BROADWAY'S NEWEST HIT: INCENTIVE ZONING FOR PRESERVING LEGITIMATE THEATRES

I. INTRODUCTION

The demolition of the Morosco and Helen Hayes Theatres to make way for the Marriott-Marquis Hotel not only incited a protest by members of the theatre community,[1] but also galvanized the belief that preserving New York City's older legitimate theatres[2] should be a continuing goal.[3] Because the land these small theatres occupy has arguably become more valuable than the return from the theatres themselves,[4] especially when they are "dark,"[5] the temptation is great for theatre owners either to sell their sites to real estate developers or to use their buildings in other, more profitable ways.[6]

There are two significant interrelated threats to the preservation of the City's older legitimate theatres. One is that the business is in a slump. Ticket sales are sluggish, production costs have skyrocketed, and profits are down.[7] The second threat is the City's policy of discouraging real estate development on midtown Manhattan's eastside and its attempt to encourage such de-

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[1] Corry, *Broadway Stages a Drama to Save Two Theaters*, N.Y. Times, Mar. 5, 1982, at A1, col. 2. At one time the Marriott-Marquis Hotel was known as the Portman Hotel.

[2] Legitimate theatres can be defined as theatres that present "legitimate attractions." Legitimate attractions were defined by the Supreme Court in United States v. Shubert, 348 U.S. 222, 223 n.3 (1954), as " 'stage attractions performed in person by professional actors' including 'plays, musicals, and operettas' but not ordinarily including 'stock company attractions, vaudeville, burlesque, bands, individual dancers, dance groups, concerts, and vocal or instrumental presentations.' " *Id.* (source omitted).

[3] *See* Prial, *Court Stay Lifted and Demolition Begins at Two Broadway Theaters*, N.Y. Times, Mar. 23, 1982, at 1, col. 2.

[4] The value of prime Manhattan real estate is astronomical. *See, e.g.*, Stetson, *Developing Office Space Now Costs $250 a Sq. Ft.*, N.Y. Times, Apr. 1, 1984, § 8, at 1, col. 2 (the land alone costs $1500 per sq. ft. in desirable areas of midtown Manhattan); Kennedy, *Sale of 2 Large Buildings in Manhattan Stirs Interest*, N.Y. Times, Aug. 3, 1983, at B6, col. 3 (two large office towers sold for $57.6 and $39.5 million each); Henry, *Boston Firm May Breathe New Life Into Citicorp Site*, N.Y. Times, July 6, 1983, at B7, col. 1 (firm pays $84 million for site at Lexington Avenue at 53rd Street); Shenon, *U.S. Assay Site Sold Downtown for $27 Million*, N.Y. Times, July 21, 1983, at B9, col. 1 (one of the highest prices ever paid at a government real estate auction); Anderson, *Long After the El, What's on Third? A Wall of Towers*, N.Y. Times, Jan. 30, 1983, § 8, at 1, col. 4 (office space rents for up to $47 per sq. ft. per year on Third Avenue).

[5] A "dark" theatre is one without a show. *See* Hartley, *The "Last Hurrah" For Old Broadway?*, 93 U.S. NEWS & WORLD REP. 85 (1982).

[6] Goldberger, *Theater Zone: Panacea or Problem?*, N.Y. Times, Oct. 1, 1983, at 31, col. 1.

[7] Hartley, *supra* note 5, at 85.

velopment on the westside[8]—the location of the Theatre District. Such policy is embodied in the City's zoning ordinance which essentially allows developers to build larger, and more profitable, buildings in and near the Theatre District. Coupling the theatre owners' economic plight with the encouragement of real estate development in their area creates a pressure upon them, albeit an economically attractive one, to perhaps sell their properties to developers and realize a hefty profit.[9]

Mayor Koch formed the Theatre Advisory Council (TAC)[10] in response to preservationists'[11] belief that existing zoning regulations for the Theatre District are insufficient to ensure preservation of the older theatres.[12] The TAC, which is comprised of theatre owners, actors, architects, urban planners, and lawyers, has submitted its plan to the City regarding the preservation of the older theatres.[13]

In its report, the TAC recommended the implementation of three types of controls. First, it suggested that landmark designation of the theatres be based on a case-by-case determination of each particular theatre's cultural or architectural merit.[14] In essence, the TAC advised against wholesale or blanket landmark designation of all the theatres. Second, it asked that theatre owners enter into voluntary covenants whereby they would promise not to demolish or change the use of their legitimate theatre.[15] Third, it recommended that those theatre owners who enter into such covenants, or who own landmark designated theatres, be entitled to sell transfer development

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8 To Preserve The Broadway Theatre, Report of the Theatre Advisory Council 6, 10 (June 1984) [hereinafter cited as TAC Report].

9 *Id.* at 8–9. *See also supra* note 4.

10 *13 Are Appointed to Theater Council*, N.Y. Times, June 23, 1982, at B3, col. 1.

11 The staunchest and most vociferous of the preservationists include Joseph Papp, Treat Williams, Christopher Reeve, and Colleen Dewhurst. *See* Prial, *supra* note 3.

12 *See* Goldberger, *supra* note 6. A full explication of the current zoning in the Theatre District is beyond the scope of this Note. However, for the applicable zoning regulations for the Theatre District, see ZONING RESOLUTION OF THE CITY OF NEW YORK § 81–70 (1984).

13 *See* TAC Report, *supra* note 8. The Report was submitted to the City Planning Commission for its review and approval. If the Commission approves the plan, it must then be approved by the Board of Estimate and signed by the Mayor if it is to become law.

The forty-four legitimate theatres that are the subject of the TAC's recommendations include the Belasco, Biltmore, Lyceum, Nederlander, Palace, and Winter Garden Theatres. Although the forty-four theatres are located within the area bounded by 55th Street in the north, 41st Street in the south, Sixth Avenue in the east, and Eighth Avenue in the west, most of the theatres are on 44th and 45th Streets between Seventh and Eighth Avenues.

14 TAC Report, *supra* note 8, at 13–16.

15 *Id.* at 18.

rights (TDRs).[16]

In an earlier draft of its report, the TAC recommended the implementation of a fourth land use control—Theatre District Bonuses (TDBs).[17] This suggestion was eventually dropped from the final report.[18] TDBs are an incentive zoning device that would allow a developer who builds in the Theatre District to build a larger than normal sized building in return for his payment to the City.[19] Such payments would be put into a trust fund and then be distributed to those theatre owners who enter into the voluntary covenant not to demolish their theatre.[20] The TAC dropped the TDB proposal because it believed that such a device "could be found objectionable on either policy or legal grounds"[21] as "zoning for sale" or a form of "special assessment."[22]

Before demonstrating, however, that the TDB proposal would be upheld by the courts, this Note will first discuss the need for preserving the City's older legitimate theatres. This Note will then analyze the City's landmarks law, voluntary covenants, TDRs, and TDBs. This will be followed with a discussion of the constitutional basis of zoning, including an examination of *Penn Central Transportation Co. v. New York City*,[23] which validated the City's landmarks law and the use of TDRs. This Note will then discuss incentive zoning and demonstrate that the TDB plan is a constitutionally valid incentive zoning device which will best assure legitimate theatre preservation.

II. Why Preserve At All?

It is generally believed by theatre owners, urban planners, and members of the threatre community, that the older Broadway theatres are irreplaceable.[24] Not only are they considered to be intimate and comfortable,[25] but the older theatres are histori-

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16 *Id.* at 18–19.

17 New York City Theatre Advisory Council, Saving the Theatres: A Land Use Plan for the Broadway Theatre District 59–65 (July 7, 1983) (unpublished draft) [hereinafter cited as TAC Draft].

18 TAC Report, *supra* note 8, at 19.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* *See infra* notes 92–95 and accompanying text.

