A Process Evaluation of New York City’s Zoning Resolution (ZR) § 74-79: Why Is It Being Used So Infrequently?

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In 1968, to mitigate the financial burden of landmark designation, New York City adopted a transferable development rights mechanism, Zoning Resolution (ZR) § 74-79, that gave property owners the option of transferring their unused development rights in return for a payment. This thesis is a process review of the Zoning Resolution (ZR) § 74-79. It studies the historic, political and legal context that precipitated the adoption of ZR § 74-79, traces subsequent amendments to the resolution, and evaluates the projects that have used ZR § 74-79 to determine whether or not the mechanism is being used as originally intended. By analyzing past ZR § 74-79 applications and conducting interviews with current legal, planning and preservation professionals, the thesis answers the following question: why has the Zoning Resolution (ZR) § 74-79 been used so infrequently? Understanding the current process of ZR§74-79 will help preservation and planning professionals evaluate the risk of legal challenges to the Landmarks Law as well as inform future changes to the existing resolution.

Keywords: Historic Preservation, Land Use, Transferable Development Rights
INTRODUCTION

Historic preservation is particularly difficult in dense urban areas like New York City where land values are high and there is substantial pressure to develop all land to its “highest and best” use.\(^1\) As a result of the pressure to develop, many historic buildings have been lost. As New York City grew at the turn of the 19\(^{th}\) century, many early significant buildings such as the Gillander Building were demolished to clear land for the next wave of building.\(^2\)

Older, more gracious structures were demolished to make way for functional buildings designed to utilize completely all available space—a response necessary to counter the staggering costs of land, construction, financing and property taxes.\(^3\)

A 1930 survey by the National Association of Building Owners and Managers concluded that “there were few if any buildings over forty years of age left on Lower Broadway near Wall Street.”\(^4\) The idea that New York City must constantly reinvent itself in order to remain a globally competitive city continues to frame today’s planning discourse. However, the unabated drive to develop has been tempered by a strong historic preservation movement that emerged in the mid-20\(^{th}\) century.

New York City codified its commitment to protect historically significant buildings in 1965 when it adopted its Landmark Law which stipulated that the city had the right to identify and protect historic resources. One of the key obstacles that the new law had to overcome was

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\(^1\) “Highest and best use” is the idea that all lots should be built-out to fully maximize their allowable zoning, thus, maximizing the financial return as well.

\(^2\) The Gillender Building was located at the intersection of Wall and Nassau Streets and was demolished in 1910, after standing for only 14 years. Daniel M. Abramson, “Obsolescence: Notes Towards a History,” *Praxis* 5 (2003): 107.


\(^4\) Abramson, *op. cit.*, 106.
rationalizing the restrictions imposed on personal property through landmark designation. Even after the Landmarks Law was adopted, the legal validity of the statute remained tenuous due to the fact that private property owners who could not generate the highest and best use of their property had standing to claim a regulatory ‘taking’ under the Fifth Amendment. In 1968, to mitigate the financial burden of landmark designation and avoid a constitutional challenge to the new law, New York City adopted a transferable development rights mechanism, Zoning Resolution (ZR) § 74-79, that gave property owners the option of transferring their unused development rights from the landmark site in return for financial compensation. This mechanism was seen as a way to save the landmark, while providing a reasonable return for landmark property owners.

This thesis is a process review of the Zoning Resolution (ZR) § 74-79. It studies the historic, political and legal context that precipitated the adoption of ZR § 74-79, traces subsequent amendments to the resolution, and evaluates the projects that have used ZR § 74-79 to determine whether or not the mechanism is being used as originally intended. By analyzing past ZR § 74-79 applications and conducting interviews, the thesis answers the following question: why has the Zoning Resolution (ZR) § 74-79 been used so infrequently? Understanding the current process of ZR§ 74-79 will help preservation and planning professionals evaluate the risk of legal challenges to the Landmarks Law as well as inform future changes to the existing resolution.

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5 A regulatory ‘taking’ is the effective deprivation of one’s use of his/her private property due to the implementation of a regulation without due process and just compensation.

6 The New York City Landmarks Law defines a reasonable return as “a net annual return of six per cent of the assessed valuation of the building and its site.” “Development Rights Transfer in New York City,” The Yale Law Journal 82, no. 338 (1972): 350. (Herein after referred to as Yale Law Journal.)

7 This thesis does not attempt to evaluate whether or not the landmarks that have transferred their air rights are “successfully” preserved. Instead, the thesis focuses on documenting the landmark building’s participation in the process established under Zoning Resolution (ZR) § 74-79.
**ADOPTING ZONING RESOLUTION (ZR) §74-79**

*Urban Planning & Historic Preservation: A Tangled Relationship*

Throughout its history, the New York City preservation movement has had a tangled relationship with urban planning. While many cities include provisions to achieve preservation goals in their zoning ordinances, New York City chose to adopt separate legislation and create an autonomous regulatory agency to protect the city’s historic resources. The codification of New York City’s preservation movement during the late 1950s to mid-1960s happened concurrently with the City’s re-examination of its land use practices. Preservation advocates originally wanted aesthetic and historic preservation controls built into the zoning revision that occurred in the late 1950s and resulted in the 1961 Zoning Resolution. James Felt, the City Planning Commissioner under Mayor Robert F. Wagner, was sympathetic to preservationists’ concerns and many of the zoning discussions became a platform to articulate New York City’s preservation agenda.8 Ultimately, the land use reforms in the 1961 Zoning Resolution were devoid of any regulations that would protect the historic urban fabric. However, the divide between preservation and land use policy lasted for less than a decade. By 1968, zoning legislation was adopted to allow landmark buildings to transfer their air rights to adjacent properties in order to alleviate the financial burden of landmark designation.9

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9 Air rights under common law are technically the “right to build upwards without legal limitation.” However, in this thesis, air rights are used interchangeably with development rights, which both refer to the “imaginary, three-dimensional envelope of space permitted by the zoning ordinance [that can be built on any given lot].” *The Yale Law Journal*, 338-340. The New York Department of City Planning also uses the two terms interchangeably.
1961 Zoning Resolution

Air rights became an increasingly valued component of property rights with the adoption of the 1961 Zoning Resolution, which systematized the use of Floor Area Ratio (FAR) as the main density control and amended the definition of a “zoning lot.” (Floor Area Ratio is “an index figure which expresses the total allowable floor area of a building as a multiple of the area of its lot.”) With the implementation of FAR as the city’s main density control, air rights became a limited, quantified commodity. To pass this stricter density control, city planners had to win the support of developers through a political compromise that included adopting a liberalized definition of a “zoning lot.”

The new definition of a “zoning lot” treated long-term leases the same as fee-simple ownership; therefore, a developer could sign a development rights lease for no less the 50 years with an option to renew to insure a lease duration of not less than 75 years and merge the air rights of the two parcels in order to achieve greater density than what the single lot’s FAR would permit. This transfer of air rights is known as a zoning lot merger. As defined by Marcus, a zoning lot merger is the simplest example of transferrable development rights and involves a group of contiguous parcels.

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10 The Yale Law Journal, 346. For example a 10,000 square foot lot with an FAR of 12 would be allowed to build 120,000 square feet of floor space.

11 As discussed in Note 10, the air rights, which under common law extended to the heavens, with the introduction of FAR were limited to a defined three-dimensional space that could not exceed a prescribed bulk and/or height limit.

12 Prior to the 1961 Zoning Resolution, as defined by Norman Marcus a “lot” was defined as “contiguous parcels that were (i) held in common ownership; or (ii) held in separate ownership, provided that one of the parcels benefited from the use of the adjoining parcel’s air rights by way of an air rights sale, lease, or other conveyance.” Norman Marcus, “Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan,” Brooklyn Law Review 50, no. 4 (1984): 871-2.

underdeveloped and undeveloped sites on one zoning lot that are in common control for development purposes.\textsuperscript{14}

Zoning lot mergers were a popular way to transfer air rights as-of-right. An as-of-right project complies with the existing zoning code and does not require any additional discretionary review. The systematic application of FAR as the city’s main density control and the liberalization of the “zoning lot” definition created the regulatory framework that facilitated the adoption of a mechanism to transfer air rights even further than what was possible through zoning lot mergers.

By the end of the 1960s, New York City increasingly explored different programs for transferring development rights in order to achieve planning and preservation goals.

\textit{New York City Landmarks Law}

In 1965, New York City passed the Landmarks Law and codified the city’s commitment to historic preservation as a ‘public necessity…required in the interest of the health, prosperity, safety and welfare of the people.’\textsuperscript{15} The law provided the legal mechanism necessary to save key historic resources in a city enamored with development and change.\textsuperscript{16} It established the Landmarks Preservation Commission (LPC) “to protect the city's architectural, historical, and

\textsuperscript{14} \textit{Ibid}, p. 870. Marcus distinguishes between a zoning lot merger and transferrable development rights defining a zoning lot merger as “an as-of-right merger of air rights within one zoning lot. TDR is a term used to describe a variety of techniques that involve the transfer of air rights from one zoning lot to another that is either contiguous or non-contiguous to the original lot.” (870) For the purpose of this thesis, all zoning lot mergers will be identified as such and not referred to as an example of transferrable development rights. Using Marcus’ definition, zoning lots mergers are as-of-right air rights transfers between a “single” zoning lot.


\textsuperscript{16} Wood, \textit{op. cit.}, 6.
cultural heritage” by designating landmark buildings as well as historic districts. Once identified, historic resources are managed through systematic regulation of all proposed changes.

As adopted, the Landmarks Law included a provision that allowed property owners to claim unfair economic hardship due to landmark designation. If the LPC denied an application to alter or demolish a landmark, the property owner could appeal the denial arguing that he/she was unable to achieve a reasonable economic return. If the property owner won the appeal, the LPC had to work with the property owner to create a plan for preserving the landmark. In creating the plan, the LPC was able to permit partial or complete tax exemption.

Saving Urban Landmarks through Transferrable Development Rights (TDR)

Although the Landmarks Law included a provision to acknowledge the potential of undue economic hardship, further measures to mitigate the financial burden of landmark designation were adopted just three years after the original preservation ordinance was passed. In 1968, New York City adopted the Zoning Resolution (ZR) §74-79. Instead of amending the Landmarks Law, the City created a pioneering transferrable development rights (TDR) zoning mechanism that allowed landmarks to transfer their air rights to an “adjacent lot.” The definition of “adjacency” allowed air rights to move further than was allowed under the amended definition of a “zoning lot” included in the 1961 Zoning Resolution. Per the statute,

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18 The Yale Law Journal, 351.

19 For the purpose of the Zoning Resolution, “landmark building” was defined as a structure designated by the Landmarks Preservation Commission and the Board of Estimate. The definition does not include “public parks, any structures within public parks or historic districts, those portions of zoning lots used for cemetery purposes, statutes, monuments, bridges or any structures owned by or on land owned by City, State or Federal governments or their agencies.” New York City Planning Commission, “Section 74-79 Transfer of Development Rights from Landmark Sites,” City Planning Report, May 1, 1968, 301.
adjacent lot shall mean a lot which is contiguous to the lot occupied by the landmark building or one which is across a street or opposite to the lot occupied by the landmark building, or, in the case of a corner lot, one which fronts on the same street intersection as the lot occupied by the landmark building.\textsuperscript{20}

Giving owners of landmarks a greater area over which they could transfer their air rights distinguished ZR§74-79 from as-of-right zoning lot mergers. By transferring air rights, the adjacent lot could increase its basic maximum allowable FAR by 20 percent maximum. The resolution also required provision for the landmark’s continuing maintenance, but left the specific maintenance requirements intentionally vague to allow for case-by-case flexibility.\textsuperscript{21} In addition, the resolution provided no specifications for how to price the air rights. In practice, the value of the air rights has been set according to market conditions specific to the location of the air rights transfer.

As cited by \textit{Yale Law Review}, the New York City Planning Commission (CPC) felt that “multiple benefits” would be derived from the new resolution.

The owner of a designated landmark building can realize an economic gain by selling his unbuilt, additional floor area he would otherwise not have; the neighborhood, meanwhile, can retain an essential amenity, a revitalized landmark, plus new development harmonious with the character of the area and of a quality unattainable under previous conditions; the City, most importantly, can benefit by new tax revenues from what was previously untaxable.\textsuperscript{22}

The ability to transfer air rights over a greater distance was considered an innovative planning tool that could satisfy the economic concerns of the landmark owner, insure the protection of neighborhood character, and provide financial benefits for the city. Yet, despite the seeming

\textsuperscript{20} New York City Planning Commission, \textit{op. cit.}, 301.


\textsuperscript{22} New York City Planning Commission, \textit{op. cit.}, 303.
comprehensive nature of the mechanism and its ability to address the potential economic burden of landmark designation, the Landmarks Law continued to face legal challenges.

Validation of TDR in Penn Central Transportation Company v New York City

The most significant legal challenge was the watershed case of Penn Central Transportation Company v New York City in which the Supreme Court ultimately ruled in favor of the City’s constitutional right to regulate historic resources. The Penn Central battle began in 1966 when the Penn Central Transportation Company was notified that its train station, Grand Central Terminal, had been calendared to be designated an individual landmark. After a twelve year battle, the Supreme Court decided in 1978 that the plaintiff’s claim that LPC’s denial of an application to construct a tower on their landmark building did not rise to the level of a ‘taking’.24

Penn Central Transportation Company’s ability to transfer its air rights in order to extract value from its property was a much discussed component of the court’s opinion even though it was not the primary holding that validated the constitutionality of the Landmarks Law. Justice William J. Brennan Jr. noted that in response to the particular economic challenge faced by the owners of Grand Central, the ZR§74-79 was amended in 1969 (i) to redefine an “adjacent site” to include all lots under a common chain of ownership and (ii) to allow Grand Central to transfer 100 percent of their air rights to one site rather than adhering to the previous restriction of 20

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percent. The opinion stated that while the ability to transfer air rights would “not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants.”

Penn Central was a crucial decision that bolstered the City’s use of TDR as a key planning tool.

The *Penn Central* decision was vitally important for the continuation of TDR in New York City. In validating the Landmarks Preservation Law and its supportive TDR options in the Zoning Resolution, the Supreme Court allowed the city to consider and develop new occasions for using TDR to further its other planning goals.

New York City has continued to expand its use of transferrable development rights. There have been a number of special districts created throughout the city in which property owners are able to move their air rights over multiple blocks rather than only across the street. The City’s continued reliance on TDR as a mechanism to achieve planning goals was facilitated by the Supreme Court’s approval of ZR§74-79 as an economic tool to save urban landmarks.

