of persons residing in such household, as set forth for the County of San Francisco in California Administrative Code Section 6932.

(E) "Sponsor" shall mean an applicant seeking approval for construction of a project subject to this Subsection and such applicants' successors and assigns.

(g) In the Mid-South of Market Special Use District, as described in Section 249.1 of this Code, the basic floor area ratio limit for office uses shall be 2.0 to 1.

(h) The allowable gross floor area on a lot which is the site of an unlawfully demolished building that is governed by the provisions of Article 11 shall be the gross floor area of the demolished building for the period of time set forth in, and in accordance with the provisions of, Section 1114 of this Code, but not to exceed the basic floor area permitted by this Section.

(i) In calculating the permitted floor area of a new structure in a C-3 district, the lot on which an existing structure is located may not be included unless the existing structure and the new structure are made part of a single development complex, the existing structure is or is made architecturally compatible with the new structure, and, if the existing structure is in a Conservation District, the existing structure meets or is made to meet the standards of Section 1109(c), and the existing structure meets or is reinforced to meet the standards for seismic loads and forces of the 1975 Building Code. Determinations under this paragraph shall be made in accordance with the provisions of Section 309.

(j) In calculating allowable gross floor area on a preservation lot from which any TDRs have been transferred pursuant to Section 128, the amount allowed herein shall be decreased by the amount of gross floor area transferred.

SEC. 127. TRANSFER OF PERMITTED BASIC GROSS FLOOR AREA.

(a) When allowed. The maximum permitted gross floor area for any building or development on a lot may be increased by transfer to such lot of basic gross floor area that is permitted under Section 124 of this Code but unbuilt upon an adjacent lot which is occupied by a historical, architectural or aesthetic landmark that has been so designated by the Board of Supervisors pursuant to Article 10 of this Code. For the purposes of this section, an adjacent lot is one which either abuts for a distance not less than 25 feet along a side or rear lot line of the lot to which the basic gross floor area transfer is made (hereinafter referred to as the transferee lot), or would so abut for such a distance if not separated solely by a street or an alley.

(b) Required documentation. No transfer of permitted basic gross floor area shall be effective under this Section unless an instrument, legally sufficient in both form and content to effect such a transfer, has been entered into among all the parties concerned, except that if both the adjacent lot and the transferee lot are in one ownership no such instrument shall be necessary. An attested copy of the said instrument of transfer shall be filed with the Department of City Planning prior to approval by said Department of any building permit application affected by such transfer. In addition, no transfer of permitted basic gross floor area shall be effective under this Section in any case unless a further document in a form approved by the City Attorney has been executed by the parties concerned, and by the Zoning Administrator, and recorded in the office of the County Recorder, serving as a notice of the restrictions under this Section applying both to the adjacent lot and to the transferee lot by virtue of this arrangement for transfer of permitted basic gross floor area. This notice of restrictions shall include a specific reference to the aforesaid instrument of transfer, except where both the adjacent lot and the transferee lot are in the same ownership.

(c) Contents of required documents. Both the instrument of transfer and the notice of restrictions shall specify (1) the amount of permitted basic gross floor area to be transferred, the total amount permitted on the transferee lot by virtue of the transfer, and the remaining amount permitted on the adjacent lot; (2) the duration of the transfer, which shall be specified to be not less than the actual lifetime of any building on the transferee lot whose construction is made possible, in whole or in part, by the transfer; (3) the effects of any subsequent changes in the basic floor area ratio limit under this Code upon the permitted basic gross floor area for both lots; and (4) the effects of any subsequent changes in the size of either lot, whether by virtue of conveyance, condemnation or otherwise, upon the permitted basic gross floor area for both lots.

(d) Limitations. No transfer of permitted gross floor area shall serve to increase the total gross floor area permitted under this Code on the adjacent lot and the transferee lot taken together, either presently or prospectively. No building permit application shall be approved by the Department of City Planning at any time, nor shall any building permit be issued by any City department at any time, if the result of such approval or issuance would be to increase the total permitted gross floor area of both such lots taken together above such total as calculated on the basis of the floor area ratio limits prevailing at that time for such lots.

(e) Completed transfers. Any transfer of permitted gross floor area completed prior to the effective date of this section shall be effective notwithstanding the location of the transferee lot outside the C-3-O district and notwithstanding the aggregate transfer of more than one-half the gross floor area permitted on the adjacent lot under the basic floor area ratio limit, provided all other conditions of this section have been met.

(f) Any restrictions or limitations imposed upon any lot by virtue of the transfer of gross floor area permitted by this section shall remain in effect notwithstanding an amendment of this section which removes authorization for such a transfer.

SEC. 128. TRANSFER OF DEVELOPMENT RIGHTS IN C-3 DISTRICTS.

(a) Definitions.

1. Development Lot: A lot to which TDR may be transferred to increase th allowable gross floor area of development thereon beyond that otherwise permitted b Section 124.

2. Owner of record: The owner or owners of record in fee.

3. Preservation Lot: A parcel of land on which is either (i) a Significant o Contributory Building (as designated pursuant to Article 11); or (ii) a Category V buildin that has complied with the eligibility requirement for transfer of TDR as set forth i Section 1109(c); or (iii) a structure designated a landmark pursuant to Article 10 of thi Code. The boundaries of the Preservation Lot shall be the boundaries of the Assessor's lo on which the building is located at the time the ordinance or, as to Section 1109(c) resolution, making the designation is adopted unless boundaries are otherwise specified i the ordinance.

4. Transfer Lot: A Preservation Lot located in a C-3 District from which TDR may be transferred. A lot zoned P (public) may in no event be a Transfer Lot.

5. Transferable Development Rights (TDR): Units of gross floor area which may be transferred, pursuant to the provisions of this Section and Article 11 of this Code, from a Transfer Lot to increase the allowable gross floor area of a development on a Development Lot.

6. Unit of TDR: One unit of TDR is one square foot of gross floor area.

(b) Amount of TDR Available for Transfer. The maximum TDR available for transfer from a Transfer Lot consists of the difference between (aa) the allowable gross floor area permitted on the Transfer Lot by Section 124 and (bb) the gross floor area of the development located on the Transfer Lot.

(c) Eligibility of Development Lots and Limitation on Use of TDR on Development Lots. TDR may be used to increase the allowable gross floor area of a development on a Development Lot if the following requirements and restrictions are satisfied:

1. (i) The Transfer Lot and the Development Lot are located in the same C-3 Zoning District, or (ii) the Transfer Lot is located in a C-3-O or C-3-R District and the Development Lot is located in the C-3-O(SD) Special Development District; or (iii) the Transfer Lot is a Preservation Lot that contains a Significant building and is located in a C-3-G or C-3-S District and the Development Lot is located in the C-3-O(SD) Special District.

2. TDR may not be transferred for use on any lot on which is or has been located a Significant or Contributory building; provided that this restriction shall not apply if the designation of a building is changed to Unrated; nor shall it apply if the City Planning Commission finds that the additional space resulting from the transfer of TDR is essential to make economically feasible the reinforcement of a Significant or Contributory building to meet the standards for seismic loads and forces of the 1975 Building Code, in which case TDR may be transferred for that purpose subject to the limitations of this section and Article 11, including Section 1111.6. Any alteration shall be governed by the requirements of Sections 1111 to 1111.6.

3. Notwithstanding any other provision of this Section, development on a Development Lot is limited by the provisions of this Code, other than those on floor area ratio, governing the approval of projects, including the requirements relating to height, bulk, setback, sunlight access, and separation between towers, and any limitations imposed pursuant to Section 309 review applicable to the Development Lot. The total allowable gross floor area of a development on a Development Lot may not exceed the limitation imposed by Section 123(c).

(d) Effect of Transfer of TDR.

1. Transfer of TDR from a Transfer Lot permanently reduces the development potential of the Transfer Lot by the amount of the TDR transferred. In addition, transfer of TDR from a Preservation Lot containing a Contributory building or a landmark designated pursuant to Article 10 causes such building to become subject to the same

restrictions on demolition and alteration, and the same penalties and enforcement remedies, that are applicable to Significant buildings Category I, as provided in Article 11.

(e) Procedure for Determining TDR Eligibility

1. In order to obtain a determination of whether a lot is a Transfer Lot and, if it is, of the amount of TDR available for transfer, the owner of record of the lot may file an application with the Zoning Administrator for a Statement of Eligibility. The application for a Statement of Eligibility shall contain or be accompanied by plans and drawings and other information which the Zoning Administrator determines is necessary in order to determine whether a Statement of Eligibility can be issued. Any person who applies for a Statement of Eligibility prior to expiration of the time for request of reconsideration of designation authorized in Section 1105 shall submit in writing a waiver of the right to seek such reconsideration.

2. The Zoning Administrator shall, upon the filing of an application for a Statement of Eligibility and the submission of all required information, issue either a proposed Statement of Eligibility or a written determination that no TDR are available for transfer and shall mail that document to the applicant and to any other person who has filed with the Zoning Administrator a written request for a copy. Any appeal of the proposed Statement of Eligibility or determination of non-eligibility shall be filed with the Board of Permit Appeals within 20 days of the date of issuance of the document. If not appealed, the proposed Statement of Eligibility or the determination of non-eligibility shall become final on the 21st day after the date of issuance. The Statement of Eligibility shall contain at least the following information: (i) the name of the owner of record of the Transfer Lot; (ii) the address, legal description and Assessor's Block and Lot of the Transfer Lot; (iii) the C-3 use district within which the Transfer Lot is located; (iv) whether the Transfer Lot is a Preservation Lot or Development Lot; (v) if a Preservation Lot, whether the Transfer Lot contains a Significant or Contributory Building, a Category V building, or an Article 10 landmark; (vi) the amount of TDR available for transfer; and (vii) the date of issuance.

3. Once the proposed Statement of Eligibility becomes final, whether through lack of appeal or after appeal, the Zoning Administrator shall record the Statement of Eligibility in the Office of the County Recorder. The County Recorder shall be instructed to mail the original of the recorded document to the owner of record of the Transfer Lot and, if a copy of the document is presented at the time of the recordation, shall conform the copy and mail it to the Zoning Administrator.

(f) Cancellation of Eligibility.

1. If reasonable grounds should at any time exist for determining that a building on a Preservation Lot may have been altered or demolished in violation of Articles 10 or 11, including Sections 1110 and 1112 thereof, the Zoning Administrator may issue and record with the County Recorder a Notice of Suspension of Eligibility for the affected lot and, in cases of demolition of a Significant or Contributory building, a notice that the restriction on the floor area ratio of a replacement building, pursuant to Section 1114, may be applicable and shall mail a copy of such notice to the owner of record of the lot. The notice shall provide that the property owner shall have 20 days from the date of the notice in which to request a hearing before the Zoning Administrator in order to dispute this initial determination. If no hearing is requested, the initial determination of the Zoning Administrator is deemed final on the 21st day after the date of the notice, unless the Zoning Administrator has determined that the initial determination was in error.

2. If a hearing is requested, the Zoning Administrator shall notify the property owner of the time and place of hearing, which shall be scheduled within 21 days of the request, shall conduct the hearing, and shall render a written determination within 15 days after the close of the hearing. If the Zoning Administrator shall determine that the initial determination was in error, that officer shall issue and record a Notice of Revocation of Suspension of Eligibility. Any appeal of the determination of the Zoning Administrator shall be filed with the Board of Permit Appeals within 20 days of the date of the written determination following a hearing or, if no hearing has been requested, within 20 days

after the initial determination becomes final.

3. If after an appeal to the Board of Permit Appeals it is determined that an unlawful alteration or demolition has occurred, or if no appeal is taken of the determination by the Zoning Administrator of such a violation, the Zoning Administrator shall record in the Office of the County Recorder a Notice of Cancellation of Eligibility for the lot, and shall mail to the property owner a conformed copy of the recorded Notice. In the case of demolition of a Significant or Contributory building, the Zoning Administrator shall record a Notice of Special Restriction noting the restriction on the floor area ratio of the Preservation Lot pursuant to the provisions of Section 1114, and shall mail to the owner of record a certified copy of the Notice. If after an appeal to the Board of Permit Appeals it is determined that no unlawful alteration or demolition has occurred, the Zoning Administrator shall issue and record a Notice of Revocation of Suspension of Eligibility and, if applicable, a Notice of Revocation of the Notice of Special Restriction pursuant to Section 1114, and shall mail conformed copies of the recorded notices to the owner of record.

4. No notice recorded under this Section 128(f) shall affect the validity of TDR that have been transferred from the affected Transfer Lot in compliance with the provisions of this Section prior to the date of recordation of such notice, whether or not such TDR have been used.

(g) Procedure for Transfer of TDR.

1. TDR from a single Transfer Lot may be transferred as a group to a single transferee or in separate increments to several transferees. TDR may be transferred either directly from the original owner of the TDR to the owner of a Development Lot or to persons, firms or entities who acquire the TDR from the original owner of the TDR and hold them for subsequent transfer to other persons, firms, entities or to the owners of a Development Lot or Lots.

2. When TDR are transferred, they shall be identified in each Certificate of Transfer by a number. A single unit of TDR transferred from a Transfer Lot shall be identified by the number "1". Multiple units of TDR transferred as a group for the first time from a Transfer Lot shall be numbered consecutively from "1" through the number of units transferred. If a fraction of a unit of TDR is transferred, it shall retain its numerical identification. (For example, if 5,000-1/2 TDR are transferred in the initial transfer from the Transfer Lot, they would be numbered "1 through 5,000 and one-half of 5,001.) TDR subsequently transferred from the Transfer Lot shall be identified by numbers taken in sequence following the last number previously transferred. (For example if the first units of gross floor area transferred from a Transfer Lot are numbered 1 through 10,000, the next unit transferred would be number 10,001.) If multiple units transferred from a Transfer Lot are subsequently transferred separately in portions, the seller shall identify the TDR sold by numbers which correspond to the numbers by which they were identified at the time of their transfer from the Transfer Lot. (For example, TDR numbered 1 through 10,000 when transferred separately from the Transfer Lot in two equal portions would be identified in the two Certificates of Transfer as numbers 1 through 5,000 and 5,001 through 10,000.) Once assigned numbers, TDR retain such numbers for the purpose of identification through the process of transferring and using TDR. The phrase "numerical identification," as used in this section, shall mean the identification of TDR by numbers as described in this subsection.

3. Transfer of TDR from the Transfer Lot shall not be valid unless (i) a Statement of Eligibility has been recorded in the Office of the County Recorder prior to the date of recordation of the Certificate of Transfer evidencing such transfer and (ii) a Notice of Suspension of Eligibility or Notice of Cancellation of Eligibility has not been recorded prior to such transfer or, if recorded, has thereafter been withdrawn by an appropriate recorded Notice of Revocation or a new Statement of Eligibility has been thereafter recorded.

4. Transfer of TDR, whether by initial transfer from a Transfer Lot or by a subsequent transfer, shall not be valid unless a Certificate of Transfer evidencing such

transfer has been prepared and recorded. The Zoning Administrator shall prepare a form of Certificate of Transfer and all transfers shall be evidenced by documents that are substantially the same as the Certificate of Transfer form prepared by the Zoning Administrator, which form shall contain at least the following:

(i) for transfers from the Transfer Lot only:

(aa) execution and acknowledgement by the original owner of TDR as the transferor(s) of the TDR; and

(bb) execution and acknowledgement by the Zoning Administrator; and

(cc) a notice, prominently placed and in all capital letters, preceded by the underlined heading "Notice of Restriction," stating that the transfer of TDR from the Transfer Lot permanently reduces the development potential of the Transfer Lot by the amount of TDR transferred, with reference to the provisions of this section.

(ii) for all transfers:

(aa) the address, legal description, Assessor's Block and Lot, and C-3 use district of the Transfer Lot from which the TDR originates; and

(bb) the amount of TDR transferred; and

(cc) numerical identification of the TDR being transferred; and

(dd) the names and mailing addresses of the transferors and transferees of the TDR; and

(ee) execution and acknowledgement by the transferors and transferees of the TDR; and

(ff) a reference to the Statement of Eligibility, including its recorded instrument number and date of recordation, and a recital of all previous transfers of the TDR, including the names of the transferors and transferees involved in each transfer and the recorded instrument number and date of recordation of each Certificate of Transfer involving the TDR, including the transfer from the Transfer Lot which generated the TDR.

5. When a Certificate of Transfer for the transfer of TDR from a Transfer Lot is presented to the Zoning Administrator for execution, that officer shall not execute the document if a transfer of the TDR would be prohibited by any provision of this Section or any other provision of this Code. The Zoning Administrator shall, within 5 business days from the date that the Certificate of Transfer is submitted for execution, either execute the Certificate of Transfer or issue a written determination of the grounds requiring a refusal to execute the Certificate.

6. Each duly executed and acknowledged Certificate of Transfer containing the information required herein shall be presented for recordation in the Office of the County Recorder and shall be recorded by the County Recorder. The County Recorder shall be instructed to mail the original Certificate of Transfer to the person and address designated thereon and shall be given a copy of the Certificate of Transfer and instructed to conform the copy and mail it to the Zoning Administrator.

(h) Certification of Transfer of TDR for a Project on a Development Lot.

1. When the use of TDR is necessary for the approval of a building permit for a project on a Development Lot, the Superintendent of the Bureau of Building Inspection shall not approve issuance of the permit unless the Zoning Administrator has issued a written certification that the owner of the Development Lot owns the required number of TDR. When the transfer of TDR is necessary for the approval of a site permit for a project on a Development Lot, the Zoning Administrator shall impose as a condition of approval of the site permit the requirement that the Superintendent of the Bureau of Building Inspection shall not issue the first addendum to the site permit unless the Zoning Administrator has issued a written certification that the owner of the Development Lot owns the required number of TDR.

2. In order to obtain certification as required in Section 128(h)1, the permit applicant shall present to the Zoning Administrator:

(i) information necessary to enable the Zoning Administrator to prepare the Notice of Use of TDR, which information shall be at least the following:

(aa) the address, legal description, Assessor's Block and Lot, and zoning

classification of the Development Lot;

(bb) the name and address of the owner of record of the Development Lot;

(cc) amount and numerical identification of the TDR being used;

(dd) a certified copy of each Certificate of Transfer evidencing transfer to the owner of the Development Lot of the TDR being used; and

(ii) A report from a title insurance company showing the holder of record of the TDR to be used, all Certificates of Transfer of the TDR, and all other matters of record affecting such TDR. In addition to showing all such information, the report shall guarantee that the report is accurate and complete and the report shall provide that in the event that its guarantee or any information shown in the report is incorrect, the title company shall be liable to the City for the fair market value of the TDR at the time of the report. The liability amount shall be not less than $10,000 and no more than $1,000,000, the appropriate amount to be determined by the Zoning Administrator based on the number of TDR being used.

(iii) An agreement whereby the owner of the Development Lot shall indemnify the City against any and all loss, cost, harm or damage, including attorneys' fees, arising out of or related in any way to the assertion of any adverse claim to the TDR, including any loss, cost, harm or damage occasioned by the passive negligence of the City and excepting only that caused by the City's sole and active negligence. The indemnity agreement shall be secured by a first deed of trust on the Development Lot, or other security satisfactory to the Department of City Planning and the City Attorney.

3. If the Zoning Administrator determines that the project applicant has complied with the provisions of subsection (h)(2) and all other applicable provisions of this section, and that the applicant is the owner of the TDR, that officer shall transmit to the Superintendent of the Bureau of Building Inspection, with a copy to the project applicant, written certification that the owner of the Development Lot own the TDR. Prior to transmitting such certification, the Zoning Administrator shall prepare a document entitled Notice of Use of TDR stating that the TDR have been used and may not be further transferred, shall obtain the execution and acknowledgment on the Notice of the owner of record of the Development Lot, shall execute and acknowledge the Notice, shall record it in the Office of the County Recorder, and shall mail to the owner of record of the Development Lot a conformed copy of the recorded Notice. If the Zoning Administrator determines that the project applicant is not the owner of the TDR, or has not complied with all applicable provisions of this section, that determination shall be set forth in writing along with the reasons therefor. The Zoning Administrator shall either transmit certification or provide a written determination that certification is inappropriate within 10 business days after the receipt of all information required pursuant to subsection (h)(2).

(i) Cancellation of Notice of Use; Transfer from Development Lot.

1. The owner of a Development Lot for which a Notice of Use of TDR has been recorded may apply for a Cancellation of Notice of Use if (i) the building permit or site permit for which the Notice of Use was issued expires or was revoked or cancelled prior to completion of the work for which such permit was issued and the work may not be carried out; or (ii) any administrative or court decision is issued or any ordinance or initiative or law is adopted which does not allow the applicant to make use of the permit or (iii) a portion or all of such TDR are not used.

2. If the Zoning Administrator determines that the TDR have not been and will not be used on the Development Lot based on the reasons set forth in subsection (i)(1), the Zoning Administrator shall prepare the Cancellation of Notice of Use of TDR. If only a portion of the TDR which had been acquired are not being used, the applicant may identify which TDR will not be used and the Cancellation of Notice of Use of TDR shall apply only to those TDR. The Zoning Administrator shall obtain on the Cancellation of Notice of Use of TDR the signature and acknowledgment of the owner of record of the Development Lot as to which the Notice of Use of TDR was recorded, shall execute and

acknowledge the document, and shall record it in the office of the County Recorder.