23 438 U.S. 104 (1978).

24 Goldberger, *supra* note 6.

25 Ellen Burstyn, actress and member of the TAC, said:

> I wish I could express to you the incomparable joy of being on a stage in a theater like the Nederlander Theater and to sit very quietly and in a very soft voice say a line of potent intimacy and feel the audience listen—feel them

cally important as an embodiment of, and a memorial to, the classic plays that have run in them.[26] These theatres also create "an enticing presence, . . . rich in visual variety,"[27] that make the Theatre District an exciting place to see theatre.

The newer theatres are seen as failures both as works of design and as places to perform.[28] They are "cold, austere, and lacking in the grace that almost all the [pre-World War II] theatres possess."[29] Even though most of the older theatres are not architectural masterpieces, the aesthetic and design failure of the newer theatres leads to the conclusion that the older theatres "work better as settings for the production of live theatre."[30] If New York City's theatre industry is to remain at the "apex of the American theatre industry,"[31] its superior theatres must be preserved.

Preservation is not only a means to an aesthetic goal but also a means to an economic goal. The New York City theatre business is a $1.5 million a year industry and a major tourist attraction.[32] The older theatres are more intimate and comfortable than the newer ones. They are better places to view theatre[33] and, hence, notwithstanding the popularity of the show running in the theatre, will attract larger audiences. Given the choice between owning an older theatre or a newer one, an owner would choose the former as the audience potential is greater. Thus, preservation is actually in the best economic interests of the theatre owners.[34] But with escalating production costs, smaller audiences, and higher property values,[35] the temptation for theatre owners to sell their properties to developers is great. Preservation must be coupled with additional and more immediate economic incentives so that theatre owners will remain in the theatre business.

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stop breathing—and, saying the line, hold the pause so long that the whole room comes together in one point of focus.

Gottlieb, *Saving the Theaters*, N.Y. Times, Sept. 23, 1983, at B1, col. 1.

[26] *See* Goldberger, *supra* note 6.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *See* Note, *The Curtain Rises on Consent Decree Modification in the Theatre Industry: United States v. Shubert*, 2 CARDOZO ARTS & ENT. L.J. 91, 110 (1983).

[32] Hartley, *supra* note 5, at 85.

[33] If an actor is more inspired acting in an older theatre it follows that the performance will be superior. The tremendous support of so many actors in trying to save the Helen Hayes and Morosco Theatres underscores this point. *See supra* note 25.

[34] *See* TAC Report, *supra* note 8, at 9.

[35] *See supra* notes 4 and 32 and accompanying text.

Why preserve? To fulfill both the aesthetic end of maintaining the City's superior theatre structures and the economic end of saving the theatre and tourist industries.

III. Descriptions and Analyses of Proposed Land Use Regulations

A. *Landmark Designations*

New York City's Landmarks Preservation Law[36] (Landmarks Law) gives broad authority to the Landmarks Preservation Commission[37] to designate property as a landmark if that property exemplifies architectural or cultural merit that is worthy of preservation.[38] The Commission may also designate entire neighborhoods as historic districts.[39] The policy underlying this law is that certain older buildings are irreplaceable and worth saving because they enhance the quality of city life for all.[40]

Landmark designation imposes a duty upon the property owner to keep the building in good repair[41] and to seek permission from the Commission before the building may be altered, reconstructed, or demolished.[42] Such permission, if granted, comes as a "certificate of no effect" or a "certificate of appropriateness."[43] Obtaining such permission may require a public hearing before the Commission.[44]

A designated building may be demolished only when all of the following conditions are met: a finding by the Commission that there is hardship to the owner—that is, economic return of less than 6% of valuation of the land and building plus 2% for depreciation of the value of the building; the owner's rejection of a relief program proposed by the Commission; and, the City's unwillingness to purchase the building.[45]

One feature of a building that landmark designation does not affect is the building's use.[46] That is, an owner of a landmarked building may utilize it any way he desires so long as

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[36] New York, N.Y., Charter and Admin. Code ch. 8-A, §§ 205.1.0–207–21.0 (1976).
[37] *Id.* § 207–1.0(e).
[38] *Id.* § 207–2.0 (Supp. 1984).
[39] *Id.* § 207–2.0(4) (Supp. 1984).
[40] *Id.* § 205–1.0. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 108 (1978).
[41] New York, N.Y., Charter and Admin. Code ch. 8-A, § 207–10.0 (1976).
[42] *Id.* § 207–4.0.
[43] *Id.* §§ 207–4.0 to –6.0.
[44] *Id.*
[45] TAC Report, *supra* note 8, at 12.
[46] New York, N.Y., Charter and Admin. Code ch. 8-A, § 207–3.0(a) (1976).

such use does not involve the alteration of the structure or contravene the applicable zoning use provisions.

Although the TAC recommended designating some theatres as landmarks, it warned against blanket designation and asked the Commission to consider several aspects of the theatre business before designating any theatres.[47] The TAC noted that: "[A]pplication of the Landmarks Law and its regulation process to the theatres could interfere with the function of theatrical production. . . ."[48] The nature of theatrical production requires constant alteration of the interior and exterior of the theatre for each new show.[49] Stages must be altered, lights require modification, and other structural changes may need to be made for seating, sets, and exterior signage. If the theatre were landmarked, an owner would have to seek permission from the Commission before it could make these necessary changes. Such a procedure would hinder a theatre's daily operations which require flexibility.

The TAC also explained that landmark designation might inhibit the financing of shows.[50] Many theatre owners are also producers.[51] To finance a show, many owners borrow by using the theatre building as collateral.[52] It follows that if a theatre's value has dropped so would the amount of a loan available from a bank. Landmark designation would lower the value of a theatre. This is because such designation prohibits demolition and hence limits the property's full economic potential—a 30 story office tower generates more revenue than a theatre. Banks lend on their ability to foreclose and utilize a property to its full unencumbered economic potential. Landmark designation limits that potential thereby lowering the amount an owner can borrow and inhibiting theatre production.

Although the TAC praised the Landmarks Law as a legally valid and successful preservation tool, it acknowledged the law's main weakness.[53] The law does not prescribe how a landmark may be used.[54] Therefore, landmark designation of a theatre would not prevent a theatre owner from using his theatre as a

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47 TAC Report, *supra* note 8, at 13–16.
48 *Id.* at 13.
49 *Id.* at 14.
50 *Id.* at 15.
51 *Id.*
52 *Id.* The use of TDRs, however, mitigates the financial burden of landmarking. Although it is not made clear, it appears that the TAC favors giving landmarked theatres' owners the right to use TDRs. *Id.* at 16–18.
53 *Id.* at 15.
54 *See supra* note 46.

movie theatre, discotheque, or a pornographic shop. Because one of the TAC's objectives is not only to preserve the theatres' physical structures but also to insure that the shows remain in the District, landmark designation is not by itself a complete solution.

B. *Voluntary Covenants*

Voluntary covenants would bind the theatre owner and his successors not to demolish the theatre and to use it as a legitimate theatre except during dark periods when it may be used for a temporary alternate use.[55] In return for entering into the covenant, the owner may receive funds from the proposed New York City Theatre Trust (Theatre Trust) for financial aid in the maintenance of his theatre.[56] Voluntary covenants are thus intended as a supplement for those theatres that will be landmarked and as the main preservation tool for those that are not.[57]

This technique solves three basic shortcomings of the Landmarks Law. First, it ensures the preservation of those theatres that cannot be landmarked—that is, those that lack architectural or cultural merit, or would be put in economic strife by designation.[58] Second, the covenant would not be set aside merely upon a showing of hardship as landmark designation allows.[59] Third, the covenant would require that the theatre be used as a legitimate theatre; landmark designation does not prescribe use restrictions.[60]

The TAC Report, however, fails to explain how the covenant would be implemented. It claims that the covenant "is already part of a well established practice by which the City Planning Commission, in approving special permits, secures commitments and protections for the public related to a project under review."[61] Yet, the typical conditions that property owners must satisfy in order to be granted a special permit seem drastically different in character from the conditions contemplated by the proposed covenant. Most of these conditions merely require that the owner provide extra parking,[62] a certain amount of open

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55 TAC Report, *supra* note 8, at 18.