*Grand Central Today: Continued Threat of Idle Air Rights* 

In August 2012, the New York City Department of City Planning (DCP) announced its proposal to rezone East Midtown in order to facilitate the transfer of Grand Central’s remaining one million square feet of air rights and spur construction of new Class A office space. The

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26 *Ibid*


28 The proposed Midtown East Rezoning will be discussed in greater detail in the chapter on *Does ZR§74-79’s Infrequent Use Matter?*

29 The general boundaries of the Midtown East Rezoning are from East 37th Street to the south, East 57th Street to the North, Fifth Avenue to the West and Second Avenue to the East. For the exact boundaries, see Figure 4.
proposal has raised protest from other landmark buildings in Midtown that also want to participate in the newly created transfer process, which affords landmark owners the ability to transfer air rights over multiple blocks. Three landmark religious institutions, St. Patrick’s Cathedral, St. Bartholomew’s Church and Central Synagogue, are all lobbying the city to be included in the new program. As noted by chief administrative officer at St. Bart’s, “We have been given this responsibility to maintain historic structures, and yet as part of that we have not been allowed to realize the value of those structures, and that puts us in a difficult position.”

In addition, the preservation community is concerned that a significant up-zoning in Midtown East will create added development pressure on historic resources that have not been formally protected through landmark designation. Advocacy organizations in the City, such as the Municipal Art Society (MAS), are actively campaigning for the designation of “at-risk” resources to protect them from demolition. However, as noted by the president of the Real Estate Board of New York City, many of the “at risk” buildings are the same sites that will potentially be redeveloped if the rezoning is adopted.

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TRANSFERABLE DEVELOPMENT RIGHTS

Studying Transferrable Development Rights

Many studies have reviewed transferrable development right (TDR) programs since they were adopted as part of the land use policy toolkit in the late 1960s. As one of the earliest TDR programs, New York City’s Zoning Resolution (ZR) §74-79 generated significant scholarly interest and many articles published during the 1970s focused on the use of air rights in New York City. As was noted by the Yale Law Review,

The use and potential abuse of this technique is of considerable import to other American cities. Just as the pioneering ordinance of 1916 had significant influence throughout the United States and was widely emulated, so also has New York’s plan for development rights transfer in aid of landmark preservation already attracted national attention.32

Norman Marcus and John Costonis were the two seminal scholars who framed the discourse on transferrable development rights. Marcus was the legal counsel for New York City’s DCP from 1963 to 1985.33 Costonis is a lawyer who has devoted his career to issues of land use, private property rights, and historic preservation.

Recognized Challenge: The Plight of Urban Landmarks

Marcus and Costonis both identified the particular threat to urban landmarks. As defined by Costonis, urban landmarks are characterized by four qualities: 1) they are underbuilt according to current zoning; 2) while the landmark building may generate a positive net operating cash flow, the potential cash flow from a new development is significantly greater; 3) most urban landmarks tend to be clustered in the same area of the city; and 4) the areas with a concentration of urban


landmarks are usually well-served by city infrastructure. These identified qualities foster intense pressure to extract value from the unused development rights that so many landmarks possess, particularly in dense urban cores that have continued to experience rising land values.

**Weaknesses of Zoning Resolution (ZR) §74-79**

In his influential work, *Space Adrift*, Costonis elaborated a detailed critique of Zoning Resolution (ZR) §74-79. Although adopted in 1968, Costonis asserts that the resolution had yet to be used as of 1974, despite one attempt in 1971 involving Amster Yards on East 49th Street that was ultimately abandoned due to a downturn in the real estate market. Costonis’ attributes the lack of use to five weaknesses. First, the air rights market was unpredictable. By limiting transfers to adjacent lots, ZR §74-79 severely constrained the potential market, and there was no guarantee that the profit from selling air rights would cover the economic burden of landmark ownership. Second, ZR §74-79 required a special permit, thus making the process costly and unattractive to developers and landmark property owners. Third, using ZR §74-79 was voluntary, and with little track record and the potential for legal challenges, few landmark property owners elected to participate. Fourth, the vague language of the resolution made it difficult to determine how the City would evaluate whether or not a property owner had upheld obligations outlined in the preservation plan, and if not, what recourse the City would have to compel compliance. Fifth,

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35 *Ibid*, 54. Amster Yards is a small L-shaped interior courtyard located in the midblock between East 49th and East 50th street and between Third Avenue and Second Avenue that exemplifies important architectural and cultural characteristics of New York City. The courtyard is surrounded by brick buildings that vary in height from one to four stories with the oldest structures dating back to the late 1860s. Landmarks Preservation Commission, “Amster Yard Designation Report LP-0277 No. 6,” (1966). Neighborhood Preservation Center. http://neighborhoodpreservationcenter.org/db/bb_files/AMSTER-YARD.pdf (accessed February 5, 2013). As research later revealed, the first ZR §74-79 transfer occurred in 1972; however, this transfer has little documentation other than a three page City Planning Commission report.

while the density might be removed from the historic resource, the landmark still risked being “suffocated in adjacent superdensity” due to the contiguity requirements. Many of the resolution’s components that Costonis critiqued continue to be included in the current Zoning Resolution (ZR) §74-79. The DCP has made few changes to address the identified weaknesses of the original zoning resolution other than an amendment in 1969, which relaxed the contiguity requirements and bulk limitations, to mitigate the legal challenge posed by the Penn Central Transportation Company.

Costonis proposed a municipal transferrable development rights bank. Unlike the New York City transfer mechanism, which was limited to a narrow geographic scope of adjacent lots, Costonis argued that the municipality should articulate an entire district as the potential unit for air rights transfers. The use of a district avoids the impaired marketability and capriciousness of New York City’s adjacency requirements. According to Costonis’ proposed “Chicago Plan,” the City of Chicago would assess the value of a landmark building and provide the owner with an “Incentive Package” that included an authorization to transfer their air rights and a real estate tax reduction as a result of the transfer. In return for this “Incentive Package,” the landmark owner would agree to a “Preservation Restriction” that limited future development of the property.

37 Ibid, 589.

38 For more detail on the 1969 Amendment to ZR §74-79, see section titled Validation of TDR in Penn Central Transportation Company v New York City.

39 As Marcus states in his 1971 article in Law and Contemporary Problems, “The unit of development control chosen by the City was the zoning lot. Had the City chosen a different unit of control as its basis—perhaps a block basis, or a square mile basis—there would have been no bias against wider area transferability of development potential. A block by block control could achieve density objectives as successfully as a lot by lot approach.” (378)


41 Ibid, 592-3.
While Norman Marcus acknowledged the potential benefits of transferring air rights over a broader geographic area, he cautioned that the practical realities of a TDR bank could prohibit its implementation. In 1984, responding to Costonis’ critiques, Marcus examined all of the extant TDR mechanisms in an “attempt to evaluate the use of TDRs in New York City, its successes and its failures.” The mechanisms ranged from simple zoning lot mergers that moved air rights between contiguous parcels to Special Permit Districts, such as the South Street Seaport, which allowed landmark property owners to transfer their air rights to non-adjacent sites identified as suitable for development.  

Marcus used a legal framework to determine the feasibility of moving air rights over a larger geographic area according to the air rights bank model proposed by Costonis. He identified two central challenges to a municipal air rights transfer bank. First, the municipality might be subject to antitrust liability challenges if it were to mandate the sale and purchase of air rights through a centralized, municipal bank. Second, the municipality lacked the fiscal capacity to create a political entity that would oversee the acquisition and storage of the air rights. Ultimately, Marcus concluded that discretionary air rights transfers over broad geographic areas posed a heavy cost to the municipality and risked losing “a rational planning link.” He argued that transferring air rights is more efficient through zoning lot mergers, which were as-of-right and restricted to contiguous lots.

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42 Marcus, “Air Rights in New York City,” 890-1. For a full discussion of zoning lot mergers, see 1961 Zoning Resolution Section in the Adopting Zoning Resolution (ZR) § 74-79 Chapter. The South Street Seaport District was an area-wide plan with designated sending sites, which were the historic seaport buildings, and receiving sites, which were underdeveloped sites the City believed were suitable for future commercial development. The air rights were transferred either directly between the two private property owners or they could be conveyed to a “consortium of commercial banks,” which could store the rights and reallocate them as demand warranted.

43 Ibid, 902-3. The antitrust liability challenge could be based on a claim that the city’s actions, mandating a system of buying and selling air rights through a centralized bank, were restraining trade.

44 Ibid, 897. A rational planning link is best defined by Marcus’s Law & Contemporary Problems article as “the essential interrelationship of zoning density controls to street width, transit access, school seats, and other objects of planning concern.” (372)
Inspired by the New York City ordinance and Costonis’ argument for the value of a TDR bank, many second generation TDR programs adopted during the 1980s incorporated a “bank” structure, including the “poster child” programs in Montgomery County, Maryland and New Jersey Pinelands. Both Montgomery County and New Jersey Pinelands use a TDR bank to preserve open space within a broad geographic region that balances preservation areas with identified areas for additional development. In Maryland, the county identified the need to preserve rapidly disappearing agricultural land. In New Jersey, the state identified sensitive wetlands and forested areas that they wanted to protect. Both of the programs are implemented in conjunction with a compulsory comprehensive plan that identifies sending and receiving areas, establishes the municipal body that mediates the purchase and sale of the air rights, and outlines mandatory program participation requirements for local property owners. Analysis of these programs occurred in studies published during the 1990s that identified “the importance of stakeholders and their inclusion in program design and implementation.” As of 2008, Montgomery County and New Jersey Pinelands had preserved 51,830 and 55,905 acres respectively. This rural/suburban application of transferrable development rights has continued to be one of the most active and studied applications of TDR.

In an urban context, transferring air rights continued to be a tool that NYC City Planning increasingly depended on to achieve flexibility in new area-wide planned subdistricts, such as the


46 Ibid, 380.

Theater Subdistrict, which was a part of the Midtown Special District. Established in 1998, the Theater Subdistrict identified 25 theaters, many of them individual landmarks, as eligible sending sites. Developers were able to use the theatre’s air rights through certification in order to increase their floor area by 20 percent and with further discretionary review, the developer could increase their FAR by 40 percent. In exchange for the ability to transfer their air rights over a broader geographic region and thus increasing the value of their air rights, theatres had to agree to maintain their building as a “legitimate Broadway playhouse.” 48 Between 2003 and 2011, 11 transfers took place in the Theater Subdistrict. 49

_TDR Turns 40_

Since the 1970s and 1980s, there have been few detailed studies of New York City’s TDR mechanisms. Machemer and Kaplowitz’s 2002 study focused on establishing “an evaluative framework;” however, there is still a lack of empirical evidence on the program’s strengths and weaknesses. 50 In their 2007 study, Kaplowitz, Machemer and Pruetz focused on broad comprehensive surveys that tried to identify the common characteristics of the most successful programs throughout the United States. They found that the creation of a TDR bank and extensive background studies, which identified the potential market for air rights, potential sending and receiving sites, and the appropriate transfer ratio, led to the most successful TDR

48 David W. Dunlap, “Theater Air Rights Plan Awaits Reviews; Plan on Broadway Air Rights Awaits Reviews,” _New York Times_, January 25, 1998, RE1. The boundaries for the Theatre Subdistrict are from Eighth Avenue to the west, Avenue of the Americas to the East, 40th Street to the south, and 57th Street to the west.


50 Kaplowitz et al., 380. The Machemer and Kaplowitz evaluative framework applied “a set of programme characteristics that [were] pertinent to a myriad of growth management techniques” in order to determine common characteristics in successful TDR programs. Patricia L. Machemer and Michael D. Kaplowitz, “A Framework for Evaluating Transferable Development Rights Programmes,” _Journal of Environmental Planning and Management_ 45, no. 6 (2002):793.
In addition, the type of development demand, particularly housing demand, contributed to a program’s success. The study concluded that planners have a significant opportunity to influence the success of TDR programs since background studies and the creation of a TDR bank fall under their purview.

Most of the comprehensive studies mention New York City’s TDR programs in the discussion of the historic context of the mechanism since the City adopted the earliest program. However, most recent studies focus on rural and suburban transferrable development rights and elide the intricacies of New York City’s different transfer mechanisms. Kaplowitz et al. (2008) note that it is hard to compare the number of transfers in urban programs with the number of acres saved in rural programs, and many of the studies tend to focus on the latter, since there is greater access to quantitative data. Despite numerous scholarly studies that focus on process evaluations of TDR to identify best practices, there is still a lack of empirical data, particularly for New York City’s pioneering Zoning Resolution (ZR) §74-79. Costonis and Marcus were the last scholars who explicitly focused their research on Zoning Resolution (ZR) § 74-79, and even with their research there exists no comprehensive database of Zoning Resolution (ZR) § 74-79 applications.

51 Kaplowitz et al., 385. A transfer ratio is the relationship between the unit of air rights extinguished and the unit of development permitted. For example in Montgomery Country in the Rural Density transfer zone, “residential density may be transferred at the rate of one development right per five acres less one development right for each existing dwelling unit.” Montgomery County Planning, “Appendix A: Summary of Rural Density Transfer Zone (RDT) and Rural Cluster Zone (RC).”

52 Kaplowitz et al., 385-6.

53 Ibid, 380.
RESEARCH DESIGN

My research was a process review of the Zoning Resolution (ZR) § 74-79 that covered 1968 (the year the zoning resolution was adopted) to the last application completed in 2009. The geographic boundaries were confined to Manhattan, since it is the only borough with any transfer activity under ZR § 74-79. The scope of research included all ZR § 74-79 applications, a total of 14. Two applications were withdrawn, one application was denied, and one approved application was never built; therefore, there are a total of ten completed ZR § 74-79 transfers. The research was divided into two phases. Phase I included collecting and describing all of the data on ZR § 74-79 applications. Phase II entailed conducting interviews in order to answer why Zoning Resolution (ZR) § 74-79 has been used so infrequently.

Phase I

The first phase of my research required organizing all of the data on ZR § 74-79 applications into a comprehensive database. The database included information such as the date of the special permit, the block and lots involved in the transfer, the as-of-right FAR versus built FAR, the quantity of air rights transferred, the parties involved in the transfer, and the additional zoning relief requested as part of the project scope. The data identified consistent characteristics of ZR § 74-79 applications and clarified how the mechanism has been used since its adoption.

The total number of ZR § 74-79 Special Permit applications was generated from a list of ZR § 74-79 Special Permit applications provided by the LPC combined with a list of all transfers to-date included in the 1991 Grand Central Subdistrict Report published by the DCP and supplemented with all recent ZR § 74-79 applications listed on City Planning’s Land Use &
CEQR Application Tracking System (LUCATS). All of the ZR § 74-79 applications since 1979 have been recorded on LUCATS. The compiled list was corroborated by reviewing all of the Special Permits available on the City Planning website and documentation available on the Office of the City Register’s online Automated City Register Information System (ACRIS), as well as reviewing the list with leading land use lawyers in the city who have been involved in many of the identified transfers. The data were contextualized by reviewing the overall individual landmark designation activity between 1968 and 2012 as well as which landmarks have transferred their air rights via zoning lot merger rather than through ZR § 74-79. As of June 2012, there were a total of 1,316 individual landmarks. A list of all individual landmarks was provided by the LPC. Additional data on landmarks that have transferred air rights via zoning lot mergers was provided by New York University’s Furman Center for Real Estate and Urban Policy.