3. Once a Cancellation of Notice of Use of TDR has been recorded, the owner of the Development Lot may apply for a Statement of Eligibility in order to transfer the TDR identified in that document. The procedures and requirements set forth in this Section governing the transfer of TDR shall apply to the transfer of TDR from the owner of a Development Lot after a Notice of Use has been filed, except for the provisions of this Section permanently restricting the development potential of a Transfer Lot upon the transfer of TDR; provided, however, that the district or districts to which the TDR may be transferred shall be the same district or districts to which TDR could have been transferred from the Transfer Lot that generated the TDR.

(j) Erroneous Notice of Use; Revocation of Permit If the Zoning Administrator determines that a Notice of Use of TDR was issued or recorded in error, that officer may direct the Superintendent of the Bureau of Building Inspection to suspend any permit issued for a project using such TDR, in which case the Superintendent shall comply with that directive. The Zoning Administrator shall thereafter conduct a noticed hearing in order to determine whether the Notice of Use of TDR was issued or recorded in error. If it is determined that the Notice of Use of TDR was issued or recorded in error, the Superintendent of the Bureau of Building Inspection shall revoke the permit; provided, however, that no permit authorizing such project shall be revoked if the right to proceed thereunder has vested under California law. If it is determined that the Notice of Use of TDR was not issued or recorded in error, the permit shall be reinstated.

(k) Effect of Repeal or Amendment. TDR shall convey the rights granted herein only so long and to the extent as authorized by the provisions of this Code. Upon repeal of such legislative authorization, TDR shall thereafter convey no rights or privileges. Upon amendment of such legislative authorization, TDR shall thereafter convey only such rights and privileges as are permitted under the amendment.

SEC. 132.1 SETBACKS; C-3 DISTRICTS

(a) Upper-Level Setbacks. Setbacks of the upper parts of a building abutting a public sidewalk in any C-3 district may be required, in accordance with the provisions of Section 309, as deemed necessary:

1. to preserve the openness of the street to the sky and to avoid the perception of overwhelming mass that would be created by a number of tall buildings built close together, with unrelieved vertical rise; or

2. to maintain the continuity of a predominant street wall along the street, provided however, that the setback required pursuant to this paragraph may not exceed the following dimensions:

DEPTH OF SETBACK (in feet)

Height of Street Wall in Feet	Street Width 64'-67'	68'-71'	72'-75'	76'-80'
68 or less	18	20	22	24
69 - 81	14	16	18	20
82 - 94	10	12	14	16
95 -107	8	10	12	14
108-120	6	8	10	12

(b) Market Street Setback. In order to preserve the predominant street wall, structures on the southeast side of Market Street between the southerly extension of the easterly line of the Powell Street right of way and Tenth Street shall be set back 25 feet from the Market Street property line at 90 feet.

(c) Separation of Towers.

1. Requirement. In order to provide light and air between structures, all

SEC. 1108. NOTICE OF DESIGNATION. When a building has been designated Significant or Contributory or its designation is changed pursuant to Section 1106, or when a new Conservation District is established or the boundary of a Conservation District changed pursuant to Section 1107, the Zoning Administrator shall notify each affected property owner by mail and shall cause a copy of the ordinance, or notice thereof, to be recorded in the office of the County Recorder.

SEC. 1109. PRESERVATION LOTS; ELIGIBILITY FOR TRANSFER OF DEVELOPMENT RIGHTS. For the purpose of transfer of development rights (TDR) as provided in Section 128 of this Code, lots on which are located Significant or Contributory Buildings, or Category V Buildings in those certain Conservation Districts and portions thereof as indicated in Section 8 of the Appendix relating to that district are eligible preservation lots as provided in this section:

(a) Significant Buildings. Lots on which are located buildings designated as Significant Buildings - Category I or Category II - are eligible to transfer the difference between the allowable gross floor area permitted on the lot by Section 124 of this Code and the gross floor area of the development on the lot, if all the requirements for transfer set forth in Section 128 are met. Lots on which are located Significant buildings which have been altered in conformance with the provisions of this Article retain eligibility for the transfer of TDR.

(b) Contributory Buildings. Lots on which are located buildings designated as Contributory Buildings - Category III or Category IV - are eligible to transfer the difference between the allowable gross floor area permitted on the lot by Section 124 of the Code and the gross floor area of the development on the lot, if all the requirements for transfer set forth in Section 128 are met. Alteration or demolition of such a building in violation of Section 1110 or Section 1112, or alterations made without a permit issued pursuant to Section 1111 - 1111.6, eliminates eligibility for the transfer of TDR; provided, however, that such eligibility may nonetheless be retained or acquired again if, pursuant to Section 1114(b), the property owner demonstrates as to any alteration that it was not major, or if the property owner restores the demolished or altered building. Once any TDR have been transferred from a Contributory building, the building is subject to the same restrictions on demolition and alteration as a Significant building. These restrictions may not be removed by the transfer of TDR back to the building.

(c) Category V Buildings in Conservation Districts. Where explicitly permitted in Section 8 of the Appendix establishing a Conservation District, lots located in such a District on which are located Category V buildings (designated as neither Significant nor Contributory) are eligible to transfer the difference between the allowable gross floor area permitted on the lot under Section 124 of the Code and the gross floor area of the development on the lot, if all the requirements for transfer set forth in Section 128 are met; provided, however, that a lot is eligible as a Preservation Lot pursuant to this section only if (1) the exterior of the building is substantially altered so as to make it compatible with the scale and character of the Significant and Contributory buildings in the district, including those features described in Sections 6 and 7 of the Appendix to Article 11 describing the relevant district, and has thus been determined a Compatible Rehabilitation, and the building meets or has been reinforced to meet the standards for seismic loads and forces of the 1975 Building Code or (2) the building on the lot is new, having replaced a Category V building, and has received approval as a Compatible Replacement Building, pursuant to Section 1113. The procedures governing these determinations are set forth in Section 309.

SEC. 1110. ALTERATION OF SIGNIFICANT OR CONTRIBUTORY BUILDINGS OR BUILDINGS IN CONSERVATION DISTRICTS. With respect to a designated Significant or Contributory Building or any Category V building in a Conservation District, no person shall carry out or cause to be carried out any alteration to the exterior of a building for which a permit is required pursuant to the Building Code unless the permit is approved

pursuant to the provisions of Section 1111 - 1111.6 of this Article; provided, however, that this approval is not required with respect to the owner of a Contributory Building of Category III who has not transferred any TDR and who elects to proceed with a major alteration without reference to Sections 1111 - 1111.6. Election to proceed without a permit pursuant to this Section may be made at the time that the Zoning Administrator determines that the proposed alteration is major pursuant to Section 1111.1. If no election is made at the time of the Zoning Administrator's determination that an alteration is major, the applicant may make such election at any time thereafter. Review under Sections 1111 - 1111.6 shall cease after such election has been made and the permit shall be processed without regard to the requirements of that section. Election shall be made in writing on a form provided by the Zoning Administrator. Where an owner elects not to proceed pursuant to Sections 1111 - 1111.6, the proposed alteration for which the application is filed shall be deemed not to meet the requirements of Section 1111.6, and if the alteration permit is issued and work commenced thereunder, the Zoning Administrator shall not issue a Statement of Eligibility for the lot on which the building is located.

SEC. 1111. APPLICATIONS FOR PERMITS TO ALTER. The Zoning Administrator may define categories of alterations which are deemed to be minor alterations and individual permits falling within those categories shall be reviewed and acted upon without referral to the Zoning Administrator for review pursuant to Sections 1111 - 1111.6. All other applications for permits to undertake any alteration of a building designated Significant or Contributory or a building in any Conservation District shall be referred to the Zoning Administrator by the Central Permit Bureau within five days of receipt. An applicant for a major alteration permit for a Category V building in any of the conservation districts which provides for such eligibility may request on the application a determination that if the proposed alteration is completed as approved, the building will be deemed a Compatible Rehabilitation under Section 1109(c) so that the lot on which the building is located becomes eligible as a Preservation Lot for the transfer of TDR.

SEC. 1111.1. Determination of Major Alteration. Within ten days after referral by the Central Permit Bureau, the Zoning Administrator shall determine in writing if the proposed alteration is a Major Alteration or a Minor Alteration.

(a) An alteration is considered Major if any of the following apply:

1. The alteration will substantially change, obscure or destroy exterior character-defining spaces, materials, features or finishes; or

2 The alteration would affect all or any substantial part of a building's structural elements, exterior walls or exterior ornamentation; or

3. The alteration occurs by virtue of construction which results in a substantial addition of height above the height of the building.

(b) An alteration is considered minor if:

1. The criteria set forth in subsection (a) do not apply; or

2. It is an alteration of the ground floor display areas within the architectural frame (piers and lintels) of the building to meet the needs of first floor commercial uses.

(c) The Zoning Administrator shall mail to the applicant and any individuals or organizations who so request the written determination as to the category of the proposed alteration. Decisions of the Zoning Administrator may be appealed to the Board of Permit Appeals within 10 days of the written determination in the manner provided in Section 308.2.

(d) Permits determined to be for minor alterations shall be returned, with that determination noted, to the Central Permit Bureau for further processing; provided, however, that the Zoning Administrator may take any action with respect to the application otherwise authorized.

SEC. 1111.2. Referral of Applications for Major Alterations to Landmarks

Preservation Advisory Board; Review by the Department of City Planning.

(a) Upon determination that the proposed alteration is a major alteration, the Director of Planning shall refer applications for permits to alter Significant and Contributory buildings to the Landmarks Preservation Advisory Board for its report and recommendation, which shall be rendered within thirty days. Said time limit for the Board to render its report may be extended by the Department of City Planning for an additional thirty days to render its report in the case of complex alterations, multiple hearings, or upon request of the applicant. If the Board fails to submit a report and recommendation within the time allowed, the matter may be considered without reference to such report and recommendation.

(b) Simultaneously with the proceedings before the Landmarks Board, the application shall be reviewed by the Department of City Planning.

(c) Applications for permits to alter any Category V building in a Conservation District which alteration is determined to be major shall be governed by the standards of Section 1111.6(c) and the procedures set forth in Section 309.

SEC. 1111.3. Recommendation of the Director of Planning. After considering any report and recommendation submitted by the Landmarks Preservation Advisory Board, the Director of Planning shall make a determination on the application and shall submit a written recommendation containing findings to the Planning Commission. The recommendation may be to approve, to approve with conditions, or disapprove the application for alteration, and, where applicable, the application for a determination that the building is a Compatible Rehabilitation. The Commission, the applicant and any other person who so requests shall be supplied with a copy of reports and recommendations of the Landmarks Preservation Advisory Board and the findings and recommendations of the Director of Planning.

SEC. 1111.4. CONSIDERATION AND DECISION BY THE CITY PLANNING COMMISSION.

(a) The recommendation of the Director of Planning shall be placed on the consent calendar of the City Planning Commission; provided, however, that upon the request of the applicant or of any person prior to the City Planning Commission meeting or by a member of the Commission at the meeting, the matter may be removed from the consent calendar and calendared for a public hearing before the Planning Commission at a later meeting, which shall be the next regular meeting of the Commission unless the applicant otherwise consents.

(b) Notice of the time, place and purpose of the hearing before the City Planning Commission shall begin given as follows:

1. By mail to the applicant
2. When the application is for alteration of a building located in a Conservation District, by mail not less than 10 days prior to the date of the hearing to the owners of all real property within 300 feet of property that is the subject of the application.

SEC. 1111.5. DECISION BY THE CITY PLANNING COMMISSION. The Planning Commission may approve, disapprove or approve with conditions an application for an alteration permit and, where applicable, for a determination that the building is a Compatible Rehabilitation, and shall make findings in support of its decision. If the Planning Commission approves the recommendation of the Director of Planning, it may adopt or modify the findings of the Director of Planning as appropriate. Where the Planning Commission disapproves the recommendations of the Director of Planning, it shall make findings supporting its decision. If the Commission disapproves the application for a permit to alter, it shall recommend disapproval to the Central Permit Bureau which shall deny the application. The Planning Commission's determination that a building qualifies or fails to qualify as a Compatible Rehabilitation is a final administrative decision. Any decision of the Planning Commission rendered pursuant to this Section shall

be rendered within 30 days from the date of conclusion of the hearing.

SEC. 1111.6. STANDARDS AND REQUIREMENTS FOR REVIEW OF APPLICATIONS FOR ALTERATIONS. The Board of Permit Appeals, the City Planning Commission, the Director of Planning, and the Landmarks Board shall be governed by the following standards in the review of applications for major alteration permits.

(a) The proposed alteration shall be consistent with and appropriate for the effectuation of the purposes of this Article 11.

(b) For Significant Buildings - Categories I and II and for Contributory Buildings - Categories III and IV, proposed alterations of structural elements and exterior features ((and, if designated pursuant to the provisions of Article 10, significant interiors)) shall be consistent with the architectural character of the building, and shall comply with the following specific requirements:

1. The distinguishing original qualities or character of the building may not be damaged or destroyed. Any distinctive architectural feature which affects the overall appearance of the building shall not be removed or altered unless it is the only feasible means to protect the public safety.

2. The integrity of distinctive stylistic features or examples of skilled craftsmanship that characterize a building shall be preserved.

3. Distinctive architectural features which are to be retained pursuant to paragraph (1) but which are deteriorated shall be repaired rather than replaced, whenever possible. In the event replacement is necessary, the new material shall match the material being replaced in composition, design, color, texture and other visual qualities. Repair or replacement of missing architectural features shall be based on accurate duplication of features, substantiated by historic, physical or pictorial evidence, if available, rather than on conjectural designs or the availability of different architectural elements from other buildings or structures. Replacement of non-visible structural elements need not match or duplicate the material being replaced.

4. Contemporary design of alterations is permitted provided that such alterations do not destroy significant exterior architectural material and that such design is compatible with the size, scale, color, material and character of the building and its surroundings.

5. The degree to which distinctive features need be retained may be less when the alteration is to exterior elements not constituting a part of a principal facade or when it is an alteration of the ground floor frontage in order to adapt the space for ground floor uses.

6. In the case of Significant Buildings -- Category I, any additions to height of the building (including addition of mechanical equipment) shall be limited to one story above the height of the existing roof, shall be compatible with the scale and character of the building, and shall in no event cover more than 75% of the roof area.

7. In the case of Significant Buildings -- Category II, a new structure or addition, including one of greater height than the existing building, may be permitted on that portion of the lot not restricted in Appendix B even if such structure or addition will be visible when viewing the principal facades at ground level, provided that the structure or addition does not affect the appearance of the retained portion as a separate structure when so viewing the principal facades and is compatible in form and design with the retained portion. Alteration of the retained portion of the building is permitted as provided in paragraphs 1 through 6 of this subsection (b).

(c) Within Conservation Districts, all major exterior alterations, of Category V buildings, shall be compatible in scale and design with the District as set forth in Sections 6 and 7 of the appendix which describes the District.

SEC. 1111.7. PERMITS FOR SIGNS.

(a) Wherever a permit for a sign is required pursuant to Article 6 of this Code, an application for such permit shall be governed by the provisions of this Section in addition

to those of Article 6.

(b) Apart from and in addition to any grounds for approval or disapproval of the application under Article 6, an application involving a permit for a business sign, or general advertising sign, identifying sign, or name plate to be located on a Significant or Contributory building or any building in a Conservation District may be disapproved, or approved subject to conditions if the proposed location, materials, means of illumination or method or replacement of attachment would adversely affect the special architectural, historical or aesthetic significance of the building or the Conservation District. No application shall be denied on the basis of the content of the sign.

(c) The Director of Planning shall make the determination required pursuant to subsection (b). Any permit applicant may appeal the determination of the Director of Planning to the City Planning Commission by filing a notice of appeal with the Secretary of the Commission within 10 days of the determination. The City Planning Commission shall hear the appeal and make its determination within 30 days of the filing of the notice of appeal.

SEC. 1112. DEMOLITION OF SIGNIFICANT AND CONTRIBUTORY BUILDINGS AND BUILDINGS IN CONSERVATION DISTRICTS. No person shall demolish or cause to be demolished all or any part of a Significant or Contributory Building or any building in a Conservation District without obtaining a demolition or alteration permit pursuant to the provisions of this Article. Applications for permits to demolish Category V buildings located outside a Conservation District may be processed without reference to this Article.

SEC. 1112.1. APPLICATIONS FOR A PERMIT TO DEMOLISH. Applications for a permit to demolish any Significant or Contributory Building or any building in a Conservation District shall comply with the provisions of Section 1006.1 of Article 10 of this Code.

In addition to the contents specified for applications in Section 1006.1 of Article 10, any application for a permit to demolish a Significant building, or a Contributory building from which TDR have been transferred, on the grounds stated in Section 1112.7(a)(1), shall contain the following information:

(a) For all property:

1. The amount paid for the property;

2. The date of purchase, the party from whom purchased, and a description of the business or family relationship, if any, between the owner and the person from whom the property was purchased;

3. The cost of any improvements since purchase by the applicant and date incurred;

4. The assessed value of the land, and improvements thereon, according to the most recent assessments;

5. Real estate taxes for the previous two years;

6. Annual debt service, if any, for the previous two years;

7. All appraisals obtained within the previous five years by the owner or applicant in connection with his or her purchase, financing or ownership of the property;

8. Any listing of the property for sale or rent, price asked and offers received, if any;

9. Any consideration by the owner for profitable and adaptive uses for the property, including renovation studies, plans, and bids, if any; and

(b) For income producing property:

1. Annual gross income from the property for the previous four years;

2. Itemized operating and maintenance expenses for the previous four years;

3. Annual cash flow for the previous four years.

Applications for the demolition of any Significant or Contributory Building shall also contain a description of any Transferable Development Rights or the right to such rights

which have been transferred from the property, a statement of the quantity of such rights and untransferred rights remaining, the amount received for rights transferred, the transferee, and a copy of each document effecting a transfer of such rights.

SEC. 1112.2. DISPOSITION OF APPLICATIONS TO DEMOLISH CONTRIBUTORY BUILDINGS AND UNRATED BUILDINGS IN CONSERVATION DISTRICTS.

(a) The Zoning Administrator shall determine, within 5 days of acceptance of a complete application, the designation of the building and, with respect to Contributory buildings, whether any TDR have been transferred from the lots of such buildings.

(b) If the Zoning Administrator determines that TDR have been transferred from the lot of a Contributory building, the application for demolition of that building shall be reviewed and acted upon as if it applied to a Significant building.

(c) The Zoning Administrator shall approve any application for demolition of a Contributory building in a Conservation District from which no TDR have been transferred, or an Unrated building located in a Conservation District, if a building or site permit has been lawfully issued for a replacement structure on the site, in compliance with Section 1113. The Zoning Administrator shall approve an application for demolition of a Significant building - Category II if a building or site permit has been lawfully issued for an alteration or replacement structure on the portion of the site which would be affected by the demolition, in compliance with Section 1111.6(b)(7). The Zoning Administrator shall disapprove any application for a demolition permit where the foregoing requirement has not been met; provided, however, that the Zoning Administrator shall approve any otherwise satisfactory application for such a permit notwithstanding the fact that no permit has been obtained for a replacement structure if the standards of Section 1112.7 for allowing demolition of a Significant building are met.

(d) The Zoning Administrator shall approve applications to permit demolition of a Contributory Building - Category III from which no TDR have been transferred only if a building or site permit for a replacement building on the same site has been approved, and it has been found, pursuant to review under the procedural provisions of Section 309, that the proposed replacement will not adversely affect the character, scale or design qualities of the general area in which it is located, either by reason of the quality of the proposed design or by virtue of the relation of the replacement structure or structures to their setting. Notwithstanding the preceding sentence, the Zoning Administrator shall approve any such demolition permit application if the standards of Section 1112.7 for allowing demolition of a Significant building are met.

SEC. 1112.3. APPLICATIONS TO DEMOLISH SIGNIFICANT BUILDINGS OR CONTRIBUTORY BUILDINGS FROM WHICH TDR HAVE BEEN TRANSFERRED; ACCEPTANCE AND NOTICE. Upon acceptance as complete of applications for a permit to demolish any Significant building or to demolish any Contributory building from which TDR have been transferred, the application shall be placed on the agenda of the Planning Commission for hearing.

SEC. 1112.4. REFERRAL TO THE LANDMARKS PRESERVATION ADVISORY BOARD PRIOR TO HEARING; REVIEW BY THE DIRECTOR OF PLANNING. The application for a permit to demolish a building covered by Section 1112.3 shall be referred to the Landmarks Preservation Advisory Board and considered by said Board pursuant to the provisions of Section 1006.4 of this Code. The Director of Planning shall prepare a report and recommendation for the Planning Commission. If the Landmarks Board does not act within 30 days of referral to it, the Planning Commission may proceed without a report and recommendation from the Landmarks Board.

SEC. 1112.5. PLANNING COMMISSION HEARING AND DECISION. The application shall be heard by the Planning Commission. Notice of the hearing shall be given in the manner set forth in Section 309(c). In such proceedings, the applicant has the burden of

establishing that the criteria governing the approval of applications set forth in Section 1112.7 have been met.

SEC. 1112.6. DECISION OF THE PLANNING COMMISSION. The Planning Commission may approve, disapprove or approve with conditions, the application, and shall make findings relating its decision to the standards set forth in Section 1112.7. The decision of the Planning Commission shall be rendered within 30 days from the date of conclusion of the hearing.

SEC. 1112.7. STANDARDS FOR REVIEW OF APPLICATIONS TO DEMOLISH. The Board of Permit Appeals, the City Planning Commission, the Director of Planning, and the Landmarks Board shall follow the standards in this section in their review of applications for a permit to demolish any Significant or Contributory building from which TDR have been transferred.