56 *Id.* at 18–19. The New York City Theatre Trust will be used to promote the continuation of the theatre in New York City in two ways. It will subsidize ticket prices and eventually commission the writing and production of serious drama which is fast becoming an extinct species on Broadway. *Id.* at 19–20.

57 *Id.* at 18.

58 *Id.*

59 *Id.* at 12.

60 *Id.* at 18.

61 *Id.*

62 *See, e.g.*, ZONING RESOLUTION OF THE CITY OF NEW YORK § 73–123(d) (1984).

space,[63] and that the proposed development not cause undue traffic and congestion.[64] The proposed covenant would require a far greater condition—a promise not to demolish the building. It does not appear that the plan could be so easily implemented, because the condition the covenant contemplates is not similar to currently established conditions in the Zoning Resolution.

To confuse implementation of the voluntary covenant even more, the TAC characterizes the covenant as one that would "run with the land."[65] This implies a common law covenant that would have to fulfill the rigid court prescribed requirements of such an agreement. If the type of covenant discussed in the TAC Report were enacted as a common law covenant it would probably be held invalid for at least two reasons. First, New York courts are unlikely to enforce a covenant that purports to last in perpetuity.[66] The TAC Report does not attempt to limit the covenant's length by reference to time or an extrinsic event.[67] Second, to fulfill the horizontal privity requirement of a common law covenant there must be an express agreement between the promisor theatre owner and promisee City.[68] Such an express agreement would, however, raise the objection that a government entity may not contract away its right to exercise its police power in a different manner at a later time.[69] In other words, the City

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63 *See, e.g., id.* § 73–125(a).

64 *See, e.g., id.* § 73–24(b).

65 TAC Report, *supra* note 8, at 18.

66 *See, e.g.*, Eagle Enters. v. Gross, 39 N.Y.2d 505, 349 N.E.2d 816, 384 N.Y.S.2d 717 (1976). In *Eagle*, the court refused to enforce a covenant that had unlimited time duration on the rationale that such a covenant unduly retricts alienation and is onerous upon successors. *Id. See also* Armstrong v. County of Onondaga, 85 A.D.2d 906, 446 N.Y.S.2d 793 (1981) (court refused to enforce an affirmative easement, saying that to do so would "have the effect of creating an affirmative covenant . . . with no temporal limitation upon its duration"); Orange and Rockland Utils. v. Philwold Estates, 70 A.D.2d 338, 421 N.Y.S.2d 640 (1979) (covenant purporting to last in perpetuity invalid); Arroyo v. Rosenbluth, 115 Misc.2d 655, 454 N.Y.S.2d 610 (Civ. Ct. 1982) (covenant to restore a building is not perpetual and should be enforced).

If, however, a covenant's duration were to be limited to the life of the building itself, then a court might enforce the covenant terms. *See generally* Nicholson v. 300 Broadway Realty Corp., 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959) (covenant to supply heat enforceable as the covenant is necessarily limited in time to the life of the building); Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938) (covenant to pay annual park improvement fee enforceable since covenant limited to 23 years). Query the application of this concept when the covenant itself is a promise to maintain the building in perpetuity.

67 TAC Report, *supra* note 8, at 18.

68 *Neponsit*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

69 *See, e.g.*, Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960). In *Church*, the defendant town board rezoned a citizen's property from residential to business use on the condition that the citizen agree to erect a fence and plant shrubbery around his property so as to keep it inconspicuous and residential looking. The court upheld the town's rezoning on the grounds that there was no evidence of an

cannot legally promise to pay funds from the Theatre Trust in perpetuity because it has the sovereign right to change its mind.

To avoid the pitfalls associated with common law covenants, the City would have to implement the covenant with what is known as conditional zoning.[70] Conditional zoning arises when a city, without committing itself by explicit contractual agreement, secures a property owner's agreement to limit the use of his property and then rezones such property in some way.[71] To achieve this, the theatre owners would execute and record a restrictive covenant. The City would then amend the Zoning Resolution to provide that covenanting theatres be entitled to payments from the Theatre Trust.[72] The covenant, given legal force as conditional zoning through an amendment to the Zoning Resolution, would be enforceable by the City.

C. *Transfer Development Rights*

TDRs represent the difference in area between the maximum size building allowed by zoning regulations on a particular site and the size of the building actually on the site.[73] The owner of the TDR may sell this unbuilt space to another landowner so that the latter may construct a building on his site larger than normal zoning regulations would allow.

An illustration is the best explanation. Building A's size is 50,000 square feet. Yet because of the zoning regulations applicable to its site, Building A's site can legally accommodate a building of 75,000 square feet. A developer building on Site B may purchase, from Building A's owner, the 25,000 square feet

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explicit contractual agreement between the town and the citizen. *Id.* at 259, 168 N.E.2d at 696, 203 N.Y.S.2d at 869.

70 *See* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 175 (1975).

71 *Id.* Note, however, that the covenant could still be invalidated if it amounts to "spot zoning." Spot zoning means the improper permission to use an "island," a small piece of land, for a more intensive use than permitted on neighboring lands. *Id.* at 168. The test for determining whether something is spot zoning is whether the zoning of that island, different from surrounding areas, is irrational or arbitrary. *Id.* at 169. *See generally* Vernon Park Realty Inc. v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954) (area zoned residential completely surrounded by commercially zoned property is spot zoning and unconstitutional).

72 This would follow the scheme of *Church* closely in the sense that the promisor executes and records the covenant unilaterally. The City would then legislate the rezoning by adding provisions for payments from the Trust to covenanting theatres.

73 For analyses of TDRs, see Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Gilbert, *Saving Landmarks: The Transfer of Development Rights*, HISTORIC PRESERVATION, July-Sept. 1970, at 13; Marcus, *Air Rights Transfer in New York City*, 36 LAW & CONTEMP. PROB. Summer 1971 at 373; Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972).

of TDRs and thus build an additional 25,000 square feet onto his building above what the zoning regulations for Site B allow.

TDRs are usually available only to owners of designated landmarks.[74] They may be transferred "directly across the street, diagonally across an intersection, or across streets through a common chain of title."[75]

The TAC proposed that theatre owners be entitled to sell TDRs.[76] This privilege will be extended to all theatre owners regardless of whether or not their theatre is landmarked.[77] Moreover, theatre owners will be entitled to transfer these TDRs in a broad area,[78] covering approximately 32 blocks, and not be restricted to transferring them, for example, only across the street. TDRs, however, will only be available to those non-landmarked theatre owners who enter into the voluntary covenant.[79] Additionally, those who utilize TDRs will be obligated to give a portion of the proceeds from the sale of TDRs to the Theatre Trust.[80]

D. *Theatre District Bonuses*

The TDB proposal is an incentive zoning device. Incentive zoning occurs where a developer provides a certain amenity on his property or in his building, for example, a plaza, and is then allowed to build extra footage onto that building.[81] Such extra footage is called a bonus and its amount depends upon the type of amenity provided. The bonus is set by zoning regulations and is computed by using the site's total floor area ratio (FAR).[82] FAR is a multiple, also set by zoning regulations, which when multiplied by the square footage of the size of a site sets out the total amount of footage that the building may contain.[83] For example, a site of 10,000 square feet with a FAR of 8 will produce

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74 TAC Report, *supra* note 8, at 13.

