

FURMAN CENTER POLICY BRIEF

# Unlocking the Right to Build:

## Designing a More Flexible System for Transferring Development Rights

New York City faces a severe shortage of affordable housing. Between 2005 and 2012, median rents in the city increased by 11 percent in real dollars, while the median income of renter households actually declined slightly.<sup>1</sup> That left 47 percent of low-income renter households severely rent-burdened, paying more than half their income towards rent and utilities.<sup>2</sup>

Addressing this shortage of affordable housing is one of the biggest challenges facing the new de Blasio administration. The city's affordable housing policy will undoubtedly require many strategies, from preserving

the existing stock of affordable units to encouraging the construction of new affordable units. Over the past decades, the city has managed to subsidize the development of new affordable units in part by providing developers with land the city had acquired when owners abandoned properties or lost them through tax foreclosures during the fiscal crisis of the 1970s. Almost none of that land remains available, and the high cost of privately owned land poses significant barriers to the production of new affordable housing.

In this brief, we explore the potential of one strategy the city could use to encourage the production of affordable housing despite the high cost of land: allowing the transfer of unused development rights. As we describe in further detail below, the city's zoning ordinance currently allows owners of buildings that are underbuilt to transfer their unused

<sup>1</sup> American Community Survey, Bureau of Labor Statistics Consumer Price Index, and Furman Center.

<sup>2</sup> American Community Survey. More than 60 percent of all rental households in New York City earn less than 80 percent of the area's median income for households the same size, a commonly used definition of "low income." (New York City Housing and Vacancy Survey and Furman Center). In 2012, this threshold was \$66,400 for a four-person household in the New York City-area (U.S. Department of Housing and Urban Development).



development capacity (often referred to as transferable development rights or TDRs) to another lot in certain circumstances. These development rights transfers play an important role in New York City real estate development by allowing developers to deploy the development rights from underbuilt lots to build larger projects than would otherwise be permitted. TDRs can be controversial, however. Some community members decry the buildings that result from the accumulation of development rights because those buildings sometimes end up much taller than the existing skyline, casting oversized shadows on streets, parks, and other buildings. Others complain that TDRs are underused because the city's regulation of how unused development rights can be transferred is too strict. That underuse, they argue, both keeps an area below its zoned density and renders the development rights worthless, even though the right to sell TDRs is intended in part to mitigate the opportunity cost the owner of the underdeveloped building faces in not developing to the full extent zoning allows. If a modification to the existing TDR transfer restrictions can successfully balance the concerns raised by both sides, we estimate that it could be an important new tool for producing affordable housing.

# I. Development Rights Transfers in New York City

For each lot in the city, New York's zoning code (known as the "Zoning Resolution") specifies the maximum number of square feet of floor area that can be built per square foot of lot area. This ratio (known as the "Floor Area Ratio" or "FAR") depends on the location of the lot (e.g., the zoning district in which it is located and, in some cases, whether it faces a wide or narrow street), the use to which

the building would be put (e.g., residential, commercial, community facility, or manufacturing), and whether or not the developer includes certain amenities or land uses (e.g., a public plaza or affordable housing). For example, a landowner with a 5,000 square foot lot with a maximum residential FAR of 2.5 could construct a residential building with 12,500 square feet of floor area. However, if this lot has an existing building with only 10,000 square feet of floor area, the landowner has 2,500 square feet of unused development rights that she may be able to transfer as TDRs.

Because TDRs allow receiving sites to house bigger buildings than the Zoning Resolution otherwise permits, the city carefully restricts how development rights can be transferred. Currently, the Zoning Resolution offers three types of mechanisms for transferring TDRs:

## Zoning Lot Mergers

Through a process known as a "zoning lot merger," owners of adjacent land in the same zoning district, or in some cases, different zoning districts,<sup>3</sup> can agree to link their properties together and have them treated as one lot for zoning purposes. This effectively allows underbuilt properties to transfer unused development rights to other properties in the group, because the unused rights of the grantor site and additional development on the recipient site together comply with the maximum FAR applicable to the redefined "zoning lot." Because the underlying zoning fully applies to the combined zoning lot, there is no fundamental change to the conventional zoning structure. Landowners can orchestrate this type of transfer "as-of-right," meaning that they do not need any approval from the city.

<sup>3</sup> In general, landowners can freely transfer development rights within merged zoning lots that are within a single zoning district or split between different districts with the same maximum FAR and permitted use. For merged zoning lots split between zoning districts with different maximum FARs, limited transfers are generally permitted from the district with the higher maximum to the district with the lower maximum, but not from the district with the lower maximum FAR to the district with the higher maximum.



Because the lots in a zoning lot merger must be adjacent to one another and transfers across zoning district boundaries are limited, the market for available development rights relying on this transfer mechanism is very constrained. Owners of unused rights can only sell if a neighboring lot happens to be a development opportunity owned by an interested purchaser located in a zoning district into which rights can be transferred. Consequently, for many underbuilt properties, there are effectively no opportunities for zoning lot mergers. Where they do occur, however, the strict adjacency rules ensure that the neighborhood bearing the burden of any new buildings using TDRs transferred in this way is the same neighborhood that enjoys the benefit of the underdevelopment on the lot from which the rights originated.