Phase II

The second phase of research entailed interviewing legal, preservation, and planning professionals to determine why ZR § 74-79 has been used so infrequently. The interviewees were selected based on their experience with or expertise on ZR § 74-79. They included private zoning consultants, a partner at Kramer, Levin, Naftalis, & Frankel LLP, a large New York City


55 All City Planning Reports since 1938 have been catalogued online and can be accessed at: http://a030-cpc.nyc.gov/html/cpc/index.aspx and ACRIS is accessible at http://a836-acris.nyc.gov/Scripts/Coverpage.dll/index.

law firm that has completed ZR § 74-79 applications, and the General Counsels for the LPC and the DCP. (See list of interviewees in Appendix A.) In total, nine interviews were conducted.

The interviews were organized thematically around three central topics: a) general questions about ZR § 74-79, b) process questions about ZR § 74-79, and c) legal questions about ZR § 74-79. (See Interview Outline in Appendix B.) Prior to conducting the interviews, the Institutional Review Board (IRB) confirmed that the proposed research allowed for exemption from requiring consent of all participants. The interviews followed a conversational format and were recorded unless the interviewee requested otherwise. The audio recordings are confidential, but the information shared by an interviewee was incorporated into my thesis. The interviewee was identified unless he/she requested that the information remain confidential.
ZR § 74-79 Application Process

An applicant who wishes to obtain a ZR § 74-79 Special Permit must work with both the LPC and the DCP. Initially, the applicant meets with the LPC staff to insure that the new building’s materiality and design complements the landmark building. Before approving or denying an application, the LPC holds a public hearing to review the proposed project. To approve a project, the LPC must, first, determine that there is a harmonious architectural relationship between the proposed building and the Landmark and second, verify that the proposed landmark maintenance plan is adequate. Upon completing the public hearing, the LPC Chair issues a letter to the DCP Chair describing whether or not the Commission, which has voted, has issued a positive or negative report for the project.

As the applicant consults with the LPC staff, he/she also confers with the DCP staff particularly if the project includes a request to waive bulk and height requirements. During the City Planning portion of the process, the application must go through the Uniform Land Use Review Procedure (ULURP), which includes project review by the applicable Community Board and the Borough President. Once the project has been approved by the LPC as well as reviewed by the Community Board and Borough President, the CPC evaluates the project at a public hearing. For the CPC to approve the project, the Commission must make three findings,

(1) that the permitted transfer of floor area or variations in the front height and setback regulations will not unduly increase the bulk of any


development or enlargement, density of population or intensity of use in any block to the detriment of the occupants of buildings on the block or nearby blocks, and that 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;

(2) that the program for continuing maintenance will result in the preservation of the landmark; and

(3) that in the case of landmark sites owned by the City, State or Federal Government, transfer of development rights shall be contingent upon provision by the applicant of a major improvement of the public pedestrian circulation or transportation system in the area. 59

The first finding allows the CPC to review the project’s proposed additional bulk in relation to the surrounding area and the potential impact of the increased density. The second finding is based on the LPC’s recommendation, and the third finding only applies to city-owned landmarks that go through the ZR § 74-79 application process. The CPC’s decision on whether or not to grant a special permit is the final required action in the application process. It is not necessary for the City Council to approve ZR § 74-79 applications, as is required with other ULURP applications, unless the application includes a legislative decision such as a zoning text amendment. 60 However, the City Council may elect to review the application when the CPC files its decision with the City Council’s Office of the Speaker as per the requirements of the New York City Charter. 61

59 New York City Zoning Resolution § 74-79. The third finding that pertains to city-owned landmarks was not part of the original zoning resolution as adopted in 1968. It was added in a subsequent amendment that was adopted on May 13, 1970 by the City Planning Commission. New York Department of City Planning, CP-21166 no. 20: 351.

60 David Karnovsky, interview by Kate Gilmore, Department of City Planning, March 14, 2013.

61 The City Council retains veto power for all ZR § 74-79 Special Permit.
Since the resolution’s adoption, there have been changes to the roles played by each regulatory agency involved in the ZR § 74-79 Special Permit process. In the 1980s, City Planning Vice Chairman Gallent critiqued the process noting "the awkward role of the Planning Commission in arriving at a late stage in a lengthy approval process to make a basic judgment on a major development proposal."62 Even though the DCP staff was involved earlier in the design process, the CPC had no purview until much later in the project’s development. During the 1980s, there was sense that the LPC was shaping the growth of the city to a greater degree than City Planning through the creation of new historic districts and new developments that used ZR § 74-79 Special Permits to construct some of the most significant new commercial office space created during the decade.63 For the early ZR § 74-79 Special Permits, the LPC focused on critiquing the new building’s design in relation to the existing landmark. In addition, the approved maintenance plans required periodic inspections to assure continuing maintenance rather than requiring a comprehensive initial restoration as part of the ZR § 74-79 Special Permit approval process.

Today, the LPC focuses on pro-active restoration requirements that are tied to a certificate of occupancy for the new building. The LPC’s letters to the DCP focus on restoration measures required in order to bring the landmark building into “sound, first class condition.”64 There is less emphasis on the design of the proposed building as exemplified in the LPC’s


discussion of the proposed building to be constructed using the Seagram Building’s air rights. The LPC notes that “the simple rectilinear massing of the proposed tower and its lack of set backs will relate well to the massing and composition of the Seagram Building.”

Whereas, the design of the new building used to be the primary focus of the LPC’s ZR § 74-79 Special Permit review, today, the LPC focuses on the restorative work required for project approval.

*Changing Landmarkscape*

When ZR § 74-79 was adopted in 1968, there was a total of 267 individual landmarks throughout the five boroughs. As of January 2012, there were 1,318 individual landmarks. The nearly 500 percent increase in the number of individual landmarks has dramatically changed the size of the landmark air rights pool. Today, as the price of land in New York City continues to rise, this pool of untapped development potential attracts increased interest. In addition, with the significant number of individual landmarks as well as historic districts, the LPC has had to shift its focus from the creation of new landmarks to the regulation of current landmarks. While the LPC will continue to identify new landmarks as additional buildings reach 30 years of age and become eligible for designation, the agency must balance this work with an increased stewardship responsibility due to the number of historic structures that fall under its jurisdiction.


66 The total number of individual landmarks was derived from GIS data of all of the City’s landmarks provided by Jennifer Most at the Landmarks Preservation Commission.
Since 1968, there have been 14 ZR § 74-79 Special Permit applications submitted to the CPC. Eleven of the applications were approved, one was denied, and two were withdrawn. One approved project that sought to use air rights from Rockefeller Center was never built due to a downturn in the real estate market; therefore, ten projects have been successfully built using ZR § 74-79 to increase the allowable bulk of the new development. (Table 1)

The first project to use the new ZR § 74-79 Special Permit process was approved in 1972; however, there is little recorded documentation of this transfer. The majority of the transfers, six in total, occurred between 1979 and 1985. During this period one transfer was approved each year except for 1983. Another cluster of transfer activity occurred in the late 2000s, when three additional transfers occurred, one each year from 2007 to 2009. (Figure 1) One approved application that does not fall within either cluster of activity is the 1990 approval of Rockefeller Center’s air rights transfer. (This project will be explored in further detail in the Case Studies section.) The denied application for a project at 383 Madison Avenue was filed in 1989, and the two withdrawn applications were filed in 1980 and 1988. The 1980 withdrawn application was to

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67 This section provides an overview of the general characteristics of all ZR § 74-79 Special Permits applications. The following section uses three case studies to examine particular transfers in greater detail.

68 In the existing transferrable development rights research, it was very hard to find the total number of ZR § 74-79 transfers and a list of where these transfers took place. An article written by Jerold Kayden in 1992 alludes to “fewer than 15 cases from landmark buildings recorded during the program’s first 19 years of operation.” This information was originally sourced from a report by Richard J. Roddewig and Cheryl A Inghram’s Transferrable Development Rights Programs, Planning Advisory Service Report no. 401 (Chicago: American Planning Association, 1987). The Roddewig and Inghram report sourced information from interviews with Norman Marcus who was a leading expert on TDR; however, it didn’t clearly attribute the number to a source. As recently as January 2013, an article published by The Real Deal cited 14 transfers since the program’s adoption 40 years ago. Hiten Samtani, “Developers, wary of cost and delay, spurn city’s landmark transfers program for air rights,” The Real Deal, Published January 29, 2013. The total number in this thesis was generated from a list of ZR § 74-79 Special Permit applications provided by the Landmarks Preservation Commission combined with a list of all transfers to-date included in the 1991 Grand Central Subdistrict Report published by the Department of City Planning and supplemented with all recent ZR § 74-79 applications listed on LUCATS. The compiled list was corroborated by reviewing all of the Special Permits and documentation available on ACRIS, as well as reviewing the list with leading land use lawyers in the city that have been involved in many of the transfers included on the list.
transfer air rights from the Knox Building at 452 Fifth Avenue to 442 Fifth Avenue. The project was later completed using a zoning lot merger and ZR § 74-711 in order to modify the bulk and height of the new office tower. The second withdrawn application was to transfer air rights from St. Paul’s Chapel to 47 Church Street and was abandoned in 1988.

The clustered transfer activity mirrors larger trends in the Manhattan real estate market. The use of ZR § 74-79 is market-driven and was more frequent during the heated real estate markets of the 1980s and 2000s. The additional time and expense required to complete a Special Permit process was not a significant obstacle when the real estate market experienced periods of enormous growth because the new projects created through transferring air rights were highly profitable. However, a deep recession in the early 1990s, which in New York City was worse than the current downturn, led to a protracted pause in ZR § 74-79 applications that lasted 17 years. (Figure 1) Similarly, there have been no ZR § 74-79 applications since the MOMA/Hines project in 2009 due to the most recent recession.

Geographically, the transfers have occurred in Lower Manhattan and Midtown. (Figure 2 & 3) All of the transfers in Lower Manhattan occurred during the 1980s; whereas, transfers have happened in Midtown from the 1970s to the 2000s. The majority of ZR § 74-79 transfers, seven

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70 ZR § 74-711 is a Special Permit process that allows for a bulk and use waivers for landmark buildings or new construction within an historic district.

71 During the course of this application, Zoning Resolution (ZR) § 74-79 was amended to clarify the definition of “landmark building and other structure.” As originally written, the zoning resolution excluded the use of air rights from designated cemeteries as a landmark building; however, the resolution was unclear as to whether or not the air rights from a cemetery that was part of a zoning lot, which also included a historic structure such as St. Paul’s, could be calculated as part of the total air rights of the landmark building. Bruce Lambert, “Churchyard Air Rights Might Be Windfall: Loophole May Let Churches Sell Air Rights of Graveyards,” New York Times, December 11, 1986, B1. In 1987, the Department of City Planning amended the Resolution to clarify that any portion of a zoning lot used for cemetery purposes could not transfer its development rights. St. Paul’s Chapel pursued multiple development scenarios in order to sell their air rights, but none proved viable.

72 Paul Selver, interview by Kate Gilmore, Kramer, Levin, Naftalis, & Frankel LLP Office, February 6, 2013.
in total, have occurred in Midtown including the three most recent transfers. Except for the first transfer in 1972, which was located in a residential zone with a maximum FAR of 10, all of the ZR § 74-79 projects are located in the densest areas of Manhattan, zoned for commercial uses and a maximum FAR of 15.

On average, the projects transferred 181,546 sq. ft. of air rights.73 (Table 1) The largest transfer request was to move 787,335 sq. ft. of air rights from Grand Central to the proposed commercial office tower at 383 Madison Avenue; however, this project was denied.74 The CPC could not make the first finding required for approving the special permit, noting that the proposed project “unduly increase[d] the bulk, density of population and intensity of use to the detriment of the occupants of buildings on nearby blocks.”75 The largest approved transfer was for 506,380 sq. ft., or an additional 8.2 FAR, from Rockefeller Center, which was never executed due to the real estate collapse of the early 1990s. The largest completed transfer was from 55 Wall Street in 1985 when 363,010 sq. ft. of air rights were used to add an additional 6.76 FAR to the new commercial office space at 60 Wall Street. The smallest transfer was from Amster Yards, which contributed 30,701 sq. ft., or 1 FAR, to the new development at 805 Third Avenue, which had a total FAR of 17.73. All of the transfers that occurred in the late 2000s added more than 6 FAR to the total project bulk.

ZR § 74-79 was considered an innovative zoning tool since it allowed air rights to move over a further distance than what was permitted as-of-right, which was only between contiguous

73 This is an average of all of the approved ZR § 74-79 Special Permit applications.

74 The project was later completed by transferred air rights from Grand Central through the Grand Central Subdistrict provisions.

lots through a zoning lot merger.\textsuperscript{76} However, four of the ZR § 74-79 approved applications had contiguous sending and receiving sites. (Table 1) The majority of the transfers have been between “adjacent” lots across the street, rather than contiguous. Six projects transferred air rights between sending and receiving sites that were separated by an intervening street. The 1969 amendment to the original ZR § 74-79 that allowed air rights to be transferred between lots that could prove a continuous chain of common ownership has been approved once for a project that was never built. When the amendment was adopted it was believed that the added flexibility would further enhance the ability to use the new mechanism; however, this has not been the case in practice. The first application to move air rights through a chain of ownership for 383 Madison Avenue was denied. The plan for the project put forth by a Wall Street investment company First Boston proposed to move the air rights between two lots that were connected by underground railway tracks. The intervening surface lots between the sending and receiving site had once all been under common ownership, and the lawyer for First Boston argued that due to the subsurface rail lines there was still a common chain of ownership. The CPC rejected this definition of common ownership.\textsuperscript{77} The only chain of ownership air rights transfer that was approved was for the new proposed Rockefeller Plaza West Development, which was all under the ownership of the Rockefeller Development Corporation; however, as noted previously, this project was never built due to a downturn in the real estate market.\textsuperscript{78}

\textsuperscript{76} Although more restrictive in its contiguity requirements, zoning lot mergers can be used to move air rights over a broad geographic area. If a number of contiguous lots are merged into one zoning lot, there is no restriction as to how far the air rights can be transferred.