75 *Id.*

76 *Id.* at 18.

77 *Id.*

78 *Id.* at Exhibit C. The proposed receiving zone extends from the south side of 41st Street to the north side of 57th Street and from the west side of Eighth Avenue to the west side of Sixth Avenue. The zone also extends along the north and south sides of 42nd Street from the west side of Sixth Avenue to the east side of Eleventh Avenue.

79 *Id.* at 18. Note, however, that owners of landmarked theatres will be entitled to use TDRs also.

80 *Id.*

81 *See* Mandelker, *The Basic Philosophy of Zoning: Incentive or Restraint*, in THE NEW ZONING 15 (N. Marcus and M. Grove eds. 1970).

82 For other examples of incentive zoning devices currently available in the Theatre District, see ZONING RESOLUTION OF THE CITY OF NEW YORK §§ 81-743 to -745 (1984).

83 *Id.* § 12-10.

an 80,000 square foot building. A bonus will typically range from 1 to 3 FAR,[84] and this is then added to a site's base FAR to compute a site's total FAR.

Under the TDB technique, developers who build within an identified area within or near the Theatre District would be entitled to a bonus of 3 FAR in return for their cash payment to the Theatre Trust.[85] Such money would fund the Theatre Trust and then be given to those threatre owners who entered into the voluntary covenants.[86]

TDBs have two significant advantages over TDRs. One advantage is that funds generated from TDBs are not dependent upon whether or not theatre owners enter into the covenant.[87] A developer would merely have to choose to utilize the bonus and the money would be collected by the Theatre Trust. TDRs, however, can only be sold by covenanting theatre owners.[88] Therefore, TDR generated revenues are necessarily dependent upon the theatre owner's choice to enter into the covenant. The possibility exists that TDBs will generate more funds to the Theatre Trust thereby better ensuring theatre maintenance and preservation.

TDBs are also potentially more valuable than TDRs in the following way. TDRs involve a single payment.[89] TDBs, however, contemplate that the developer make an initial payment for the bonus and then make additional payments for the life of the building.[90] The additional payments will reflect the changing market value of the building.[91] Because such value usually increases so will the TDB payments. Hence, TDBs can generate more revenues than the single payment TDRs which reflect only the building's current market value.

The main objection to TDBs is that they may be seen as "zoning for sale."[92] In other examples of incentive zoning the developer's amenity is a concrete one, for example, a plaza[93] or other improvement.[94] Here, the developer's amenity is a cash payment. In both situations the developer's bonus is increased

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84 *See supra* note 82.
85 TAC Report, *supra* note 8, at 19.
86 *Id.*
87 *Id.*
88 *Id.* at 18.
89 *Id.*
90 *Id.* at 19.
91 TAC Draft, *supra* note 17, at 60–61.
92 TAC Report, *supra* note 8, at 19.
93 ZONING RESOLUTION OF THE CITY OF NEW YORK § 81–23 (1984).
94 *See, e.g., id.* § 81–53 (subway station improvement bonus).

density in his building. It is argued that the amenity in typical incentive zoning situations is one that is density ameliorating, in that the extra density caused by the bonus is offset by the open space or improvement of the amenity.[95] In the TDB context, however, the cash does not provide a density reducing improvement like a plaza and is, thus, seen as zoning for sale.

All zoning regulations, including the TDB proposal, must pass muster under the United States Constitution. The following section will review the constitutional limits of zoning. It will be shown that despite the TAC's doubts about TDBs, TDBs would withstand judicial review under the applicable constitutional analysis.[96] It will also be shown that: many other incentive zoning techniques that are presently used are not density ameliorating;[97] TDBs actually create less density than some incentive zoning techniques presently available in the Theatre District;[98] and, zoning for sale, or payment for increased density, is an established part of the City's Zoning Resolution.[99]

IV. Constitutional Basis For Zoning

Comprehensive city planning in the form of zoning regulations must take into account potential constitutional challenges. The question is: To what extent may government regulate private property without violating the fifth amendment's prohibition against taking private property for public use without just compensation?[100] The answer to this question really depends upon society's attitude toward the rights that comprise private property and to how far it is willing to let government go to validly regulate and possibly devalue that property without paying for it.[101] Although the Supreme Court's pronouncements on the tak-

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95 *See* Marcus, *Zoning Exactions Employed to Solve Housing Problems*, N.Y.L.J., Oct. 5, 1983, at 1, col. 3. Professor Marcus states: "Exaction of money from applicants for exercise of zoning discretion is a taboo—to put it mildly. Money alone does not relieve impacts but may make it more possible for desirable amenities or mitigating measures to come on line when the related development is built." *Id.* at 11, col. 3.

96 *See infra* notes 165–82 and accompanying text.

97 *See infra* notes 168–73 and accompanying text.

98 *Id.*

99 *See infra* notes 180–82 and accompanying text.

100 The fifth amendment provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The fifth amendment is made applicable to the states through the fourteenth amendment. *See* Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 160 (1980); PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897).

101 Just how far government may go is at the heart of the takings matter. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922). "How far" depends upon the

ings clause are by no means straightforward or easily comprehended,[102] this section will review these decisions and summarize the present state of takings law.

Analyzing the takings case law that deals with zoning regulations is a thorny business because there is a conceived interrelationship[103] between the fourteenth amendment's due process clause[104] and the fifth amendment's takings clause.[105] This is because zoning regulations involve the state's police powers which are analyzed under the fourteenth amendment's due process clause,[106] while an aggrieved party's claim that the regulation amounted to a taking, by causing the value of his property to diminish, is analyzed under the fifth amendment.[107] This conflict is highlighted in *Smyth v. Ames*[108] where the Court said that: "[T]he question whether [rates] are so unreasonably low as to deprive the carrier of its property *without [just] compensation* as the Constitution secures, and therefore without *due process of law* [is a matter for judicial review]."[109] Thus, the courts frequently "blend"[110] the takings issue and the due process[111] issues causing substan-

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perception of whether government should have greater or lesser control over individuals' property rights. *See* Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 587 (1981); Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROB., Summer 1980, at 66.

102 "The attempt to distinguish 'regulation' from 'taking' is the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark." C. HAAR, LAND USE PLANNING 766 (3d ed. 1977). Why is this so, one might wonder. Professor Stoebuck suggests that the confusion results from the Supreme Court's inconsistent treatment of the takings clause which "leave[s] the subject as disheveled as a ragpicker's coat." Stoebuck, *Police Power, Takings and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059 n.11 (1980).

103 Oakes, *supra* note 101, at 592.

104 The fourteenth amendment states in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

105 Oakes, *supra* note 101, at 592.

106 *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 631 (1981); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 121 (1978); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

107 *See* Costonis, *Presumptive and Per Se Takings: A Decisional Model For the Taking Issue*, 58 N.Y.U.L. REV. 465, 484–85 (1983).

108 169 U.S. 466 (1898).

109 *Id.* at 526 (emphasis added) (cited in Oakes, *supra* note 101, at 592).

110 Stoebuck, *supra* note 102, at 1081.

111 The substantive due process doctrine, which rests on the fifth and fourteenth amendments, proclaims that property rights are protected against substantive legislation which detrimentally affects those rights. The era of substantive due process is best known by the decision in Lochner v. New York, 198 U.S. 45 (1905). In *Lochner*, the Court invalidated a New York statute which limited bakery hours to 60 per week and 10 per day.

The substantive due process era as embodied in *Lochner* came to a dead stop, however, in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *West Coast* reestablished

tial confusion.[112] The problem is actually one of settling the tension between police power regulations—which require a due process analysis—and the prohibition against taking. The following section will show how the Court has allowed the extension of the state's police powers—especially in the area of historic preservation.