No demolition permit may be approved unless: (1) it is determined that under the designation, taking into account the value of Transferable Development Rights and costs of rehabilitation to meet the requirements of the Building Code or other city, state or federal laws, the property retains no substantial remaining market value or reasonable use; or (2) the Superintendent of the Bureau of Building Inspection or the Chief of the Bureau of Fire Prevention and Public Safety determines, after consultation, to the extent feasible, with the Department of City Planning, that an imminent safety hazard exists and that demolition of the structure is the only feasible means to secure the public safety. Costs of rehabilitation necessitated by alterations made in violation of Section 1110, by demolition in violation of Section 1112, or by failure to maintain the property in violation of Section 1117, may not be included in the calculation of rehabilitation costs under subsection (1).

SEC. 1113. NEW AND REPLACEMENT CONSTRUCTION IN CONSERVATION DISTRICTS. No person shall construct or cause to be constructed any new or replacement structure or add to any existing structure in a Conservation District unless it is found that such construction is compatible in scale and design with the District as set forth in Sections 6 and 7 of the Appendix which describes the District. Applications for a building or site permit to construct or add to a structure in any Conservation District shall be reviewed pursuant to the procedures set forth in Section 309 and shall only be approved pursuant to Section 309 if they meet the standards set forth herein. If a building or site permit application for construction of a building is approved pursuant to this section and if the building is constructed in accordance with such approval, and if the building is located in a Conservation District for which, pursuant to Section 8 of the Appendix establishing that district, such a transfer is permitted, the building shall be deemed a Compatible Replacement building, and the lot on which such building is located shall be eligible as a Preservation Lot for the transfer of TDRs.

SEC. 1114. UNLAWFUL ALTERATION OR DEMOLITION.

(a) In addition to any other penalties provided in Section 1119 or elsewhere, alteration or demolition of a Significant or Contributory building or any building within a Conservation District in violation of the provisions of this Article shall eliminate the eligibility of the building's lot as a Preservation Lot, and such lot, if it is the site of an unlawfully demolished Significant building, or Contributory Building from which TDR have been transferred, may not be developed in excess of the floor area ratio of the demolished building for a period of 20 years from the unlawful demolition. No department shall approve or issue a permit that would authorize construction of a structure contrary to the provisions of this section.

(b) A property owner may be relieved of the penalties provided in Subsection (a) if: (1) as to an unlawful alteration or demolition, the owner can demonstrate to the Zoning Administrator that the violation did not constitute a major alteration as defined in

Section 1111.1; or (2) as to an unlawful alteration, the owner restores the original distinguishing qualities and character of the building destroyed or altered, including exterior character-defining spaces, materials, features, finishes, exterior walls and exterior ornamentation. A property owner who wishes to effect a restoration pursuant to subsection (b)(2) shall, in connection with the filing of a building or site permit application, seek approval of the proposed restoration by reference to the provisions of this section. If the application is approved and it is determined that the proposed work will effect adequate restoration, the City Planning Commission shall so find. Upon such approval, and the completion of such work, the lot shall again become an eligible Preservation Lot and the limitation on floor area ratio set forth in subsection (a) shall not thereafter apply. The City Planning Commission may not approve the restoration unless it first finds that the restoration can be done with a substantial degree of success. The determination under this Subsection (b)(2) is a final administrative decision.

SEC. 1115. CONFORMITY WITH OTHER CITY PERMIT PROCESSES. Except where explicitly so stated, nothing in this Article shall be construed as relieving any person from other applicable permit requirements. The following requirements are intended to insure conformity between existing City permit processes and the provisions of this Article:

(a) Upon the designation of a building as a Significant or Contributory Building, or upon the designation of the Conservation District, the Zoning Administrator shall inform the Central Permit Bureau of said designation or, in the case of a Conservation District, of the boundaries of said District and a complete list of all the buildings within said District and their designations. The Central Permit Bureau shall maintain a current record of such Buildings and Conservation Districts.

(b) Upon receipt of any application for a building permit, demolition permit, site permit, alteration permit, or any other permit relating to a Significant or Contributory Building or a building within a designated Conservation District, the Central Permit Bureau shall forward such application to the Department of City Planning, except as provided in Section 1111. If the Zoning Administrator determines that the application is subject to provisions of this Article, processing shall proceed under the provisions of this Article. The Central Permit Bureau shall not issue any permit for construction, alteration, removal or demolition of any structure, or for any work involving a Significant or Contributory building or a building within a Conservation District unless either the Zoning Administrator has determined that such application is exempt from the provisions of this Article, or processing under this Article is complete and necessary approvals under this Article have been obtained. The issuance of any permit by a City department or agency that is inconsistent with any provision of this Article may be revoked by the Superintendent of the Bureau of Building Inspection pursuant to Section 303(e) of the San Francisco Building Code.

(c) No abatement proceedings or enforcement proceedings shall be undertaken by any department of the City for a Significant or Contributory building or a building within a Conservation District without, to the extent feasible, prior notification of the Department of City Planning. Such proceedings shall comply with the provisions of this Article where feasible.

SEC. 1116. UNSAFE OR DANGEROUS CONDITIONS. Where the Superintendent of the Bureau of Building Inspection or the Chief of the Bureau of Fire Prevention and Public Safety determines that a condition on or within a Significant or Contributory building is unsafe or dangerous and determines further that repair or other work rather than demolition will not threaten the public safety, said official shall, after consulting with the Department of City Planning, to the extent feasible, determine the measures of repair or other work necessary to correct the condition in a manner which, insofar as it does not conflict with state or local requirements, is consistent with the purposes and standards set forth in this Article.

SEC. 1117. MAINTENANCE REQUIREMENTS AND ENFORCEMENT THEREOF.

(a) Maintenance. The owner, lessee, or other person in actual charge of a Significant or Contributory building shall comply with all applicable codes, laws and regulations governing the maintenance of property. It is the intent of this section to preserve from deliberate or inadvertent neglect the exterior features of buildings designated Significant or Contributory, and the interior portions thereof when such maintenance is necessary to prevent deterioration and decay of the exterior. All such buildings shall be preserved against such decay and deterioration and free from structural defects through prompt corrections of any of the following defects:

1. Facades which may fall and injure members of the public or property.

2. Deteriorated or inadequate foundation, defective or deteriorated flooring or floor supports, deteriorated walls or other vertical structural supports.

3. Members of ceilings, roofs, ceiling and roof supports or other horizontal members which sag, split or buckle due to defective material or deterioration.

4. Deteriorated or ineffective waterproofing of exterior walls, roofs, foundations or floors, including broken windows or doors.

5. Defective or insufficient weather protection for exterior wall covering, including lack of paint or weathering due to lack of paint or other protective covering.

6. Any fault or defect in the building which renders it not properly watertight or structurally unsafe.

(b) Enforcement Procedures. The procedures set forth in Building Code Section 203 governing unsafe buildings or property shall be applicable to any violations of this Section.

SEC. 1118. FILING FEES AND PROVISIONS FOR EXEMPTION. Fees under this section shall be collected by the Central Permit Bureau as follows:

(a) For each application for designation or change of designation of a Significant or Contributory building, the fee shall be $500.

(b) For each application for designation or change of boundary of a Conservation District, the fee shall be $500.

(c) An application for a permit for alteration of a Significant or Contributory building or building within a designated Conservation District which the Zoning Administrator has deemed minor as provided in Section 1111 or 1111.1 shall have no fee in addition to other fees which may be applicable.

(d) An application for a permit for alteration not deemed minor, as described in subsection (c) above, shall be $100. This fee shall be in addition to any fee otherwise required for permits to alter or demolish; provided, however, that if the permit is for alteration of a Contributory Building located outside a Conservation District from which no TDR have been transferred, and the applicant elects to proceed without issuance of a permit pursuant to sections 1111 - 111.6, the fee shall be $25.00.

(e) An application for a permit to demolish a Significant or Contributory building shall be $500. This fee shall be in addition to any fee otherwise required for permits to alter or demolish. However, no fee in addition to that otherwise required for a demolition permit shall be charged for an application to demolish a Contributory building located outside a Conservation District from which no TDR have been transferred or a Category V building in a Conservation District from which no TDR have been transferred.

(f) For each application for a Statement of Eligibility, execution of a Certificate of Transfer, and Certification of Transfer of TDR pursuant to Section 128, the fee shall be $200.

(g) For each application for a certification of transfer of TDR, the fee shall be $200.

(h) For each permit application subject to Section 309 review, the fee shall be the same as an application for a conditional use permit.

(i) Exemption. Any organizations exempt from federal income taxes under Internal Revenue Code Section 501(c)(3) shall be exempt from paying the fees specified in this section.

New York City

74-79

Transfer of Development Rights from Landmark Sites

In all districts except R1, R2, R3, R4, or R5 Districts or C1 or C2 Districts mapped within such districts, for new *developments* or *enlargements*, the City Planning Commission may permit *development* rights to be transferred to adjacent lots from lots occupied by landmark *buildings* † *or other structures*, may permit the maximum permitted *floor area* on such adjacent lot to be increased on the basis of such transfer of development rights, may permit, in the case of residential *developments* or *enlargements*, the minimum required *open space* or the minimum *lot area per room* to be reduced on the basis of such transfer of development rights, may permit variations in the front height and setback regulations and the regulations governing the size of required loading berths, and minor variations in *plaza*, *arcade* and *yard* regulations, for the purpose of providing a harmonious architectural relationship between the *development* or † *enlargement* and the landmark *building or other structure*.

† Where a *zoning lot* occupied by a landmark *building or other structure* is located in a *Residence District*, the Commission may modify the applicable regulation of primary business entrances, *show windows*, *signs* and entrances and exits to *accessory* off-street loading berths on the "adjacent lot" in a *Commercial District* provided that such modifications will not adversely affect the harmonious relationship between the *building* † on the "adjacent lot" and landmark *building or other structure*.

For the purposes of this Section, the term "adjacent lot" shall mean a lot which is contiguous to the lot occupied † by the landmark *building or other structure* or one which is across a *street* and opposite to the lot occupied † by the landmark *building or other structure* or, in the case of a *corner lot*, one which fronts on the same *street* intersection as the lot occupied by the landmark *building* † *or other structure*. It shall also mean in the case of lots located in C5-3, C5-5, C6-6, C6-7 or C6-9 Districts 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 or other* † *structure*. 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 or other structure*" 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 Admin— † istrative Code, but shall not include those portions of *zoning lots* used for cemetery purposes, statues, † monuments and bridges. No transfer of development rights is permitted pursuant to this Section from those portions of *zoning lots* used for cemetery purposes, any structures within historic districts, statues, monuments or bridges.

The grant of any special permit authorizing the transfer and use of such *development rights* shall be in accordance with all the regulations set forth in Sections 74-791 (Requirements for application), 74-792 (Conditions and limitations), and 74-793 (Transfer instruments and notice of restrictions).

Italicized words are defined in Section 12-10.

74-69

Seaplane Bases

In all districts, the City Planning Commission may permit seaplane bases provided that the following findings are made:

(a) That such *use* and the take-off and landing operations it serves are so located as not to impair the essential character or future *use* or *development* of the surrounding area.

(b) That such *use* is so located as to draw a minimum of vehicular traffic to and through local streets in *residential* areas.

The City Planning Commission shall refer the application to the Federal Aviation Agency for the report of such agency as to whether the seaplane base is either an integral part of, or will not interfere with, the general plan of airports for New York City and the surrounding metropolitan region.

The City Planning Commission may prescribe appropriate additional conditions and safeguards to minimize adverse effects on the character of the surrounding area.

The City Planning Commission shall require the provision of adequate *accessory* off-street parking spaces necessary to prevent the creation of traffic congestion caused by the curb parking of vehicles generated by such *use* and shall determine the required spaces in accordance with the purposes established in this resolution.

74-70 NON-PROFIT HOSPITAL STAFF DWELLINGS

In all *Residence Districts*, or in C1, C2, C3, C4, C5, C6, or C7 Districts, the City Planning Commission may permit *non-profit hospital staff dwellings* located on a *zoning lot*, no portion of which is located more than 1,500 feet from the non-profit or voluntary hospital and related facilities, provided that the following findings are made:

(a) That the *bulk* of such *non-profit hospital staff dwelling* and the density of population housed on the site will not impair the essential character or the future *use* or *development* of the surrounding area.

(b) The the number of *accessory* off-street parking spaces provided for such *use* will be sufficient to prevent undue congestion of *streets* by such *use*.

The City Planning Commission may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area.

74-71

Landmark Preservation

74-711

Landmark preservation in all districts

In all districts, upon application of the Landmarks Preservation Commission, the City Planning Commission may permit modification of the *use* and *bulk* regulations, except *floor area ratio* regulations, applicable to *zoning lots* with existing *buildings* provided that the following findings are made:

(a) That the said *zoning lot* contains a landmark designated by the Landmarks Preservation Commission, or that said *zoning lot* lies within a Historic District designated by the landmarks Preservation Commission; and

(b) That a program has been established for continuing maintenance that will result in the preservation of the subject *building* or *buildings*; and

(c) That such *bulk* modifications relate harmoniously to all structures or *open space* in the vicinity in terms of scale, location and access to light and air in the area, as determined by the City Planning Commission.

(Continued next page)

Italicized words are defined in Section 12-10.

74-711 (continued)

(d) That the modification of *use* regulations will have minimal adverse effects on the conforming *uses* in the surrounding area.

Before applying to the City Planning Commission for such modification of *bulk* and *use* regulations, the Landmarks Preservation Commission shall obtain a report from the Department of Buildings and the Fire Department.

For such existing *buildings* or portion thereof being converted to *residential use*, the City Planning Commission shall make the following findings:

(1) that the gross *residential floor area per room* shall be at least equal to the requirement set forth herein:

Total Existing *FAR*	Required Gross *Floor Area Per Room* (S.F.)
below 3.4	215
† between 3.4 and 7.5	240
above 7.5	300

† However, for such *buildings* in zoning districts requiring mandatory compliance with the Quality Housing Program the average *net square feet of a dwelling unit* or *rooming unit* as defined in Section 28-02 (Definitions) shall not be less than as set forth in Section 28-21 (Size of Dwelling Units).

(2) that for *buildings* with a total existing FAR above 7.5, there shall be at least 12 square feet of social or recreational space for each *residential room* except where the Landmarks Preservation Commission certifies that the provision of such space will adversely affect the landmark.

(3) that the gross *floor area* of any mezzanine constructed within a *dwelling unit* shall not exceed 33⅓ percent of the *floor area* contained within the residential unit. The *floor area* of such mezzanine shall not be included in gross residential *floor area* for purposes of determining the minimum required number of *residential rooms* stated in (1) above.

(4) that the design of *building* interiors will result in interior useable space of high quality and amenity in terms of such elements as dwelling size, privacy, ventilation and storage facilities.

When such conversions involve the relocation of non-residential tenants the Commission shall require the payment of a conversion contribution in accordance with the provisions of Section 15-50 through Section 15-58.

The City Planning Commission may prescribe appropriate additional conditions and safeguards which will enhance the character of the *development* of said *zoning lot*.

74-712

Developments or enlargements on landmark sites in certain districts

The provisions of this Section shall be applicable in C5-3, C5-5, C6-6, or C6-7 districts located within the area bounded by 59th Street, Lexington Avenue, 40th Street and Eighth Avenue in the borough of Manhattan, for *developments* or *enlargements* on *zoning lots* having a *lot area* of at least 40,000 square feet, which contain individually designated landmarks, which have an existing pedestrian open area of at least 4,000 square feet aggregated in a single location and which were in single ownership on or before July 1, 1976.

The City Planning Commission may, upon application, permit a modification of the *floor area ratio*, height and setback, *yards*, *courts*, building spacing and or *accessory* off-street parking regulations applicable to a *development* or *enlargement* on a *zoning lot* containing an individually designated landmark for which either a certificate of no effect on protected architectural features or a certificate of appropriateness has been issued by the Landmarks Preservation Commission specifically covering such *development* or *enlargement*. Such *development* or *enlargement* when completed may be located adjacent to but not over a landmark. For the purposes of this Section, whether the proposed *development* or *enlargement* is to be "adjacent to but not over" shall be determined by the Landmarks Preservation Commission in its certificate of no effect on protected architectural features or its certificate of appropriateness. A copy of a request filed by the applicant with the Landmarks Preservation Commission for such certification shall be concurrently filed with the City Planning Commission in the event such *development* or *enlargement* does not comply with the applicable district regulations. Filing of such request with the City Planning Commission shall be a precondition to subsequent filing pursuant to this Section 74-712.

For such *developments* or *enlargements*, the allowable *floor area ratio* of a *zoning lot* may be increased from 15.00 to a maximum of 18.00; provided that the findings set forth hereinafter are satisfied. No *floor area* bonus provisions other than those set forth herein shall be applicable to the *zoning lot*.

In the case of a *development* or *enlargement* containing *residential uses*, the maximum *floor area ratio* for the *residential* portion shall not exceed 12.00 and the *lot area per room requirements* of Sections 23-20 and 35-40 shall not apply. In lieu thereof, there shall be no more than one *room* for every 300 square feet of gross *residential floor area*.

As a condition for granting a special permit for such *development* or *enlargement*, and in determining the extent of the increase in *floor area ratio* the City Planning Commission shall make the following findings:

(a) That there is a harmonious relationship among the subject landmark, all other structures or *open space* in the vicinity and the new *development* or *enlargement* in terms of scale, bulk and location as determined by the City Planning Commission.

(b) That a program for continuing maintenance of the landmark site, including the landmark building and any designated interior has been *developed* and approved by the Landmarks Preservation Commission and approved by the City Planning Commission. Such program shall include, among other things, protective measures during the construction period and preservation measures thereafter; for example, performance standard surety requirements.

(c) That where any modifications are authorized in height and setback, *yard*, *court*, or *building* spacing regulations for any new *development* or *enlargement* on the *zoning lot* any disadvantages to the surrounding area caused by reduced access of light and air will be more than offset by the advantages of the landmark's preservation to the local community and the City as a whole.

(d) That the modification of *accessory* off-street parking requirements on the *zoning lot* is necessary to minimize vehicular and pedestrian congestion on surrounding *streets*.

(e) That the *development* provides adequate access and egress including through *block* pedestrian circulation when deemed necessary by the City Planning Commission to minimize congestion on surrounding *streets*.

(Continued next page)

Italicized words are defined in Section 12-10.

74-712 (Continued)

The City Planning Commission shall prescribe additional conditions and safeguards as it deems appropriate. In this connection, among other conditions, the City Planning Commission shall require:

(i) a report from the Landmarks Preservation Commission identifying historically or architecturally significant spaces within the landmark which should be preserved. Where such interior spaces are identified to be preserved upon the completion of the *development* or *enlargement* the Landmarks Preservation Commission may develop a program for the continuing maintenance of such interior spaces, and such program shall be approved by the Landmarks Preservation Commission and the City Planning Commission; and

(ii) public accessibility to all or a portion of the landmark pursuant to a reasonable plan.

The City Planning Commission may also prohibit certain uses of any historically or architecturally significant spaces identified by the Landmarks Preservation Commission.

When the owner of a *zoning lot* containing a landmark building is subject to certain private restrictions or limitations, a copy of all such restrictions and limitations imposed on the real property shall be filed with the City Planning Commission and the Landmarks Preservation Commission.

74-72

Bulk Modification

74-721

Height and Setback and Yard Regulations

A. In C4-7, C5-2, C5-3, C5-4, C6-1A, C6-4, C6-5, C6-6, C6-7 or M1-6 Districts the City Planning Commission may permit modification of the height and setback regulations including tower coverage controls for *developments* or *enlargements* located on a *zoning lot* having a minimum area of 40,000 square feet or occupying an entire *block*. For such *developments* or *enlargements* the Commission may modify the minimum required distance between a new *building* and an existing *building* as set forth in Section 23-70 (Minimum Required Distance Between Two or More Buildings on a Single Zoning Lot) provided that the following findings are met:

a) The minimum distance provided between a new *building* and an existing *building* is 60 feet;

b) "$L_a + L_b$" as defined in Section 23-70 (Minimum Required Distance Between Two or More Buildings on a Single Zoning Lot) is not more than 150 feet; and

c) The relationship of the said *building* permits the best site planning and distribution of open area possible on the *zoning lot*.

† For *developments* or *enlargements* on *zoning lots* occupying an entire *block* and located in a C6-4 district with a basic commercial *floor area ratio* of 10, the Commission may also modify the supplementary *use* regulations of Section 32-422 (Locations of floors occupied by non-residential uses) provided the following findings are made:

a) that the *non-residential uses* are located in a portion of a *mixed building* which has separate access to the *street* with no openings of any kind to the *residential* portion of the *building* at any *story;* and

b) that the *non-residential uses* are not located above the lowest *story* containing *dwelling units* unless the *residential* and *non-residential* portions are separated in accordance with the provisions of Section 23-82 (Building Walls Regulated by Minimum Spacing Formula).

Where such *zoning lot* is located within the *Special South Street Seaport District,* (Article VIII, Chapter 8), on application the City Planning Commission may permit modification of height and setback regulations and an increase in tower coverage beyond that allowed by Section 88-06 where the *development* satisfies either of the following conditions:

(1) That the developer obtains negative easements limiting the height of future *development* to 85 feet or less on any adjoining *zoning lot(s)* which are contiguous or would be contiguous to said *zoning lot* but for the separation by a *street* or *street* intersection, and such easements are recorded against such adjoining *zoning lots* by deed or written instrument. The Commission shall consider the aggregated areas of said *zoning lot* and the adjoining lots subject to such negative easements and the extent to which they achieve future assurance of light and air comparable to the standards of the Seaport and Manhattan Landing Districts in determining the maximum permitted coverage. In no event shall such coverage exceed 80 percent of the *zoning lot* on which the *development* will be located; or

(2) That coverage on a *receiving lot* may be increased above 55 percent, but in no event to more than 80 percent, where additional *development rights* are purchased and converted to coverage according to the formula set forth in Section 88-06.