\textsuperscript{78} See Appendix D for the full details on each ZR 74-79 application with accompanying site maps that identify each project’s sending and receiving sites.
Preservation Purpose

As required by ZR § 74-79, there must be a program for the continuing maintenance of the landmark. The language of the resolution is vague, and as interpreted by the LPC’s legal counsel, for early projects the requirement was met by the creation of a trust fund. During Dorothy Miner’s tenure as legal counsel for the LPC between 1975 and 1994, the practice was established to require an easement as part of the plan for continuing maintenance for most ZR § 74-79 Special Permit applications issued during the 1980s. The New York Landmarks Conservancy Inc. holds easements on Amster Yards, India House, and 60 Wall Street, and the LPC holds an easement for John Street Methodist Church. An easement for Rockefeller Center to be held by the Landmarks Conservancy was drafted, but never executed since the project was unrealized.79

The easements on Amster Yards and India House were instrumental in allowing the Landmarks Conservancy to compel the landmark owners to maintain their properties. Amster Yards was heavily damaged during a project to adapt the building for a new owner, the Cervantes Institute. Although nearly resulting in a lawsuit, the Landmarks Conservancy was ultimately able to compel the owner to restore the building to its original condition. Similarly, the façade of India House was crumbling during the 1980s, and the landmark property owner was compelled to fix the façade, which led to a conflict when the landmark owner claimed he had no funding for the restoration despite the recent sale of the landmark’s air rights.80

79 Alex Herrera.

80 Alex Herrera. Where the profit from the sale of India House’s air rights went remains a mystery. The administering of the easement by the Conservancy was funded by a one-time $35,000 payment held in a trust as per the Special Permit No. C 810325 ZSM issued by the City Planning Commission.
After Miner’s tenure as the LPC’s legal counsel ended in 1994, subsequent ZR § 74-79 applications have not required an easement as part of the landmark maintenance plan. As interpreted by the LPC’s current legal counsel, Mark Silberman, the Restrictive Declaration signed by the landmark owner is sufficient to insure the long-term care of landmark buildings. Some landmark owners still elect to donate an easement for tax benefits, as was the case for the Seagram Building even though they are no longer an integral component of the ZR § 74-79 process. It is unclear whether the lack of an easement will become problematic if either the Tiffany Building or University Club fails to uphold the covenants of the Restrictive Declaration. The City will have the legal authority to compel the landmark owners to maintain the building but may lack the financial resources or proper personnel to monitor the buildings. However, there may be less need to use easements as a point of leverage since the LPC has begun to require pro-active restoration tied to issuing the certificate of occupancy for the new building.
ZR § 74-79 CASE STUDIES

In order to explore the dynamics and intricacies of the ZR § 74-79 Special Permit process, this thesis presents three case studies that exemplify important characteristics of the process including the complexity, the influence of market dynamics, and the current standardized landmark maintenance provisions.81

Financial Square (1984): Complexity

The Financial Square project developed by Howard Ronson of HRO International demonstrates the complexity of ZR § 74-79 applications. The project involved multiple discretionary land use actions and was the only ZR § 74-79 application that sought to use air rights transferred from a city-owned landmark. The proposed development was a United States Assay Office.82 The landmark building was the First Precinct Police Station located at 20 Old Slip. The police station was located on a zoning lot across the street from a city-owned fire station on a separate lot. As part of the project, the existing fire station was demolished and the zoning lot that it occupied was merged with the landmark zoning lot to increase the total number of air rights that could be transferred. In order to merge the zoning lot, the street between the two lots was de-mapped to make the lots contiguous. The zoning lot merger changed the Landmark Zoning Lot from 5,255 square feet to 11,346 square feet. The developer of the project was then able to transfer 135,273 square feet of air rights from the landmark to the new development located at 32 Old Slip, a new commercial office tower designed by Edward Durell Stone.

81 Each ZR § 74-79 application could merit its own case study due to the unique complexity of each project, yet the three selected are particularly illustrative. For additional details on each project see Appendix D.

In order to satisfy the third finding required to approve a ZR § 74-79 Special Permit, substantial improvements to the pedestrian or traffic circulation had to be included as part of the project. The CPC required the applicant to commit to the creation and maintenance of a “piazza” in front of the landmark police station. In addition, the applicant agreed to improve paving on Old Slip, Front Street and Gouverneur Lane. The Special Permit also noted that the sale of the air rights would generate considerable revenue, although the exact price for the air rights was not disclosed, and that this revenue would be paid into the City’s General Fund.

The LPC reviewed the project’s siting, materiality and design. In its final report, the LPC found that the siting of the building was “direct and simple.” The building was designed with a clearly defined colonnaded base that related to the solid masonry of the Police Precinct. The base was clad in stone, a contemporary treatment with a historic material, allowing the building to relate to the neighboring landmark, while still projecting a modern image. The LPC found the program of continuing maintenance was satisfactory and issued a positive report for the project.

The project sparked a renewed debate as to whether or not the City should be able to sell its landmarks’ air rights. In 1970, when the City first amended ZR § 74-79 to allow air rights transfers from city-owned landmarks there was a significant public outcry. The City was hoping

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84 The Maintenance Program for the First Precinct Police Station was outlined by the City of New York’s Department of General Services, Division of Real Property in correspondence with the Landmarks Preservation Commission. The City committed to requiring the current tenant to repair identified issues, to documenting the building’s current condition to serve as a “baseline survey” for all subsequent maintenance, and to adopt a cyclical inspection program in order to monitor the tenant and insure proper care of the building. Terrence Moan to Gene A. Norman, “Maintenance Program,” March 27, 1984, ACRIS Records for Block 34, Lot 37 Manhattan.
to transfer air rights from the United States Customs House across Bowling Green to a proposed project at 1 Broadway. Beverly Spatt, LPC commissioner at the time, went on the record stating,

Selling and transfer of air rights from a public landmark to solve the city’s fiscal problems is a warping of the zoning resolution…If we sell the air rights over the Customs House the first time, what will be next? The Public Library on 42nd Street? And the museums?\(^{85}\)

The project at 1 Broadway never materialized, and the debate as to whether or not the City should transfer air rights from their own landmarks subsided. However, the Financial Square project reignited the controversy in the mid-1980s. The tenant of the First Precinct Police station, Old Slip Associates, sued the City claiming that they were planning a renovation and were entitled to the use of the air rights over the building. The City ultimately went forward with the disposition of the city-owned air rights despite concerns that it would set a precedent and that the City had no comprehensive information on the total potential development that existed over city-owned landmarks.\(^{86}\)

The incredibly complex Financial Square project, which included a zoning lot merger, street de-mapping, disposition of city-owned property, and an air rights transfer ultimately won public approval when the developer pledged to construct a fire station as part of the new development. The public good of the fire station outweighed the potential issues created by transferring air rights from city-owned landmarks. City Planning Commissioner Gallent, who


would oppose subsequent ZR § 74-79 applications, wrote a concurring statement arguing that although the project was approved, it raised major concerns. The first concern was the significant tower coverage approved for the project. Tower coverage regulations required that any portion of a building in Lower Manhattan over 85 feet tall cover only 40 percent of the site. Instead of the permitted 40 percent tower coverage, Financial Square was approved with 72 percent tower coverage. Gallent cautioned that the CPC had repeatedly approved much higher tower coverage allowances in Lower Manhattan despite the zoning regulations established to “allow light and air to reach the street and promote a more comfortable pedestrian climate at ground level.”

The developers argued that lower tower coverage created an economic hardship due to the reduced floor size, which made the building financially infeasible.

The second issue Gallent raised was the amount of bulk transferred from the landmark building. He argued that there should be a mandatory 20 percent cap on the increased bulk of the receiving site for all landmark transfers. As written, the ZR § 74-79 had this restriction in place for all zoning districts outside high density areas. However, Gallent asserted that this cap was appropriate for all zoning districts in order to “facilitate our goal of preventing buildings from achieving unreasonable densities and becoming totally out of scale and context.”

The final issue was density. Gallent acknowledged that the increased congestion generated by the new project would be unacceptable to some, and that, due to the number of new

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88 Ibid.

89 Ibid. High density areas are defined as commercial districts with an FAR of 10 or higher.

90 Ibid.
buildings in Lower Manhattan, the CPC should undertake a comprehensive study of the appropriate maximum density in order to avoid crippling subway congestion. Many of the issues raised by Gallent are echoed in other ZR § 74-79 applications completed during the 1980s. In particular, the issue of appropriate tower coverage for the proposed building was raised in the Special Permit applications to transfer air rights from India House, John Street Methodist Church, and 55 Wall Street.

*Rockefeller Plaza West (1990): Market-Driven*

As exemplified by Rockefeller Plaza West, ZR § 74-79 is a market-driven tool. Without a robust real estate market, ZR § 74-79 will not be used. In the real estate boom of the 1980s, Rockefeller Center Development had begun to assemble a project to transfer the air rights from Rockefeller Center’s iconic Channel Gardens, La Maison Francaise, the British Building, and the sunken plaza to a receiving site at 745 Seventh Avenue. The application was the only approved ZR § 74-79 Special Permit to use the contiguous chain of ownership in order to facilitate the transfer.91

Despite the LPC and CPC’s approval, the project lay dormant due to a recession in the early 1990s that decimated property values and led to a 17.6 percent vacancy rate for Midtown office buildings.92 In 1994, the Rockefeller Center Development Corporation planned to construct a parking lot as an interim use for the site, since it was unable to find an anchor tenant to proceed with the construction of a 55-story office tower.93 By 1997, Bear Sterns was identified

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91 See Appendix D for a diagram of the sending and receiving sites for the proposed project.
as a potential anchor tenant. However, the building did not break ground until 1999 when Morgan Stanley partnered with the Rockefeller Group to develop a 32-story office building as an auxiliary location for the securities company. The building finally opened in 2001 as the Lehman Brothers headquarters.

The development of 745 Seventh Avenue illustrates the market-driven characteristics of ZR § 74-79 Special Permits. During the heated real estate market of the 1980s, the complexity, cost and time of a ZR § 74-79 air rights transfer was economically viable, yet when the office market crashed, the air rights transfer was abandoned.


The development project sought to transfer 200,965 square feet from the landmark Seagram’s Building to a new development at 610 Lexington Avenue. The proposed development will be a 63-story mixed-use building with 225,504 square feet of hotel use, 47,019 square feet of residential use, and 9,504 square feet of retail use.

The most recent ZR § 74-79 applications, such as the Seagram’s Building, have used a standardized landmark maintenance program developed by the LPC in conjunction with private applicants for the special permit. This program is incorporated into a deed restriction that,

94 Bagli, B6.


among other things, establishes the maintenance standard for the landmark, and a program for cyclical maintenance of the landmark once any initial restoration work has been completed. This form is typically attached to the agreement pursuant to which the landmark’s excess development rights are purchased with the understanding that it will be amended to reflect a work program specific to the landmark prior to closing and that it will, upon closing, be recorded against the landmark lot. The ability to standardize the landmark maintenance provisions is due to the body of knowledge that the LPC has accumulated throughout the ZR § 74-79 application process, which has allowed the LPC to articulate clear requirements for meeting the maintenance commitment. 97

In reviewing the ZR § 74-79 Special Permit application, the LPC required that the Seagram Building owners complete certain pro-active restoration work as part of the project’s approval. The restorative work included “cleaning, repairing and replacing plaza paving and walls, cleaning and repairing façade masonry, and cleaning and applying a protective oil coating to the façade bronze and Muntz-metal.”98 The comprehensive restorative program intended to bring the Seagram’s Building to sound, first class condition, while the continuing maintenance program insures future care of the landmark building.

The continuing maintenance program includes: a) Periodic Inspections including submission of Local Law 10 & 11 Façade Inspection Reports b) Emergency Protection Program, c) Access to Designated Structure for LPC or representatives, and d) Failure to Perform, provision that allows deferred maintenance to be corrected by the City of New York at the sole

97 Paul Selver. An example of the declaration can be found in the ACRIS documents for the Seagram’s Building ZR § 74-79 air rights transfer.

cost of the landmark owner. The provisions insure that the landmark is maintained in first-class condition above and beyond what is required as per the Landmarks Law. The inspections occur on a five year cycle and include the brick masonry, stone masonry, windows, cornices, and roof. The Emergency Protection Program creates measures that compel the landmark property owner to comply with all requirements of the LPC in the event of a fire or other emergency. The landmark owner is prohibited from demolishing or altering the building in any way without permission from the LPC and the LPC has the final determination of the appropriate course of action.99

WHY HAS ZR § 74-79 BEEN USED SO INFREQUENTLY?

ZR § 74-79 has been used infrequently because: 1) it has limited viability outside dense central business districts, 2) the required Special Permit approval adds cost and time to the development process, and 3) many landmarks lack viable receiving sites. Each of these factors is discussed in further detail below.

Limited Viability

Outside the central business district, the use of ZR § 74-79 confers little benefit because it only permits the receiving site to increase its bulk by 20 percent. Bulk increases are more easily acquired through as-of-right processes such as zoning lot mergers, the Inclusionary Housing Program or a bonus for the provision of a new plaza. Furthermore, outside of the central business district, development sites are not typically large enough to generate a square footage that makes a developer interested in acquiring additional FAR through a Special Permit air rights transfer. In the central business district, even though development sites have become increasingly small (of all the ZR § 74-79 applications, the MoMA project is on the smallest site), each site has the capacity to achieve a high enough FAR to make ZR § 74-79 viable. If a developer already knows discretionary actions will be required for a particular project, he/she may also be more inclined to pursue a ZR § 74-79 Special Permit since the resolution facilitates both bulk transfer as well as height and setback waivers. The majority of ZR § 74-79 applications include height

100 The answer to my research question was informed by a series of informational interviews. See Appendix A, for a list of interviewees.

101 The Inclusionary Housing Program was adopted by the NYC Department of City Planning and it permits up to a 20% increase in FAR if a project creates or preserves affordable housing for low-income households. Department of City Planning, “Inclusionary Housing Program,” http://www.nyc.gov/html/dcp/html/zone/zh_inclu_housing.shtml (accessed February 26, 2013).
and setback waivers which allow a developer to build larger floor plates and thereby increase the project’s total leasable area and the developer’s overall economic return.

*Increased Time & Cost*

The time and cost of a Special Permit were often cited during interviews as one of the main deterrents for transferring air rights from an individual landmark.102 Once a project is certified to enter the Uniform Land Use Review Procedure (ULURP), the duration of the process is approximately seven months. However, prior to that (that is, during the ULURP process), there is no specified time frame.103 During this period a developer is often incurring carrying costs of owning or leasing the land for the project as well as paying legal, architectural and zoning consultant fees. Approved ZR § 74-79 applications are shepherded through the Special Permit process by a small subset of lawyers and zoning consultants with expert knowledge of New York City’s Zoning Code and regulatory framework. Buying the required level of expertise is costly. Having the fiscal capacity to go through ULURP is often beyond the means of smaller landmark institutions, since institutions often seek to sell their air rights when they suffer from a scarcity of funding.

To avoid the cost of a Special Permit, developers and landmark owners often resort to a zoning lot merger in order to transfer air rights, as-of-right, between contiguous zoning lots. If a

102 This statement seems somewhat contradictory since ZR § 74-711-- another special permit process that allows an individual landmark to waive bulk and use restrictions-- is used frequently. See Note 63 for additional information about ZR § 74-711. The discrepancy between each Special Permit’s use is likely due to the fact that other mechanisms exist to achieve the same results as ZR § 74-79, such as transferring bulk through an as-of-right zoning lot merger. Whereas, there are few other mechanisms that allow waivers of use requirements for either the landmark building or a new building on the landmark site, thus, making ZR § 74-711 more attractive and valuable.

landmark building sells its air rights via zoning lot merger, there is no requirement to insure the long-term maintenance of the landmark building. Thus, the development pressure on the landmark building is mitigated, but the landmark’s survival is not guaranteed. Since 2003, 21 landmarks in Manhattan and one landmark in Brooklyn have transferred their air rights through zoning lot mergers. Of the 21 landmark zoning lot mergers in Manhattan since 2003, only seven have been in areas zoned with an FAR of 15. Landmark zoning lot mergers occur over a much broader geographic range of the city including neighborhoods with a maximum FAR as low as 5. In addition, while ZR § 74-79 transfers are concentrated in commercial districts of the city, zoning lot mergers from landmarks have occurred in residential, commercial and manufacturing districts.