A. *Origins*

In 1922, the Supreme Court announced in the seminal case, *Pennsylvania Coal Co. v. Mahon*,[113] the concept of taking which is still followed by the Court.[114] Speaking for the Court, Justice Holmes held that a regulation which prohibited the plaintiff coal mining company from mining under its land, amounted to a taking.[115] This regulation, the state argued, was enacted to prevent subsidence of the mining surface.[116] To determine whether a taking had occurred, the Court viewed the impact of the regulation upon the value of the claimant's property. Holmes stated that "[g]overnment hardly could go on if to some extent [property] values . . . could not be diminished without paying for every such change in the general law [but] . . . when [the diminution in value of the land] reaches a certain magnitude . . ."[117] there is a taking.[118] The tension between the police power and

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that courts cannot substitute their social and economic beliefs for the judgment of legislatures. Oakes, *supra* note 101, at 592–93. Hence in the area of economic rights the Court will grant great deference to the legislature. *See* Ferguson v. Skrupa, 372 U.S. 726, 730–31 (1963); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Nebbia v. New York, 291 U.S. 502, 537–39 (1934); Munn v. Illinois, 94 U.S. 113, 134 (1876). Note, however, that the Court will not give deference to legislatures in certain areas, perhaps resurrecting the substantive due process of *Lochner*. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception).

Professor Stoebuck claims that substantive due process involves the three prong test enunciated in Lawton v. Steele, 152 U.S. 133, 137 (1894). The test is: "(1) whether the interests of the public require the police power exercise; (2) whether the means are reasonably necessary for the accomplishment of the purpose; and (3) whether the means are 'unduly oppressive' on the individuals." Stoebuck, *supra* note 102, at 1082.

112 Stoebuck, *supra* note 102, at 1081. Stoebuck calls this problem pervasive in case law and cites the following cases that blend: Corthouts v. Town of Newington, 140 Conn. 284, 99 A.2d 112 (1953); LaSalle Nat'l Bank v. County of Cook, 12 Ill.2d 40, 145 N.E.2d 65 (1957); Kozesnik v. Montgomery Township, 24 N.J. 154, 131 A.2d 1 (1957); Stevens v. Town of Huntington, 20 N.Y.2d 352, 229 N.E.2d 591, 283 N.Y.S.2d 16 (1967).

113 260 U.S. 393 (1922).

114 *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 639 (1981) (Brennan, J., dissenting); PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 174, 178 (1979).

115 260 U.S. at 415.

116 *Id.* at 412.

117 *Id.* at 413.

118 *Id.*

the takings clause became apparent.

In *Pennsylvania Coal*, the statute, were it to be enforced, would have caused a major diminution in the value of the claimant's land, and hence, amounted to a taking. The Court left very little guidance for future cases beyond that: " [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[119] There is no taking when the legislature is acting validly within its police powers objectives[120] and when the regulation does not go "too far."[121] The courts are thus left to decide whether a taking has occurred on an ad hoc basis.[122]

The police power regulation that generally raises the takings

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119 *Id.* at 415.

See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). In *Loretto*, the Court held that a regulation that required landowners to submit to a permanent physical invasion upon their property had gone "too far." The defendant, Manhattan CATV, was permitted, pursuant to a state law, to install its cable and crossover boxes on Manhattan apartment buildings (plaintiff being an owner of one such building) for a one-time $1 payment to the building owner. Plaintiff brought suit to invalidate this regulation as a taking. The Court invalidated the regulation even though the intrusion upon plaintiff's land was minimal because the invasion was permanent. Most significantly, the majority rejected the balancing analysis typical in modern takings cases as inappropriate and instead articulated a per se rule for determining whether the regulation is a taking. The per se rule posits that any *permanent physical occupation* is a taking without regard to the public interests the regulation serves. The Court insisted that there is a distinction "between a permanent physical occupation . . . and a regulation that merely restricts the use of property." *Id.* at 426 (citation omitted).

For a stinging critique of *Loretto*'s per se rule, see Costonis, *supra* note 107, at 501–23, 548–52.

120 260 U.S. at 415.

121 *Id.*

122 L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9–2, at 459 (1978). *See also* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967). Scholars have attempted to help the courts along with their ad hoc analysis. Michelman enunciates four distinct classifications of what constitutes a taking:

(1) *Physical Invasion*—"whether or not the public or its agents have physically used or occupied something belonging to the claimant. The one incontestable case for compensation seems to occur when the government deliberately causes its agents or the public to 'regularly' use, or 'permanently' occupy space, or a thing which [is private property]." *Id.* at 1184. *Adopted in Loretto*, 458 U.S. 419 (1982).

For some interesting examples of inverse condemnation vis-a-vis air space takings, see United States v. Causby, 328 U.S. 256 (1946), and Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 216 N.W.2d 651 (1974).

(2) *Diminution of Value*—"the size of the harm sustained by the claimant or the degree to which his affected property has been devalued." Michelman, *Ethical Foundations*, at 1184.

This test was enunciated by Holmes in *Pennsylvania Coal*. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 41–42 (1964).

(3) *Balancing Social Gains Against Private Losses*—"whether the claimant's loss is or is

issue is zoning. Prior to 1926, most courts were loath to allow legislatures to regulate property.[123] Such regulation was considered an improper police power objective.[124] This attitude changed in 1926 with the Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*[125]

In *Euclid*, the municipality had enacted a comprehensive zoning plan that divided the town into six use districts.[126] The first district allowed only residential uses while the sixth district allowed the most noxious uses such as heavy manufacturing.[127] A portion of plaintiff's land was located in an area that prohibited industrial uses.[128] He claimed that the value of the property was lowered because its market value as a residential development carried a substantially lower return than its market value as an industrial development.[129]

The Court held that the regulation was not a taking since the plaintiff realized the reasonable and expected use and return on his property.[130] More significantly, the Court held that the regulation withstood the due process attack since the regulation bore a rational relation to the public health, morals, safety, and welfare.[131] A regulation is unreasonable, the Court held, if it is not rationally related to the state's legitimate police powers objec-

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not outweighed by the public's concomitant gain." Michelman, *Ethical Foundations*, at 1184.

See Kratovil and Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 609 (1954). *But cf.* Bacich v. Bd. of Control, 23 Cal. 2d 343, 351, 144 P.2d 818, 823–24 (1944) (points out the fallaciousness of the balancing test as applied to the taking issue).

(4) *Private Fault and Public Benefit*—"whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people." Michelman, *Ethical Foundations*, at 1184. "The idea is that compensation is required when the public helps itself to good at private expense, but not when the public simply requires one of its members to stop making a nuisance of himself." *Id.* at 1196.

123 C. HAAR, *supra* note 102, at 185.

124 *Id.*

125 272 U.S. 365 (1926).

126 *Id.* at 380–83. The plan was cumulative in that the U1 district allowed only single family dwellings while the U2 district allowed two family dwellings and single family dwellings, and the U3 district included U2 and U1 uses and heavier uses and so on.

127 *Id.*

128 *Id.* at 382.

129 *Id.* at 384. The plaintiff claimed the value of its land was lowered $7,500 per acre as a result of the regulation. Conceivably, the Court could have held that this factor alone amounted to a taking and Judge Oakes queries this. Oakes, *supra* note 101, at 607.

130 272 U.S. at 385.

131 *Id.* at 397. The Court applied the deferential standard typical of the post-*Lochner* case. *See, e.g.*, Williamson v. Lee Optical Inc., 348 U.S. 483 (1955); United States v. Carolene Prods. Co, 304 U.S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *See also* Nectow v. City of Cambridge, 277 U.S. 183, 187–88 (1928), which stated that:

> [A] court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation

tives.[132] In *Euclid*, the means of enacting land use regulation was held to be rationally related to the legitimate state objective of protecting neighborhood health and safety.