Prior to the Commission's public hearing on such *development*, the applicant shall indicate to the Commission its final decision as to the option chosen.

As a condition for the special permit, the Commission shall make the following findings:

(a) That such special permit will aid in achieving the general purposes and intent of the Special District(s) in which the *development* is located.

(b) That the modification of height and setback will provide a better distribution of bulk on the *zoning lot.*

(c) That the distribution of bulk and the *development* permits adequate access of light and air to surrounding *streets* and properties.

(Continued next page)

HISTORIC PRESERVATION TDRs tdrck

CHICAGO

Discussion with Joan Pomeranc,
Chicago Landmarks Commission staff, 312-744-3200

Chicago discussed TDRs in 1960s as part of the Chicago Plan (by John Costonis), but currently development rights can only be transfered within a single or adjacent parcel under a P.U.D., but not to other parcels (not "across the street"). Joan characterized Chicago as of the "let's make a deal" mentality, not particularly forward thinking.

see:
Space Adrift by John Costonis, 1974...
and a more recent book by Costonis (uncertain of title)

NEW YORK

Richard Moses,
New York City Landmarks Preservation Commission staff, 212-553-1100

Will send a copy of the sections of NY's zoning ordinance related to TDRs; he must check with their legal dept before sending to get current version. Expects to mail on Thursday 7/11.

SAN FRANCISCO

Grant DeHart
Maryland Environmental Trust, 301-974-5350

Will send copy of SF ordinance, but states that one really needs to have more information about the entire San Francisco Plan; suggests a discussion of the specifics is in order.

Ⓐ ISSUES

- planning basis (amend Ag or Heat. Pres. MP)
- all sites or just CBDs
- create sending + receiving zones — CBD-TDR zones
- rezone thru SMA
- how to calculate transferrable density
  - commercial or residential
  - optional or standard
  - geographical
- which properties apply (old designations or new only)
- County TDR bank (if bank buys, requires renovation)

EXCERPT

Transferable Development Rights Programs: TDRs and the Real Estate Marketplace

Richard J. Roddewig and Cheryl A. Inghram

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APA
Planning Advisory Service
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tion, the Conservancy has been posting TDC prices, which have steadily declined to the current $15,000 level.

Measured by the criteria set out in Chapter 1, Santa Monica's TDR program has been successful. However, the future of the program is uncertain, and it may soon end. Los Angeles County is nearing completion of its local coastal plan for the Malibu Santa Monica Mountain area and will soon reclaim permit authority from the commission. The county has opposed the TDC program, taking the position that many of the lots would never be developed due to slope, lack of roads, and zoning standards. The county argues that development permits would be awarded only to sites that are actually developable. In the meantime, uncertainty over the future of the program has softened the market for TDCs, inasmuch as many developers are expecting county zoning to permit higher as-of-right densities in the marine terrace.

NEW YORK CITY

For decades, developers in New York City have made use of air rights to construct buildings exceeding standard zoning density, but it was not until 1968 that a TDR program was developed specifically for landmark buildings. New York's TDR program was the first in the country and continues to be one of the most successful.

In New York, there are two ways that a developer can obtain additional density for skyscraper construction. The most frequent form of air rights transfer is through the zoning-lot merger. A city block is the limit of a zoning lot. Individual parcels on the block may be "merged" into a single zoning lot by a declaration of single-lot status filed by parties with interest in the adjacent parcels on the block. Structures with unused floor area ratio (FAR) may use these "as-of-right" zoning-lot mergers to transfer unused FAR to vacant parcels in the same block for new development.

In 1968, New York City amended its zoning ordinance to permit a TDR from locally designated landmark buildings to "adjacent" lots on the same block, across the street, or diagonally across an intersection. Development rights in New York City are simply calculated on the basis of a one-to-one transfer of unused FAR from the landmark to the receiving site. A year later the city planning commission redefined "adjacent sites," permitting a transfer of rights from landmarks to any lot in a chain of adjacent common ownership, provided that the first link in the chain is contiguous to or across the street from the landmark property. Lawyers for Penn Central Transportation Co., owners of the landmark Grand Central Terminal, have recently argued that control of the underground railroad right-of-way between two sites meets the requirement of a chain of common ownership. The adjacent lot provision of the TDR mechanism was also amended to assist with preservation in the South Street Seaport District.

The TDR program for landmarks was designed both to ensure preservation of the sending site and quality development on the receiving site. An application to use TDRs must be submitted to the city planning commission. Site plans of the sending and the receiving site, as well as a plan for preserving and maintaining the landmark building, are reviewed by the commission. The estimated costs of maintaining the landmark are evaluated by the city when it reviews the price of the development rights to be transferred, and the commission has the legal authority to reject the transfer if the proposed price is insufficient to maintain the landmark. The owners of landmark properties from which development rights have been severed are then required to donate a preservation and conservation easement to a qualified organization to ensure compliance with the preservation and maintenance agreement.

While landmark property owners may ultimately transfer all unused FAR, the floor area of the proposed building to be constructed on the receiving lot cannot be more than 20 percent greater than the amount the receiving lot was entitled to prior to the transfer. In its review of the proposed transfer, the planning commission assesses not only the benefits that will accrue to the landmark, but also the impact of the proposed project on its neighbors. Potential ill effects of overbuilding on the receiving site and design compatibility with neighboring properties are also reviewed.

New York City's TDR program has been among the most active of any in the country, yet during the 18 years that the TDR mechanism has been in effect, there have been only a dozen transfers from the nearly 700 landmark structures in New York City. The reason is simple: developers have easier and therefore more attractive ways to gain density. The first choice of developers in the market for additional density is the zoning-lot merger, which is as-of-right and is not subject to a process of review and approval. If a developer cannot achieve density through zoning-lot merger, a change in zoning to a higher density classification may be sought. Only after these options have been exhausted does a developer typically seek TDRs from landmark properties and submit to the strenuous planning review involved in TDR approvals.

In New York, the TDR mechanism has been limited to individual landmarks and has not been extended to properties within designated historic districts. The New York City Landmarks Preservation Commission fears that the fragile character and scale of historic districts are ill-suited to receiving additional density. Extension of the TDR concept to historic districts would create an even more serious oversupply of TDRs in a market with a very low demand, driving down the price of the TDRs and making the concept less effective as a historic preservation mechanism. Even without including historic districts, the Landmarks Preservation Commission estimates there is a current supply of 20 million square feet of potential development rights from already designated landmarks.

The TDR mechanism has been extended to one historic district in New York, the South Street Seaport area. Through a special zoning amendment, the city designated both a preservation area and a redevelopment area consisting of a number of parking lots within an eight-block radius. Unused development rights could be shifted from the preservation area to the area designated for new development. A consortium of financial institutions agreed to accept development rights in exchange for writing off delinquent mortgages, enabling the owners of buildings in the Seaport District to qualify for loans to renovate their

properties. The commercial banks were permitted to hold the development rights in a TDR "bank" and to sell the rights for new construction. The TDR mechanism was the catalyst for reinvestment in the historic buildings of the South Street Seaport area, now a major tourism generator, and stimulated new office development in the area of the district that was able to support additional density. Several major office buildings have been constructed with TDRs from the bank.

DENVER

Late in 1979, planned construction of downtown Denver's Sixteenth Street Mall and a proposal to create a new National Register of Historic Places historic district that would include Sixteenth Street buildings prompted a joint public/private exploration of options for integrating new development with the historic fabric of Sixteenth Street. What eventually emerged from the process of discussion was a TDR ordinance adopted in January 1982.

The adoption of Denver's TDR ordinance was not accompanied by either downzoning or the historic district and landmark designation discussed in 1979. A TDR is strictly voluntary. In Denver, many downtown property interests and politicians oppose strong protection for designated historic buildings, and owner consent to designation is almost always sought. In the absence of strict regulation, the TDR option offers an economic incentive to landmark designation and rehabilitation of historic structures.

Unlike most TDR ordinances, which are typically developed by local government staff, Denver's ordinance was planned and drafted by a committee representing Downtown Denver, Inc., Historic Denver, Inc., the Denver Landmark Commission, and the Colorado Historical Society, as well as other community and development interests. After three months of work, the committee had an ordinance and then promoted and sold the ordinance to city government, the public, and Denver's City Council, where it passed unanimously. The resulting ordinance established Denver's B-5 TDR district, which includes an approximately 40-block area of Denver's downtown.

Soon after the ordinance was passed, the Denver Partnership (a not-for-profit advocacy organization for downtown business and development) established a second committee to propose zoning changes for the warehouse district located on the western edge of downtown to protect the historic character of the warehouse buildings and to encourage housing development. Again, included on the committee were representatives of the preservation community, the city, private developers, property owners, an attorney, and members who had expertise in real estate, appraisal, architecture, and banking. One result of the committee's work was an extension of the TDR tool to the warehouse district through creation of the B-7 TDR district.

The B-5 and B-7 ordinances share the following provisions.

- Only landmark buildings individually designated by the Denver Landmark Commission are qualified sending sites.
- Before it is eligible to sell development rights, the sending building must be rehabilitated to the standards of the Denver Landmarks Commission.
- Transfers may occur only within each zone.
- The TDR amount that can be transferred from a site is calculated by deducting the density of the landmark from the base FAR allowed.
- The receiving site cannot increase its density more than 2.5:1 FAR beyond the base zoning.
- In order to limit the burden of paperwork on the city, the landmark structure can make no more than four transfers.
- Once density is transferred, future development on the sending site is permanently reduced by the number of TDRs sold. In the event the building is destroyed by fire or other casualty, the FAR of any new project would be limited to the density allowance after the transfer. There is no requirement to impose an easement on the sending site ensuring the preservation of the historic building. The committee that drafted the ordinance felt that such a provision would be politically unacceptable and might threaten potential income tax benefits to donors of preservation easements.

In the B-7 warehouse district, an additional incentive encouraged residential development. Owners of historic structures may sell one square foot of density for each square foot of housing included in the landmark building as well as unused FAR.

The TDR ordinance—if used widely—could lower the overall density of the B-5 TDR district. The maximum density with all allowable zoning bonuses in a B-5 district is an 18:1 FAR; however, TDRs from sending sites are calculated based upon an assumed maximum 10:1 to 12:1 FAR. Potential density of the B-7 TDR district, however, increased with adoption of the ordinance because of the option to transfer additional density from areas of buildings developed as residential space.

In the 40-block B-5 Central Business District TDR area, there is an inventory of approximately 2.7 million square feet of density that can be transferred from already designated landmarks and, according to a study done by Shlaes and Co., a potential of 13 million square feet of density shift if buildings identified as potential landmarks by the Denver Planning Department are also counted. In the 23-block B-7 TDR district, about 1.6 million square feet of density shift is available from existing and potential landmarks.

In the four years since Denver's ordinance was enacted, there has been only one transfer. The Denver Athletic Club, located in the B-5 TDR district, transferred 60,000 square feet of density at a price of about $15 per square foot to a site five blocks away. But despite the lack of transfers, the creation of TDRs has given owners of other landmark properties options they did not have before. The owners of two properties used their TDRs as collateral for rehabilitation construction loans.

Two factors in the Denver real estate market have suppressed an active trade in TDRs. First, with the successful completion of the Tabor Center, downtown Denver

has strengthened as a retail location, creating new demand for retail shopping. Furthermore, new retail complexes can be built to a profitable size without acquiring additional density from landmark buildings. Second, Denver has been experiencing unprecedented office vacancy levels, and new office towers that might benefit from the availability of additional density will remain on the drawing boards until the office space surplus has been absorbed. Until this situation improves, it will be difficult to assess the success of Denver's TDR program.

Despite Denver's currently inactive TDR market, the program has had some important accomplishments. The use of TDRs as collateral saved the Navarre Building, a landmark that was endangered at the time Denver was drafting its TDR ordinance. The TDR incentive has also induced some downtown property owners to seek or at least consent to landmark designation and has been a factor in decisions to undertake rehabilitation projects.

SEATTLE

In 1985 Seattle adopted a new downtown plan with four significant TDR components. The objectives of the TDR scheme for downtown Seattle are to retain and rehabilitate low-income housing in the downtown; to preserve Seattle landmarks; to encourage compatible in-fill development in historic districts; and to retain varied building scale in high-density office areas. Adoption of the TDR program was accompanied by downzoning and limitations on density in the office and retail core.

Under the new plan, a base FAR of 10 is permitted in the office core, and, with a series of bonuses, an FAR of 20 may be achieved. A developer may increase density from an FAR of 10 to 13 through "general" bonuses such as the provision of day care, parks, sculptured building tops, or retail atriums, or from the transfer of unused development rights from designated Seattle landmarks. Floor area ratio may be increased from 13 to 15 with a combination of general bonuses, affordable housing bonuses, and TDRs from low-income housing or landmarks. Finally, an increase in density from 15 to 20 FAR may be achieved only through the low-income housing TDR or through bonuses involving construction of low- and moderate-income housing, rehabilitation of vacant residential buildings, or density bonuses for the provision of low-income housing.

Unused development rights may be transferred from designated Seattle landmarks located within office, retail, or mixed commercial districts in the downtown core. Within retail districts, development rights may be received only from a site located on the same block. There are also limitations placed on sending sites. Sending sites in office districts may transfer only the difference between the base FAR and the FAR of the existing structure. In retail, mixed-use, and residential districts, transfers are generally limited to the difference between the FAR of the landmark structure and an FAR of 6.0.

The Seattle Department of Community Development has established guidelines for a transfer from landmark structures. Proposed development projects using TDRs from a landmark building require certificates of approval from the Seattle Landmark Preservation Board. A condition of approval for the development rights transfer is the restoration and adoption of a plan for long-term preservation of the landmark structure. When the receiving lot owner applies for development project review, a schematic drawing showing the proposed rehabilitation of the landmark building must be included in the application. The owner of the sending lot also must apply for a certificate of approval for the proposed rehabilitation or restoration. The review and approval process includes safeguards to ensure that funds from the sale of TDRs are available for the restoration of the landmark and that the rehabilitation is completed. For example, a certificate of occupancy for the new building on the receiving site will not be issued until the landmark building is rehabilitated, and the funds from a sale of TDRs necessary to rehabilitate the landmark are placed in a department of community development escrow account. If the landmark does not need rehabilitation, or has already been rehabilitated and certified by the National Park Service for the investment tax credit on rehabilitation of a certified historic structure, the proceeds from the sale of the development rights are not regulated by the city.

The owners of the sending and the receiving sites must file a TDR agreement with the city to certify that the owner of the receiving lot will complete the rehabilitation of the landmark and that the owner of the landmark agrees to preserve the structure for the life of the new development on the receiving site. The TDR agreement is enforced through a protective covenant or preservation and conservation easement.

Although this program was implemented in 1985, no transfers from landmark buildings have yet been made. On the other hand, a number of transfers from low-income housing have occurred. This is partly a consequence of program design. General bonuses can be used to achieve 13 FAR. And housing bonuses can be used to achieve an increase from 13 to 20 FAR without complicating the process by negotiating a landmark TDR purchase and submitting to review and agreements that delay and add expense to the development process.

The design of the program implements one goal of the downtown plan, which is to encourage the retention of low-income housing opportunities downtown. Downtown Seattle has lost some of its low-income housing stock through gentrification, but the city estimates that 7,311 low-income housing units are still available downtown. None of the low-income housing is built to the full FAR, and unused density from low-income downtown housing sites may be transferred to other downtown sites. When such a transfer occurs, the building sending TDRs must be brought into compliance with housing and building codes. The city also requires that the greater of 50 percent of the total floor area or the floor area in use for low-income housing be retained as low-income housing for at least 20 years.

Apparently, low-income housing groups have been competing to sell their development rights, depressing the price well below the projected price. Planners calculated that developers could pay up to $25 per square foot for additional density; however, TDRs from low-income housing have been selling for only $9 per square foot. As

the price has decreased, the city has seen more development proposals using this density option. This has caused some concern that low-income TDRs are being sold too cheaply to ensure the preservation and production of enough low-income housing units to fulfill the city's planning goals. The city may be forced to intervene in the low-income TDR market.

SAN FRANCISCO

A doubling of downtown office space during the 16 years between 1965 and 1981 and an average annual growth rate of over 1.7 million square feet of office space per year was causing congestion in the city's financial district and a loss of historic character and scale. In addition, the city has a weak preservation ordinance and a board of supervisors traditionally reluctant to adopt rigorous preservation controls. In response to this unprecedented growth in new office construction and the unfavorable political climate, San Francisco has made a commitment to using TDRs to accomplish historic preservation.

The new downtown plan adopted by ordinance in San Francisco in October 1985 was a dramatic response to these problems. It lowers base FAR limits, imposes height and setback requirements, requires the preservation of 251 significant buildings, and provides incentives to encourage the retention of 183 buildings that are less historically significant but that contribute to the historic and architectural character of downtown San Francisco. The plan allows for the transfer of unused development rights from significant and "contributory" buildings. A significant building may be demolished only for public safety reasons or if, considering the value of the building's TDRs, it retains no substantial remaining market value. Alterations to significant buildings must be reviewed according to the Secretary of the Interior's Standards for Rehabilitation, and owners are required to maintain the buildings and prevent neglect. The plan only encourages and does not mandate preservation of contributory buildings, but if a contributory building sells TDRs, the building must be rehabilitated and maintained as a landmark.

Although the plan was prepared for the most part by staff of the San Francisco Department of City Planning, the Foundation for San Francisco's Architectural Heritage, an influential private preservation organization, played an important role in the plan's eventual form and design. The foundation identified and rated the buildings deserving of preservation and sponsored a report by a local planning consultant to give the city background on preservation and TDR programs as well as recommendations for making them work.

With the adoption of its TDR mechanism, San Francisco discarded most of the conventional bonuses previously relied upon by developers to gain density. Through the purchase of TDRs, developers may increase density from base FARs ranging from six to 10 in downtown office districts to an FAR of 18. It is only through the transfer of TDRs from historic buildings or open space (or from the inclusion of housing within a new building) that a developer can achieve maximum density. Thus, the incentive for developers to use TDRs in San Francisco is exceedingly strong.

In developing the downtown plan and its TDR provisions, the city identified receiving sites and calculated the total number of transfers the area could handle in order to ensure a healthy market for the TDRs as well. In addition, the plan redirects downtown office expansion to the south of the Market Street district because zoning of that area allows the highest densities.

The plan also encourages the preservation and enhancement of open space and the creation of additional open space through the TDR mechanism. A review of past planning policies revealed that plazas adjacent to new construction have not always provided the most desirable locations for open space. In the new plan, unused floor area from an approved open space site may be transferred to a development site. This permits developers to build intensively on one site while providing open space in an area where it is needed. Not-for-profit organizations interested in park development could also acquire desirable park sites and sell the development rights to developers.

Are the results of San Francisco's TDR program as promising as its commitment? The early results must be evaluated in light of the city's adoption of a three-year limit on growth, permitting the development of only 2.85 million square feet of major office construction in the city, or about 950,000 square feet per year. Because of the high vacancy rate in downtown San Francisco, the planning commission has turned down major new office construction projects in the first year following adoption of the new downtown plan. Inasmuch as no new projects have been approved, no transfers have occurred under the new plan. One new office project, the 101st Building, was approved just before the new plan went into effect, and the city did require purchase of development rights. Developers purchased TDRs from two structures rated as "significant."

In November 1986, San Francisco voters approved Proposition M, setting further limits on growth and making the future market for TDRs more uncertain. Proposition M extends the three-year growth curb indefinitely and effectively lowers the growth cap from 950,000 square feet per year to 475,000 square feet for the next 11 to 15 years and 950,000 square feet per year thereafter. Although the planning department is currently reviewing 11 office construction projects, including several that will use TDRs, Proposition M will depress the market for TDRs well below the program designers' original projections.

Unlike New York, Denver, and Seattle, San Francisco's TDR mechanism does not impose a requirement on the owner to enter into an agreement to restore or to preserve the building. Instead, this obligation is enforced through provisions of the ordinance implementing the plan, which require the preservation of significant buildings and contributory buildings that have sold TDRs. In addition, TDRs do not have to be transferred from parcel to parcel as in some other TDR schemes; it is possible for downtown San Francisco development rights to "float," unattached to a sending or receiving site. A Certificate of Transfer documents the exchange of TDRs from the original owner to the owner of a development lot or to persons or firms who may hold them for subsequent transfer. Although it is possible that a speculative market might

develop in "floating TDRs," at present this is not occurring because title companies are unwilling to insure development rights not attached to a site.

An owner of a significant or contributory building who wishes to sell unused development rights applies to the city for a statement of eligibility. To date, very few owners of landmark buildings have applied for certificates of eligibility. Some real estate brokers have expressed an interest in handling sales of TDRs.