### Special Purpose Districts

In some cases, the Zoning Resolution permits more distant transfers that depart from the underlying zoning structure in order to serve specific planning goals. The Zoning Resolution defines several neighborhood-specific “special purpose districts,” which each have their own additional land use rules applicable only in that neighborhood. In some of these special purpose districts the Zoning Resolution allows unused development rights to be transferred from designated grantor sites to any property in a designated receiving area. For example, to help preserve historic Broadway theaters and ensure their continued use, the city has, since 1998, permitted specified theaters located in the Theater Subdistrict of the Special Midtown District to transfer unused development rights to almost any other lot in the Theater Subdistrict (roughly between 6th and 8th Avenues, from 40th to 57th Street). Theaters transferring rights under the program must provide assurances (through restrictive covenants) that the granting site will remain a theater, and must contribute to a “Theater Subdistrict Fund” dedicated to enforcing theater preservation measures and supporting local

theater activities.<sup>4</sup> Purchasers can increase the allowable bulk on receiving sites by up to 20 percent through such transfers as-of-right, and in some cases can use even more TDRs with a discretionary authorization from the City Planning Commission. In the Special West Chelsea District, the Zoning Resolution has, since 2005, helped protect the High Line park corridor by allowing owners of land underneath it and immediately to its west to transfer unused development rights to receiving zones located along or near 10th and 11th Avenues. Developers can use TDRs to increase the allowable bulk on receiving sites in the Special West Chelsea District by limited amounts as-of-right. Special purpose district rules allow expanded TDR transfer rights as well in part of the Hudson Yards area, near Grand Central Terminal, and in the South Street Seaport, among other areas.

Special purpose district programs generally allow as-of-right transfers with a looser spatial relationship between the grantor and recipient sites than zoning lot mergers permit.<sup>5</sup> However, even though individual transfers may be as-of-right, the creation of a special purpose district with a TDR program is subject to the city’s environmental review process (“CEQR”) and Uniform Land Use Review Procedure (“ULURP”), which requires public hearings and approval by the City Planning Commission and City Council.

### Landmark Transfers

Finally, to support preservation of the city’s historic buildings, the Zoning Resolution (Section 74-79) provides a special transfer process to some of the landmarks designated by the city’s Landmarks Preservation Commission (“LPC”). This transfer provision

<sup>4</sup> See New York City Department of City Planning. (2010, September 16). New York City Theater Subdistrict Council Announce Grant Awards to Support Audience Development and Theater Production. Available at <http://www.nyc.gov/html/dcp/html/about/pr091610.shtml>.

<sup>5</sup> Because grantors in special purpose districts can transfer their development rights to a relatively wide set of recipients, their development rights are sometimes called “floating TDRs.”



allows individual landmarks located outside historic districts in mid- and high-density zoning districts to transfer unused development rights not only to adjacent lots, but also to lots across the street or, if the landmark is on a corner, to any lot on another corner that faces the same intersection.<sup>6</sup> Like the rules for zoning lot mergers, the landmark transfer rules restrict transfers to ensure that any burdens of development resulting from the transfer are born by the same neighborhood that benefits from proximity to the underbuilt landmark. Owners seeking to transfer TDRs through the landmark program rather than a zoning lot merger, however, must secure a special permit from the City Planning Commission, which, in turn, requires a report of the LPC and public review through ULURP and CEQR. In addition, owners must enter into a binding agreement to maintain the landmark, and, except in the highest-density commercial zoning districts, the program allows the receiving site to increase its allowable FAR by no more than 20 percent with a landmark's development rights.

To better understand the market for TDRs in New York City, the Furman Center used publicly available data sources to compile a comprehensive database of TDR transactions completed between 2003 and 2011.<sup>7</sup> Our analysis of this database identified 361 “arm’s length” transactions between unaffiliated property owners during this period, which transferred more than 6.8 million square feet of development rights. The vast majority of the transactions—328—occurred through a zoning lot merger. We identified 31 special purpose district transfers that were

completed primarily in the Theater Subdistrict and the Special West Chelsea District. Only two transfers were completed during this time through Section 74-79 of the Zoning Resolution, the special landmark transfer program. The transfers were overwhelmingly concentrated in Manhattan, and most of those were south of Central Park.

It is important to note that, in addition to the narrowly defined parameters of permissible TDR transfers under the Zoning Resolution, the ability of property owners to sell unused development rights is often significantly limited by the “zoning envelope.” While TDR purchases allow developers to exceed the FAR otherwise permitted on a specific development site, building projects, even those acquiring TDRs through the special purpose district and landmark programs, generally remain subject to the other, non-FAR zoning regulations that apply in the site’s zoning district, such as direct and indirect height limits, yard, street-wall, and set-back requirements, and maximum lot-coverage limits. Such restrictions define a spatial “envelope” in which new buildings must fit. The requirement that lots receiving TDRs remain subject to envelope constraints effectively limits development rights transfers to relatively dense parts of the city, where the zoning envelope is less restrictive. Along with market demand,<sup>8</sup> this helps explain the concentration of TDRs, as Figure 1 shows, in relatively few areas of the city. Even in these areas, however, the zoning envelope is often an important constraint, especially in “contextual” districts, which have more restrictive zoning envelopes to promote development that is consistent with the size and form of the existing buildings in a neighborhood.

6 In the highest density commercial zoning districts, landmarks can also transfer further, through chains of lots under common ownership.

7 We describe our dataset in further detail and provide a more comprehensive analysis of the TDR market in a separate policy brief released last October. Furman Center for Real Estate and Urban Policy. (2013, October). *Buying Sky: The Market for Transferable Development Rights in New York City*. Available at [http://furmancenter.org/files/BuyingSky\\_PolicyBrief\\_21OCT2013.pdf](http://furmancenter.org/files/BuyingSky_PolicyBrief_21OCT2013.pdf). All of the data about past development rights transfers referenced in this brief are based on analysis of the Furman Center database.