In short, *Pennsylvania Coal* holds that although the state may exercise its police powers to regulate legitimate public objectives, it may not go "too far."[133] Thus, it envisions a test of harshness.[134] *Euclid* holds that the means of land use regulation is rationally related to the police power ends of health, safety, and welfare.[135]

B. *Analyzing the Ends—What is a Legitimate Police Power Objective?*

In order for a regulation to be valid—and thus before one can analyze the relation between the police power objectives and the regulation—such objectives must be identified. The police power objectives have been phrased in terms of protecting health, safety and morals, and the general welfare.[136] The state may prevent persons from doing things on their land which threaten these values.[137]

Within the parameters of the police power the courts have

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to the public health, the public morals, the public safety or the public welfare in its proper sense."

Id. (quoting *Euclid*, 272 U.S. at 395).

For a rare use of the deferential standard of *Euclid* used to *invalidate* a zoning regulation, see Moore v. City of East Cleveland, 431 U.S. 494 (1977). In *Moore*, the Court overturned a zoning ordinance which limited occupancy of a dwelling unit to a "family" and narrowly defined "family" so that a grandmother was forbidden from having two grandchildren live in her home. In Justice Stevens' concurring opinion, which was necessary for the plurality decision, the ordinance could not survive the tolerant deferential standard. He said:

> Since this ordinance has not been shown to have any "substantial relation to the general public, health, safety, morals, or general welfare" of the city . . ., and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property—that of an owner to decide who may reside on his or her property—it must fall under the limited standard of review of zoning decisions which this Court preserved in *Euclid* and *Nectow*.

Id. at 520–21 (Stevens, J., concurring).

132 272 U.S. at 395.

133 *See supra* notes 113–22 and accompanying text.

134 Stoebuck claims that the "too far" test is really part of the substantive due process analysis in that it is part of the Lawton v. Steele, 152 U.S. 133 (1894), three-prong test—the third prong being that a regulation shall not be unduly oppressive. Stoebuck, *supra* note 102, at 1081–82. *See supra* note 111; *see also* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976) (*Pennsylvania Coal* was really a due process case; its language about takings is only a metaphor).

135 *See supra* notes 125–31 and accompanying text.

The Court utilized both the harshness test and the rational relation test in Agins v. City of Tiburon, 447 U.S. 255 (1980). The Court stated: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land. . . ." *Id.* at 260 (citations omitted).

136 *See* E. FREUND, THE POLICE POWER 3 (1904).

137 *Id.*

carved out explicit examples of permissible police power objectives.[138] *Euclid* dealt with the prohibition of commercial and industrial uses in residential areas—a health and safety concern.[139] In *Young v. American Mini Theatres, Inc.*,[140] the Supreme Court held that regulating the location of adult movie theatres was a valid exercise of the police power—a welfare concern.[141] Another recent pronouncement of a permissible police power objective came in *Penn Central Transportation Co. v. New York City*.[142] This case shows the present state of zoning law with regard to historic preservation.

C. *Penn Central—Landmark Preservation Is a Legitimate Police Power Objective*

In *Penn Central*, the owner of landmark-designated Grand Central Terminal in New York City challenged the constitutionality of the City's Landmarks Law[143] as a fifth amendment taking and a violation of the fourteenth amendment's guarantee of due process.[144] The United States Supreme Court held for the City.[145]

The owners of Grand Central Terminal, which was designated as a landmark in 1968, wanted to construct a 55-story office tower above the station.[146] The Landmarks Commission rejected two different plans that the owners had submitted for approval, calling the building of either planned office tower "above a flamboyant Beaux-Arts facade . . . nothing more than an aesthetic

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138 Stoebuck states that: "[T]he police power is a huge 'growth industry' in America today." Stoebuck, *supra* note 102, at 1057.

See also Agins, 447 U.S. at 257 (1980) (ordinance requiring open space is a valid public objective); Andrus v. Allard, 444 U.S. 51 (1979) (protecting bald eagles is a legitimate state objective).

139 272 U.S. at 392–95.

140 427 U.S. 50 (1976).

141 For a comment on the *Young* decision and a look at New York City's failed attempt to institute adult-use regulations, see Marcus, *Zoning Obscenity: or, the Moral Politics of Porn*, 27 BUFFALO L. REV. 1 (1977).

142 438 U.S. 104 (1978). *See also* People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963). *Stover* let stand a Westchester County ordinance prohibiting the erection of clotheslines in a front or side yard of a home. The defendant's clothesline, filled with old clothes and rags, was meant as a peaceful protest against the city's taxes. What is interesting about the case is that the court upheld the ordinance not on the ground of a health or safety concern but rather on an aesthetic concern. The city offered evidence that the clothesline prohibition was enacted to prevent motorist distraction and to provide access for fire persons. Nevertheless, the court upheld the statute on aesthetic considerations. *Id.* at 466, 191 N.E.2d at 275, 240 N.Y.S.2d at 737.

143 NEW YORK, N.Y. CHARTER AND ADMIN. CODE ch. 8-A, § 207–10.0(a) (1976).

144 438 U.S. at 122.

145 *Id.*

146 438 U.S. at 116.

joke."[147] The owners then sued the City in state court claiming that the Landmarks Law amounted to a taking—the value of TDRs,[148] they claimed, did not satisfy just compensation—and a violation of the fourteenth amendment's guarantee of due process of the law. The trial court and the New York Court of Appeals held for the City[149] as did the Supreme Court.[150]

The Supreme Court rejected the plaintiff's claim that the diminution in value of its property as a result of the Landmarks Law amounted to a taking.[151] The plaintiffs were attempting to invoke the harshness test of *Pennsylvania Coal*. Finding that the law did not interfere with the present use of the station and that the present use permitted a reasonable return on the investment,[152] the Court rejected this argument. Moreover, the Court noted that the value of the TDRs mitigated any financial burden imposed by the regulation.[153]

The Court also found no merit in plaintiff's claim that the regulations were tantamount to "spot zoning."[154] Spot zoning occurs when a zoning regulation arbitrarily singles out a particular parcel of land for less favorable treatment than surrounding parcels.[155] The plaintiffs claimed that the Landmarks Law applied only to selective property owners and unfairly burdened them while the benefit of preservation inured to the entire City.[156] This they claimed amounted to a taking.[157] The Court rejected this argument by noting that all zoning regulations unfavorably affect some property owners more than others.[158]

Most significantly, the Court extended the police power objectives of the state by holding that a municipality may legitimately preserve structures and areas with special historic or cultural significance.[159] Such an objective, the Court held, is

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147 *Id.* at 117–18.

148 Recall that an owner of a landmark may utilize TDRs. ZONING RESOLUTION OF THE CITY OF NEW YORK 74–79 (1984).

149 Penn Cent. Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20 (1975), *aff'd*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

150 438 U.S. 104 (1978).

151 *Id.* at 131–32. The Court cited both *Euclid* and Hadacheck v. Sebastian, 239 U.S. 394 (1915), where both claimants suffered a substantial diminution of value of their property. 438 U.S. at 131.

152 438 U.S. at 136–37.

153 *Id.*

154 *Id.* at 132–33.

155 *See* Note, *Spot Zoning*, 23 URB. L. ANN. 457 (1982). *See also supra* note 72.

156 438 U.S. at 132–33.

157 *Id.*

158 *Id.*

159 *Id.* at 129. The Court stated that:

rationally related to the City's Landmarks Law. The importance of this police power extension is that the City may legitimately preserve the Theatre District. The question remains: Can the City preserve with the incentive zoning device of TDBs?