Appendixes

Appendix A. Existing TDR Programs

				Purpose			
Location	TDR	PDR	Rights Transferred	Historic Preservation	Control or Redirect Growth	Protect Farms	Preserve Open Space or Protect Environment
ALASKA							
Matanuska-Susitna Borough	—	—	—	—	×	×	—
ARIZONA							
Scottsdale	×	—	—	—	—	—	×
CALIFORNIA							
Los Angeles	×	—	yes	×	—	—	—
San Bernardino County	×	—	—	—	×	—	—
San Diego	×	—	—	×	—	—	—
San Francisco	×	—	yes	×	×	—	×
Santa Monica Malibu Mountains	×	—	yes	—	—	—	×
Tahoe Regional Planning Agency	—	—	—	—	—	—	—
COLORADO							
Denver	×	—	yes	×	—	—	—
Pitkin County (under consideration)	×	—	—	—	×	×	×
CONNECTICUT							
State of Connecticut	—	×	yes	—	—	×	—
Windsor	×	—	—	—	×	—	—
DISTRICT OF COLUMBIA	×	—	yes	×	—	—	—
FLORIDA							
Collier County	×	—	yes	—	—	—	×
Dade County	×	—	—	—	—	—	×
Hollywood	×	—	—	—	—	—	×
Lee County (under consideration)	×	—	—	—	—	—	×
Monroe County (under consideration)	×	—	—	—	—	—	×
Palm Beach County	×	—	yes	—	—	×	—
St. Petersburg	—	—	—	—	—	—	—
LOUISIANA							
New Orleans	×	—	—	×	—	—	—
MARYLAND							
Calvert County	×	—	yes	—	×	×	—
Howard County	—	×	—	—	—	—	—
Montgomery County	×	—	yes	—	—	×	—

Continued

Location	TDR	PDR	Rights Transferred	Purpose: Historic Preservation	Purpose: Control or Redirect Growth	Purpose: Protect Farms	Purpose: Preserve Open Space or Protect Environment
MASSACHUSETTS							
State of Massachusetts	—	×	yes	—	—	×	—
Nantucket	—	×	yes	—	×	—	×
Sunderland	×	—	—	—	—	—	—
MONTANA							
Bridger Canyon Zoning District Gallitan County	×	—	yes	—	—	—	×
NEW HAMPSHIRE							
State of New Hampshire	—	×	—	—	—	×	—
NEW JERSEY							
Burlington County	—	×	yes	—	—	×	—
Chesterfield	×	—	—	—	—	×	—
Hillsborough Township	×	—	yes	—	—	×	—
Hunterdon County	—	×	—	—	—	—	×
Pinelands	×	—	yes	—	×	×	×
NEW YORK							
Eden	×	—	—	—	—	—	—
New York City	×	—	—	×	—	—	—
Southampton Township	×	—	—	—	—	—	—
Suffolk County	—	×	yes	—	—	—	—
PENNSYLVANIA							
Birmingham Township	×	—	—	—	—	—	—
Buckingham Township	×	—	yes	—	—	×	×
Kennett Square	×	—	—	—	—	—	—
Upper Makefield	×	—	—	—	—	—	—
RHODE ISLAND							
State of Rhode Island	—	×	yes	—	—	×	—
TEXAS							
Dallas	×	—	—	×	—	—	—
WASHINGTON							
Island County	×	—	—	—	—	×	×
King County	—	×	yes	—	—	×	—
Seattle*	×	—	yes	×	—	—	—
WYOMING							
Teton County (under consideration)	×	—	—	—	×	—	×

Note: This table was compiled primarily from secondary source materials and not all of the information was verified with each community cited. It is presented primarily to assist those undertaking research. The acronym "PDR" stands for "Purchase of Development Rights" and refers to outright acquisition of development rights to protect a resource by government entities with no corresponding intention to resell or transfer the density to other sites.

*Also low-income housing.

Appendix B. Examples of TDR Ordinances

1. Denver Zoning Ordinance—Section 59-54 (3) (m)

Transfer of development rights from properties containing historic structures. To authorize, upon appeal in specific cases, subject to terms and conditions fixed by the board, an exception permitting the transfer of unused development rights or undeveloped floor area from zone lots containing a structure that has been designated for preservation pursuant to and as set forth in chapter 30 of the Revised Municipal Code. Such transfer shall meet all of the following conditions and requirements:

1. This procedure shall be permitted only in the B-5 and B-7 districts, and transfers from one zone lot to another zone lot shall be permitted only within the same specific zone district. This procedure may be utlilized by a maximum of four times for any specific zone lot.
2. The maximum amount of undeveloped floor area that may be transferred from a zone lot containing a designated structure shall be the difference between the existing gross floor area in the designated structure and the maximum gross floor area permitted by the district regulations for property zoned B-5 or the supplementary maximum gross floor area permitted by the regulations for property zoned B-7.
3. Every application shall contain the signatures of the owners of all properties involved.
4. No structure receiving floor area and located in the B-5 district shall be enlarged through one or more applications of this procedure by more than 25 percent of the basic maximum gross floor area.
5. No structure receiving floor area and located in a B-7 district shall be enlarged through one or more applications of this procedure by more than 25 percent of the supplementary maximum gross floor area; provided, however, that where the gross floor area of a structure will not exceed six times the zone lot area counting any and all of the special floor areas allowed by Section 59-380(b)(1), except street-level floor areas of Section 59-380(b)(1)a, such structure may be enlarged by an amount equal to 50 percent of the supplementary maximum gross floor area. Such structure shall provide the low-level light areas as required by Section 59-380(b)(1).

All such transfers approved by the board shall be recorded by the department of zoning administration among the records of the clerk and recorder of the city, which recording shall contain a statement signed by the owner of the zone lot containing the structure that has been designated for preservation acknowledging the physical limitations placed on the property as a result of the transfer.

Upon recording with the clerk and recorder of the city, the department of zoning administration shall administer the provisions of this subsection (3)m, with the following restrictions and limitations: (1) The construction of the transferred floor area shall not be permitted until the structure designated for preservation is utilized by a use by right and the exterior has been renovated or restored according to Section 30-6 of the Revised Municipal Code; and (2) if for any reason the structure designated for preservation is partially or completely destroyed after the transfer of unused development rights through this procedure, no new structure shall be built exceeding the floor area of the former structure unless additional floor area is permitted through a new application of this procedure, through a combining of zone lots, or through other transfer procedures.

2. Collier County, Florida, TDR Ordinance

SECTION 9. SPECIAL REGULATIONS

9.1 **"ST" Special Treatment Overlay District—Special Regulations for Areas of Environmental Sensitivity and Lands and Structures of Historical and/or Archaeological Significance.**

a. *Intent and Purpose.* Within Collier County, there are certain areas that, because of their unique assemblages of flora and/or fauna, their aesthetic appeal, historical or archaeological significance, or their contribution to their own and adjacent ecosystems, make them worthy of special regulations. Such regulations are directed toward the conservation, protection, and preservation of ecological, commercial, and recreational values for the greatest benefit to the people of Collier County. Such areas include, but are not necessarily limited to, mangrove and freshwater swamps, barrier islands, coastal beaches, estuaries, cypress domes, natural drainage ways, aquifer recharge areas, and lands and structures of historical and archaeological significance.

The purpose of this overlay district regulation is to ensure the maintenance of these environmental and cultural resources and to encouragee the preservation of the intricate ecological relationships within the systems and, at the same time, permit those types of developments that will hold changes to levels determined acceptable by the board of county commissioners after public hearing.

b. *"ST" as a Zoning Overlay District; Designation of "P-ST" Lands.*

EXCERPT

Transferable Development Rights Programs: TDRs and the Real Estate Marketplace

Richard J. Roddewig and Cheryl A. Inghram

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tion, the Conservancy has been posting TDC prices, which have steadily declined to the current $15,000 level.

Measured by the criteria set out in Chapter 1, Santa Monica's TDR program has been successful. However, the future of the program is uncertain, and it may soon end. Los Angeles County is nearing completion of its local coastal plan for the Malibu Santa Monica Mountain area and will soon reclaim permit authority from the commission. The county has opposed the TDC program, taking the position that many of the lots would never be developed due to slope, lack of roads, and zoning standards. The county argues that development permits would be awarded only to sites that are actually developable. In the meantime, uncertainty over the future of the program has softened the market for TDCs, inasmuch as many developers are expecting county zoning to permit higher as-of-right densities in the marine terrace.

NEW YORK CITY

For decades, developers in New York City have made use of air rights to construct buildings exceeding standard zoning density, but it was not until 1968 that a TDR program was developed specifically for landmark buildings. New York's TDR program was the first in the country and continues to be one of the most successful.

In New York, there are two ways that a developer can obtain additional density for skyscraper construction. The most frequent form of air rights transfer is through the zoning-lot merger. A city block is the limit of a zoning lot. Individual parcels on the block may be "merged" into a single zoning lot by a declaration of single-lot status filed by parties with interest in the adjacent parcels on the block. Structures with unused floor area ratio (FAR) may use these "as-of-right" zoning-lot mergers to transfer unused FAR to vacant parcels in the same block for new development.

In 1968, New York City amended its zoning ordinance to permit a TDR from locally designated landmark buildings to "adjacent" lots on the same block, across the street, or diagonally across an intersection. Development rights in New York City are simply calculated on the basis of a one-to-one transfer of unused FAR from the landmark to the receiving site. A year later the city planning commission redefined "adjacent sites," permitting a transfer of rights from landmarks to any lot in a chain of adjacent common ownership, provided that the first link in the chain is contiguous to or across the street from the landmark property. Lawyers for Penn Central Transportation Co., owners of the landmark Grand Central Terminal, have recently argued that control of the underground railroad right-of-way between two sites meets the requirement of a chain of common ownership. The adjacent lot provision of the TDR mechanism was also amended to assist with preservation in the South Street Seaport District.

The TDR program for landmarks was designed both to ensure preservation of the sending site and quality development on the receiving site. An application to use TDRs must be submitted to the city planning commission. Site plans of the sending and the receiving site, as well as a plan for preserving and maintaining the landmark building, are reviewed by the commission. The estimated costs of maintaining the landmark are evaluated by the city when it reviews the price of the development rights to be transferred, and the commission has the legal authority to reject the transfer if the proposed price is insufficient to maintain the landmark. The owners of landmark properties from which development rights have been severed are then required to donate a preservation and conservation easement to a qualified organization to ensure compliance with the preservation and maintenance agreement.

While landmark property owners may ultimately transfer all unused FAR, the floor area of the proposed building to be constructed on the receiving lot cannot be more than 20 percent greater than the amount the receiving lot was entitled to prior to the transfer. In its review of the proposed transfer, the planning commission assesses not only the benefits that will accrue to the landmark, but also the impact of the proposed project on its neighbors. Potential ill effects of overbuilding on the receiving site and design compatibility with neighboring properties are also reviewed.

New York City's TDR program has been among the most active of any in the country, yet during the 18 years that the TDR mechanism has been in effect, there have been only a dozen transfers from the nearly 700 landmark structures in New York City. The reason is simple: developers have easier and therefore more attractive ways to gain density. The first choice of developers in the market for additional density is the zoning-lot merger, which is as-of-right and is not subject to a process of review and approval. If a developer cannot achieve density through zoning-lot merger, a change in zoning to a higher density classification may be sought. Only after these options have been exhausted does a developer typically seek TDRs from landmark properties and submit to the strenuous planning review involved in TDR approvals.

In New York, the TDR mechanism has been limited to individual landmarks and has not been extended to properties within designated historic districts. The New York City Landmarks Preservation Commission fears that the fragile character and scale of historic districts are ill-suited to receiving additional density. Extension of the TDR concept to historic districts would create an even more serious oversupply of TDRs in a market with a very low demand, driving down the price of the TDRs and making the concept less effective as a historic preservation mechanism. Even without including historic districts, the Landmarks Preservation Commission estimates there is a current supply of 20 million square feet of potential development rights from already designated landmarks.

The TDR mechanism has been extended to one historic district in New York, the South Street Seaport area. Through a special zoning amendment, the city designated both a preservation area and a redevelopment area consisting of a number of parking lots within an eight-block radius. Unused development rights could be shifted from the preservation area to the area designated for new development. A consortium of financial institutions agreed to accept development rights in exchange for writing off delinquent mortgages, enabling the owners of buildings in the Seaport District to qualify for loans to renovate their

properties. The commercial banks were permitted to hold the development rights in a TDR "bank" and to sell the rights for new construction. The TDR mechanism was the catalyst for reinvestment in the historic buildings of the South Street Seaport area, now a major tourism generator, and stimulated new office development in the area of the district that was able to support additional density. Several major office buildings have been constructed with TDRs from the bank.

DENVER

Late in 1979, planned construction of downtown Denver's Sixteenth Street Mall and a proposal to create a new National Register of Historic Places historic district that would include Sixteenth Street buildings prompted a joint public/private exploration of options for integrating new development with the historic fabric of Sixteenth Street. What eventually emerged from the process of discussion was a TDR ordinance adopted in January 1982.

The adoption of Denver's TDR ordinance was not accompanied by either downzoning or the historic district and landmark designation discussed in 1979. A TDR is strictly voluntary. In Denver, many downtown property interests and politicians oppose strong protection for designated historic buildings, and owner consent to designation is almost always sought. In the absence of strict regulation, the TDR option offers an economic incentive to landmark designation and rehabilitation of historic structures.

Unlike most TDR ordinances, which are typically developed by local government staff, Denver's ordinance was planned and drafted by a committee representing Downtown Denver, Inc., Historic Denver, Inc., the Denver Landmark Commission, and the Colorado Historical Society, as well as other community and development interests. After three months of work, the committee had an ordinance and then promoted and sold the ordinance to city government, the public, and Denver's City Council, where it passed unanimously. The resulting ordinance established Denver's B-5 TDR district, which includes an approximately 40-block area of Denver's downtown.

Soon after the ordinance was passed, the Denver Partnership (a not-for-profit advocacy organization for downtown business and development) established a second committee to propose zoning changes for the warehouse district located on the western edge of downtown to protect the historic character of the warehouse buildings and to encourage housing development. Again, included on the committee were representatives of the preservation community, the city, private developers, property owners, an attorney, and members who had expertise in real estate, appraisal, architecture, and banking. One result of the committee's work was an extension of the TDR tool to the warehouse district through creation of the B-7 TDR district.

The B-5 and B-7 ordinances share the following provisions.

- Only landmark buildings individually designated by the Denver Landmark Commission are qualified sending sites.
- Before it is eligible to sell development rights, the sending building must be rehabilitated to the standards of the Denver Landmarks Commission.
- Transfers may occur only within each zone.
- The TDR amount that can be transferred from a site is calculated by deducting the density of the landmark from the base FAR allowed.
- The receiving site cannot increase its density more than 2.5:1 FAR beyond the base zoning.
- In order to limit the burden of paperwork on the city, the landmark structure can make no more than four transfers.
- Once density is transferred, future development on the sending site is permanently reduced by the number of TDRs sold. In the event the building is destroyed by fire or other casualty, the FAR of any new project would be limited to the density allowance after the transfer. There is no requirement to impose an easement on the sending site ensuring the preservation of the historic building. The committee that drafted the ordinance felt that such a provision would be politically unacceptable and might threaten potential income tax benefits to donors of preservation easements.

In the B-7 warehouse district, an additional incentive encouraged residential development. Owners of historic structures may sell one square foot of density for each square foot of housing included in the landmark building as well as unused FAR.

The TDR ordinance—if used widely—could lower the overall density of the B-5 TDR district. The maximum density with all allowable zoning bonuses in a B-5 district is an 18:1 FAR; however, TDRs from sending sites are calculated based upon an assumed maximum 10:1 to 12:1 FAR. Potential density of the B-7 TDR district, however, increased with adoption of the ordinance because of the option to transfer additional density from areas of buildings developed as residential space.

In the 40-block B-5 Central Business District TDR area, there is an inventory of approximately 2.7 million square feet of density that can be transferred from already designated landmarks and, according to a study done by Shlaes and Co., a potential of 13 million square feet of density shift if buildings identified as potential landmarks by the Denver Planning Department are also counted. In the 23-block B-7 TDR district, about 1.6 million square feet of density shift is available from existing and potential landmarks.

In the four years since Denver's ordinance was enacted, there has been only one transfer. The Denver Athletic Club, located in the B-5 TDR district, transferred 60,000 square feet of density at a price of about $15 per square foot to a site five blocks away. But despite the lack of transfers, the creation of TDRs has given owners of other landmark properties options they did not have before. The owners of two properties used their TDRs as collateral for rehabilitation construction loans.

Two factors in the Denver real estate market have suppressed an active trade in TDRs. First, with the successful completion of the Tabor Center, downtown Denver

has strengthened as a retail location, creating new demand for retail shopping. Furthermore, new retail complexes can be built to a profitable size without acquiring additional density from landmark buildings. Second, Denver has been experiencing unprecedented office vacancy levels, and new office towers that might benefit from the availability of additional density will remain on the drawing boards until the office space surplus has been absorbed. Until this situation improves, it will be difficult to assess the success of Denver's TDR program.

Despite Denver's currently inactive TDR market, the program has had some important accomplishments. The use of TDRs as collateral saved the Navarre Building, a landmark that was endangered at the time Denver was drafting its TDR ordinance. The TDR incentive has also induced some downtown property owners to seek or at least consent to landmark designation and has been a factor in decisions to undertake rehabilitation projects.

SEATTLE

In 1985 Seattle adopted a new downtown plan with four significant TDR components. The objectives of the TDR scheme for downtown Seattle are to retain and rehabilitate low-income housing in the downtown; to preserve Seattle landmarks; to encourage compatible in-fill development in historic districts; and to retain varied building scale in high-density office areas. Adoption of the TDR program was accompanied by downzoning and limitations on density in the office and retail core.

Under the new plan, a base FAR of 10 is permitted in the office core, and, with a series of bonuses, an FAR of 20 may be achieved. A developer may increase density from an FAR of 10 to 13 through "general" bonuses such as the provision of day care, parks, sculptured building tops, or retail atriums, or from the transfer of unused development rights from designated Seattle landmarks. Floor area ratio may be increased from 13 to 15 with a combination of general bonuses, affordable housing bonuses, and TDRs from low-income housing or landmarks. Finally, an increase in density from 15 to 20 FAR may be achieved only through the low-income housing TDR or through bonuses involving construction of low- and moderate-income housing, rehabilitation of vacant residential buildings, or density bonuses for the provision of low-income housing.

Unused development rights may be transferred from designated Seattle landmarks located within office, retail, or mixed commercial districts in the downtown core. Within retail districts, development rights may be received only from a site located on the same block. There are also limitations placed on sending sites. Sending sites in office districts may transfer only the difference between the base FAR and the FAR of the existing structure. In retail, mixed-use, and residential districts, transfers are generally limited to the difference between the FAR of the landmark structure and an FAR of 6.0.

The Seattle Department of Community Development has established guidelines for a transfer from landmark structures. Proposed development projects using TDRs from a landmark building require certificates of approval from the Seattle Landmark Preservation Board. A condition of approval for the development rights transfer is the restoration and adoption of a plan for long-term preservation of the landmark structure. When the receiving lot owner applies for development project review, a schematic drawing showing the proposed rehabilitation of the landmark building must be included in the application. The owner of the sending lot also must apply for a certificate of approval for the proposed rehabilitation or restoration. The review and approval process includes safeguards to ensure that funds from the sale of TDRs are available for the restoration of the landmark and that the rehabilitation is completed. For example, a certificate of occupancy for the new building on the receiving site will not be issued until the landmark building is rehabilitated, and the funds from a sale of TDRs necessary to rehabilitate the landmark are placed in a department of community development escrow account. If the landmark does not need rehabilitation, or has already been rehabilitated and certified by the National Park Service for the investment tax credit on rehabilitation of a certified historic structure, the proceeds from the sale of the development rights are not regulated by the city.

The owners of the sending and the receiving sites must file a TDR agreement with the city to certify that the owner of the receiving lot will complete the rehabilitation of the landmark and that the owner of the landmark agrees to preserve the structure for the life of the new development on the receiving site. The TDR agreement is enforced through a protective covenant or preservation and conservation easement.

Although this program was implemented in 1985, no transfers from landmark buildings have yet been made. On the other hand, a number of transfers from low-income housing have occurred. This is partly a consequence of program design. General bonuses can be used to achieve 13 FAR. And housing bonuses can be used to achieve an increase from 13 to 20 FAR without complicating the process by negotiating a landmark TDR purchase and submitting to review and agreements that delay and add expense to the development process.

The design of the program implements one goal of the downtown plan, which is to encourage the retention of low-income housing opportunities downtown. Downtown Seattle has lost some of its low-income housing stock through gentrification, but the city estimates that 7,311 low-income housing units are still available downtown. None of the low-income housing is built to the full FAR, and unused density from low-income downtown housing sites may be transferred to other downtown sites. When such a transfer occurs, the building sending TDRs must be brought into compliance with housing and building codes. The city also requires that the greater of 50 percent of the total floor area or the floor area in use for low-income housing be retained as low-income housing for at least 20 years.

Apparently, low-income housing groups have been competing to sell their development rights, depressing the price well below the projected price. Planners calculated that developers could pay up to $25 per square foot for additional density; however, TDRs from low-income housing have been selling for only $9 per square foot. As

the price has decreased, the city has seen more development proposals using this density option. This has caused some concern that low-income TDRs are being sold too cheaply to ensure the preservation and production of enough low-income housing units to fulfill the city's planning goals. The city may be forced to intervene in the low-income TDR market.

SAN FRANCISCO

A doubling of downtown office space during the 16 years between 1965 and 1981 and an average annual growth rate of over 1.7 million square feet of office space per year was causing congestion in the city's financial district and a loss of historic character and scale. In addition, the city has a weak preservation ordinance and a board of supervisors traditionally reluctant to adopt rigorous preservation controls. In response to this unprecedented growth in new office construction and the unfavorable political climate, San Francisco has made a commitment to using TDRs to accomplish historic preservation.

