



Non-As-of-Right Transfers Across Streets

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October 2016

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Non-As-of-Right Transfers Across Streets

A. General – promotion of policy goals

1. Landmarks, special district, public improvements, affordable housing, parks, agricultural lands
2. In some cases, transfer fees paid to private owners, in some cases transfer fees paid to municipalities or authorities

B. Grand Central Case

1. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646 (1978)

- a. Background

- b. Supreme Court finds that transferable development rights program mitigates against finding that landmark law constitutes a taking of private property

- i. [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. 438 U.S. at 137.

2. In contrast, Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587 (1976)

- a. Background

- b. New York Court of Appeals finds that transferable development rights mechanism does not sufficiently mitigate zoning regulation and cannot avoid finding that that regulation violates due process.

But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action. ...

By compelling the owner to enter an unpredictable real estate market to find a suitable receiving lot for the rights, or a purchaser who would then share the same interest in using additional development rights, the amendment renders uncertain and thus severely impairs the value of the development rights before they were severed. Hence, when viewed in relation to both the value of the private parks after the amendment, and the value of the development rights detached from the private parks, the amendment destroyed the economic value of the property. It thus constituted a deprivation of property without due process of law. 39 N.Y.2d at 598-600.

C. Landmarks transfers – Zoning Resolution Section 74-79

1. Under Zoning Resolution Section 74-79, the City Planning Commission (“CPC”) may, by special permit, transfer unused development rights from a zoning lot with a landmark (but not a property in a Historic District) across a street and, in some cases, across multiple streets and blocks.
2. Other bulk modifications available
3. Process - Subject to uniform land use review procedure (“ULURP”), environmental review
4. Documentation
 - a. Restrictive Declaration
 - b. Transfer Instrument/Notice of Restrictions
5. Only 12 transfers approved

D. Special District Transfer Mechanisms

1. Lower Manhattan (1972)
 - a. Purpose – preservation of landmark buildings
 - b. Granting and receiving lots defined

- c. “Banking program” – rights can be conveyed to a “person”
 - d. Process – CPC certification of initial transfer, subsequent transfers
 - e. Documentation – Deed, Development Rights Grant/Transfer Instrument
2. Grand Central Subdistrict (1992)
- a. Purpose
 - i. Development rights from Grand Central Terminal (1.7 million sf) and other landmarks in the area
 - ii. Planning considerations – transportation, etc.
 - b. Process
 - i. 1 FAR by certification
 - ii. up to 21.6 FAR by special permit within Subdistrict Core
 - c. Documentation – Transfer of Development Rights, Notice of Restrictions
 - d. Recent amendments
3. Theater District (1998)
- a. Purpose – Preserve Broadway theaters
 - b. Process
 - c. CPC Certification – up to 20% increase on receiving sites
 - d. CPC Authorization – up to 44% increase on receiving sites in 8th Avenue Corridor
 - e. Documentation
 - i. Declaration of Restrictions – ensures continued theater use for the life of the new development
 - ii. Transfer Instrument and Notice of Restrictions
 - iii. Closing deliveries
 - f. 500,000 sf transferred to date

4. West Chelsea (2005)
 - a. Creates a High Line Transfer Corridor, 100-feet wide and containing the entire High Line structure and portions of adjacent lots between West 18th and West 30th Streets. Owners of property within the corridor are permitted to transfer their development rights to designated receiving sites within the Special District. The construction of stair access to the High Line would be required as a condition of the transfer on some properties.
 - b. FAR increases also available for contributions to High Line improvement fund.
 - c. Process – Notification to Department of City Planning
 - i. Floor area calculations
 - ii. Copy of transfer instrument
 - iii. High Line Access Easement
 - d. Documentation
 - i. Notice of Zoning Lot Restrictions
 - ii. Transfer and Distribution of Floor Area
 - iii. High Line Access Easement
5. Hudson Yards (2005)
 - a. Comprehensive vision for a new central business district, including extension of No. 7 subway, rezoning for significant commercial and residential development, new open space network, convention corridor.
 - b. Previously zoned for light manufacturing and commercial uses at an FAR of 5 to 6.
 - c. After rezoning, base FAR ranges from 6 to 19, with bonuses available up to 12, 13, 19, 21.6 or as high as 33 FAR, depending on the subdistrict.
 - d. Restricted primarily to commercial use, although residential and community facility permitted in combination with office use, after a certain threshold of commercial floor area has been developed.
 - e. Bonus mechanisms

- i. District Improvement Fund – used for infrastructure improvements, including No. 7 extension, platform over Eastern Rail Yard and new parks and streets. Contribution level initially set at \$100 per square foot of floor area, now \$125.49.
 - Process – CPC Certification
 - Documentation – Restrictive Declaration
- ii. Distribution of floor area from Eastern Rail Yard (19 FAR) to sites within Large-Scale Plan Subdistrict. 5.1 million square feet to be developed on Eastern Rail Yard site, 5.7 million square feet to be transferred off-site. Price – 65% of land value.
 - Process – CPC Certification
 - Documentation
 - Notice of Restrictions
 - Transfer Instrument