V. TDBs—Applying The Constitutional Analysis to Incentive Zoning for Preservation

An incentive zoning plan must satisfy the constitutional limitations of zoning.[160] First, it must pass muster under the diminution of value test enunciated by *Pennsylvania Coal*.[161] For example, if a particular plan required developers to spend an unreasonable amount of money so as to achieve a small increase in FAR the plan would probably be struck down as too harsh. Second, it must fulfill the requirements of due process.[162] There must be a rational relationship between the police power objectives and the regulation. In terms of incentive zoning the police power objective is the amenity that the city wants the developer to provide; the regulation is the FAR bonus that the developer is allowed to add to his building.[163] Therefore, the due process analysis of incentive zoning requires a look at the relationship between the amenity (police power objective) and the bonus (regulation).[164] In order for the TDB plan to withstand judicial review it must satisfy these requirements.

> [N]ationwide legislative efforts have been precipitated by . . . a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.

Id. at 107–08.

The expansion of the state's police power in the area of takings law is illustrated by comparing *Penn Cent.* with United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896). In *Gettysburg Ry.*, the Court held that the condemnation of privately held property for the purpose of developing the Gettysburg National Park constituted a "public purpose" under the takings clause. The government was willing to pay for the property through eminent domain; the railroad complained that historic preservation was not a "public purpose" for which the government could condemn land. In *Penn Cent.*, the City was also trying to preserve an historic area but did not have to resort to eminent domain. The Court held that the police powers of the City could validly be used to control historic preservation. These cases illustrate the remarkable growth of government's power. In *Gettysburg Ry.*, the government had to resort to eminent domain to preserve (and even that was at question—*i.e.*, whether preservation was a public purpose under the takings clause). In *Penn Cent.*, the government did not have to resort to eminent domain but could legitimately regulate historic preservation through its police power without giving compensation.

160 *See supra* notes 100–42 and accompanying text.

161 *See supra* notes 113–22 and accompanying text.

162 *See supra* notes 131–32 and accompanying text.

163 Comment, *Bonus or Incentive Zoning—Legal Implications*, 21 Syracuse L. Rev. 895, 898 (1970).

164 *Id.*

TDBs would survive under the diminution of value test as the plan does not require the developer to spend an unreasonable amount of money to receive the bonus. The price of a TDB would be no more than the cost of installing a plaza or a new theatre and the bonus granted to the developer would be of similar size as granted under the plaza and new theatre incentive zoning devices.[165]

The goal of the TDB program is to preserve and protect the legitimate theatre industry and its structures. The power of a municipality to preserve its structures and areas that are architecturally or historically valuable was affirmed in *Penn Central*. The implementation of TDBs as a preservation device has a sufficient basis as a legitimate police power objective.

The final requirement—the relation between the bonus and the amenity provided—has been the issue of very little litigation in the context of incentive zoning.[166] This is because incentive zoning, by its nature, discourages litigation since the developer is actually receiving more FAR than he would have under the normal zoning for that site.[167] Before passing judgment on the fate of TDBs under the rational relationship requirement, it would be helpful to view other incentive zoning mechanisms that are currently in effect.

During the Lindsay administration, the City's Zoning Resolution was amended to allow the new theatre bonus.[168] This provision allows a developer to achieve up to a 20% greater FAR in a new building if he constructs a legitimate theatre in the building.[169] The obvious difficulty with this incentive is that the City is allowing the developer to increase density without providing a corresponding amenity that will relieve the density.[170] Indeed, the new theatre increases the density of the area even more be-

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165 The bonus for an urban plaza built in the Midtown Special District is 1 FAR. ZONING RESOLUTION OF THE CITY OF NEW YORK § 81-23 (1984). *See also infra* notes 184–87 and accompanying text. The bonus for providing a new theatre is no more than 20% of the base FAR of the site. *Id.* § 81-744. The TDB bonus would be 3 FAR. TAC Report, *supra* note 8, at 19.

166 Mandelker, *supra* note 81, at 19.

167 *Id.*

168 Weinstein, *How New York's Zoning Was Changed to Induce the Construction of Legitimate Theatres*, in THE NEW ZONING 131 (N. Marcus and M. Grove eds. 1970) (how the new theatre bonus evolved). The new theatre bonus is codified in ZONING RESOLUTION OF THE CITY OF NEW YORK § 81-744 (1984).

Four theatres have been built under this incentive zoning provision. They are the Gershwin, Minskoff, Circle in the Square, and American Place. A fifth theatre is presently under construction in the Marriot-Marquis Hotel. TAC Report, *supra* note 8, at 8 & n.5.

169 ZONING RESOLUTION OF THE CITY OF NEW YORK § 81-744 (1984).

170 Comment, *Incentive Zoning*, *supra* note 163, at 898.

cause of the crowds that the new theatre attracts.[171] In this mechanism, the bonus of greater density is not related to the amenity of the new theatre at all. The basis for the bonus is theatre preservation, yet the additional density of the new building has not created the need for a new theatre.[172] The need for the new theatre has been caused by *any* office building which displaces an old theatre or somehow impairs the small scale of the Theatre District whether or not it is built with a new theatre.[173]

In comparison to the new theatre bonus, the TDB system does seem to consist of a rational relation between the amenity and the bonus. First, the TDB does not create as much density as the new theatre bonus which creates a higher FAR plus the additional crowds attracted by the new theatre. Second, the exaction of money in the form of a TDB is voluntarily taken from *any* building to be built in the theatre district—whether or not it displaces an older theatre—because any such building destroys the character of the district's scale. Thus, taking money from the developer and using it for the preservation of the older theatres achieves a rational relation between the bonus and the amenity. The prospect of any higher FAR in the theatre district is a theoretical blight upon the area—higher FAR means more office use and, hence, higher property values. Higher property values threaten historic preservation because owners of historic properties in such an area will naturally want to cash in on the full market value of their property. The amenity (proceeds from the TDBs) will be used to lessen the harms of the higher FAR and higher property values by curbing theatre owners from selling their properties. In this sense, the TDBs are rationally related to preventing the harm of theatre demolition and Theatre District overdevelopment.

As noted earlier, the most formidable objection to TDBs is that they might constitute either an unlawful tax or "zoning for sale" in that a developer merely pays money for a higher FAR.[174] Again, as long as there exists a rational relation between the bonus permitted and the money being exacted, the regulation will be upheld as valid.[175] In *Jenad, Inc. v. Village of Scarsdale*,[176] the

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171 *Id.*

172 *Id.* at 899.

173 *Id.*

174 *See supra* note 95 and accompanying text.

175 Heyman, *Innovative Land Regulation and Comprehensive Planning*, in THE NEW ZONING 23, 45 (N. Marcus and M. Grove eds. 1970).

176 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966). *See also* Kamhi v. Planning Bd. of Town of Yorktown, 59 N.Y.2d 385, 452 N.E.2d 1193, 465 N.Y.S.2d 865

New York Court of Appeals approved the application of a statute that authorized the planning commission to levy a charge of $250 per lot against residential subdivider-developers. The money was to be used for park, playground, and recreational purposes within the subdivision development.[177] The court upheld the required payment because it was not a tax, but rather a "reasonable form of village planning for the general community good."[178] Moreover, the charge of $250 was held to be rationally related to the permissible objective of preventing the destruction of open space in rapidly developing suburban areas.[179]

The TDB plan consists of a rational nexus between the bonus and the money being exacted. The proceeds of TDBs are to be spent to preserve the theatres that undirected real estate development would destroy. In return for constructing a larger office building, the existence of which threatens the character of the Theatre District, the developer is paying to relieve the impact of the harm that his office building will create in the Theatre District.

The exaction of money for floor area bonuses is already a part of the City's Zoning Resolution throughout the City and in the Theatre District. Under the Housing Quality Ordinance[180] developers are offered floor area bonuses in return for a cash payment. The money is then held in escrow by the City with its use to be decided later.[181] Within the Theatre District, developers are given FAR bonuses if they rehabilitate an existing theatre.[182] Rehabilitation requires cash outlays similar to TDBs

(1983) (four and one-half acre park dedication requirement held invalid); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966) (required land dedication for park purposes held valid).