**Lack of Receiving Sites**

Even if the individual landmark has the fiscal and organizational capacity to go through the ZR § 74-79 Special Permit process and is located in a dense central business district, a lack of receiving sites often constrains the use of ZR § 74-79. St. Patrick’s has a high organizational capacity and the means to pursue a ZR § 74-79 air rights transfer. However, the air rights have nowhere to land as dictated by the current restrictions as to how far the air rights may be transferred. This issue of “stranded air rights” is a current topic of research at New York

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104 John Infranca, fellow at the Furman Center, email to message to author, January 17, 2013. The Furman Center provided a list of all individual landmarks that transferred their air rights via zoning lot merger since 2003. To further analyze the data, each zoning lot merger was mapped in GIS to review the geography of the transfers as well as the zoning of the areas where the transfers occurred.

105 This thesis does not model the current development potential for each individual landmark due to time constraints. However, the identified characteristics of past ZR § 74-79 transfers applied as criteria would refine the accuracy of a soft site model that predicts future development spurred by ZR § 74-79 transfers. Through the application of certain criteria including site size, available FAR, year built, and landmark status, a soft site analysis determines the development potential of each lot within a given study area. Further research should pursue this analysis.
University’s Furman Center for Real Estate and Urban Policy. In an effort to determine the quantity of “stranded” air rights, the Center examined all individual landmarks in Manhattan’s Community Districts 1 through 6. This study area is where the majority of air rights transfers have occurred since 2003. The Center determined how many individual landmarks have potential receiving sites within the same block, and the preliminary data identified 64 landmarks with “stranded” air rights totaling 9,953,373 square feet.¹⁰⁶

In summary, Zoning Resolution (ZR) § 74-79 has been used infrequently because it is not viable outside of Manhattan’s densest areas. The time and cost of going through a Special Permit Process deters developers, who have alternative mechanisms, such as zoning lot mergers, to use as-of-right in order to transfer bulk. In addition, many individual landmarks lack viable receiving sites; thus, even if developer demand exists, the lack of receiving sites impinges upon the ability to complete the transfer.

¹⁰⁶ When identifying “stranded” air rights, the Furman Center did not consider whether there were any potential receiving sites across the block or at the corner, which the landmark could transfer air rights to via ZR § 74-79; therefore, the number of “stranded” air rights may be overstated. In addition, the data does not reflect whether or not any of these landmarks transferred their air rights prior to 2003. A supplemental manual analysis of each landmark will be done in the future to further refine the data. John Infranca, a fellow at the Furman Center, email message to the author, January 24, 2013.
DOES ZR § 74-79'S INFREQUENT USE MATTER?

The debate spurred by the Midtown East Rezoning proposal has created renewed interest in ZR § 74-79 and a call to update all policies that govern landmark air rights transfers. While the infrequent use of ZR § 74-79 does not currently undermine the legality of landmark designation, the real estate community argues that the new context created by adopting the Midtown East Rezoning may prove fertile ground to construct a lawsuit against the Landmarks Law.

Proposed Midtown East Rezoning: New Context to Challenge the Landmarks Law?

As this research progressed, the proposed Midtown East Rezoning increasingly framed the discussion of ZR § 74-79 and the implications of its infrequent use. The Midtown East Rezoning proposal aims to facilitate the transfer of Grand Central Terminal’s remaining one million square feet of undeveloped air rights and spur new office construction. As proposed, the rezoning would allow Grand Central to transfer air rights over a broader geographic area. (Figure 4) In addition, the DCP proposes amendments to the “onerous public review process.”107 Currently, any air rights transfers within the Grand Central Subdistrict are discretionary and require substantial pedestrian network improvements, which must be negotiated with the Metropolitan Transit Authority. In addition, the maximum achievable density is 21.6 FAR.108 With the rezoning, Grand Central would be able to transfer air rights as-of-right within the broader Subdistrict boundaries, and new developments could potentially achieve an FAR of 24 through transfer bonuses. In addition to a “Landmark Transfer” mechanism, the proposed rezoning introduces a


“District Improvement Bonus (DIB).” The DIB is a mechanism that allows developers to purchase additional FAR as-of-right by contributing to a fund that will be used to create improved pedestrian circulation in the study area. The DCP has set the contribution rate at $250 per square foot of air rights. A committee comprised of five mayoral appointments and the DCP Chair would identify projects to be funded through the DIB.

By establishing the DIB, the City has set itself in competition with individual landmarks trying to sell their air rights either through existing mechanisms such as ZR § 74-79 or in the newly amended Grand Central Subdistrict. Figure 5 shows that the first 3 bonus FAR that exceed the project’s as-of-right allowance must be purchased through a DIB contribution. To acquire additional FAR, the developer can either do so through a Landmark Transfer or a DIB contribution. A developer is unlikely to pursue two different transactions methods in order to acquire the same amount of FAR. The procedure for acquiring additional FAR seems to favor the DIB contribution, further diminishing the value of Grand Central’s air rights and the landmark’s ability to transfer its air rights despite the purported intent of the rezoning to facilitate the transfer. Furthermore, any individual landmarks within the proposed rezoning area will have to competitively price their air rights at $250 or less to appeal to developers who can purchase air rights from the City to achieve an FAR of 24 with no additional discretionary review.

109 Ibid, p. 9. Although the mechanism is referred to as a general “Landmark Transfer,” all DCP discussions and presentations have only identified Grand Central as a landmark eligible to transfer air rights through this new mechanism despite protests of other individual landmarks within the Grand Central Subdistrict. See Section Grand Central Today: Continued Threat of Idle Air Rights for more information on this controversy.


112 The air rights purchased via a DIB contribution are not extent air rights transferred from another location, but rather new air rights created as part of the upzoning planned as part of the Midtown East Rezoning.
While the Midtown East Rezoning only affects a handful of landmarks directly, the new policy may have broad implications for all individual landmarks. Many real estate interests have used the conversations about the rezoning as an opportunity to highlight ZR § 74-79’s “failure” as an effective “safety valve” meant to confer value to landmarked air rights. Real estate interests argue that the inability to use the transfer mechanism has undermined a private property owner’s ability to generate a reasonable return through the sale of the property’s unused air rights. The inability to generate a reasonable return may lead to a lawsuit challenging the constitutionality of the Landmarks Law.\(^1\) Whether or not there is sufficient ground to challenge the Landmarks Law, the real estate community has successfully raised the question of ZR § 74-79’s efficacy and framed a public discourse that pushes for new policies to address some of the perceived failures of the ZR § 74-79 process.

In speaking with the DCP’s legal counsel, the proposed air rights transfer system is seen as an “extension of the incentive zoning principle but applied area-wide,” similar to the mechanism established in Hudson Yards Subdistrict.\(^2\) The Hudson Yards rezoning also included a DIB created to finance the 7 Line subway extension, decking over the rail yards as well as new parks and streets.\(^3\) The preservation community has not taken a definitive stance on

\^1\ Vicki Been, interview by Kate Gilmore, NYU Furman Center Office, February 5, 2013.

\^2\ David Karnovsky, interview by Kate Gilmore, Department of City Planning Office, March 14, 2013. As defined by Jerold Kayden, incentive zoning “is a land use regulatory technique through which cities grant private real estate developers the legal right to disregard otherwise applicable zoning restrictions in return for providing environmental amenities such as public parks and plazas and, most recently, social facilities and services such as affordable housing, day care centers, and job training.” Jerold Kayden, “Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States,” \emph{B.C. Environmental Affairs Law Review} 19, no. 565 (1991-92): 568.

\^3\ City Planning Commission, “Hudson Yards Rezoning,” City Planning Report N 040500(A) ZRM, November 22, 2004, 15. When the Hudson Yards Rezoning was adopted the DIB price was established at $100 per additional square foot of floor area. Department of City Planning, “Special Hudson Yards District: Zoning Text Amendment as Adopted by City Council N 040500(A) ZRM,” January 19, 2005, 32.
whether or not the Midtown East Rezoning may undermine the Landmarks Law. In the report issue by MAS in February 2013, there is a small section that discusses landmark transferrable development rights. MAS notes that the City will be in competition with landmark air rights and calls for “a more liberal transfer provision” pointing to many of the recent studies elaborated below that have explored transferring landmark air rights over broader geographic boundaries.  

Alternative Transfer Mechanisms

The Midtown East Rezoning has created a platform for a renewed debate as to how to manage landmark air rights, and new transfers mechanisms have been proposed. The NYU Furman Center of Real Estate and Urban Policy has examined the effect of loosening contiguity requirements for landmark air rights. The Center presented preliminary research on December 13, 2012 at a policy breakfast that it co-hosted with the Moelis Institute for Affordable Housing Policy. Highlighting stranded air rights as a key issue constraining the current use of ZR § 74-79, their research modeled how many new receiving sites would exist if landmark air rights transfers were permitted over an entire block. As modeled, 73 percent of all landmarks in CB 1-6 would have new transfer options. The Furman Center’s research indicates that changing contiguity requirements of the current ZR § 74-79 may lead to increased potential receiving sites. However, the presentation did not advocate for a particular policy amendment, though the Director of the

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117 See discussion of “stranded” air rights in *Why has ZR § 74-79 been used so infrequently?* for additional information.

118 Vicki Been, Furman Center Presentation at “Air Rights Innovations: Using TDRs to Achieve Policy Goals” Policy Breakfast hosted by NYU’s Furman Center of Real Estate and Urban Policy and the Moelis Institute for Affordable Housing Policy, December 13, 2012. The figure does not take into account the existing zoning restrictions that may restrict the number of viable transfers such as boundaries between zoning lots.
Furman Center did stress the importance of exploring as-of-right transfer mechanisms to increase use.\textsuperscript{119}

Another current proposal advocates for the creation of a private landmark air rights bank. The proposal has been put forward by an organization known as Landrex that believes the “current system is broken,” ZR § 74-79 does not achieve its intended role as a safety valve, and waiting to see if there is actual grounds for a constitutional challenge is too risky.\textsuperscript{120} The mission of the organization is to “unlock and monetize more than 25 million square feet of transferrable development rights held over 180 individual landmarks.”\textsuperscript{121} The individual landmarks that qualify to participate in the program must be owned by a non-profit or a religious institution. The proposal has “something for everyone, although not the same thing for everyone.”\textsuperscript{122} Individual landmarks in the outer boroughs that currently have no transaction market or organizational capacity to participate in air rights transfers will no longer be discriminated against “based on accidents of geography.”\textsuperscript{123}

The bank will pool the air rights from all participating landmarks and act as a clearinghouse. Participating landmarks can annually elect to contribute all or a portion of their unused air rights. The sale of air rights will be to receiving sites within areas that the City has already approved for additional density such as those that have an Inclusionary Housing Bonus

\textsuperscript{119} Been, Furman Center Presentation, December 13, 2012.


\textsuperscript{121} Ken Fisher, Landrex Presentation, December 13, 2012.

\textsuperscript{122} Ken Fisher, interview by Kate Gilmore, Cozen O’Connor Office, January 25, 2013.

\textsuperscript{123} Ibid.
overlay. The air rights will be valued at the receiving site. The first 10 percent of the profits will be paid out per transferring property and the remainder will be paid out on a pro rata basis. The money from the bank will cover any work that the LPC has approved. Once the landmark owner receives approval from the LPC and provides a cost estimate, Landrex will write a check to cover the cost of the work or for whatever portion of the work the current account balance covers. As the plan is currently conceived, it is unclear whether Landrex will have any recourse if a property owner does not use the money to conduct the maintenance work or to compel a landmark property owner to conduct necessary maintenance if they do not voluntarily do so. This plan is in its nascent, coalition building stages; however, advocates for the plan hope it will gain momentum before the end of the Bloomberg Administration.¹²⁴

When considered in the context of the DCP’s proposed Midtown East Rezoning, the infrequent use of ZR § 74-79 may undermine the Landmarks Law. The infrequent use, in and of itself, does not pose a threat to the legality of the Landmarks Law. However, the real estate community may be able to make a convincing argument that the legal challenge exists and gain support for policy changes that do not enhance preservation planning goals. The following recommendations identify strategies to mitigate the policy threat as well as examine the broader issue of how to deal with unused development potential over urban landmarks.

¹²⁴ Ibid.
RECOMMENDATIONS

With the renewed focus on Zoning Resolution (ZR) § 74-79, it is crucial that the preservation and planning constituencies review the history of the mechanism, understand the planning and preservation goals the mechanism intends to achieve, and strategically identify policy amendments that meet these goals. This section outlines the following recommendations that will leverage planning and preservation goals in the debate about how to update the City’s policy on transferring landmark air rights:

1) Contextualize the “infrequent” use of ZR § 74-79

2) Draft a pro-active preservation proposal

3) Modify the existing Zoning Resolution ZR § 74-79 instead of creating a new transfer mechanism

Contextualize the “Infrequent” Use of ZR § 74-79

This thesis describes ZR § 74-79’s use as “infrequent” as a rhetorical hook to examine the process; however, the use of ZR § 74-79 may not actually be infrequent when contextualized. The following recommendations for further study will enhance the ability to qualify the efficacy of ZR § 74-79. First, there should be a comprehensive survey of the total number of unused air rights above individual landmarks. Without knowing the entire pool of air rights it is difficult to assess the impact of unlocking this additional density. From a planning perspective, greater documentation will improve a planner’s ability to manage the growth of a neighborhood. From a preservation perspective, a comprehensive database may fuel additional development pressure.
ZR § 74-79 is one of multiple zoning mechanisms that can facilitate the preservation of historic resources. Once there is a comprehensive database, additional research should determine how many individual landmarks could sell their air rights via zoning lot mergers. In certain areas in the outer boroughs, there is not enough development activity to generate a market for air rights. Thus, even if an individual landmark has a contiguous receiving site, no transfer activity will occur. This scenario should not be identified as a failure of ZR § 74-79, but rather a scenario in which the safety valve of ZR § 74-79 is not necessary due to low development pressure.

In areas with significant development pressure, instead of using ZR § 74-79, many individual landmarks elect to use ZR § 74-711 combined with a zoning lot merger in order to transfer air rights and receive height and setback waivers. ZR § 74-711 also provides the added utility of permitting use modifications. When a landmark owner elects to use ZR § 74-711, this demonstrates the sophistication of New York City’s preservation zoning, which allows the flexibility to use different mechanisms according to the project requirements, not the failure of ZR § 74-79. Only after additional research clarifies the number of landmark buildings that are only able to use ZR § 74-79 to transfer their air rights will it be possible to accurately contextualize the frequency of ZR § 74-79’s use.

Pro-Active Preservation Proposal

From a preservation perspective, this thesis has raised more questions than it has answered. The real estate community believes that there is an opportunity to challenge the Landmarks Law if the Midtown East Rezoning is adopted as currently proposed. However, this argument may be a tactic to shape the public’s perception of ZR § 74-79’s failure and the need to modify the
resolution. The preservation community needs to create its own proposal for the future use of ZR § 74-79, rather than allowing the real estate community to articulate a new policy for landmark air rights.