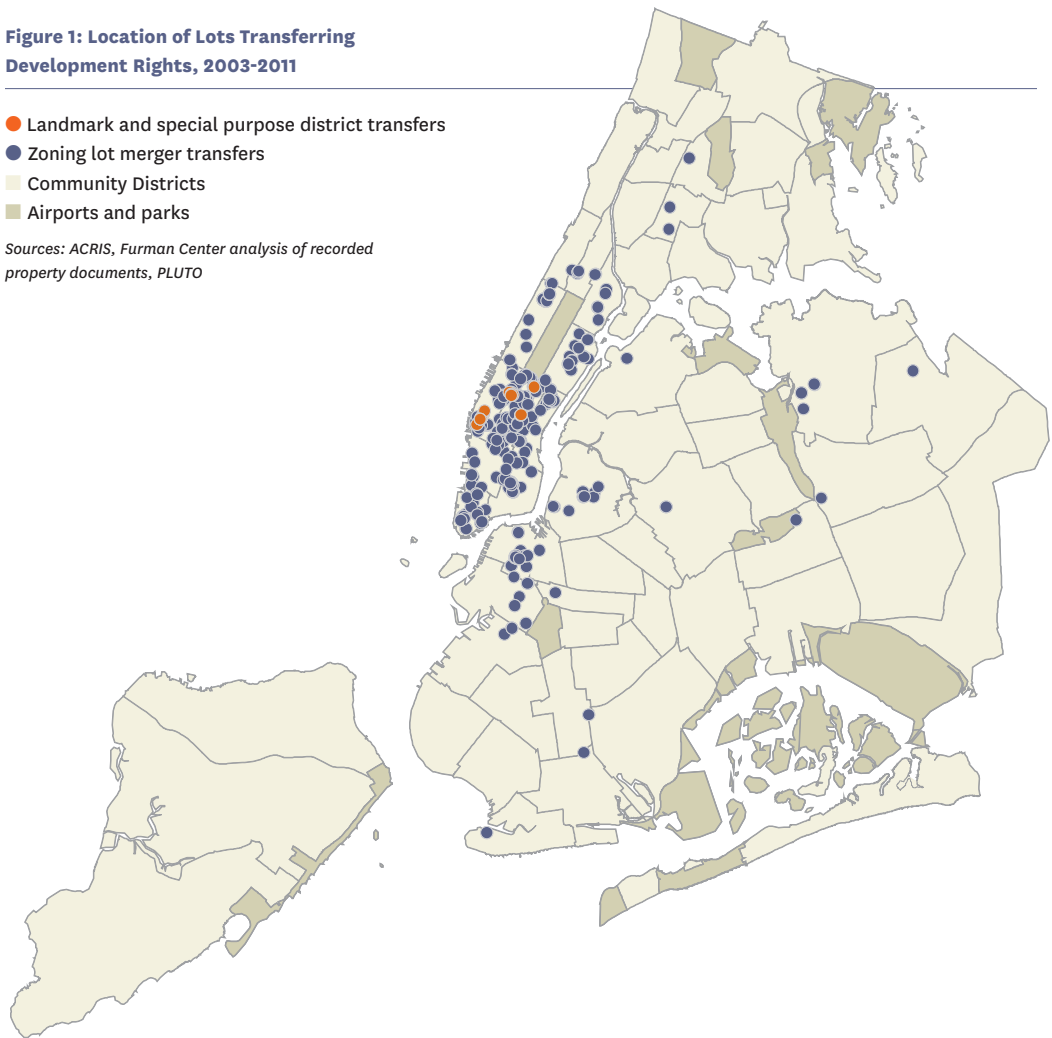
8 The demand for TDRs depends on the rents and sales prices a developer anticipates from the additional floor area created using development rights. In some neighborhoods, the market value of new building space may simply not be high enough to generate demand for TDRs, even where a transfer may be legally permissible.



**Figure 1: Location of Lots Transferring Development Rights, 2003-2011**

- Landmark and special purpose district transfers
- Zoning lot merger transfers
- Community Districts
- Airports and parks

Sources: ACRIS, Furman Center analysis of recorded property documents, PLUTO



In some cases, owners of development sites acquiring TDRs may be able to modify the zoning envelope for their project. Section 74-79 of the Zoning Resolution, though rarely used, permits purchasers of development rights through the landmark transfer program to apply for waivers from some zoning envelope constraints as part of the special permit process. Lots obtaining development rights from a landmark through a zoning lot merger are also able to apply for a special permit for modifications to the zoning envelope through a different provision in the zoning resolution.<sup>9</sup> Other projects may be able to obtain waivers through other special permits the Zoning Resolution makes available or a variance, though special permits are subject to ULURP and the standards for variances are fairly strict.

<sup>9</sup> Zoning Resolution Section 74-711.

The state's Multiple Dwelling Law places another constraint on development that, in turn, limits the ability to use TDRs at certain sites. The Multiple Dwelling Law limits the FAR on residential buildings to 12.<sup>10</sup> In the highest density zoning districts, developers can already reach this cap by earning an allowable FAR bonus through the city's Inclusionary Housing Program if they create (or preserve) affordable units. TDRs cannot be used on top of that bonus if they would increase a project's residential FAR over 12, and even if a developer were to choose to use TDRs instead of the Inclusionary Zoning bonus, the size of TDR transfers in these zones is effectively limited by the Multiple Dwelling Law.

<sup>10</sup> Multiple Dwelling Law Section 26.3.



## II. The Case for Reform

One of the most vexing challenges developers face in building new affordable and market-rate housing alike is the declining number and extremely high prices of building sites in the parts of the city that offer high levels of amenities, such as good schools, transportation access, and proximity to employment centers. There is very little vacant land in these parts of the city and only a limited number of older, smaller buildings that can be profitably demolished so that the lot can be redeveloped with new construction under current zoning. At the same time, given the limited options for transferring TDRs in New York City, there are many property owners with development rights that are functionally stranded. Indeed, even landmark owners—for whom the city created a special program in part to offset the special burdens landmarking imposes—are often unable to realize the value of their development rights. Thus, some of the density the Zoning Resolution already allows is unlikely to be realized with the current transfer rules, despite the demand for new housing.