The new downtown plan adopted by ordinance in San Francisco in October 1985 was a dramatic response to these problems. It lowers base FAR limits, imposes height and setback requirements, requires the preservation of 251 significant buildings, and provides incentives to encourage the retention of 183 buildings that are less historically significant but that contribute to the historic and architectural character of downtown San Francisco. The plan allows for the transfer of unused development rights from significant and "contributory" buildings. A significant building may be demolished only for public safety reasons or if, considering the value of the building's TDRs, it retains no substantial remaining market value. Alterations to significant buildings must be reviewed according to the Secretary of the Interior's Standards for Rehabilitation, and owners are required to maintain the buildings and prevent neglect. The plan only encourages and does not mandate preservation of contributory buildings, but if a contributory building sells TDRs, the building must be rehabilitated and maintained as a landmark.

Although the plan was prepared for the most part by staff of the San Francisco Department of City Planning, the Foundation for San Francisco's Architectural Heritage, an influential private preservation organization, played an important role in the plan's eventual form and design. The foundation identified and rated the buildings deserving of preservation and sponsored a report by a local planning consultant to give the city background on preservation and TDR programs as well as recommendations for making them work.

With the adoption of its TDR mechanism, San Francisco discarded most of the conventional bonuses previously relied upon by developers to gain density. Through the purchase of TDRs, developers may increase density from base FARs ranging from six to 10 in downtown office districts to an FAR of 18. It is only through the transfer of TDRs from historic buildings or open space (or from the inclusion of housing within a new building) that a developer can achieve maximum density. Thus, the incentive for developers to use TDRs in San Francisco is exceedingly strong.

In developing the downtown plan and its TDR provisions, the city identified receiving sites and calculated the total number of transfers the area could handle in order to ensure a healthy market for the TDRs as well. In addition, the plan redirects downtown office expansion to the south of the Market Street district because zoning of that area allows the highest densities.

The plan also encourages the preservation and enhancement of open space and the creation of additional open space through the TDR mechanism. A review of past planning policies revealed that plazas adjacent to new construction have not always provided the most desirable locations for open space. In the new plan, unused floor area from an approved open space site may be transferred to a development site. This permits developers to build intensively on one site while providing open space in an area where it is needed. Not-for-profit organizations interested in park development could also acquire desirable park sites and sell the development rights to developers.

Are the results of San Francisco's TDR program as promising as its commitment? The early results must be evaluated in light of the city's adoption of a three-year limit on growth, permitting the development of only 2.85 million square feet of major office construction in the city, or about 950,000 square feet per year. Because of the high vacancy rate in downtown San Francisco, the planning commission has turned down major new office construction projects in the first year following adoption of the new downtown plan. Inasmuch as no new projects have been approved, no transfers have occurred under the new plan. One new office project, the 101st Building, was approved just before the new plan went into effect, and the city did require purchase of development rights. Developers purchased TDRs from two structures rated as "significant."

In November 1986, San Francisco voters approved Proposition M, setting further limits on growth and making the future market for TDRs more uncertain. Proposition M extends the three-year growth curb indefinitely and effectively lowers the growth cap from 950,000 square feet per year to 475,000 square feet for the next 11 to 15 years and 950,000 square feet per year thereafter. Although the planning department is currently reviewing 11 office construction projects, including several that will use TDRs, Proposition M will depress the market for TDRs well below the program designers' original projections.

Unlike New York, Denver, and Seattle, San Francisco's TDR mechanism does not impose a requirement on the owner to enter into an agreement to restore or to preserve the building. Instead, this obligation is enforced through provisions of the ordinance implementing the plan, which require the preservation of significant buildings and contributory buildings that have sold TDRs. In addition, TDRs do not have to be transferred from parcel to parcel as in some other TDR schemes; it is possible for downtown San Francisco development rights to "float," unattached to a sending or receiving site. A Certificate of Transfer documents the exchange of TDRs from the original owner to the owner of a development lot or to persons or firms who may hold them for subsequent transfer. Although it is possible that a speculative market might

develop in "floating TDRs," at present this is not occurring because title companies are unwilling to insure development rights not attached to a site.

An owner of a significant or contributory building who wishes to sell unused development rights applies to the city for a statement of eligibility. To date, very few owners of landmark buildings have applied for certificates of eligibility. Some real estate brokers have expressed an interest in handling sales of TDRs.

Appendixes

Appendix A. Existing TDR Programs

				Purpose			
Location	TDR	PDR	Rights Transferred	Historic Preservation	Control or Redirect Growth	Protect Farms	Preserve Open Space or Protect Environment
ALASKA							
Matanuska-Susitna Borough	—	—	—	—	×	×	—
ARIZONA							
Scottsdale	×	—	—	—	—	—	×
CALIFORNIA							
Los Angeles	×	—	yes	×	—	—	—
San Bernardino County	×	—	—	—	×	—	—
San Diego	×	—	—	×	—	—	—
San Francisco	×	—	yes	×	×	—	×
Santa Monica Malibu Mountains	×	—	yes	—	—	—	×
Tahoe Regional Planning Agency	—	—	—	—	—	—	—
COLORADO							
Denver	×	—	yes	×	—	—	—
Pitkin County (under consideration)	×	—	—	—	×	×	×
CONNECTICUT							
State of Connecticut	—	×	yes	—	—	×	—
Windsor	×	—	—	—	×	—	—
DISTRICT OF COLUMBIA	×	—	yes	×	—	—	—
FLORIDA							
Collier County	×	—	yes	—	—	—	×
Dade County	×	—	—	—	—	—	×
Hollywood	×	—	—	—	—	—	×
Lee County (under consideration)	×	—	—	—	—	—	×
Monroe County (under consideration)	×	—	—	—	—	—	×
Palm Beach County	×	—	yes	—	—	×	—
St. Petersburg	—	—	—	—	—	—	—
LOUISIANA							
New Orleans	×	—	—	×	—	—	—
MARYLAND							
Calvert County	×	—	yes	—	×	×	—
Howard County	—	×	—	—	—	—	—
Montgomery County	×	—	yes	—	—	×	—

Continued

APPENDIX A. CONTINUED

Location	TDR	PDR	Rights Transferred	Purpose: Historic Preservation	Purpose: Control or Redirect Growth	Purpose: Protect Farms	Purpose: Preserve Open Space or Protect Environment
MASSACHUSETTS							
State of Massachusetts	—	×	yes	—	—	×	—
Nantucket	—	×	yes	—	×	—	×
Sunderland	×	—	—	—	—	—	—
MONTANA							
Bridger Canyon Zoning District Gallitan County	×	—	yes	—	—	—	×
NEW HAMPSHIRE							
State of New Hampshire	—	×	—	—	—	×	—
NEW JERSEY							
Burlington County	—	×	yes	—	—	×	—
Chesterfield	×	—	—	—	—	×	—
Hillsborough Township	×	—	yes	—	—	×	—
Hunterdon County	—	×	—	—	—	—	×
Pinelands	×	—	yes	—	×	×	×
NEW YORK							
Eden	×	—	—	—	—	—	—
New York City	×	—	—	×	—	—	—
Southampton Township	×	—	—	—	—	—	—
Suffolk County	—	×	yes	—	—	—	—
PENNSYLVANIA							
Birmingham Township	×	—	—	—	—	—	—
Buckingham Township	×	—	yes	—	—	×	×
Kennett Square	×	—	—	—	—	—	—
Upper Makefield	×	—	—	—	—	—	—
RHODE ISLAND							
State of Rhode Island	—	×	yes	—	—	×	—
TEXAS							
Dallas	×	—	—	×	—	—	—
WASHINGTON							
Island County	×	—	—	—	—	×	×
King County	—	×	yes	—	—	×	—
Seattle*	×	—	yes	×	—	—	—
WYOMING							
Teton County (under consideration)	×	—	—	—	×	—	×

Note: This table was compiled primarily from secondary source materials and not all of the information was verified with each community cited. It is presented primarily to assist those undertaking research. The acronym "PDR" stands for "Purchase of Development Rights" and refers to outright acquisition of development rights to protect a resource by government entities with no corresponding intention to resell or transfer the density to other sites.

*Also low-income housing.

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Transfer of development rights from properties containing historic structures. To authorize, upon appeal in specific cases, subject to terms and conditions fixed by the board, an exception permitting the transfer of unused development rights or undeveloped floor area from zone lots containing a structure that has been designated for preservation pursuant to and as set forth in chapter 30 of the Revised Municipal Code. Such transfer shall meet all of the following conditions and requirements:

1. This procedure shall be permitted only in the B-5 and B-7 districts, and transfers from one zone lot to another zone lot shall be permitted only within the same specific zone district. This procedure may be utlilized by a maximum of four times for any specific zone lot.
2. The maximum amount of undeveloped floor area that may be transferred from a zone lot containing a designated structure shall be the difference between the existing gross floor area in the designated structure and the maximum gross floor area permitted by the district regulations for property zoned B-5 or the supplementary maximum gross floor area permitted by the regulations for property zoned B-7.
3. Every application shall contain the signatures of the owners of all properties involved.
4. No structure receiving floor area and located in the B-5 district shall be enlarged through one or more applications of this procedure by more than 25 percent of the basic maximum gross floor area.
5. No structure receiving floor area and located in a B-7 district shall be enlarged through one or more applications of this procedure by more than 25 percent of the supplementary maximum gross floor area; provided, however, that where the gross floor area of a structure will not exceed six times the zone lot area counting any and all of the special floor areas allowed by Section 59-380(b)(1), except street-level floor areas of Section 59-380(b)(1)a, such structure may be enlarged by an amount equal to 50 percent of the supplementary maximum gross floor area. Such structure shall provide the low-level light areas as required by Section 59-380(b)(1).

All such transfers approved by the board shall be recorded by the department of zoning administration among the records of the clerk and recorder of the city, which recording shall contain a statement signed by the owner of the zone lot containing the structure that has been designated for preservation acknowledging the physical limitations placed on the property as a result of the transfer.

Upon recording with the clerk and recorder of the city, the department of zoning administration shall administer the provisions of this subsection (3)m, with the following restrictions and limitations: (1) The construction of the transferred floor area shall not be permitted until the structure designated for preservation is utilized by a use by right and the exterior has been renovated or restored according to Section 30-6 of the Revised Municipal Code; and (2) if for any reason the structure designated for preservation is partially or completely destroyed after the transfer of unused development rights through this procedure, no new structure shall be built exceeding the floor area of the former structure unless additional floor area is permitted through a new application of this procedure, through a combining of zone lots, or through other transfer procedures.

2. Collier County, Florida, TDR Ordinance

SECTION 9. SPECIAL REGULATIONS

9.1 "ST" Special Treatment Overlay District—Special Regulations for Areas of Environmental Sensitivity and Lands and Structures of Historical and/or Archaeological Significance.

a. *Intent and Purpose.* Within Collier County, there are certain areas that, because of their unique assemblages of flora and/or fauna, their aesthetic appeal, historical or archaeological significance, or their contribution to their own and adjacent ecosystems, make them worthy of special regulations. Such regulations are directed toward the conservation, protection, and preservation of ecological, commercial, and recreational values for the greatest benefit to the people of Collier County. Such areas include, but are not necessarily limited to, mangrove and freshwater swamps, barrier islands, coastal beaches, estuaries, cypress domes, natural drainage ways, aquifer recharge areas, and lands and structures of historical and archaeological significance.

The purpose of this overlay district regulation is to ensure the maintenance of these environmental and cultural resources and to encouragee the preservation of the intricate ecological relationships within the systems and, at the same time, permit those types of developments that will hold changes to levels determined acceptable by the board of county commissioners after public hearing.

b. *"ST" as a Zoning Overlay District; Designation of "P-ST" Lands.*

EXCERPT

Transferable Development Rights Programs: TDRs and the Real Estate Marketplace

Richard J. Roddewig and Cheryl A. Inghram

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tion, the Conservancy has been posting TDC prices, which have steadily declined to the current $15,000 level.

Measured by the criteria set out in Chapter 1, Santa Monica's TDR program has been successful. However, the future of the program is uncertain, and it may soon end. Los Angeles County is nearing completion of its local coastal plan for the Malibu Santa Monica Mountain area and will soon reclaim permit authority from the commission. The county has opposed the TDC program, taking the position that many of the lots would never be developed due to slope, lack of roads, and zoning standards. The county argues that development permits would be awarded only to sites that are actually developable. In the meantime, uncertainty over the future of the program has softened the market for TDCs, inasmuch as many developers are expecting county zoning to permit higher as-of-right densities in the marine terrace.

NEW YORK CITY

For decades, developers in New York City have made use of air rights to construct buildings exceeding standard zoning density, but it was not until 1968 that a TDR program was developed specifically for landmark buildings. New York's TDR program was the first in the country and continues to be one of the most successful.

In New York, there are two ways that a developer can obtain additional density for skyscraper construction. The most frequent form of air rights transfer is through the zoning-lot merger. A city block is the limit of a zoning lot. Individual parcels on the block may be "merged" into a single zoning lot by a declaration of single-lot status filed by parties with interest in the adjacent parcels on the block. Structures with unused floor area ratio (FAR) may use these "as-of-right" zoning-lot mergers to transfer unused FAR to vacant parcels in the same block for new development.

In 1968, New York City amended its zoning ordinance to permit a TDR from locally designated landmark buildings to "adjacent" lots on the same block, across the street, or diagonally across an intersection. Development rights in New York City are simply calculated on the basis of a one-to-one transfer of unused FAR from the landmark to the receiving site. A year later the city planning commission redefined "adjacent sites," permitting a transfer of rights from landmarks to any lot in a chain of adjacent common ownership, provided that the first link in the chain is contiguous to or across the street from the landmark property. Lawyers for Penn Central Transportation Co., owners of the landmark Grand Central Terminal, have recently argued that control of the underground railroad right-of-way between two sites meets the requirement of a chain of common ownership. The adjacent lot provision of the TDR mechanism was also amended to assist with preservation in the South Street Seaport District.

The TDR program for landmarks was designed both to ensure preservation of the sending site and quality development on the receiving site. An application to use TDRs must be submitted to the city planning commission. Site plans of the sending and the receiving site, as well as a plan for preserving and maintaining the landmark building, are reviewed by the commission. The estimated costs of maintaining the landmark are evaluated by the city when it reviews the price of the development rights to be transferred, and the commission has the legal authority to reject the transfer if the proposed price is insufficient to maintain the landmark. The owners of landmark properties from which development rights have been severed are then required to donate a preservation and conservation easement to a qualified organization to ensure compliance with the preservation and maintenance agreement.

While landmark property owners may ultimately transfer all unused FAR, the floor area of the proposed building to be constructed on the receiving lot cannot be more than 20 percent greater than the amount the receiving lot was entitled to prior to the transfer. In its review of the proposed transfer, the planning commission assesses not only the benefits that will accrue to the landmark, but also the impact of the proposed project on its neighbors. Potential ill effects of overbuilding on the receiving site and design compatibility with neighboring properties are also reviewed.

New York City's TDR program has been among the most active of any in the country, yet during the 18 years that the TDR mechanism has been in effect, there have been only a dozen transfers from the nearly 700 landmark structures in New York City. The reason is simple: developers have easier and therefore more attractive ways to gain density. The first choice of developers in the market for additional density is the zoning-lot merger, which is as-of-right and is not subject to a process of review and approval. If a developer cannot achieve density through zoning-lot merger, a change in zoning to a higher density classification may be sought. Only after these options have been exhausted does a developer typically seek TDRs from landmark properties and submit to the strenuous planning review involved in TDR approvals.

In New York, the TDR mechanism has been limited to individual landmarks and has not been extended to properties within designated historic districts. The New York City Landmarks Preservation Commission fears that the fragile character and scale of historic districts are ill-suited to receiving additional density. Extension of the TDR concept to historic districts would create an even more serious oversupply of TDRs in a market with a very low demand, driving down the price of the TDRs and making the concept less effective as a historic preservation mechanism. Even without including historic districts, the Landmarks Preservation Commission estimates there is a current supply of 20 million square feet of potential development rights from already designated landmarks.

The TDR mechanism has been extended to one historic district in New York, the South Street Seaport area. Through a special zoning amendment, the city designated both a preservation area and a redevelopment area consisting of a number of parking lots within an eight-block radius. Unused development rights could be shifted from the preservation area to the area designated for new development. A consortium of financial institutions agreed to accept development rights in exchange for writing off delinquent mortgages, enabling the owners of buildings in the Seaport District to qualify for loans to renovate their

properties. The commercial banks were permitted to hold the development rights in a TDR "bank" and to sell the rights for new construction. The TDR mechanism was the catalyst for reinvestment in the historic buildings of the South Street Seaport area, now a major tourism generator, and stimulated new office development in the area of the district that was able to support additional density. Several major office buildings have been constructed with TDRs from the bank.

DENVER

Late in 1979, planned construction of downtown Denver's Sixteenth Street Mall and a proposal to create a new National Register of Historic Places historic district that would include Sixteenth Street buildings prompted a joint public/private exploration of options for integrating new development with the historic fabric of Sixteenth Street. What eventually emerged from the process of discussion was a TDR ordinance adopted in January 1982.

The adoption of Denver's TDR ordinance was not accompanied by either downzoning or the historic district and landmark designation discussed in 1979. A TDR is strictly voluntary. In Denver, many downtown property interests and politicians oppose strong protection for designated historic buildings, and owner consent to designation is almost always sought. In the absence of strict regulation, the TDR option offers an economic incentive to landmark designation and rehabilitation of historic structures.

Unlike most TDR ordinances, which are typically developed by local government staff, Denver's ordinance was planned and drafted by a committee representing Downtown Denver, Inc., Historic Denver, Inc., the Denver Landmark Commission, and the Colorado Historical Society, as well as other community and development interests. After three months of work, the committee had an ordinance and then promoted and sold the ordinance to city government, the public, and Denver's City Council, where it passed unanimously. The resulting ordinance established Denver's B-5 TDR district, which includes an approximately 40-block area of Denver's downtown.

Soon after the ordinance was passed, the Denver Partnership (a not-for-profit advocacy organization for downtown business and development) established a second committee to propose zoning changes for the warehouse district located on the western edge of downtown to protect the historic character of the warehouse buildings and to encourage housing development. Again, included on the committee were representatives of the preservation community, the city, private developers, property owners, an attorney, and members who had expertise in real estate, appraisal, architecture, and banking. One result of the committee's work was an extension of the TDR tool to the warehouse district through creation of the B-7 TDR district.

The B-5 and B-7 ordinances share the following provisions.

- Only landmark buildings individually designated by the Denver Landmark Commission are qualified sending sites.
- Before it is eligible to sell development rights, the sending building must be rehabilitated to the standards of the Denver Landmarks Commission.
- Transfers may occur only within each zone.
- The TDR amount that can be transferred from a site is calculated by deducting the density of the landmark from the base FAR allowed.
- The receiving site cannot increase its density more than 2.5:1 FAR beyond the base zoning.
- In order to limit the burden of paperwork on the city, the landmark structure can make no more than four transfers.
- Once density is transferred, future development on the sending site is permanently reduced by the number of TDRs sold. In the event the building is destroyed by fire or other casualty, the FAR of any new project would be limited to the density allowance after the transfer. There is no requirement to impose an easement on the sending site ensuring the preservation of the historic building. The committee that drafted the ordinance felt that such a provision would be politically unacceptable and might threaten potential income tax benefits to donors of preservation easements.

In the B-7 warehouse district, an additional incentive encouraged residential development. Owners of historic structures may sell one square foot of density for each square foot of housing included in the landmark building as well as unused FAR.

The TDR ordinance—if used widely—could lower the overall density of the B-5 TDR district. The maximum density with all allowable zoning bonuses in a B-5 district is an 18:1 FAR; however, TDRs from sending sites are calculated based upon an assumed maximum 10:1 to 12:1 FAR. Potential density of the B-7 TDR district, however, increased with adoption of the ordinance because of the option to transfer additional density from areas of buildings developed as residential space.

In the 40-block B-5 Central Business District TDR area, there is an inventory of approximately 2.7 million square feet of density that can be transferred from already designated landmarks and, according to a study done by Shlaes and Co., a potential of 13 million square feet of density shift if buildings identified as potential landmarks by the Denver Planning Department are also counted. In the 23-block B-7 TDR district, about 1.6 million square feet of density shift is available from existing and potential landmarks.

In the four years since Denver's ordinance was enacted, there has been only one transfer. The Denver Athletic Club, located in the B-5 TDR district, transferred 60,000 square feet of density at a price of about $15 per square foot to a site five blocks away. But despite the lack of transfers, the creation of TDRs has given owners of other landmark properties options they did not have before. The owners of two properties used their TDRs as collateral for rehabilitation construction loans.

Two factors in the Denver real estate market have suppressed an active trade in TDRs. First, with the successful completion of the Tabor Center, downtown Denver

has strengthened as a retail location, creating new demand for retail shopping. Furthermore, new retail complexes can be built to a profitable size without acquiring additional density from landmark buildings. Second, Denver has been experiencing unprecedented office vacancy levels, and new office towers that might benefit from the availability of additional density will remain on the drawing boards until the office space surplus has been absorbed. Until this situation improves, it will be difficult to assess the success of Denver's TDR program.

Despite Denver's currently inactive TDR market, the program has had some important accomplishments. The use of TDRs as collateral saved the Navarre Building, a landmark that was endangered at the time Denver was drafting its TDR ordinance. The TDR incentive has also induced some downtown property owners to seek or at least consent to landmark designation and has been a factor in decisions to undertake rehabilitation projects.