E. Inclusionary housing, Zoning Resolution § 23-90 (1987)

1. Traditional approach.
 - a. Limited to R10, 10 FAR zoning districts.
 - b. Bonus up to an additional 2 FAR.
 - c. Achieved by either construction, rehabilitation or preservation of lower income housing, either on the same site or on another site, which may be publicly or privately owned.
 - d. Off-site new construction is most common. For every square foot of newly constructed off-site lower income housing, the floor area of the compensated development may be increased by 4 square feet. For example, on a 10,000 square foot site in an R10 district, the maximum permitted floor area of 100,000 square feet may be increased by 20,000 square feet through the construction of 5,000 square feet of lower income housing.
 - e. Recent rezonings have altered the bonus rate in some R10 districts – 1.25 FAR of floor area compensation per 1 FAR of affordable housing -- and extended inclusionary housing to lower density districts

- f. Off-site projects must be located either within the same community district or within one-half mile of the compensated development.
- g. Lower income project must be turned over to a non-profit administering agent, which is responsible for operating and managing the project.
- h. Lower income household is defined as one with a gross income of up to 80 percent of the median income for New York City. Rents must be at a level no higher than necessary to cover maintenance and operation, and no household may pay rent of more than 30 percent of its total household income. All lower income units are subject to rent stabilization.
- i. Certificates for construction of lower income housing are transferable.
- j. Process/Documentation
 - i. Purchase contract
 - Includes benchmarks
 - Remedies
 - ii. HPD approval of affordable housing plan/regulatory agreement
 - iii. Restrictive declaration against generating site
 - iv. HPD issues permit notice – authorizing building permit for compensated development
 - v. HPD issues completion notice that TCO or PCO has been issued for affordable housing
 - vi. Certificates issued – authorizing issuance of TCO or PCO for compensated development
 - vii. Closing

2. Policy shift to on-site, and mandatory, inclusionary.

F. Other Models

- 1. District improvement funds
- 2. Public realm improvements

3. Park transfers
- G. Title Insurance
- H. National perspectives
1. State enabling acts
 - a. At least 25 states
 2. Programs Nationwide
 - a. 239 programs
 - b. Most for preservation of farmland or natural resource areas
 - c. Some for historic preservation, downtown revitalization, housing and recreation
 3. Rural programs
 - a. Montgomery County, Maryland (1980)
 - i. Preservation of farmland
 - ii. Created 93,000 acre agricultural reserve, more than 70,000 acres are currently under easement as a result of TDR program
 - iii. One TDR equals 5 acres
 - iv. Development potential reduced from 1 unit per 5 acres to 1 unit per 25 acres
 - v. Once a TDR is created the land is restricted by a permanent easement ensuring the property will not be developed for residential use at densities which exceed 1 unit per 25 acres
 - vi. Application
 - Preliminary subdivision plan utilizing TDRs
 - Planning Board approval
 - Site plan prepared
 - Planning Board approval

- Record Easement and Deed of Transfer indicating restriction on the sending area
- Subdivision record plat indicating TDRs on receiving parcel
- Planning Board approval
- Record plat in Office of Land Records

4. Urban programs

a. Approximately 20 cities have programs

a. Los Angeles (Enacted 1975; Amended in 1985)

i. TFAR – transfer of floor area ratio

ii. Promotes historic preservation, open space, housing, cultural/community facilities, and public transportation

iii. Increases FAR from 6:1 to 13:1

iv. Community benefit fee – based on land value, lot size, current FAR zone, and amount of transfer

- Used to promote historic preservation, open space, housing, cultural/community facilities, and public transportation

v. Transfer fee

- If purchased from the city, 10% of community benefit fee or \$5 psf, whichever is greater
- If purchased from private party, negotiable

vi. Process

- Under 50,000 sf can be transferred by administrative approval of the Director of City Planning
- Above 50,000 sf requires a City Planning Commission public hearing process

vii. More than 6 million sf transferred, more than \$90 million in public benefits generated since 1975

- b. San Francisco (Enacted 1985; Amended 2013)
 - i. Historic preservation
 - ii. Certification process
 - Owner of a preservation lot obtains a statement of eligibility, which establishes that that property qualifies as a transfer lot and the amount of TDRs available for transfer and is recorded against the property
 - To convey TDRs, the city's zoning administrator records a certificate of transfer
 - iii. Since 1985, the program has generated more than 5 million sf of TDRs from more than 100 parcels; more than 2.5 million sf have been transferred
- c. Washington DC (Enacted 1984; Amended in 1991)
 - i. Historic preservation, affordable housing
 - ii. Process/Documentation
 - Covenant on the sending parcel
 - Use of TDRs at a receiving site is permitted as a matter of right and requires only administrative review to ensure compliance with the code
 - iii. Almost 10 million sf transferred to date, including approximately 1.5 million sf in landmark transfers
- d. Others