Landmarks own a considerable number of TDRs that could be transferred to other lots if rules were modified. Many properties that

have been landmarked because of their historical or cultural significance were built decades or centuries ago, and are not nearly as large as the zoning would allow if those lots were redeveloped today. Further, landmarked buildings must obtain approval from the LPC for any work on the building that will affect the building’s exterior appearance, and the LPC usually requires that any alterations maintain the integrity of the original design. In many cases, this makes it difficult to expand the landmark building to use all the FAR allowed on the lot. The owners of those landmarks therefore have significant unused development rights. New York City has designated about 1,400 individual landmarks since the LPC was established in 1965.<sup>11</sup> Table 1 shows that in the neighborhoods where TDR transactions have been concentrated, almost half of the lots with landmarked buildings have more than 10,000 square feet of unused development rights.<sup>12</sup>

We estimate that the landmarked buildings located in Manhattan below Central Park (community districts 1-6) hold more than 33 million square feet of unused development rights, the equivalent of 12 Empire State Buildings, or roughly 33,000 apartments that could

<sup>11</sup> New York Landmarks Preservation Commission. Through December 1, 2013.

<sup>12</sup> Our method for estimating the unused development rights on lots is described in the Methodology and Notes section at the end of this brief.

**Table 1: Individually Designated Landmarks with Unused Development Rights by Community District, Manhattan Community Districts 1-6, 2011**

<i>Community District</i>	<i>Number of Lots with Landmarks</i>	<i>Percentage of Landmark Lots with at Least 10,000 sf of Unused Development Rights</i>
Financial District (MN 01)	114	50%
Greenwich Village/Soho (MN 02)	62	26%
Lower East Side/Chinatown (MN 03)	53	40%
Clinton/Chelsea (MN 04)	36	33%
Midtown (MN 05)	188	61%
Stuyvesant Town/Turtle Bay (MN 06)	51	41%
Total	504	48%

Source: PLUTO, Furman Center analysis of the Zoning Resolution and New York City Department of City Planning Data and



house about 66,000 people.<sup>13</sup> It is hard to know exactly how much would be transferred if TDR programs were reformed, because that will depend upon market demand, among other factors. But, if all of this development capacity could be used and 20 percent were dedicated to affordable housing development (a proportion used in several current affordable housing programs), it would be enough for almost 7,000 new affordable units in Manhattan below 59th Street alone.<sup>14</sup>

The city adopted Section 74-79 of the Zoning Resolution, the landmark transfer program, to help individually designated landmarks realize the value of their unused rights and thereby ease the financial burdens that landmarking imposes on the property owners. But, landmarks are not, in fact, taking advantage of this program. We identified only two such transfers between 2003 and 2011, our study period, although we know of at least one other that closed more recently.<sup>15</sup> Twenty-seven other landmarks were able to sell TDRs during this time, but did so through zoning lot mergers, the Theater Subdistrict program (which was designed to preserve historic theaters, some of which are landmarked), and other special purpose district programs.

While there may be additional reasons the landmark program isn't being used, developers, land-use attorneys, and landmark owners repeatedly have told us that the special permit

requirement, which requires the developer to go through the ULURP process, is a primary deterrent. This process is especially onerous relative to the size of many potential transfers, given the 20 percent cap on increased FAR that applies to most potential buyers of landmark rights. Also, even though the landmarks transfer program allows transfer to a wider range of lots than do zoning lot mergers, the number of viable purchasers for a landmark's unused rights often remains very small or non-existent. While Section 74-79 of the Zoning Resolution was intended, in part, to offset the burdens landmarking imposes on owners, the benefit the provision provides accordingly is, in many cases, illusory.

Special district TDR programs, on the other hand, have provided the flexibility needed to allow the city to achieve some major goals—from allowing the redevelopment of the greater Times Square area while preserving its historic theaters to limiting the density surrounding the High Line park.

Of course, transfers of development rights, even through zoning lot mergers, have also produced some very controversial developments—from the Trump World Tower near the United Nations to the spate of buildings underway or proposed on 57th Street—that opponents argue cast long shadows on the surrounding neighborhoods and parks. Accordingly, some constituencies believe that even the city's existing TDR programs allow development that is sometimes incompatible with the city's neighborhoods, and therefore should be further limited. In light of the possible shortcomings of the landmark transfer program, the track record of the special district programs, and concerns about "oversized" development in mind, we explore below ideas for reforming the use of TDRs. We begin by reviewing the essential components of a TDR program, then assess various ways those components could be reformed.

13 Based on an average 1,000 gross square foot per unit for residential buildings in Manhattan built since 1961 (Furman Center analysis of PLUTO data) and two residents per unit (the average household size in Manhattan per the 2010 U.S. Census).

14 Further, unused development rights on landmarked lots in other boroughs also could generate affordable units. If the program were expanded to include unused development rights on non-landmark lots, that could generate even more affordable units.

15 The two landmark program transfers between 2003 and 2011 that we identified were from the University Club (for the proposed MoMa tower) and the Tiffany Building (for the hotel/condominium tower at 400 5th Avenue). A third transfer, from the Seagram Building to a development site at 610 Lexington Avenue, was approved by the city in 2008, but the parties did not complete the transfer until 2012, taking it outside of the period covered by our dataset and analysis. The city's Land Use and CEQR Application Tracking System indicates that the city approved only seven other special permits for landmark transfers in the 25 years before our study period.



# III. A Framework for Reform

## The Primary Components of a TDR Program

Any TDR program is defined by four main parameters: 1. *Which* properties are eligible to transfer TDRs? 2. *Where* can TDRs be used? 3. *How large* can the transfers be? 4. *What* must the parties do to complete the transfer? The rigidity of, and interplay between, these four parameters sets the balance between flexibility and protection against inappropriate development, and determines the public benefits that accrue to the city as a result of the transfer. We discuss each of the four parameters in greater detail below in order to identify possible reforms.