For example in the case of the Midtown East Rezoning, instead of placing the City in competition with landmark air rights, the City should create an air rights bank of blended public, City-owned air rights, and privately owned landmark air rights. To account for the importance of facilitating landmark air rights transfers the bank could be set up as a 2:1 ratio of landmark air rights to City-owned air rights.\textsuperscript{125} For every two square feet of landmark air rights sold, one square foot of City-owned air rights would be sold, so that the landmark air rights are purchased first. It is important to prioritize landmark air rights transfers to avoid potential litigation and address the ongoing issue of stranded air rights over Grand Central Terminal. The landmarks would be compensated on a pro-rata basis; therefore, the greater number of air rights contributed from an individual landmark, the greater the economic benefit to that landmark. The bank could be administered by an individual in the real estate community with a strong reputation, thus, removing a potential anti-trust liability challenge if the City were to administer the bank.\textsuperscript{126} The planning precedent for creating a pool of air rights exists in the Special South Street Seaport Subdistrict, though this pool did not combine public and private air rights. From a preservation

\begin{footnotesize}
\textsuperscript{125} This recommendation comes from my interview with Michael Parley, a zoning consultant that is expert on the New York City Zoning Resolution.

\textsuperscript{126} See \textit{Weakness of Zoning Resolution (ZR) § 74-79} (page 15) for a discussion of a potential antitrust liability challenge.
\end{footnotesize}
perspective, this proposal would eliminate the elements of the current Midtown East rezoning that undermine the Landmarks Law.\textsuperscript{127}

With any new proposal, a number of important preservation issues must be addressed including how to insure that the profits from selling the air rights go toward preservation purposes and how to finance the long term maintenance of the landmark. Many of the early trust funds such as the one created for Grand Central were carefully set aside, but never used for actual preservation projects. Other sale profits were never properly placed in a designated fund, as was the case with India House, and thus, were unavailable when capital was required for restoration work. Further research should explore different organizational structures to address these two issues. For example, landmark air rights might be leased rather than sold in order to generate continuous cash flow or the LPC should select a particular entity to hold a defined sum required for ongoing maintenance.

\textit{Modify Zoning Resolution (ZR) § 74-79}

Instead of discarding ZR § 74-79 in favor of a new proposal for transferring air rights such as the one developed by Landrex, the DCP should modify the existing resolution. From a planning perspective, the Landrex proposal lacks a rational nexus between the sending and receiving site since it proposes to move air rights across all five boroughs.\textsuperscript{128} The benefit of preserving a low-scale landmark in Brooklyn will not be felt in the crowded neighborhood of Manhattan where the

\textsuperscript{127} This thesis does not evaluate the Midtown East Rezoning’s potential impact on the existing historic resources, since large preservation advocacy organizations such as Municipal Art Society (MAS) have concentrated on this research. For additional information, consult MAS’s \textit{East Midtown: A Bold Vision for the Future} at http://www.scribd.com/doc/127599215/Municipal-Art-Society-Report-A-Bold-Vision-for-the-Future-in-East-Midtown.

\textsuperscript{128} See Note 44 for a discussion of rational nexus.
density is likely to land. In addition, from a preservation perspective, identifying receiving sites in areas that are already zoned for density bonuses created as part of the Inclusionary Housing program will set preservation in competition with affordable housing. A developer will be able to choose between acquiring air rights via a landmark transfer or an affordable housing bonus, thus, setting the two sources for additional FAR in competition with one another.

To increase the use of the current resolution, the DCP should amend ZR § 74-79 to allow certain transfers through certification. Certification allows the process to occur with minimal review from the required regulatory agencies. While not the equivalent of as-of-right, a certification rapidly streamlines the approval process by removing the ULURP requirement and all public hearings. With an as-of-right project, the developer can apply directly to the Department of Buildings to receive permits and start construction. A certification adds an extra regulatory layer requiring the applicant to submit his/her proposal to the DCP and LPC for approval before applying for a building permit. Individual landmarks should be permitted to transfer bulk to an adjacent lot through certification providing that the project is not seeking any waivers, that the bulk of the receiving site does not increase by more than 20 percent of basic maximum allowable floor area, and that a restrictive declaration is recorded against the landmark lot in order to insure the building’s long term preservation. (See Appendix C for the suggested text amendments to ZR § 74-79.)

Allowing select transfers from individual landmarks to occur through certification should spur increased use of the transfer mechanism since it eliminates the additional time and cost required when completing a Special Permit process. From a planning perspective the bulk transfer under this modified certification procedure would not undermine the overall predictability and certainty of the area’s density since the transfer is capped at increasing the
receiving site’s density no more than 20 percent of the basic maximum allowable FAR. The mandatory City Environmental Quality Review (CEQR) required for all amendments to the zoning text may pose a challenge since it is not possible to predict future landmark designations; thus, fully predicting the way density might be transferred in a given block.

From a preservation perspective, even though the process would no longer require a Special Permit, the LPC would still review a maintenance plan and require pro-active restoration as part of the certification. Changing a discretionary review process to a certification process will remove a degree of public input, which may raise concerns for preservation advocates; however, as part of the mandated CEQR process, the City will incorporate community input prior to adopting any amendment to the existing zoning text.

Contiguity is another important component of the existing resolution that should be modified if the City hopes to spur increased transfer activity. New York City has progressed in using transferrable development rights over a broader geographic region such as in the South Street Seaport Subdistrict and Theatre Subdistrict. The DCP must re-evaluate ZR § 74-79, which pioneered the use of TDR in the City, and apply best practices learned through the adoption of increasingly sophisticated transfer programs. A modification of the contiguity requirement combined with the ability to transfer bulk as-of-right would address the issue of stranded air rights as well as the transaction costs associated with the Special Permit process.

Identifying potential receiving sites is a highly contentious planning issue, since communities are not generally receptive to additional density. The Furman Center has modeled

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a redefined “adjacency” restriction that uses a block, rather than a lot, as the appropriate unit to regulate density. With the ability to transfer air rights to an adjacent block versus a lot, the radius of air rights transfers becomes approximately 8 blocks, which in Manhattan can cover a wide swath of diverse densities and uses. From a planning perspective, there must be a rational nexus between the benefit of preserving the low scale landmark and the burden of the additional density at the receiving site. By constraining the transfer radius to a block, the DCP may be able to argue that a rational nexus exists since the total potential density of the neighborhood would not increase. However, additional planning issues remain such as whether or not these transfers can occur across the boundaries of different zoning districts, which is currently not permitted.

Any successful proposal that expands the geographic boundaries for landmark air rights transfers will have to successfully navigate how the modification will interact with current regulations.

Relaxing contiguity may benefit the low-scale landmark since it will mitigate the potential of siting extreme density adjacent to the historic structure. However, a broader geographic boundary will also increase the number of different viable development sites. This raises a number of preservation issues. The newly viable development sites may themselves be important historic resources that lack formal protection. Or, if the potential development sites are not historic, they may impact historic resources in close proximity, which the LPC has no jurisdiction in protecting as part of the transfer process. Additional modeling is necessary to determine the potential preservation implications of relaxing ZR § 74-79’s contiguity requirements prior to proposing potential amendments to the existing resolution.
CONCLUSION

Intended to act as a safety valve that would mitigate a potential legal challenge to the Landmarks Law, ZR § 74-79 has been used infrequently. This thesis aimed to document the number of times ZR § 74-79 was used and identify characteristics of ZR § 74-79 Special Permit applications. The research generated two questions: why is ZR § 74-79 used infrequently and does it matter?

To answer the first question, ZR § 74-79’s infrequent use can be attributed to its limited viability outside dense central business districts, the added cost and time required to go through the Special Permit Process, and the lack of receiving sites adjacent to landmark properties. When used, it was for projects that occurred during heated real estate markets in the densest areas of Manhattan and included height and setback modifications as well as additional discretionary land use actions.

The answer to the second question is more complicated. The fact that ZR § 74-79 has been used infrequently does not undermine the validity of the Landmarks Law. However, if the Midtown East Rezoning is adopted as proposed, there may be an opportunity to challenge the statute. Yet even if the legal challenge never materializes, the real estate community has made a strong argument that the current transfer mechanism is an inadequate safety valve which may be sufficient to precipitate policy changes.

2013 is Zoning Resolution § 74-79’s 45th anniversary, an occasion that should be marked by clearly understanding the mechanism’s historic use as well as considering potential adjustments that will continue to make ZR § 74-79 a viable preservation planning tool. Planners and preservationists should be key stakeholders in the current debate, yet their voice is missing.
The recommendations presented as part of this thesis aim to inject preservation and planning objectives into the current debate as to how New York City proceeds with updating or adopting new landmark air rights transfer mechanisms. This thesis added a process review of ZR § 74-79 that examined the transfer activity to date, which will hopefully be a platform for further research and reform in order to modify the mechanism that pioneered the use of transferrable development rights in New York City.
<table>
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<tr>
<th>Table 1: Summary Characteristics of Zoning Resolution (ZR) § 74-79 Special Permit Applications</th>
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<td><strong>Site</strong> (sq. ft.)</td>
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<td>300 East 59th Street</td>
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*Information from NYC Oasis Map

**When information was not available the column was left blank
Figure 1: Timeline of Zoning Resolution (ZR) § 74-79 Special Permit Applications

- ZR § 74-79 Special Permit Completed Applications
- ZR § 74-79 Special Permit Unrealized Applications
- ZR § 74-79 Special Permit Denied Applications
- ZR § 74-79 Special Permit Withdrawn Applications

- ZR § 74-79 Special Permit Significant Amendments
  - 1968 Zoning Resolution (ZR) § 74-79
  - 1969 ZR § 74-79 amended to allow transfers in dense commercial districts to exceed the original 20% cap and to allow transfers through a contiguous chain of ownership
  - 1970 ZR § 74-79 amended to allow air rights transfers from City-owned landmarks
  - 1987 ZR § 74-79 amended to preclude the transfer of air rights from over a graveyard, even if the graveyard is located on a zoning lot with a landmark building
Figure 2: Lower Manhattan Zoning Resolution (ZR) § 74-79 Special Permit Applications

India House
1 Hanover Square
Transfer: 1981
Image Source: HABS

St John Methodist Church
44 John Street
Transfer: 1982
Image Source: MCNY

First Police Precinct
20 Old Slip
Transfer: 1984
Image Source: nyc-architecture.com

Customs House
55 Wall Street
Transfer: 1985
Image Source: MCNY
Figure 3: Midtown Manhattan Zoning Resolution (ZR) § 74-79 Special Permit Applications
Figure 4: Existing and Proposed Boundaries of the Grand Central Subdistrict

Proposed Midtown East Rezoning Boundaries (Gray)

Source: NYC Department of City Planning East Midtown Study PowerPoint Presentation, July 28, 2012
Figure 5: District Improvement Bonus (DIB) Contribution Graph

Source: NYC Department of City Planning East Midtown Study PowerPoint Presentation, January 29, 2013
APPENDIX A: LIST OF INTERVIEWEES

All interviews were in person unless otherwise noted.

Kent Barwick, President Emeritus, The Municipal Art Society of New York
Interviewed: January 22, 2013

Vicki Been, Boxer Family Professor of Law, New York University & Faculty Director, Furman Center for Real Estate and Urban Policy
Interviewed: February 5, 2013

Ken Fisher, Member, Cozen O’Connor
Interviewed January 25, 2013

Alex Herrera, Director, Technical Services Center, The New York Landmarks Conservancy
Interviewed February 20, 2013

David Karnovsky, General Counsel, NYC Department of City Planning
Interviewed March 14, 2013

Jack Kerr, Retired Partner, Simpson, Thatcher, & Bartlett LLP
Interviewed March 11, 2013 (Phone)

Michael Parley, Development Consulting Services, Inc.
Interviewed March 5, 2013

Paul Selver, Partner, Kramer, Levin, Naftalis, & Frankel LLP
Interviewed February 6, 2013

Mark Silberman, General Counsel, NYC Landmarks Preservation Commission
Interviewed February 15, 2013
APPENDIX B: GENERAL INTERVIEW OUTLINE

Introduction
Thank you for agreeing to speak with me. As I mentioned over the phone, I am Kate Gilmore, a
dual degree candidate at Columbia University in Urban Planning and Historic Preservation.

The IRB requests that I inform you that you participation in this interview is strictly voluntary. If
at any point you would like to end the interview, you are free to do so. With your permission, I
would like to record our conversation today. If you would like something to remain confidential,
please let me know, and I will be happy to respect that request.

General Questions

1. When adopted, ZR § 74-79 was believed to be a “safety valve” that would allow owners
   of landmarks to realize an economic gain, thus, mitigating the fiscal impact of landmark
designation. Yet it has rarely been used. Why do you think this mechanism hasn’t been
   used? I hope to use this general question in order to spur a more detailed conversation as
to why the mechanism is not used. If needed, I will use the questions below to draw out
   more details, including:

   1a. Is it because the economic hardship of owning a landmark has not been as
great as it was perceived to be?

   1b. Is there a certain project scale that makes the use of ZR § 74-79 feasible,
since it is a discretionary process that adds to overall development cost?

   1c. Or, is there another mechanism, such as zoning lot mergers, that is more
effective at alleviating the economic hardship?

   1d. Are there certain amendments to ZR § 74-79 that would make it a more
   appealing mechanism for developers?

Legal Questions

2. ZR § 74-79 was highlighted by Justice Brennan in the court’s opinion on the watershed
case, Penn Central Transportation Co. v. New York City, the case that upheld the
constitutionality of landmark designation. How important was Justice Brennan’s
statement that ZR § 74-79 “undoubtedly mitigated whatever financial burdens the law has
imposed on appellants”?
3. Since the mechanism has not been used and it played a large role in the court’s opinion is their potential to renew the legal challenge to the Landmarks Law on the grounds that ZR § 74-79 has not proven to be an effective mechanism?

Process Questions

4. Do you agree that, as stated by Frank Gilbert, the first legal counsel for the LPC, ZR § 74-79 is one of the most successful policy collaborations between the LPC and DCP?

5. What has been the nature of the relationship between the DCP and LPC on ZR § 74-79 applications?

6. Do you believe that the process is hindered by the onerous regulatory requirements of applying for a special permit?

   6a. Is the process of ZR § 74-79 working as intended?

7. Could this ZR § 74-79 be amended to be as-of-right?

Final Questions/Comments/Thank You

Is there anyone else with whom I should speak?

You have given me a lot of great information to work with, and I want to thank you for taking the time out of your busy schedule to meet with me.

As I continue my work, if I have any follow-up clarifications, can I email you?

Thank you again.
APPENDIX C: ZR § 74-79 PROPOSED AMENDMENT WITH DCP FORMATTING

Matter in underline is new, to be added;
Matter in strikeout is to be deleted;
Matter with # # is defined in Section 12-10;

*   *   * indicates where unchanged text appears in the Zoning Resolution.