SEATTLE

In 1985 Seattle adopted a new downtown plan with four significant TDR components. The objectives of the TDR scheme for downtown Seattle are to retain and rehabilitate low-income housing in the downtown; to preserve Seattle landmarks; to encourage compatible in-fill development in historic districts; and to retain varied building scale in high-density office areas. Adoption of the TDR program was accompanied by downzoning and limitations on density in the office and retail core.

Under the new plan, a base FAR of 10 is permitted in the office core, and, with a series of bonuses, an FAR of 20 may be achieved. A developer may increase density from an FAR of 10 to 13 through "general" bonuses such as the provision of day care, parks, sculptured building tops, or retail atriums, or from the transfer of unused development rights from designated Seattle landmarks. Floor area ratio may be increased from 13 to 15 with a combination of general bonuses, affordable housing bonuses, and TDRs from low-income housing or landmarks. Finally, an increase in density from 15 to 20 FAR may be achieved only through the low-income housing TDR or through bonuses involving construction of low- and moderate-income housing, rehabilitation of vacant residential buildings, or density bonuses for the provision of low-income housing.

Unused development rights may be transferred from designated Seattle landmarks located within office, retail, or mixed commercial districts in the downtown core. Within retail districts, development rights may be received only from a site located on the same block. There are also limitations placed on sending sites. Sending sites in office districts may transfer only the difference between the base FAR and the FAR of the existing structure. In retail, mixed-use, and residential districts, transfers are generally limited to the difference between the FAR of the landmark structure and an FAR of 6.0.

The Seattle Department of Community Development has established guidelines for a transfer from landmark structures. Proposed development projects using TDRs from a landmark building require certificates of approval from the Seattle Landmark Preservation Board. A condition of approval for the development rights transfer is the restoration and adoption of a plan for long-term preservation of the landmark structure. When the receiving lot owner applies for development project review, a schematic drawing showing the proposed rehabilitation of the landmark building must be included in the application. The owner of the sending lot also must apply for a certificate of approval for the proposed rehabilitation or restoration. The review and approval process includes safeguards to ensure that funds from the sale of TDRs are available for the restoration of the landmark and that the rehabilitation is completed. For example, a certificate of occupancy for the new building on the receiving site will not be issued until the landmark building is rehabilitated, and the funds from a sale of TDRs necessary to rehabilitate the landmark are placed in a department of community development escrow account. If the landmark does not need rehabilitation, or has already been rehabilitated and certified by the National Park Service for the investment tax credit on rehabilitation of a certified historic structure, the proceeds from the sale of the development rights are not regulated by the city.

The owners of the sending and the receiving sites must file a TDR agreement with the city to certify that the owner of the receiving lot will complete the rehabilitation of the landmark and that the owner of the landmark agrees to preserve the structure for the life of the new development on the receiving site. The TDR agreement is enforced through a protective covenant or preservation and conservation easement.

Although this program was implemented in 1985, no transfers from landmark buildings have yet been made. On the other hand, a number of transfers from low-income housing have occurred. This is partly a consequence of program design. General bonuses can be used to achieve 13 FAR. And housing bonuses can be used to achieve an increase from 13 to 20 FAR without complicating the process by negotiating a landmark TDR purchase and submitting to review and agreements that delay and add expense to the development process.

The design of the program implements one goal of the downtown plan, which is to encourage the retention of low-income housing opportunities downtown. Downtown Seattle has lost some of its low-income housing stock through gentrification, but the city estimates that 7,311 low-income housing units are still available downtown. None of the low-income housing is built to the full FAR, and unused density from low-income downtown housing sites may be transferred to other downtown sites. When such a transfer occurs, the building sending TDRs must be brought into compliance with housing and building codes. The city also requires that the greater of 50 percent of the total floor area or the floor area in use for low-income housing be retained as low-income housing for at least 20 years.

Apparently, low-income housing groups have been competing to sell their development rights, depressing the price well below the projected price. Planners calculated that developers could pay up to $25 per square foot for additional density; however, TDRs from low-income housing have been selling for only $9 per square foot. As

the price has decreased, the city has seen more development proposals using this density option. This has caused some concern that low-income TDRs are being sold too cheaply to ensure the preservation and production of enough low-income housing units to fulfill the city's planning goals. The city may be forced to intervene in the low-income TDR market.

SAN FRANCISCO

A doubling of downtown office space during the 16 years between 1965 and 1981 and an average annual growth rate of over 1.7 million square feet of office space per year was causing congestion in the city's financial district and a loss of historic character and scale. In addition, the city has a weak preservation ordinance and a board of supervisors traditionally reluctant to adopt rigorous preservation controls. In response to this unprecedented growth in new office construction and the unfavorable political climate, San Francisco has made a commitment to using TDRs to accomplish historic preservation.

The new downtown plan adopted by ordinance in San Francisco in October 1985 was a dramatic response to these problems. It lowers base FAR limits, imposes height and setback requirements, requires the preservation of 251 significant buildings, and provides incentives to encourage the retention of 183 buildings that are less historically significant but that contribute to the historic and architectural character of downtown San Francisco. The plan allows for the transfer of unused development rights from significant and "contributory" buildings. A significant building may be demolished only for public safety reasons or if, considering the value of the building's TDRs, it retains no substantial remaining market value. Alterations to significant buildings must be reviewed according to the Secretary of the Interior's Standards for Rehabilitation, and owners are required to maintain the buildings and prevent neglect. The plan only encourages and does not mandate preservation of contributory buildings, but if a contributory building sells TDRs, the building must be rehabilitated and maintained as a landmark.

Although the plan was prepared for the most part by staff of the San Francisco Department of City Planning, the Foundation for San Francisco's Architectural Heritage, an influential private preservation organization, played an important role in the plan's eventual form and design. The foundation identified and rated the buildings deserving of preservation and sponsored a report by a local planning consultant to give the city background on preservation and TDR programs as well as recommendations for making them work.

With the adoption of its TDR mechanism, San Francisco discarded most of the conventional bonuses previously relied upon by developers to gain density. Through the purchase of TDRs, developers may increase density from base FARs ranging from six to 10 in downtown office districts to an FAR of 18. It is only through the transfer of TDRs from historic buildings or open space (or from the inclusion of housing within a new building) that a developer can achieve maximum density. Thus, the incentive for developers to use TDRs in San Francisco is exceedingly strong.

In developing the downtown plan and its TDR provisions, the city identified receiving sites and calculated the total number of transfers the area could handle in order to ensure a healthy market for the TDRs as well. In addition, the plan redirects downtown office expansion to the south of the Market Street district because zoning of that area allows the highest densities.

The plan also encourages the preservation and enhancement of open space and the creation of additional open space through the TDR mechanism. A review of past planning policies revealed that plazas adjacent to new construction have not always provided the most desirable locations for open space. In the new plan, unused floor area from an approved open space site may be transferred to a development site. This permits developers to build intensively on one site while providing open space in an area where it is needed. Not-for-profit organizations interested in park development could also acquire desirable park sites and sell the development rights to developers.

Are the results of San Francisco's TDR program as promising as its commitment? The early results must be evaluated in light of the city's adoption of a three-year limit on growth, permitting the development of only 2.85 million square feet of major office construction in the city, or about 950,000 square feet per year. Because of the high vacancy rate in downtown San Francisco, the planning commission has turned down major new office construction projects in the first year following adoption of the new downtown plan. Inasmuch as no new projects have been approved, no transfers have occurred under the new plan. One new office project, the 101st Building, was approved just before the new plan went into effect, and the city did require purchase of development rights. Developers purchased TDRs from two structures rated as "significant."

In November 1986, San Francisco voters approved Proposition M, setting further limits on growth and making the future market for TDRs more uncertain. Proposition M extends the three-year growth curb indefinitely and effectively lowers the growth cap from 950,000 square feet per year to 475,000 square feet for the next 11 to 15 years and 950,000 square feet per year thereafter. Although the planning department is currently reviewing 11 office construction projects, including several that will use TDRs, Proposition M will depress the market for TDRs well below the program designers' original projections.

Unlike New York, Denver, and Seattle, San Francisco's TDR mechanism does not impose a requirement on the owner to enter into an agreement to restore or to preserve the building. Instead, this obligation is enforced through provisions of the ordinance implementing the plan, which require the preservation of significant buildings and contributory buildings that have sold TDRs. In addition, TDRs do not have to be transferred from parcel to parcel as in some other TDR schemes; it is possible for downtown San Francisco development rights to "float," unattached to a sending or receiving site. A Certificate of Transfer documents the exchange of TDRs from the original owner to the owner of a development lot or to persons or firms who may hold them for subsequent transfer. Although it is possible that a speculative market might

develop in "floating TDRs," at present this is not occurring because title companies are unwilling to insure development rights not attached to a site.

An owner of a significant or contributory building who wishes to sell unused development rights applies to the city for a statement of eligibility. To date, very few owners of landmark buildings have applied for certificates of eligibility. Some real estate brokers have expressed an interest in handling sales of TDRs.

Appendixes

Appendix A. Existing TDR Programs

				Purpose			
Location	TDR	PDR	Rights Transferred	Historic Preservation	Control or Redirect Growth	Protect Farms	Preserve Open Space or Protect Environment
ALASKA							
Matanuska-Susitna Borough	—	—	—	—	×	×	—
ARIZONA							
Scottsdale	×	—	—	—	—	—	×
CALIFORNIA							
Los Angeles	×	—	yes	×	—	—	—
San Bernardino County	×	—	—	—	×	—	—
San Diego	×	—	—	×	—	—	—
San Francisco	×	—	yes	×	×	—	×
Santa Monica Malibu Mountains	×	—	yes	—	—	—	×
Tahoe Regional Planning Agency	—	—	—	—	—	—	—
COLORADO							
Denver	×	—	yes	×	—	—	—
Pitkin County (under consideration)	×	—	—	—	×	×	×
CONNECTICUT							
State of Connecticut	—	×	yes	—	—	×	—
Windsor	×	—	—	—	×	—	—
DISTRICT OF COLUMBIA	×	—	yes	×	—	—	—
FLORIDA							
Collier County	×	—	yes	—	—	—	×
Dade County	×	—	—	—	—	—	×
Hollywood	×	—	—	—	—	—	×
Lee County (under consideration)	×	—	—	—	—	—	×
Monroe County (under consideration)	×	—	—	—	—	—	×
Palm Beach County	×	—	yes	—	—	×	—
St. Petersburg	—	—	—	—	—	—	—
LOUISIANA							
New Orleans	×	—	—	×	—	—	—
MARYLAND							
Calvert County	×	—	yes	—	×	×	—
Howard County	—	×	—	—	—	—	—
Montgomery County	×	—	yes	—	—	×	—

Continued

Location	TDR	PDR	Rights Transferred	Purpose: Historic Preservation	Purpose: Control or Redirect Growth	Purpose: Protect Farms	Purpose: Preserve Open Space or Protect Environment
MASSACHUSETTS							
State of Massachusetts	—	×	yes	—	—	×	—
Nantucket	—	×	yes	—	×	—	×
Sunderland	×	—	—	—	—	—	—
MONTANA							
Bridger Canyon Zoning District Gallitan County	×	—	yes	—	—	—	×
NEW HAMPSHIRE							
State of New Hampshire	—	×	—	—	—	×	—
NEW JERSEY							
Burlington County	—	×	yes	—	—	×	—
Chesterfield	×	—	—	—	—	×	—
Hillsborough Township	×	—	yes	—	—	×	—
Hunterdon County	—	×	—	—	—	—	×
Pinelands	×	—	yes	—	×	×	×
NEW YORK							
Eden	×	—	—	—	—	—	—
New York City	×	—	—	×	—	—	—
Southampton Township	×	—	—	—	—	—	—
Suffolk County	—	×	yes	—	—	—	—
PENNSYLVANIA							
Birmingham Township	×	—	—	—	—	—	—
Buckingham Township	×	—	yes	—	—	×	×
Kennett Square	×	—	—	—	—	—	—
Upper Makefield	×	—	—	—	—	—	—
RHODE ISLAND							
State of Rhode Island	—	×	yes	—	—	×	—
TEXAS							
Dallas	×	—	—	×	—	—	—
WASHINGTON							
Island County	×	—	—	—	—	×	×
King County	—	×	yes	—	—	×	—
Seattle*	×	—	yes	×	—	—	—
WYOMING							
Teton County (under consideration)	×	—	—	—	×	—	×

Note: This table was compiled primarily from secondary source materials and not all of the information was verified with each community cited. It is presented primarily to assist those undertaking research. The acronym "PDR" stands for "Purchase of Development Rights" and refers to outright acquisition of development rights to protect a resource by government entities with no corresponding intention to resell or transfer the density to other sites.

*Also low-income housing.

Appendix B. Examples of TDR Ordinances

1. Denver Zoning Ordinance—Section 59-54 (3) (m)

Transfer of development rights from properties containing historic structures. To authorize, upon appeal in specific cases, subject to terms and conditions fixed by the board, an exception permitting the transfer of unused development rights or undeveloped floor area from zone lots containing a structure that has been designated for preservation pursuant to and as set forth in chapter 30 of the Revised Municipal Code. Such transfer shall meet all of the following conditions and requirements:

1. This procedure shall be permitted only in the B-5 and B-7 districts, and transfers from one zone lot to another zone lot shall be permitted only within the same specific zone district. This procedure may be utlilized by a maximum of four times for any specific zone lot.
2. The maximum amount of undeveloped floor area that may be transferred from a zone lot containing a designated structure shall be the difference between the existing gross floor area in the designated structure and the maximum gross floor area permitted by the district regulations for property zoned B-5 or the supplementary maximum gross floor area permitted by the regulations for property zoned B-7.
3. Every application shall contain the signatures of the owners of all properties involved.
4. No structure receiving floor area and located in the B-5 district shall be enlarged through one or more applications of this procedure by more than 25 percent of the basic maximum gross floor area.
5. No structure receiving floor area and located in a B-7 district shall be enlarged through one or more applications of this procedure by more than 25 percent of the supplementary maximum gross floor area; provided, however, that where the gross floor area of a structure will not exceed six times the zone lot area counting any and all of the special floor areas allowed by Section 59-380(b)(1), except street-level floor areas of Section 59-380(b)(1)a, such structure may be enlarged by an amount equal to 50 percent of the supplementary maximum gross floor area. Such structure shall provide the low-level light areas as required by Section 59-380(b)(1).

All such transfers approved by the board shall be recorded by the department of zoning administration among the records of the clerk and recorder of the city, which recording shall contain a statement signed by the owner of the zone lot containing the structure that has been designated for preservation acknowledging the physical limitations placed on the property as a result of the transfer.

Upon recording with the clerk and recorder of the city, the department of zoning administration shall administer the provisions of this subsection (3)m, with the following restrictions and limitations: (1) The construction of the transferred floor area shall not be permitted until the structure designated for preservation is utilized by a use by right and the exterior has been renovated or restored according to Section 30-6 of the Revised Municipal Code; and (2) if for any reason the structure designated for preservation is partially or completely destroyed after the transfer of unused development rights through this procedure, no new structure shall be built exceeding the floor area of the former structure unless additional floor area is permitted through a new application of this procedure, through a combining of zone lots, or through other transfer procedures.

2. Collier County, Florida, TDR Ordinance

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9.1 **"ST" Special Treatment Overlay District—Special Regulations for Areas of Environmental Sensitivity and Lands and Structures of Historical and/or Archaeological Significance.**

a. *Intent and Purpose.* Within Collier County, there are certain areas that, because of their unique assemblages of flora and/or fauna, their aesthetic appeal, historical or archaeological significance, or their contribution to their own and adjacent ecosystems, make them worthy of special regulations. Such regulations are directed toward the conservation, protection, and preservation of ecological, commercial, and recreational values for the greatest benefit to the people of Collier County. Such areas include, but are not necessarily limited to, mangrove and freshwater swamps, barrier islands, coastal beaches, estuaries, cypress domes, natural drainage ways, aquifer recharge areas, and lands and structures of historical and archaeological significance.

The purpose of this overlay district regulation is to ensure the maintenance of these environmental and cultural resources and to encouragee the preservation of the intricate ecological relationships within the systems and, at the same time, permit those types of developments that will hold changes to levels determined acceptable by the board of county commissioners after public hearing.

b. *"ST" as a Zoning Overlay District; Designation of "P-ST" Lands.*

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ARTICLES

DOWNTOWN PRESERVATION STRATEGIES AND TECHNIQUES

Summary of Transcript of An Invitational Workshop of the National Trust for Historic Preservation and the Foundation for San Francisco's Architectural Heritage

Nancy C. Shanahan*

INTRODUCTION

A one-day invitational workshop was held in San Francisco, Calif., on June 29, 1983, to analyze and exchange ideas on legal, economic and political strategies and techniques for preserving downtown historic resources while encouraging desirable growth and change. A recently completed study and resulting publication, *A Preservation Strategy for Downtown San Francisco*[1] (the "Sanger Study") was used as a basis for workshop discussions.

The purposes of the Sanger Study were to review the downtown preservation experiences of other major cities, to evaluate the city planning department's rezoning proposals for downtown San Francisco and to develop a comprehensive preservation strategy for the central business district. Timing was crucial in San Francisco with a major city planning effort underway and the local preservation organization, Foundation for San Francisco's Architectural Heritage ("Heritage")

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[1]The Sanger Study was prepared by John M. Sanger Associates, Inc., for the Foundation for San Francisco's Architectural Heritage ("Heritage") with financial support from the National Trust for Historic Preservation's Critical Issues Fund. The publication is sometimes referred to as the Sanger Study or the San Francisco Study. Copies may be obtained for $15 from the Foundation for San Francisco's Architectural Heritage, 2007 Franklin Street, San Francisco, Calif., 94109.

In addition to the San Francisco Study, projects in seven other cities have received financial assistance through the Critical Issues Fund, including Chicago, Denver, Lexington, Ky., Salt Lake City, New Orleans, Buffalo and New York City's theater district. Each case involved preservationists in the early planning stages of downtown development projects, working cooperatively with developers, local business leaders and city officials.

in a position to have a significant influence in that process by providing technical expertise and strengthening its alliance with the city and development interests.

The workshop in San Francisco brought together developers, public officials and preservationists from cities across the country to critique the Sanger Study and brainstorm on tools and techniques being used and developed to deal with downtown development pressures.[2] This paper, prepared using a transcript of the workshop, identifies the key issues discussed. The major recommendations of the Sanger Study have since been incorporated in the downtown rezoning proposal issued by the San Francisco Planning Department in August 1983.[3] A draft ordinance to implement the rezoning proposal has been completed and will be considered by the San Francisco Planning Commission and Board of Supervisors in the near future.

SUMMARY OF WORKSHOP DISCUSSIONS AND ISSUE IDENTIFICATION

The workshop format divided the discussion into the three major areas identified in the Sanger Study: transfer of development rights (TDRs), conservation zones in lieu of traditional historic districts and striking an appropriate balance between economic incentives and regulatory controls. A summary of the study's key points and rationales in each of these areas stimulated discussion from which legal and political issues and controversies emerged. The workshop discussions and issues identified are summarized below.

[2]Cities represented at the workshop included San Francisco, Chicago, Denver, Salt Lake City, New Orleans, New York City, Washington, D.C., Cincinnati, Anchorage, Honolulu, Seattle, Oakland, Los Angeles and Boise.

Those who made a special contribution to the workshop in terms of experience and expertise and who are frequently quoted in the article include: Gus Bauman, litigation counsel, National Association of Home Builders, Washington, D.C.; Tersh Boasberg, Boasberg, Klores, Feldman and Tucker, Washington, D.C., and president of the National Center for Preservation Law; David Bonderman, Arnold and Porter, Washington, D.C. (now with the Robert M. Bass Group in Fort Worth, Tex.); David Callies, professor of law, University of Hawaii at Manoa; Grant Dehart, executive director of the Foundation for San Francisco's Architectural Heritage (Heritage); Richard Fleming, president and chief executive officer, The Denver Partnership, Inc.; Roy Gorman, chief counsel, California Coastal Commission and author of the Malibu/Santa Monica Mountains transfer of development credits program; Diane Manget, secretary of the board and past executive director of Historic Faubourg St. Mary Corporation; Norman Marcus, legal counsel to the New York City Planning Commission; Dorothy Miner, legal counsel to the New York City Landmarks Commission; Richard Roddewig, attorney and economist with Shlaes and Company, Chicago; Antonio Rossmann, McCutchen, Doyle, Brown and Enerson, San Francisco; John M. Sanger, John M. Sanger Associates, Inc., author of *A Preservation Strategy for Downtown San Francisco;* and George Williams, assistant director, Plans and Programs of the San Francisco Department of City Planning.

[3]The major provisions of the Sanger Study and the planning department's downtown rezoning proposal are compared in the appendix at the end of this article.

TRANSFER OF DEVELOPMENT RIGHTS AS A PRESERVATION STRATEGY

The TDR program proposed by the Sanger Study includes the following elements:

- Permit transfer of development rights only from significant buildings;
- Permit transfers within the same zoning district at a 1:1 ratio and in specific development districts at a 1.5-2:1 ratio;
- Allow an automatic right to use TDRs on eligible transferee sites up to the maximum permissible floor area ratio (FAR) or maximum achievable FAR under height and bulk limits;
- Require valid occupancy or current use as a condition for transfers;
- Permit a bonus transfer for restoration;
- Record a permanent reduction in development potential and maintenance agreement in the city's favor upon transfer;
- Encourage city support in organizing a trust to create an initial bank to ensure an active market in TDRs; and
- Prohibit the demolition or significant alteration of the highest-rated building except in restricted, special circumstances. The study highlighted this protection as a critical component of the proposed TDR program.