### **Which properties are eligible to transfer TDRs?**

Zoning lot mergers are available, in theory, to any lot in the city. To pursue specific policy goals, however, the city may define the group eligible to transfer TDRs under a given program more narrowly than all property owners. The landmark and special purpose district programs define the eligible owners fairly narrowly, for example. If the city chooses to limit the class of eligible owners, however, it must justify its decision to single out those property owners. As the existing landmark transfer program reflects, the city treats owners of individually designated landmarks differently from owners of non-landmark properties, and justifies the difference by the need to offset the burdens landmark requirements impose upon owners. Similarly, the transfer program in the Theater Subdistrict of the Special Midtown District defines the eligible owners as particular “listed theatres,” and justifies the difference by the need to “preserve and protect the character of the Theater Subdistrict as a cultural,

theatrical and entertainment showcase.”<sup>16</sup> Subsets of lots can also be defined geographically, as part of a comprehensive neighborhood-level planning project, as was done for the Special West Chelsea District.

### **Where Can TDRs Be Used?**

Where TDRs can be used under a program helps determine its effects on the neighborhoods where it applies and its fairness to surrounding property owners and residents. Zoning lot mergers, for example, only permit shifts of density within contiguous zoning lots, leaving intact the underlying zoning structure and ensuring that the sending and receiving sites are located close enough to each other that any burdens caused by the additional density on the receiving site are born by the same neighborhood that reaps the benefit of the lower density on the sending site. For TDR programs that pursue a specific policy goal, however, policymakers have to balance this concept of fairness against the need to make the eligible receiving area large enough to create a meaningful market for the development right transfers the program seeks to incentivize. Special purpose district programs generally have fixed receiving areas encompassing several sites to which any eligible grantor can transfer. Although this sometimes permits transfers over a distance of several blocks, the areas eligible for larger development are clearly identified (and carefully studied during the ULURP process) and, in the case of the Theater Subdistrict and Special West Chelsea District programs, the resulting market for TDRs has been fairly robust. In contrast, the existing landmark transfer program creates a very tight nexus between sending and receiving sites (adjacent, across the street, or kitty-corner), but the fact that the program is rarely used suggests that it does not expand the market for the rights sufficiently to overcome the administrative burden and uncertainty associated with their transfer and the 20 percent cap on increased FAR that applies in many cases.

<sup>16</sup> Zoning Resolution 81-71.





Arguably, a program without a fixed receiving zone could allow TDRs to travel further, enlarging the market, while still keeping the density within the same neighborhood.

An additional way that the city could control where development rights can be used would be to create criteria for receiving sites to ensure that the density is landing on lots where it is most likely to be appropriate. As the definition of “Qualifying Sites” in the city’s proposed East Midtown Rezoning illustrated, the city could limit transfers to lots over a certain size, within a certain zoning district, or with a certain amount of street frontage.

#### ***How large can the transfers be?***

To limit the effects of transfers on the surrounding neighborhoods, the city may restrict the amount of development rights that can be transferred by a single grantor, or purchased by a single development site. This may be especially important for transfers between lots that are further away from one another, because the area burdened by the added density on the recipient lot may not benefit as directly from permanently reduced density on the grantor lot. For example, the existing special district transfers limit the increase in FAR at the receiving site by defining either a maximum percentage increase or an absolute maximum increase in FAR. The rules governing zoning lot mergers, in contrast, do not impose any specific limits on the amount of development rights that can be transferred, other than the restrictions on transfers across zoning district boundaries and, indirectly, the zoning envelope. Critics argue that the rules governing the landmark transfer program are too restrictive. Despite the required proximity of the grantor and recipient lots, the 20 percent cap that applies to most potential recipients, regardless of their size, means that the administrative burdens the Section 74-79 process imposes often outweigh the benefits of the limited additional FAR, especially for smaller developments.

#### ***What must the parties do to complete the transfer?***

In designing TDR transfer programs, the city has to decide what it will require of owners who wish to use the program. This question implicates both the level of public review of individual transfers, and any other obligations the city imposes on the parties to a transfer to further specific policy goals. Currently, zoning lot mergers and some of the special purpose district transfer programs, such as Special West Chelsea District, require no transfer-specific public review. The landmark transfer program, on the other hand, requires a special permit prior to transfer, which involves proceeding through the time-consuming, uncertain, and costly ULURP process. For some of the special purpose district transfer programs, such as those in the Theater Subdistrict, Grand Central Subdistrict, and part of the Special Hudson Yards District, the city has allowed an intermediate option, whereby owners are permitted to transfer development rights pursuant to a certification from the city, which is a ministerial review of an application certifying that the necessary program criteria are satisfied.

Requiring public review and discretionary approval of individual transfers provides the strongest guard against out-of-context building, but protection can also be afforded through measures that are not as burdensome to the property owner as a full ULURP. Even if the city allows as-of-right transfers, for example, it can control the resulting development by carefully defining the other elements of the transfer program, such as the parameters we discuss above. The zoning envelope restrictions will also remain a check on what gets built in many zoning districts. As the infrequent use of the landmark transfer program makes clear, while the imposition of a demanding public review process may help prevent inappropriate development, it is also likely to have a significant chilling effect on potential TDR buyers, especially if the size of transfers is tightly restricted.