Article VII-- Administration

*   *   *

Chapter 4
Special Permits by the City Planning Commission

*   *   *

74-79
Transfer of Development Rights from Landmark Sites

*   *   *

74-791
Requirements for application

An application to the City Planning Commission for a grant of a special permit or certification to allow a transfer of development rights and construction based thereon shall be made by the owners of the respective zoning lots and shall include: a site plan of the landmark lot and the adjacent lot, including plans for all developments or enlargements on the adjacent lot; a program for the continuing maintenance of the landmark; and such other information as may be required by the City Planning Commission. The application shall be accompanied by a report from the Landmarks Preservation Commission.

74-792
Conditions and limitations

(a) The transfer of development rights from a landmark building shall be permitted through certification provided:
(1) that the increase in floor area allowed under the provisions of Section 74-792 (Conditions and limits) shall in no event exceed the basic maximum floor area allowable on such adjacent zoning lot by more than 20 percent; and

(2) the application does not include a request for any waivers; and

(3) a Restrictive Declaration is recorded against the Landmark Lot.

* * *

74-793
Transfer instruments and notice of restrictions

* * *
### APPENDIX D: ZR § 74-79 SPECIAL PERMIT APPLICATIONS DATABASE

**PROJECT: THE LANDMARK**

Special Permit No. CP-22151  
Special Permit Date: November 29, 1972  
Parties Involved: Nathan Kalikow

<table>
<thead>
<tr>
<th>Sending Site</th>
<th>Receiving Site</th>
</tr>
</thead>
</table>
| 311 East 58th Street  
Block: 1351  
Lot: 5 | The Landmark  
300 East 59th Street  
Block: 1351  
Lot: 1 |

**SITE CHARACTERISTICS**

**SANBORN SITE MAP**

- = Receiving Site  
= Sending Site

![Sanborn Site Map Image]

---

70
PROJECT CHARACTERISTICS

<table>
<thead>
<tr>
<th>Site Size</th>
<th>Unknown</th>
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<tbody>
<tr>
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<td>13.95</td>
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<tr>
<td>FAR Allowed</td>
<td>10</td>
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<tr>
<td>Total Project Size</td>
<td>Unknown</td>
</tr>
<tr>
<td>Total Project Cost</td>
<td>Unknown</td>
</tr>
</tbody>
</table>

AIR RIGHTS TRANSFER

| Air Rights (Sq. Ft.)       | Unknown |
| Total Cost                 | Unknown |
| Cost Per Sq. Ft.            | Unknown |
| Transfer Distance          | Contiguous |

ZONING RELIEF*

Rezoning to create a unified C5-2 District and increase the FAR of the zoning lot

Section 74-72: Modification of tower encroachment area along Second Avenue and E 59th Street

LANDMARK MAINTENANCE PROGRAM

Unclear except that the CPC Report mentions a "maintenance assured by a trust fund"

NOTES

Very little is recorded about this project. It is the only ZR 74-79 project that has occurred outside of an area zoned for an FAR of 15 or greater.

*The Zoning Relief section references any additional zoning relief, other than the air rights transfer, included as part of the project scope.
PROJECT: PHILIP MORRIS BUILDING

Special Permit No. C 780404 ZSM
Special Permit Date: February 13, 1979
Parties Involved
Philip Morris Inc.
Rosenman, Colin, Freund, Lewis, & Cohen
Samuel Lindenbaum, Lawyer

SITE CHARACTERISTICS

Sending Site
Grand Central Terminal
71 East 42nd Street
Block: 1280
Lot: 1

Receiving Site
Philip Morris Building
120-134 Park Avenue
Block: 1276
Lot: 33

SANBORN SITE MAP

= Receiving Site
= Sending Site
PROJECT CHARACTERISTICS

<table>
<thead>
<tr>
<th>Site Size</th>
<th>Unknown</th>
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<tbody>
<tr>
<td>FAR Built</td>
<td>21.6</td>
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<tr>
<td>FAR Allowed</td>
<td>15</td>
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<tr>
<td>Total Project Size</td>
<td>448,000 sq. ft.</td>
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<tr>
<td>Total Project Cost</td>
<td>$50 million</td>
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AIR RIGHTS TRANSFER

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<tr>
<th>Air Rights (Sq. Ft.)</th>
<th>74,655</th>
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<tr>
<td>Total Cost</td>
<td>$2,239,650</td>
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<tr>
<td>Cost Per Sq. Ft.</td>
<td>$30</td>
</tr>
<tr>
<td>Transfer Distance</td>
<td>Across the Street</td>
</tr>
</tbody>
</table>

ZONING RELIEF

Section 74-79: Modification of height and setback

Section 74-87: Bonus for pedestrian covered space: 62,000 sq. ft.

Section 74-87: Modification to entrance requirements for a covered pedestrian space

LANDMARK MAINTENANCE PROGRAM

Restrictive Declaration between The Penn Central Corporation (Declarant) and City of New York (Interested Party), Declaration can be amended only with approval of CPC and Board of Estimate.

A trust fund was established to pay for the ongoing maintenance (above and beyond general obligation) of the landmark. Trust was established with 5% of the total air sale proceeds, $111,982.00. The trustees were obligated to send periodic statements at least once annually outlining periodic receipts and disbursements to the LPC.

NOTES

There was no opposition to the proposal. The quantity of air rights transferred represents 3% of Grand Central's total unused development rights.
**PROJECT: CRYSTAL PAVILLION**

Special Permit No. C 790329 ZSM  
Special Permit Date: April 21, 1980  
Parties Involved: The Durst Buildings Corporation, Zuchotti & Tuffo (?), Amster Yard Inc.

### SITE CHARACTERISTICS

<table>
<thead>
<tr>
<th>Sending Site</th>
<th>Receiving Site</th>
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<tbody>
<tr>
<td>Amster Yards</td>
<td>Crystal Pavillion</td>
</tr>
<tr>
<td>North side of 49th Street</td>
<td>805 Third Avenue</td>
</tr>
<tr>
<td>Block: 1323</td>
<td>Block: 1323</td>
</tr>
<tr>
<td>Lot: 8</td>
<td>Lot: 44, 47, 145</td>
</tr>
</tbody>
</table>

### SANBORN SITE MAP

- **=: Receiving Site**
- **=: Sending Site**

![Sanborn Site Map]

### PROJECT CHARACTERISTICS

<table>
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<th>Site Size</th>
<th>30,780</th>
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<td>17.73</td>
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<td>15</td>
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<td>Total Project Size</td>
<td>534,247 sq. ft.</td>
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### AIR RIGHTS TRANSFER

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<th>30,701</th>
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<td>Total Cost</td>
<td>$500,000</td>
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<tr>
<td>Cost Per Sq. Ft.</td>
<td>$16</td>
</tr>
<tr>
<td>Transfer Distance</td>
<td>Contiguous</td>
</tr>
</tbody>
</table>
ZONING RELIEF

Section 74-87: Bonus for pedestrian covered space: 52,304 sq. ft.
Section 74-79: Waiver of height and setback
Section 74-79: Waiver of loading berth within 30 ft. of residential district boundary
Section 74-79: Waiver of restrictions against show windows, primary business entrances, and signs within 75 ft. of residential district boundary
Section 74-87: Waiver of entrance requirements to covered pedestrian space

LANDMARK MAINTENANCE PROGRAM

Preservation Easement held by the New York Landmarks Conservancy; owner to contribute $35,000 towards repair and maintenance.

"The program for the continuing maintenance of the Landmark will be accomplished through a preservation easement running in favor of the New York Landmarks Conservancy." (Special Permit, p. 4)

NOTES

One dissenting vote from City Planning Commissioner Hornstein who did not approve of the bonus for the pedestrian covered space.
PROJECT: 7 HANOVER SQUARE

Special Permit No. C 810325 ZSM
Special Permit Date: November 16, 1981

Parties Involved
Seven Hanover Associates
India House Inc.
Tuffo & Zuchotti
Paul Selver, Lawyer

SITE CHARACTERISTICS

Sending Site
India House
1 Hanover Square
Block: 29
Lot: 33

Receiving Site
7 Hanover Square
Block: 30
Lot: 19

SANBORN SITE MAP

= Receiving Site
= Sending Site
## PROJECT CHARACTERISTICS

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Value</th>
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<td>20.2</td>
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<td>FAR Allowed</td>
<td>15</td>
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<td>Total Project Size</td>
<td>717,629 sq. ft.</td>
</tr>
<tr>
<td>Total Project Cost</td>
<td>Unknown</td>
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## AIR RIGHTS TRANSFER

<table>
<thead>
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<th>Characteristic</th>
<th>Value</th>
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<tr>
<td>Air Rights (Sq. Ft.)</td>
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<tr>
<td>Cost Per Sq. Ft.</td>
<td>Unknown</td>
</tr>
<tr>
<td>Transfer Distance</td>
<td>Across the street</td>
</tr>
</tbody>
</table>

## ZONING RELIEF

- **Section 74-79**: Waiver of height and setback
- **Section 74-79**: Modification of rules governing size of loading berths
- **Section 74-82**: FAR bonus for provision of through block arcade

## LANDMARK MAINTENANCE PROGRAM

Preservation easement held by the City of New York and administered by the New York Landmarks Conservancy Inc.; funded with no less than $35,000. Landmark was required to get a comprehensive public liability insurance policy.

## NOTES

The initial report from the LPC dated June 25, 1981 didn't recommend approval of the project: noted a "disparity of scale and physical size". (LPC 6/25/81 Report, p. 2) Brutalist aesthetic noted as unharmonious with India House, even though the maintenance provision plan was adequate.

Some concern during application process as to whether or not the sending and receiving site would be considered "married" and nothing less than a zoning lot merger standard; therefore, if the landmark building were to fail to uphold the provisions of the Landmark Maintenance Program the receiving site could be held responsible as well and potentially lose the Certificate of Occupancy.
PROJECT: 33 MAIDEN LANE

Special Permit No. C 810570 ZSM
Special Permit Date: June 28, 1982
Parties Involved | George Klein

SITE CHARACTERISTICS

Sending Site
John Street Methodist Church
44-46 John Street
Block: 67
Lot: 30

Receiving Site
33 Maiden Lane
Block: 67
Lot: 23

SANBORN SITE MAP

= Receiving Site
= Sending Site
PROJECT CHARACTERISTICS

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Site Size</td>
<td>23,249</td>
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<tr>
<td>FAR Built</td>
<td>20.77</td>
</tr>
<tr>
<td>FAR Allowed</td>
<td>1.5</td>
</tr>
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<td>Total Project Size</td>
<td>483,000</td>
</tr>
<tr>
<td>Total Project Cost</td>
<td>Unknown</td>
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</table>

AIR RIGHTS TRANSFER

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Air Rights (Sq. Ft.)</td>
<td>70,927</td>
</tr>
<tr>
<td>Total Cost</td>
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<tr>
<td>Cost Per Sq. Ft.</td>
<td>Unknown</td>
</tr>
<tr>
<td>Transfer Distance</td>
<td>Contiguous</td>
</tr>
</tbody>
</table>

ZONING RELIEF

Section 74-79: Waiver of height and setback

Section 74-87: FAR bonus for provision of covered pedestrian space and modification to entrance requirements

LANDMARK MAINTENANCE PROGRAM

$30,000 to be held in a trust "for the purpose of hiring a Preservation Architect or Second Architect pursuant to the Declaration of Program of Continuing Landmark Maintenance and Preservation Easement." The John Street Methodist Church has a John Street ME Church Trust Fund Society that provides for upkeep of the landmark building. The declaration affirms the current Fund and Maintenance structure in place at the Church. The easement was conveyed to the LPC, acting on behalf of New York City.

NOTES

Vice Chairman Gallent voted against the application citing the bulk of the proposed development as "contrary to the zoning intent in this area and creating a negative pedestrian atmosphere". He said that he supported the density transfer itself but not the bulk and height modifications.

When asked why they needed the bulk, project architect said that the added bulk was necessary to achieve marketable floor plates larger than 20,000 sq. ft.
PROJECT: FINANCIAL SQUARE

Special Permit No. C841070 ZSM
Special Permit Date: October 1, 1983

Parties Involved:
- Assay Partners c/o HRO International
- Howard Ronson, Developer
- Rosenman, Colin, Freund, Lewis, & Cohen
- Samuel Lindenbaum, Lawyer

SITE CHARACTERISTICS

<table>
<thead>
<tr>
<th>Sending Site</th>
<th>Receiving Site</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Precinct Police Station</td>
<td>Financial Square</td>
</tr>
<tr>
<td>20 Old Slip</td>
<td>32 Old Slip</td>
</tr>
<tr>
<td>Block: 34</td>
<td>Block: 35</td>
</tr>
<tr>
<td>Lot: 37</td>
<td>Lot: 1</td>
</tr>
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SANBORN SITE MAP

[Map showing site characteristics]

- = Receiving Site

- = Sending Site
**PROJECT CHARACTERISTICS**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Site Size</strong></td>
<td>42,229</td>
</tr>
<tr>
<td><strong>FAR Built</strong></td>
<td>20.78</td>
</tr>
<tr>
<td><strong>FAR Allowed</strong></td>
<td>15</td>
</tr>
<tr>
<td><strong>Total Project Size</strong></td>
<td>877,651 sq. ft.</td>
</tr>
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**AIR RIGHTS TRANSFER**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Air Rights (sq. ft.)</strong></td>
<td>135,273</td>
</tr>
<tr>
<td><strong>Total Cost</strong></td>
<td>City would not disclose the price for the air rights</td>
</tr>
<tr>
<td><strong>Cost Per Sq. Ft.</strong></td>
<td>Unknown</td>
</tr>
<tr>
<td><strong>Transfer Distance</strong></td>
<td>Across the street</td>
</tr>
</tbody>
</table>

**ZONING RELIEF**

*ULURP Action:* Demapping a portion of Old Slip

*ULURP Action:* Disposition of development rights from a city-owned landmark

*ULURP Action:* Lease acquisition for a new fire facility in the proposed building

*Section 12-10:* Certification of an Urban Open Space

**LANDMARK MAINTENANCE PROGRAM**

City agreed to maintain the building is good condition. Conducted a survey to establish a basis for future maintenance, compelled tenant to upkeep the building according to requirements of LPC, and created a cyclical inspection every 3 years to insure the tenant maintained their property accordingly. No easement.

**NOTES**

This project consisted of two buildings built in two separate phases. The second building was the one that used the transferred development rights.

There was a highly contentious battle over the air rights for this project. One developer that occupied the Old Police Precinct sued the City for selling their air rights to Ronson.

The project involved a zoning lot merger of the block and lot where the old fire station was located to combine it with the Old Police Precinct lot, as well as a demapping of the street that separated the two parcels. The air rights from the newly merged Landmark lot were then all transferred to the new development. The landmark lot was enlarged from 5,255 sq. ft. to 11,346 sq. ft.

The City was able to transfer their unused development rights by transferring them to the NYC Public Development Corporation that would then negotiated the sale with Assay Partners based on an appraisal conducted by Dept. of General Services, Division of Real Property.