177 18 N.Y.2d at 84, 218 N.E.2d at 675–76, 271 N.Y.S.2d at 958.

178 *Id.*

179 *Id.* For some liberal formulations of the rational nexus requirement in subdivision exaction cases, see Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), and Longridge Builders, Inc. v. Planning Bd., 52 N.J. 348, 245 A.2d 336 (1968) (per curiam).

See also Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871 (1967); Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415 (1981); Kleven, *Inclusionary Ordinance—Police And Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A. L. REV. 1432, 1490–1528 (1974).

For the effect that Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), might have on the exaction cases, see Costonis, *supra* note 107 at 493–94.

180 ZONING RESOLUTIONS OF THE CITY OF NEW YORK § 74–95 to –959 (1984).

181 *Id. See* Oser, *City Ponders Future Course on Zoning*, N.Y. Times, Oct. 23, 1983, § 8, at 7, col. 4. *See also* Gottlieb, *A Citywide Fund to Aid Housing is Being Studied*, N.Y. Times, July 11, 1983, at B1, col. 6 (developers of luxury apartments and offices may be asked to contribute money to a fund for housing in lower income neighborhoods throughout the City in return for floor area bonuses).

182 ZONING RESOLUTION OF THE CITY OF NEW YORK § 81–745 (1984).

except that TDBs do not identify a particular theatre to be rehabilitated and the money from TDBs can be used for many different purposes. The existence of the theatre rehabilitation bonus and the Housing Quality Ordinance bonus illustrate that current incentive zoning devices utilize money exactions that are not simply density ameliorating but that are related to other public goals.[183] The existence and use of these incentive zoning mechanisms provide a strong basis for the legality and use of TDBs.

VI. Desirability of TDBs Over Alternative Incentive Zoning and Preservation Devices

When utilized with the proposed plans of landmark designation and voluntary covenants, TDBs will best assure theatre preservation. It will be shown that TDBs are superior to both other incentive zoning devices available in the Theatre District and to TDRs.

One of the most common incentive zoning devices in New York City is the plaza bonus.[184] The developer typically builds a street level open space known as a plaza which usually contains concrete potted plants and maybe some benches. In return, he may receive a bonus of up to six additional square feet in the building for each one square foot of plaza he provides.[185] Plazas are completely unsuitable for the Theatre District as they "create gaps [that] interrupt the . . . street walls that give the district its sense of place."[186] Moreover, the amenity provided by the developer is not one that prevents the harm that the building's extra density created—*i.e.*, damaging the District's character and inhibiting preservation. In addition, it has been suggested that the plaza bonus is damaging to the character of any part of the City.[187] The TDB proposal, however, will not inhibit the Dis-

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183 *Contra* Marcus, *supra* note 95.

184 Zoning Resolution of the City of New York § 23-14, § 24-16 (1984).

185 *Id.*

186 TAC Draft, *supra* note 17, at 33.

187 *See* Huxtable, *Thinking Man's Zoning*, N.Y. Times, Mar. 7, 1971, § 2 at 22, col. 1:

> In practice, [Sixth Avenue between 45th and 51st Street] . . . is revealed as a giant failure. It is a failure in urbanistic terms—or how a city looks and works. The zoning, combined with the rising cost of land and building, has been the definitive factor in driving out the small enterprises, the shops, restaurants, and services that make New York a decent or pleasurable place in which to live and work. In their place is a cold parade of standard business structures set back aimlessly from the street on bank plazas that ignore each other.

Id.

Architect Richard Weinstein calls a building with a plaza a " 'lobster building,' a mindless, ominous, faceless structure, legal under existing zoning, with 2 clawlike ap-

trict's character but will foster preservation.

Another incentive zoning device, the new theatre bonus, is objectionable because the new theatres it has spawned are failures.[188] Moreover, the concept of encouraging a developer to construct a new theatre is not related to the objective of preserving or safeguarding the character of the Theatre District and its older theatres.

As noted earlier, TDBs are also superior to TDRs. There are several disadvantages associated with TDRs. The use of TDRs will generate more density in the Theatre District than TDBs. This is because under the TDR plan the City would not be able to eliminate the other incentive zoning bonuses currently available in the District;[189] the TDB plan contemplates elimination of those bonuses.[190] The City cannot eliminate the bonuses under the TDR plan because the City would then be confronted with the valid criticism that in order to achieve higher densities developers would be forced to contract with a small number of individuals—theatre owners—for higher FARs.[191] The developers would argue that the theatre/TDR owners would be less reasonable in negotiating for the sale of TDRs. Under the TDB system all bonuses except the subway bonus would be eliminated.[192] In order to get the TDB bonus a developer would only have to deal with the City—arguably a more reasonable vendor of the bonuses.

Because TDRs would have to compete with other bonuses, a developer would more likely use those other bonuses first than buy a TDR, which could involve costly negotiations and purchases from private individuals. Hence, it is not certain that TDRs' full value would be realized.[193] Ultimately, less money would go to the Theatre Trust. Under the TDB program, the only bonus allowed in the District would be the TDB and their potential economic value is higher in this respect.

A major disadvantage of the TDR plan is that with their use

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pendages (doubtless both of them containing banks) pinching a small plaza between." Weinstein, *supra* note 168, at 133. It was this kind of building that Weinstein and other city planners did not want to see in the Theatre District when the Zoning Resolution was amended to allow the new theatre bonus. *Id.*

188 *See supra* notes 28–30 and accompanying text.

189 TAC Draft, *supra* note 17, at 56.

190 TAC Report, *supra* note 8, at 19.

191 TAC Draft, *supra* note 17, at 57.

192 TAC Report, *supra* note 8, at 19.

193 TAC Draft, *supra* note 17, at 56.

it would be impractical to downzone[194] midblocks of the Theatre District.[195] The size of the transferrable right is based upon the difference in size between the maximum zoning allowed on a site and the building actually on the site. If the permissible FAR for a site is lowered, then the size and value of the TDR is lowered. Since the value of TDBs are not based upon the permissible FAR of a zoning lot, the City could downzone Theatre District midblocks without lowering the value of TDBs.

VII. Conclusion

Preserving New York City's legitimate theatres will benefit the entire City and its citizens. Because of the precarious economic difficulties facing theatre owners, their temptation to sell out is great. Theatre owners need an incentive to stay in the business and to preserve their theatres. TDRs, although suitable for preserving other historic structures and areas, will not best serve the special needs of the Theatre District. TDBs, however, can provide this incentive to theatre owners better than TDRs since the proceeds from TDBs are potentially greater.

With TDBs, developers can look forward to bonuses that are rationally related to the needs of the Theatre District and are constitutionally valid. The higher densities that developers bring to the area will be offset by their contribution to the preservation of the area. Relieving the impact of added density does not just mean encouraging subway improvements or plazas. Higher density causes higher property values for surrounding properties and a pressure upon those landowners to sell their properties to developers. When those landowners own structures with cultural or historical significance, an extraction of a promise from them not to change the property's use and a cash proceed to them to preserve their structure curbs their temptation to sell. Hence, the objective of preservation is related to the granting of higher densities for cash exactions because high densities in an area generally threaten historic preservation.

The TAC's fears about the TDB proposal are unfounded. Therefore, the City Planning Commission should study and support the enaction of the TDB proposal in the Theatre District.

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[194] Downzoning is the lowering of a site's base FAR. *See* Couf v. DeBlaker, 652 F.2d 585, 586 n.1 (5th Cir. 1981).

[195] TAC Draft, *supra* note 17, at 56.