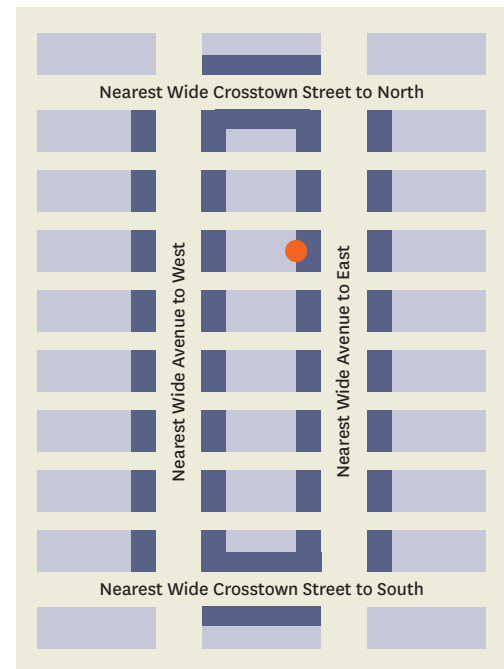


The city also may wish to include requirements in TDR programs that seek to ensure that the transfer doesn't undermine, or supports, other goals. Section 74-79 imposes a requirement that the owner of the landmark have a program for continuing maintenance of the landmark, for example, and the provision allowing Theatre Subdistrict transfers requires that a cash contribution based on the size of a transfer be paid to the Theater Subdistrict Fund for enforcing theater preservation measures, supporting the development of theatre audiences, and producing new works. Similarly, as part of a new transfer program, the city may require the parties to the transfer to contribute to other policy goals, such as affordable housing development.

### An Example, to Prompt Discussion of Reforms or New TDR Programs

This section describes one example of how the city might design a new TDR program both to improve the ability of some landmarks to capture value from their development rights, and to harness the flexibility TDRs provide to create additional affordable housing. To be clear, we are not saying that this particular proposal is the only, or even necessarily the best, program that could be designed. Nor does this section specify every detail the city would need to address if a new TDR program similar to this example were added to the Zoning Resolution. Instead, we are trying to get the conversation started by presenting a concrete, but general, illustration of the kind of program the city might consider to address controversies over the use of TDRs and to think creatively about new tools to encourage the development of affordable housing.

Figure 2: Diagram of Eligible TDR Receiving Sites



- Landmark
- Eligible Street Frontage

In our example, landmark owners would be permitted to transfer TDRs in a carefully delineated area near the landmark, as-of-right, if the transfer also would support the development of affordable housing. The program would be in addition to all currently existing transfer programs. Again, though, the example is meant to spark further discussion. Any of the elements could be modified, but any discussion of reforming the TDR transfer rules must address these issues.

### Which properties are eligible to transfer TDRs?

While there are a wide variety of ways that the city could define the property owners eligible for a new TDR program, in our example, only owners of individually designated landmark buildings would be eligible, including those located in historic districts. For the reasons described at length above, there are rational justifications, and public policy reasons, for treating landmark owners differently from other owners.



### **Where Can TDRs Be Used?**

In our example, landmarked buildings would be able to transfer unused residential development rights to lots that:

- A. Face the nearest wide,<sup>17</sup> crosstown streets to the landmark's north and south, between the nearest wide avenues to the landmark's east and west; or
- B. Face the nearest wide avenues to the landmark's east and west, between the nearest crosstown streets to the landmark's north and south, as described in (A).

The formulation sounds complicated, but as Figure 2 shows, it describes the block-faces along the wide streets and avenues immediately surrounding the grantor lot. The formulation is intended to balance flexibility and fairness, by defining a reasonably large recipient area that includes two wide cross street segments and two avenue segments – areas that typically have fewer constraints on the zoning envelope that would limit the use of the TDRs – while ensuring that unused development rights are not transferred to areas perceived to be in a different neighborhood from the grantor lot. By limiting recipient lots to those facing wide streets and avenues, the program would partially shield mid-block areas from new density and the resulting shadows and other burdens it might bring. The constraints of the existing zoning envelope would also continue to apply, providing further protections from out-of-context development in many cases, especially in contextual zones. Of course, the way our example defines the eligible receiving area is largely dependent on a fairly regular street grid, so alternative specifications would have to be developed for lower Manhattan and other parts of the city without a regular grid.

In our example, landmarks would be free to transfer development rights to recipient

<sup>17</sup> As currently defined in the Zoning Resolution, "wide" streets and avenues are public rights of way at least 75 feet wide.

sites in other zoning districts, to be used for either residential or commercial space, as long as the use is permitted in the recipient lots' district. Accordingly, TDRs could generally be used for either residential or commercial space if transferred to a commercial district, but only for residential space if transferred to a residential district.<sup>18</sup>

This exemplary program would most likely provide new transfer opportunities only to landmarks in Manhattan and other high density neighborhoods in the other boroughs, such as Downtown Brooklyn and Long Island City, Queens. Landmarks with unused development rights outside of these areas are less likely to benefit from a program like this because market demand may not support development that could use the rights and because the zoning envelope that applies to lots in low and many medium density zoning districts severely limits their capacity to accommodate additional bulk.

### **How large can the transfers be?**

In our example, there would be no specific limit on the amount of development rights an eligible receiving site could acquire under the program.<sup>19</sup> Transfers would be limited only by other existing rules for the receiving site, such as the zoning envelope and the cap on total residential FAR imposed by the Multiple Dwelling Law.

Individually designated Landmarks would be able to transfer their TDRs to a single site in one large transaction, or to multiple receiving sites through several small transactions. In our example, the amount of development rights that a landmark could transfer would be equal

<sup>18</sup> Some residential zoning districts have "commercial overlays," a secondary zoning designation that allows limited commercial development (usually on the ground floor) in primarily residential buildings. Under this program, TDRs could not be used for additional commercial space in residential zoning districts with commercial overlays.