Vice Chairman Gallent approved of the project but wrote a statement elucidate the pros and cons. Pros: new fire station and public open space. Cons: provision for 72% tower coverage instead of the as-of-right 40% approved by an earlier decision of the BSA and affirmed during the Special Permit application process, the ability to increase bulk by greater the 20% of as-of-right FAR through landmark air rights transfer (led to too much bulk in particularly congested area), and unanswered questions about ideal density and subway congestion.
PROJECT: 60 WALL STREET

Special Permit No. C 850321 ZSM
Special Permit Date: May 13, 1985

Parties Involved
- Built by JP Morgan Chase
- TDG Associates
- Citibank

SITE CHARACTERISTICS

<table>
<thead>
<tr>
<th>Sending Site</th>
<th>Receiving Site</th>
</tr>
</thead>
<tbody>
<tr>
<td>55 Wall Street</td>
<td>60 Wall Street</td>
</tr>
<tr>
<td>Block: 27</td>
<td>Block: 40</td>
</tr>
<tr>
<td>Lot: 1</td>
<td>Lot: 3</td>
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SANBORN SITE MAP

- = Receiving Site
- = Sending Site
PROJECT CHARACTERISTICS

<table>
<thead>
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<th>Value</th>
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</thead>
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<td>24.76</td>
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<td>1,328,944 sq. ft.</td>
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AIR RIGHTS TRANSFER

<table>
<thead>
<tr>
<th>Characteristics</th>
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<td>Cost Per Sq. Ft.</td>
<td>Unknown</td>
</tr>
<tr>
<td>Transfer Distance</td>
<td>Across the Street</td>
</tr>
</tbody>
</table>

ZONING RELIEF

Section 13-461: construction of 125 space accessory parking garage
Section 74-87: Covered pedestrian space FAR bonus and modified entrance requirements
Section 74-79: Modify height and setbacks regulations and rear yard requirements

LANDMARK MAINTENANCE PROGRAM

1) 55 Wall Street to be immediately improved to meet stated requirements of LPC. Building condition to be documented with photographs, plans and copies of original plans. 2) Declaration of Program of Continuing Landmark Maintenance signed by the landmark owner to be upheld by all subsequent owners that agrees to keep the building in good condition and provide insurance against possible damage. 3) Preservation Easement to be held by the Landmarks Conservancy. Citibank to pay Conservancy $125,000 to defray cost of monitoring.

NOTES

In a NY Times article, Gallent states that the proposed project will "unduly increase population density and vehicular use in one of the city's most crowded areas." Gallent had opposed earlier transfers under 74-79 including Maiden Lane and a reluctant approval of Financial Square due to the provision of a fire station. Of his twelve dissents most focus on the issue of the provision of light and air particularly with the City's busy office districts and the risk of "excessive density." He further critiqued the entire 74-79 process noting "the awkward role of the Planning Commission in arriving at a late stage in a lengthy approval process to make a basic judgment on a major development proposal." Even though the Department staff is involved in the design process when there are requests for height and bulk waivers the commission has no purview until much later in the process.

The NY Times article also enumerates the effects of development rights transfers:
1) "They have made feasible projects that might not otherwise have been buildable."
2) "They have sometimes distorted the urban landscape with buildings that are out of scale in their surroundings."
3) "They make it possible for property owners to realize the financial potential of their land without destroying the existing structure or disturbing its existing occupants."
"Transfers have helped to uphold the validity of the landmarks law."
PROJECT: 383, 385 MADISON AVENUE (DENIED)

Special Permit No. C 870193 ZSM
Special Permit Date: August 23, 1989
Parties Involved

<table>
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</thead>
<tbody>
<tr>
<td>Grand Central</td>
<td>383 Madison Avenue</td>
</tr>
<tr>
<td>71 East 42nd Street</td>
<td>Block: 1282</td>
</tr>
<tr>
<td>Block: 1280</td>
<td>Lot: 21</td>
</tr>
<tr>
<td>Lot: 1</td>
<td></td>
</tr>
</tbody>
</table>

SANBORN SITE MAP

[Map showing sites]
PROJECT CHARACTERISTICS

- **Site Size**: 43,211
- **FAR Built**: 33.15
- **FAR Allowed**: 15
- **Total Project Size**: 1,437,000 sq. ft.
- **Total Project Cost**: Unknown

AIR RIGHTS TRANSFER

- **Air Rights (sq. ft.)**: 787,335
- **Total Cost**: $43,303,425
- **Cost Per Sq. Ft.**: $55*
- **Transfer Distance**: Chain of ownership

ZONING RELIEF

*Section 74-79*: waiver of height and setback

*Section 81-44*: text amendment to permit curb cuts for loading docks on all Midtown avenues less than 75 ft. wide

*Section 81-42*: waiver of retail requirements on midtown avenues when pedestrian-oriented transit improvements are included in the project

LANDMARK MAINTENANCE PROGRAM

LPC was not able to evaluate the architectural relationship between the proposed project and the landmark since they are 4 blocks away and there wasn't an adequate program for continuing maintenance provided. The applicant has agreed to provide an additional contribution for approximately $2.2 million to the fund created with the original Grand Central transfer occurred. A report dated October 1987 stated that no work programs or reports had been submitted to the LPC for the continuing maintenance of Grand Central. The established fund had only been tapped a few times to do some planning studies rather than actual maintenance projects.

NOTES

All of the original zoning relief requested as part of the initial application was later rescinded and the applicant followed what was already in the zoning code.

In the Special Permit: "Under the Zoning Resolution, it is zoning lots that are the essential means of regulating land use throughout the city. The primacy of the zoning lot concept is the backbone of the Resolution and the basic measure used in calculating compliance with zoning." (19-20)

Even if the proper eligibility in terms of adjacency was established, the CPC would still deny the application due to the overwhelming bulk of the proposed project. (21)

Report acknowledged the need for a comprehensive planning framework to determine how to deal with Grand Central's air rights.

PROJECT: ROCKEFELLER PLAZA WEST (UNBUILT)

Special Permit No. C 890639 ZSM
Special Permit Date: May 2, 1990
Parties Involved
- Rockefeller Center Development Corp.
- Paterson, Belknap, Webb & Tyler

SITE CHARACTERISTICS

Sending Site
- British Building, La Maison Francaise,
- the Channel Gardens, & sunken plaza
- 610-620 Fifth Avenue
- Block: 1265
- Lot: 50

Receiving Site
- Rockefeller Plaza West
- 745-759 Seventh Avenue
- Block: 1002
- Lot: 1,5,7,8,61, and part of 11

SANBORN SITE MAP

= Receiving Site
■ = Sending Site

PROJECT CHARACTERISTICS

Site Size 61,266
FAR Built 21.57
FAR Allowed 14
Total Project Size 1,320,000 sq. ft.
Total Project Cost Unknown

AIR RIGHTS TRANSFER

Air Rights (sq. ft.) 506, 380
Total Cost Unknown
Cost Per Sq. Ft. Unknown
Transfer Distance Chain of ownership

ZONING RELIEF

Section 81-66: Modify the requirements of Section 81-43 related to street wall continuity along narrow street frontages.
Applicant completed a Declaration of Program of Continuing Landmark Maintenance as well as a Preservation Easement held by the Landmarks Conservancy and a Preservation Agreement with the Conservancy with respect to the maintenance and preservation of 30 Rockefeller Plaza and the lobby- a designated interior landmark. RCP would submit annual conditions statements to the conservancy, and the Conservancy would provide an inspection report for the LPC every five years. RCP would pay an annual fee of $25,000 (adjusted for inflation) for the Conservancy's monitoring as well as a one-time contribution of $200,000.

NOTES

As of 1994, the project still wasn't built and the developer was considering building an interim parking garage on the project site.
PROJECT: 400 FIFTH AVENUE

Special Permit No. C 070469 ZSM
Special Permit Date: September 19, 2007
Parties Involved
- 400 Fifth Realty LLC
- 401 Fifth LLC
- Kramer, Levin, Naftallis, & Frankel LLP

SITE CHARACTERISTICS

<table>
<thead>
<tr>
<th>Sending Site</th>
<th>Receiving Site</th>
</tr>
</thead>
<tbody>
<tr>
<td>Former Tiffany Building</td>
<td>The Setai Fifth Avenue</td>
</tr>
<tr>
<td>397 Fifth Avenue</td>
<td>400 Fifth Avenue</td>
</tr>
<tr>
<td>Block: 866</td>
<td>Block: 838</td>
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<tr>
<td>Lot: 3, 76*, 9076</td>
<td>Lot: 42, 45, 46, 47, 48</td>
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</table>

SANBORN SITE MAP

- = Receiving Site
  - = Sending Site

PROJECT CHARACTERISTICS

<p>| | |</p>
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<th></th>
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<tr>
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<td>Total Project Size</td>
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<td>Total Project Cost</td>
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AIR RIGHTS TRANSFER

<p>| | |</p>
<table>
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<tr>
<td>Air Rights (sq. ft.)</td>
<td>173,692</td>
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<tr>
<td>Total Cost</td>
<td>Unknown</td>
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<tr>
<td>Cost Per Sq. Ft.</td>
<td>Unknown</td>
</tr>
<tr>
<td>Transfer Distance</td>
<td>Across the street</td>
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</table>
ZONING RELIEF

Section 81-84: Waiver in order to locate the hotel entrance along Fifth Avenue which isn't permitted under the as-of-right zoning

Section 81-277: Allow for the modification of alternative height and setback regulations -daylight evaluations

Section 81-85: a new text amendment to waive mandatory plan elements included in the Special Midtown District and Fifth Avenue SubDistrict in the context of ZR 74-79.

LANDMARK MAINTENANCE PROGRAM

Restrictive Declaration that supersedes the one put in place under the 74-711 Special Permit application in 2003. Will include many of the provisions in that declaration plus enhanced maintenance for the roof and copper flashing. There will also be an Easement held by the Landmarks Conservancy. As part of the program of continuing maintenance, the landmark owners must submit to periodic inspections and cure any maintenance issues detailed in the periodic reports that the inspections generate. In addition, the landmark owners must submit their Local Law 11 Inspection Reports and draft an Emergency Protection Program. No easement on the landmark building.

NOTES

* Lot 76 is the landmark building and Lot 9076 is an airspace parcel above Lot 76 created to hold the floor area in separate ownership.
PROJECT: 610 LEXINGTON AVENUE

Special Permit No. C 080178 ZSM
Special Permit Date: July 2, 2008

Parties Involved
Park Avenue Hotel Acquisition LLC
375 Park Avenue LP
Kramer, Levin, Naftallis, & Frankel LLP

SITE CHARACTERISTICS

Sending Site
Seagram Building
375 Park Avenue
Block: 1307
Lot: 1, 9001

Receiving Site
610 Lexington Avenue
Block: 1307
Lot: 14, 59

SANBORN SITE MAP

[Map with symbols indicating sending and receiving sites]
**PROJECT CHARACTERISTICS**

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Value</th>
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<tbody>
<tr>
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<td>21,387</td>
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<td>FAR Built</td>
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<td>Total Project Cost</td>
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**AIR RIGHTS TRANSFER**

<table>
<thead>
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<th>Characteristic</th>
<th>Value</th>
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<td>Air Rights (sq. ft.)</td>
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<td>Cost Per Sq. Ft.</td>
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<td>Transfer Distance</td>
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</table>

**ZONING RELIEF**

*Section 81-212:* zoning text amendment to modify requirements of minimum dimension of inner courts (23-85), minimum distance b/w legally required windows and walls or lot lines/general provision (23-86), required off-street loading berths (36-62), and modification of pedestrian circulation space (81-45)

*Section 81-27:* modify the height and setback regulations within Special Midtown District Section "Alternative Height and Setback Regulations-Daylight Evaluation"

**LANDMARK MAINTENANCE PROGRAM**

Pro-active restoration. Long-term maintenance program includes: a) Periodic Inspections including submission of Local Law 10 & 11 Façade Inspection Reports b) Emergency Protection Program, c) Access to Designated Structure for LPC or representatives, and d) Failure to Perform may be corrected by the City of New York at the sole cost of the Landmark owner. Easement held by the NYC Landmarks Conservancy for tax benefits to be used by the new building at 610 Lexington Ave. Restrictive Declaration.

**NOTES**

In public testimony about the project from Community Board 5 and the Borough President, there was concern about the precedent set with the amended bulk and height waivers in the Midtown Special District and how this might apply to future projects.

Commissioner Cantor voted against the approving the Special Permit

*Lot 9001 is the airspace above the Landmark building*
PROJECT: MOMA/HINES TOWER

Special Permit No. C 090431 ZSM
Special Permit Date: September 9, 2009

Parties Involved
- The University Club
- The Museum of Modern Art
- Hines Development
- The Trust for Cultural Resources of the City of New York
- Kramer, Levin, Naftallis, & Frankel LLP

SITE CHARACTERISTICS

<table>
<thead>
<tr>
<th>Sending Site</th>
<th>Receiving Site</th>
</tr>
</thead>
<tbody>
<tr>
<td>The University Club</td>
<td>Tower Verre</td>
</tr>
<tr>
<td>1 West 54th Street</td>
<td>53 West 53rd Street</td>
</tr>
<tr>
<td>Block: 1270</td>
<td>Block: 1269</td>
</tr>
<tr>
<td>Lot: 34</td>
<td>Lot: 5, 6, 7, 8, 9, 11, 12, 13, 14, 20, 30, 58, 66, 69, 165</td>
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SANBORN SITE MAP
PROJECT CHARACTERISTICS

<table>
<thead>
<tr>
<th>Site Size</th>
<th>19,615</th>
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<tbody>
<tr>
<td>FAR Built</td>
<td>33.56</td>
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<td>FAR Allowed</td>
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<td>Total Project Size</td>
<td>658,306</td>
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AIR RIGHTS TRANSFER

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<thead>
<tr>
<th>Air Rights (sq. ft.)</th>
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<tbody>
<tr>
<td>Total Cost</td>
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</tr>
<tr>
<td>Cost Per Sq. Ft.</td>
<td>Unknown</td>
</tr>
<tr>
<td>Transfer Distance</td>
<td>Across the street</td>
</tr>
</tbody>
</table>

ZONING RELIEF

Section 74-711: distribution of allowable floor area without regard to zoning district boundaries, modified height and setback regulations (Section 81-27 & Section 81-90), modified pedestrian circulation space requirements (Section 37-50), and modified rear yard regulations (23-533).

ZR 74-711 is related to the preservation of St. Thomas, an individual landmark and not the University Club.

Using ZR 74-711 will facilitate the transfer of 68,000 sq. ft. from a lower density portion of the zoning lot with an FAR of 8 to a higher density portion of the site with an FAR of 12.

LANDMARK MAINTENANCE PROGRAM

Pro-active restoration. Long-term maintenance program includes: a) Periodic Inspections including submission of Local Law 10 & 11 Façade Inspection Reports b) Emergency Protection Program, c) Access to Designated Structure for LPC or representatives, and d) Failure to Perform may be corrected by the City of New York at the sole cost of the Landmark owner. No easement of the landmark building. Restrictive Declaration.

NOTES

CB 5 opposed the project due to the increased bulk of the new project fostered by the transfer of development rights.
BIBLIOGRAPHY


The New York Department of City Planning. Special Hudson Yards District: Zoning Text Amendment as Adopted by City Council N 040500(A) ZRM. January 19, 2005.