Study Rationale

A TDR program is the backbone of the recommended preservation strategy. Despite the lack of widespread experience with TDRs for preservation purposes, the Sanger Study concludes that a workable TDR program can represent the most important single element of a successful preservation strategy in San Francisco simultaneously addressing issues of economic and political importance. According to the Sanger Study, the limited experience with TDRs to date indicates that they will not operate successfully where they are provided only as voluntary, discretionary bonuses and their use is solely a function of market-based incentives. Thus, direct regulation of demolition of significant buildings is recommended to provide a basis for a workable TDR program and to ensure the preservation of significant buildings.

Workshop Discussion

The workshop discussion of the Sanger Study recommendations focused on two major questions: whether TDRs should be viewed as compensation or as incentives and what elements are necessary to make a TDR program work effectively.

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do not, political strength will also be lacking to force landowners to buy and sell TDRs instead of developing as they wish. Mr. Bonderman thinks TDRs are never a good enough incentive to cause the developer to change his plans. At the same time, they are politically unacceptable to the public. In his opinion, they are perceived as an inequitable handout to developers who already make more money than they should.

What makes a TDR program work for preservation purposes?

Mr. Bonderman feels strongly that TDRs will never work in any urban area. Ms. Miner expressed concern about the widespread use of TDRs proposed in the Sanger Study. With these exceptions, there was general consensus that although no pretense should be made that a TDR program is a panacea, TDRs can be useful as an effective weapon in the overall planning/zoning arsenal.

> "[T]he challenge is to sufficiently tame the TDR wildcard so that it works together with the city's plan, recognizing that landmarks preservation is one element in that plan."[6]

The following emerged as critical elements of program success:

- Creating the supply and demand for TDRs through downzoning/reducing overall density and imposing anti-demolition controls;
- Deciding upon receiving sites as a part of an overall plan;
- Developing certainty and program stability; and
- Setting up a market system such as a bank or auction place.

Creating the Supply and Demand

There was general agreement that a TDR program will not work absent a demand for the rights. Mr. Roddewig explained that the famous Chicago Plan[7] was never adopted in Chicago because floor area ratios ("FARs") were too high. "The only limitation in Chicago is the Federal Aviation Administration and the landing patterns at O'Hare Airport."[8] The key to any type of TDR system is to get the maximum FAR down low enough so that a developer needs to acquire development rights in order to build an economic building.

In addition, there must be a "supply" of development rights available for transfer. The Sanger Study's recommendation for ensuring this supply is the imposition of antidemolition restrictions on landmark buildings with a concurrent right to

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[6]Norman Marcus, transcript, p. 3.
[7]See discussion and proposal for the Chicago TDR plan in Costonis, John J., *Space Adrift: Saving Urban Landmarks Through the Chicago Plan* (Urbana: University of Illinois Press for the National Trust for Historic Preservation, 1974).
[8]Transcript, p. 44.

sell the development potential, which otherwise could have been used on the site.

The discussion centered on downzoning and the reduction in FARs. Three major concerns were raised:

—If an area is downzoned solely to create a market for development rights, the action might be subject to constitutional challenge unless clearly tied to "health, safety and welfare" justifications.

—Care must be taken not to reach the point at which such limitations and restrictions become the "last straw," making development so difficult and expensive as to reduce the city's advantage as an office market.

—Politically, the danger in downzoning to create a TDR market may be a perceptual one. TDRs might be seen as the problem rather than a solution to the problem of how to distribute the benefits and burdens of community-wide preservation.

From the workshop discussions, it became apparent that all of these concerns can be addressed through the manner in which such density reductions are accomplished. Downzoning or reductions in FARs should be accomplished as part of the overall planning process. The first step is to determine what the overall density should be in the downtown; e.g., what is politically and physically possible and what will the political entity allow after weighing all of its goals and planning objectives, including historic preservation. After the desired density has been fixed, TDRs can be looked upon as a mechanism to spread that density from protected historic sites to sites where greater density can be accommodated.

Deciding Upon Receiving Sites

Deciding where excess density from historic sites will land surfaced as an important issue, pointing to an inherent contradiction between zoning and TDRs. The tension between them becomes particularly acute when there is a floatation of rights over a large radius from the building sending them. Traditional zoning relates to infrastructure, services and other community goals. The problem is how to justify the impacts of additional density in an area that is a mile away from the benefit—the preserved historic building. In *Fred F. French Investing Co., Inc.*, a case involving private parks in New York City, the court likened a TDR scheme to spot zoning.[9] The lesson from this decision is that when development rights are sent to other areas, there should be a reduction throughout the receiving area to ensure that the overall density will not exceed a certain amount. The benefit of preserving historic buildings must be perceived as a benefit by the entire community, not just by those in the immediate vicinity of the historic

[9]Fred F. French Investing Co. Inc. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976).

building or as an economic benefit to the developer at the receiving site to justify TDRs. This is consistent with Mr. Gorman's observation that in order for a TDR program to succeed in preserving buildings, there must be a consensus that preservation is a community-wide objective, necessitating a distribution of burdens and benefits.

An interesting position was taken by Mr. Roddewig regarding how a developer might be motivated to use development rights in designated receiving areas. He feels there may be a need for a windfall—an extra level of incentives—to get developers to jump into other areas with their transferred rights.

Developing Certainty and Program Stability

Mr. Gorman shared several lessons learned through the Coastal Conservancy's transfer of development credits program in the Malibu/Santa Monica Mountains area.[10] Most importantly, the program must operate consistently over time, with stability and predictability in terms of price and availability of supply. Further, there must be certainty in the benefit of buying a TDR and proceeding with a development rather than waiting for a change in the political climate that might allow additional development on the site without purchasing additional development rights. In this regard, it is important that the program operate without routine changes or granting of variances upon discretionary review. Finally, stability of the program depends on an understanding and acceptance of the program by the larger community.

Setting Up a Market System

In the Coastal Conservancy's experience, a market system, such as a bank or auction place where developers can come together with landowners to negotiate, appears necessary. This helps to establish a price for the rights and reduces transaction costs. Mr. Marcus warned, however, that municipalities should be

[10]This program was initiated by the California Coastal Commission and the State Coastal Conservancy to transfer development credits from underdeveloped areas in the Santa Monica Mountains to developable areas on the coast. The basis for the program's operation is a requirement imposed by the Coastal Commission that, as a condition of new development in designated portions of the Coastal Zone, the developer must have a specified number of development credits. These credits can be obtained by direct purchase from the owners of the mountain lots, or indirectly from the Coastal Conservancy. Authority for this program is found in Pub. Res. Code, §§ 30000-30900 (California Coastal Act of 1976), Pub. Res. Code §§ 31000-31405 (State Coastal Conservancy) and Pub. Res. Code §§ 33000-33216 (Santa Monica Mountains Conservancy).

cautious in setting up TDR banks. In his opinion, such actions might be viewed as "manipulations of economic markets" prohibited by antitrust laws.[11]

CONSERVATION ZONES IN LIEU OF TRADITIONAL HISTORIC DISTRICTS

The Sanger Study proposed creating a new category of land use regulation known as conservation zones. These would be created under the same general zoning authority as the city's landmarks and historic district ordinance (Article 10).[12] However, they would be in addition to, and in some cases coextensive with, the more traditional historic districts. The proposal for conservation zones includes the following elements:

- Conditional use permit required for all new construction to determine consistency of scale and design with the architectural and historical character of the conservation zone;
- Conditional use permit required for all alterations to significant and contributory buildings to determine consistency with the architectural and historical integrity of the conservation zone;
- Prohibition against the use of TDR bonuses on sites of significant or contributory buildings within conservation zones except in special circumstances; and
- Certification of conservation zones as local historic districts for federal tax act purposes.

Study Rationale

The Sanger Study's rationale for recommending conservation zones instead of attempting to strengthen San Francisco's landmarks ordinance is that conservation zones are the mechanism being used and proposed by the City Planning Department to meet overall urban design concerns and planning objectives for the downtown. In San Francisco, historic preservation is recognized as one of the city's primary concerns and appears to be consistent with the overall planning objectives. The Sanger Study posits the choice as a political one. Preservationists can work within the current land use regulatory process or they can take on the greater battle of attempting to change the whole planning process by relying on a historic district ordinance — a process outside the one the city has chosen to address its planning needs.

San Francisco's landmarks ordinance is much weaker than ordinances in many major cities in the United States and Canada.[13] In San Francisco, the landmarks board's role is entirely advisory to the planning commission, even on decisions of designation. There is no right to deny demolition. Although the planning commission can delay demolition, it cannot require owners to explore alternatives to demolition to sell the property to someone willing to retain it. In addition, Article 10 imposes the extraordinary requirement of two-thirds owner consent for designation of a historic district.

While the state of San Francisco's Article 10 certainly argues for considerable changes for citywide preservation purposes, the Sanger Study recommends against making such a campaign the centerpiece of any substantial preservation effort in the downtown. With few exceptions, preservation ordinances in other cities have not in themselves been particularly successful in growing downtown areas. Traditional preservation goals can be accomplished through conservation zones in San Francisco because the current trend is to consolidate the city's power in an independent commission with regulatory authority. Furthermore, the Sanger Study argues that it is wrong, in terms of planning and regulation, to fragment and isolate the decision-making process on historic buildings from the overall planning and regulatory decision-making scheme.

Workshop Discussion

The workshop generally opposed the Sanger Study's recommendation to place primary reliance on conservation zones in lieu of historic districts to protect preservation values. Three primary issues were discussed.

Kind and Degree of Control

There was general consensus that it is not possible to provide the same kind and degree of control through conservation zones as it is through traditional historic districts. Ms. Miner and Mr. Bonderman took particularly strong positions against the conservation zone concept, stating that only a separate historic district commission can preserve the true historic character of the buildings. Planning

[11]The author is unaware of any TDR program that has been challenged on antitrust grounds. However, recent attacks on municipal regulatory powers on anti-trust grounds should be considered. This is especially true if a municipality intends to buy and sell TDRs as a central market. See, e.g., Community Communications Company, Inc. v. City of Boulder (445 U.S. 40, 1982), a cable television case in which the U.S. Supreme Court ruled that municipalities are not immune from federal antitrust suits unless their actions are specifically authorized by state statute. Before the year was out, a rival refuse collector in Chula Vista filed suit on antitrust grounds charging that the city's franchising procedures were anticompetitive (Hudson v. City of Chula Vista (S.D. Cal., No. 821723G(M))). The Santa Clara County municipal court's choice of a driving school is being challenged in Central Counties Safety Council v. Chase (N.D. Cal., No. C 83 2008-WAI(SJ)), and in another case, filed in December 1983, San Francisco's rent control law is being challenged on antitrust grounds. See, Hozz v. City and County of San Francisco (S.F. Super. Ct., No. 817405).

[12]San Francisco Planning Code, Article 10, "Preservation of Historical, Architectural and Aesthetic Landmarks."

[13]A total of 11 cities were surveyed in the Sanger Study including Baltimore, Boston, Chicago, New Orleans, New York, Philadelphia, Portland, Ore., Seattle, Toronto, Vancouver, B.C., and Washington, D.C. Of these, seven were found to have landmark laws that are stronger than San Francisco's, as measured by the ability to deny permission to demolish or substantially alter significant buildings.

departments, given their valid concerns with bulk, density, light, air, housing, transportation, growth, etc., just do not have the experience, expertise, interest or ability to deal with specific preservation concerns. Nevertheless, there was general agreement that compatibility between historic districts and the overall planning and zoning process is necessary to an effective program.

Political Feasibility and Timing

Ms. Miner urged San Francisco preservationists to wait until the climate for strengthening Article 10 shifts in their favor rather than being "bought off" now with partial measures that have only the "appearance of protection." From her viewpoint, settling for conservation zones would dilute the political pressure to create a truly effective mechanism for preservation in the long run. Unlike Ms. Miner, Mr. Roddewig agrees with Mr. Sanger that preservationists must look at the political realities at any given time. In his opinion, if it is going to be impossible to get a true historic district ordinance adopted in San Francisco today, conservation zones may be a good first step in obtaining eventually a more legitimate device to protect historic buildings.

Potential Legal Infirmity

A potential problem with the conservation zone proposal was briefly discussed. San Francisco's existing preservation ordinance (Article 10) will remain in effect under the planning department proposal. The new ordinance providing for conservation districts and designation of significant and contributory buildings is to be enacted pursuant to the same legal authority as Article 10 for almost identical purposes, e.g., that of preserving and protecting aesthetic, architectural and historic properties. Yet, designation criteria and specific protection under each will be slightly different. Consequently, it is possible that the same building or area could be designated under either ordinance provision with resulting differences in treatment. This may raise equal protection challenges.

INCENTIVES VERSUS REGULATION

The Sanger Study recommended a combination of incentives and regulations. Incentives included:

- TDRs from significant buildings;
- TDR bonus for restoration/rehabilitation of a significant building in accordance with the Secretary of the Interior's Standards;
- Use of tax-exempt bonds for rehabilitation of significant buildings;
- Relief from local regulations that penalize historic buldings; and
- City support for certification of conservation districts as approved local historic districts to enable properties located therein to use the federal rehabilitation tax credits.

Regulations included:

- Prohibition of demolition or significant alteration of the highest-rated significant buildings; and
- Requirement for conditional use permits for all new construction and alterations to significant and contributory buildings within the conservation zones to ensure consistency with the architectural and historical integrity thereof.

Study Rationale

The Sanger Study bases its proposed strategy on a workable combination of regulations and incentives, with TDRs from protected sites allowed to respond to an owner's "reasonable expectation" to get a return on his property.

Workshop Discussion

> "The lesson is that we do need both—we need the public constraints by the legislative body; we need the tools to recognize that it's only the developer in our free enterprise society who will actually bring about the end that we ideally desire."[14]

The Case for Economic Incentives

There was consensus that it is not a question of regulation versus incentives, but of how they can work together to achieve preservation goals. Within this context, several points were made on behalf of strong incentives. Mr. Bauman said that in the real world of land use politics, it's the carrot that works more often than the stick. The key is to provide incentives to preclude the regulations simply preventing an activity and to permit the workability of the program in a give-and-take situation.

Mr. Callies stated that the best way to preserve a building is to retain its economic viability. To accomplish this in the urban context, massive economic breaks are needed to make the cost of owning and operating a historic building as low as possible.

The Case for Regulation: Making Incentives Work

Most workshop participants agreed that regulations are the cornerstone of any good preservation program and, in fact, are necessary to make incentives work to accomplish preservation goals. The most convincing argument made in support of strong and dependable regulations was that they create leverage. It was pointed

[14]Antonio Rossmann, transcript, p. 145.

out that a demolition delay ordinance, such as the one presently in effect in San Francisco, gives no leverage because the developer knows that at the end of the delay period, he can do as he pleases although he will have incurred some interest costs. The availability of incentives without regulation will never make a real difference to a large scale developer, since no incentive can replace the eventual income received from a larger project. In contrast, a regulatory scheme like that in Washington, D.C., in which there is a separate, independent preservation commission with explicit authority to override zoning and prohibit demolition, creates the necessary leverage. This regulatory leverage, along with some appropriate carrots, such as bonuses, tax incentives, property tax abatements, favorable financing, TDRs and others, puts the city in a powerful negotiating position.

An important part of a strong regulatory system is certainty—the existence of a set of dependable rules instead of case-by-case determinations. One of the basic assumptions of the Sanger Study is that all the participants in the planning approval process in San Francisco desire clearer standards, far greater certainty regarding applicable rules and far less discretion in decisionmaking. Next to being able to build something close to what is proposed, Mr. Bauman stated that the most important thing to any reasonable developer is being able to depend on the rules of the game.

Strategy for Strengthening Regulations: Building Political Coalitions

The missing element in developing strong regulations in favor of preservation appears to be political power. Discussion focused on how preservationists could gain this power. Mr. Boasberg posed the fundamental question as one of strategy:

> "Does the future really lie in going with the narrower, preservationist-oriented route, or does it now lie in joining forces with the density people and the sun freaks, and these other kinds of people to get the kind of legislation which does incorporate a certain amount of preservation goals into the overall regulatory process in view of the political realities of some of these cities?"[15]

What is the proper alignment for preservationists? Should preservationists stay outside in special boards and commissions or get inside the overall planning and zoning process? Will preservationists diffuse too much power in their attempt to get inside? Several observations were made:

—Preservationists need to build coalitions. Although many people will not buy preservation on its terms, they will buy aspects of preservation on their terms if preservationists are able to communicate these to them.

—Preservationists may be trying so hard to understand development issues that they are starting to forget their own strength as preservationists.

[15]Tersh Boasberg, transcript, p. 180.

—Strong nonprofit pressure groups are needed on the outside to keep the heat on the landmarks boards and city councils.

—Since in the end what really counts are the votes, it is important that preservationists find a way to get the word out to as many people as possible through public education and media programs.

—In any given place, it may take a period of consciousness-raising during which important buildings are torn down before there will be the political power to get a strong preservation ordinance enacted.

CONCLUSION

Although there was little consensus, the following is a brief summary of some of the major issues and viewpoints expressed during the workshop:

- TDRs are not legally required as a form of compensation for regulating the demolition or alteration of historic buildings. However, they are perceived as a way to fulfill a political need to be fair to the regulated property owners.
- TDRs have not had a long and successful history as a means of preserving buildings, and there is a great deal of controversy as to whether they will ever be an effective tool. Most of those present appeared to agree that TDRs might work in San Francisco because of the apparent willingness of the city to reduce FARs and height limits and to prohibit demolition of significant structures.
- Regulation is the cornerstone of any preservation program and is necessary to make incentives effective. Only historic district and landmarks commissions can provide the kind of regulation that will protect the special qualities of historic buildings and their contexts. Conservation zones and other forms of zoning should complement rather than substitute for historic district legislation.
- The missing ingredient in the creation of a strong regulatory program is political power. Political power must be built through coalitions but with whom and how broad are the questions.
- Because every city is unique, preservation programs for downtowns must be carefully tailored to the politics, pressures, planning objectives, public opinion and land-use mechanisms at any given time and place, keeping the ultimate goal of preservation firmly in mind.

APPENDIX
SANGER STUDY AND SAN FRANCISCO PLANNING DEPARTMENT PROPOSAL: AN OVERVIEW AND COMPARISON

Sanger Study	Planning Department Proposal
Controls on significant buildings, including prohibitions against the demolition or significant alteration of the highest rated buildings, with permission to demolish or significantly alter only under restricted, special conditions.	Prohibition of demolition and significant alteration of buildings of "architectural and environmental" importance, but exclusion from this protection of buildings of primarily historic significance. (Sanger Study proposes protection of 430 buildings versus 266 proposed by the planning department.)
Creation of conservation districts including controls on significant buildings and new construction.	Same.
Provision for TDRs solely from designated significant buildings and automatic right to use TDRs on eligible transferee sites in the same zoning district or in a designated special development district up to maximum permissible floor area ratio (FAR) and maximum achievable FAR under height and bulk limits.	Same.
Provision for additional TDR bonus based on the unused FAR on the site for restoration/rehabilitation of a significant building in accordance with Secretary of the Interior Standards.	No. City is trying to avoid setting up bonus systems for any purposes.
Sponsorship of a land trust to acquire and ensure a market in TDRs.	No. There is already so much private market activity and speculation in TDRs that a land trust is unnecessary.
City authority to issue Marks Act (industrial revenue) bonds for rehabilitation of significant buildings citywide upon a showing that such financing is necessary.	Not included.
Solicitation of certification of conservation districts as approved local historic districts for tax act purposes.	No. City does not want to impose requirement of meeting Secretary's Standards on contributory buildings within conservation zones.
Relief from regulations/local codes which penalize historic buildings.	Not included.

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ZONING AND DEVELOPMENT RIGHTS: A BIBLIOGRAPHY

by

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Actions taken by city zoning boards are often in conflict with the desires of individual property owners. Unlike cases where cities force land owners to give up their land to the city for just compensation, zoning changes leave property owners with the land, but not the right to develop it in the way they desire. Many of the instances of this type of zoning changes are related to environmental concerns. In order to preserve farmland, open space, solar access, or a historical site, a city may make zoning changes which deny the land owner the right to develop potentially valuable sites. One of the concerns raised by such actions on the part of zoning boards is whether such actions constitute a "taking", which would then require that the owner be given fair compensation for his loss.

The most innovative approach taken to resolve the problem of compensating land owners is allowing the developer to transfer his development rights to a new location or to sell the right to develop to another person. The owner in effect keeps the property, but sells the right to develop that property. Two major problems are connected with TDR.

One problem is determing the worth of the potential to develop a piece of property, and the other problem is designating suitable locations to transfer those rights to. This bibliography includes both current articles on TDR and other property rights and zoning issues and older articles and books of significance to this topic.

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Anthony G. White

In the early and mid-1970's, a new device to resolve difficult zoning decisions was introduced, the "transferable development right," or TDR. As a method of compensatory regulation, it allowed a trade-off between land-owners and planners to turn zoning into a win-win situation.

If rezoning of a piece of land is deemed mandatory on the part of planners against the wishes of the owner, or if an owner desires to rezone a parcel of land against the wishes of the local government, a TDR permits a zoning density, air rights, or other development right to be transferred to a non-contiguous parcel of land under the same owner. These rights can then be sold to other owners. The government might then be relieved of the necessity of acquiring the original parcel through purchase or condemnation.

Through TDR's, agricultural land can be preserved, as can historic landmarks and resources. Since the 1970's, when several bibliographies were published, case law and legal opinion has flowered regarding TDR's, and those sources constitute the majority of the entries contained in this work.

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