<sup>19</sup> There could be a specific limit on the increase in FAR that a recipient lot could achieve through the use of TDRs, but any such limit should be carefully calibrated to avoid overly restricting transfers to small development sites in medium density zoning districts.



to the landmark's total development capacity less the size of the existing landmarked building (or any other buildings on the lot), regardless of its use. For example, a landmarked building in a residential zoning district with 100,000 square feet of floor area, but zoned for 150,000 square feet of residential floor area, would be able to transfer 50,000 square feet of TDRs. In accordance with the restrictions we've already described, the 50,000 square feet of TDRs could only be used for residential space if transferred to a lot in a residential zoning district. This means the Multiple Dwelling Law may effectively limit transfers to lots located in high density residential districts, where the Zoning Resolution generally permits only residential development, and that TDR transfers could crowd out the Inclusionary Housing Bonus in these zones.<sup>20</sup> However, if the TDRs are transferred to a lot in a commercial district that permits both residential and commercial uses, the transferred rights could be devoted to either use as part of a commercial or mixed-use building. This would limit the effects of the Multiple Dwelling Law's cap on maximum residential FAR and make TDR's less likely to compete with the Inclusionary Zoning Program to reach the cap. Nothing in our exemplary program would change the underlying use restrictions applicable to the recipient site, however, so in no case could transferred rights be used to develop additional commercial space in residential districts where commercial space would not otherwise be permitted.

**What must the parties do to complete the transfer?**

Finally, in our example, transfers from privately owned landmarks would require submission of a continuing maintenance plan to LPC, but would otherwise be as-of-right.

<sup>20</sup> For example, under the Multiple Dwelling Law, a 20,000 square foot lot could not have more than 240,000 square feet of residential floor area, so if this lot were located in a zoning district with an FAR of 10, it could only acquire 40,000 additional square feet. Approximately nine percent of all Manhattan lots facing wide streets or avenues are in residential zones that permit a base maximum FAR of 10 and are eligible for the Inclusionary Housing bonus.

Transfers could proceed without a special permit or any other discretionary action by the city,<sup>21</sup> in contrast to the existing landmark transfer program. Of course, adoption of a new TDR program itself would require an amendment to the Zoning Resolution, which would trigger ULURP as well as CEQR review requirements.<sup>22</sup>

A key element of our exemplary program is that transfers would be required to support the development of new affordable housing.<sup>23</sup> The city could choose among several mechanisms to make this connection. For example, similar to the Inclusionary Housing Program, the city could require that the recipient use a specified percentage of the transferred rights for affordable housing units in the new building, or produce affordable housing elsewhere (off-site) in proportion to the size of the TDR transfer. Alternatively (especially if the TDRs are used for commercial development), the seller of development rights could be required to contribute to an affordable housing development fund, which would be similar to contributions required under some special district transfer programs or incentive zoning programs. Existing affordable housing programs, including the Inclusionary Housing Program and the 421-a tax abatement program, could offer guidance on other design features, such as the requirements governing the development of affordable housing off-site, and income limits and rent limits for the affordable housing.

<sup>21</sup> The program could require a discretionary review process for a subset of transfers, such as those by city-owned lots, or those to development sited immediately adjacent to a landmark (and, accordingly affecting the landmark's architectural integrity).

<sup>22</sup> See Department of City Planning, Environmental Review Process. Available at [http://www.nyc.gov/html/dcp/html/env\\_review/env\\_review.shtml](http://www.nyc.gov/html/dcp/html/env_review/env_review.shtml). It is beyond the scope of this brief to analyze what the environmental review of this program would need to entail or to address any possible legal challenges based on constitutional limits to land use regulation.

<sup>23</sup> Of course, the program could instead require transfers to mitigate other burdens the development creates, such as the need for park space or particular infrastructure. The city also could consider whether the program might require that some portion of the proceeds of the transfer be contributed to a fund to promote the maintenance of landmarks that are unable to use their development rights.



## Case Studies

To illustrate the possible implications of our exemplary program, we analyze its potential effects on two specific individually designated landmarks: the Church of Our Lady of the Scapular-St. Stephen (known as “St. Stephen’s”) in Kips Bay and the Muhlenberg Library in Chelsea. We picked case studies in Manhattan because most of the TDR transfers have occurred there. For both landmarks, we show the extent of the eligible transfer area that the hypothetical scheme would define. However, because most lots in New York City are unlikely to be redeveloped in the near future, the size of the transfer area alone does not tell us much about the additional opportunities for transfers the policy would produce. To sharpen our analysis, we identify a subset of lots with characteristics suggesting they are more likely than other lots to be redeveloped. These “potentially developable lots:”

- Are located outside of historic districts (where development is significantly restricted);
- Have buildings that were built before 1970 (which might therefore be nearing the end of their useful lives and need substantial rehabilitation or replacement);
- Are not coops or condominiums (the fragmented ownership of which makes redevelopment unlikely);

- Contain fewer than 20 residential units (because moving existing tenants is difficult, especially from rent-regulated units, which many older large rental buildings contain);
- Are not government-owned;
- Have not already transferred unused development rights to other lots; and
- Have buildings that use less than 75 percent of the lot’s base development rights.

Although we are unable to model in detail the capacity of each potentially developable lot to accommodate additional density within the applicable zoning envelope, we distinguish between potentially developable lots located primarily in “contextual” zoning districts versus other types of districts. Contextual districts have more restrictive zoning envelopes to promote development that is consistent with the size and form of the existing buildings in a neighborhood. Although some recent developments in contextual zoning districts were able to use TDRs, local expert architects we consulted confirm that the rules governing non-contextual zoning districts are generally more flexible about the additional bulk that a transfer of development rights would entail.



## Case Study 1: Church of Our Lady of the Scapular-St. Stephen

The Church of Our Lady of the Scapular-St. Stephen is a Catholic church located on the north side of East 28th Street between Lexington and Third Avenues. The Zoning Resolution allows the lot containing the church to be developed with approximately 119,000 square feet of residential building area. The city estimates the church structure is only 45,000 square feet, leaving approximately 74,000 square feet of unused residential development rights. There is no public record of any prior development rights transfers from the church property. If these rights were transferred under our hypothetical program to other development sites, they could be used for approximately 74 new residential units (15 of which would be affordable, under our example, if we assume a 20 percent requirement).

Figure 3 shows the landmarked church and the surrounding blocks, calling out the potentially developable lots in contextual and non-contextual zones. Immediately to the church's west is a large potentially developable lot in the same contextual zoning district as the church that is also owned and used by the church. This lot is not landmarked, so could be redeveloped if the church so chose, but because it is in a contextual district, it may not be able to use any TDRs the church could transfer through a zoning lot merger. Immediately to the church's east is a small potentially developable lot also located in the same contextual zoning district. The church is also adjacent to one potentially developable lot to its east that is located in a non-contextual zoning district. However, this district (C2-8) has a higher maximum FAR than the church's zoning district (R8B), making it ineligible to receive development rights through a zoning lot merger. Accordingly, the church's current zoning lot merger opportunities appear to be very limited.



Liz Casey

St. Stephen's is a distinctive architectural and art-historical gem. The current building, built in 1854, was designed by James Renwick, Jr., the noted architect who also designed St. Patrick's Cathedral. The Church contains 45 murals and paintings by Constantino Brumidi, painted over a twelve-year period from 1868-1879. Brumidi is best known for his frescoes in the U.S. Capitol Building, including the west corridor, the Capitol rotunda, and the House of Representatives chamber committee rooms. Part of the Church's stated mission is to engage marginalized community members, including patients, the poor, and the elderly.

The potentially developable lot to the church's east in the non-contextual district would be able to purchase TDRs from the church through the existing landmark transfer provision if the parties were able to successfully steer the plan through ULURP and obtain a special permit. Additionally, there are four potentially developable lots directly across 29th Street from the church lot to its north, and two potentially developable lots across 28th Street to its south. These lots, too (along with the lots adjacent to the church) would be eligible to purchase TDRs through the existing landmark transfer program, but all of them are located in the same contextual district as the church itself, so may not be able to accommodate additional FAR within their zoning envelope.



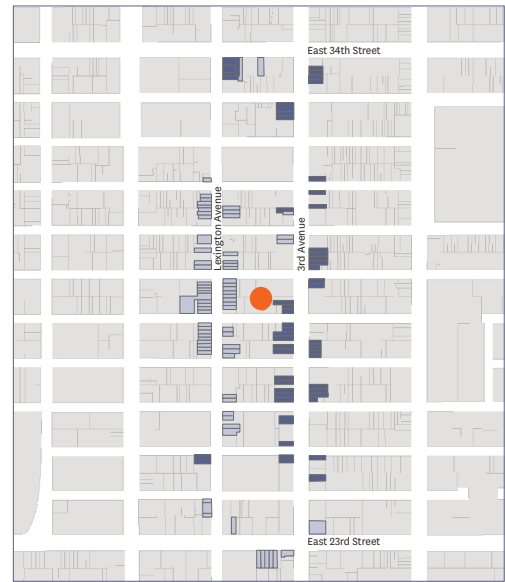
**Fig. 3: Church of Our Lady of the Scapular-St. Stephen and Surrounding Blocks**



- St. Stephen's Church
- Landmark Buildings and Interiors
- Potentially Developable Lots Not In Contextual District
- Potentially Developable Lots in Contextual District
- Designated Historic Districts
- Parks
- Blocks

Source: Furman Center analysis of PLUTO and the Zoning Resolution.

**Fig. 4: Eligible TDR Receiving Lots for Church of Our Lady of the Scapular-St. Stephen Under Hypothetical Program**



- St. Stephen's Church
- Potentially Developable Lots Not In Contextual District
- Potentially Developable Lots in Contextual District
- Blocks

Source: Furman Center analysis of PLUTO and the Zoning Resolution.

Under our example program, the church would have many more potential transfer options. Figure 4 shows the eligible transfer area under the program, which includes the blocks of East 23rd and East 34th Streets (the first wide crosstown streets to the landmark's north and south) between Lexington and Third Avenues (the first wide avenues to the landmark's east and west), and the eleven blocks of Lexington and Third Avenues between East 23rd and 34th Streets. Fronting on this ring of wide streets and avenues are 66 potentially developable lots in contextual zones and, more significantly, 52 potentially developable lots located in non-contextual zones. It appears that this program would provide the church with many more promising transfer opportunities than the Zoning Resolution currently affords.

**Table 2: Number of Potentially Developable Lots Eligible to Purchase TDRs from the Church of Our Lady of the Scapular-St. Stephen**

	In Contextual Zoning Districts	In Non-contextual Zoning Districts
Existing Zoning Lot		
Merger Provisions	2	0
Existing Landmark Transfer Program	8	1
Under our example TDR Program	66	52



## *The Challenge of Historic Districts*

Landmarked buildings face unique challenges because of their landmark designation, which requires owners to maintain the building in good condition and prohibits redevelopment of the site without approval from the LPC.\* Section 74-79 of the Zoning Resolution, the landmark transfer provision, provides owners of individually landmarked buildings with a benefit not available to other buildings, but this benefit doesn't extend to all landmarks. Approximately 172 individually designated landmark buildings happen to sit in one of the city's many historic districts and, as a result, are not eligible to use this provision; they are explicitly excluded. Within a historic district there are not likely to be many potential buyers for development rights because of the district's restrictions on development, which apply to all buildings (not just individual landmarks) in the district.

But, if individual landmark buildings in historic districts were permitted to transfer pursuant to 74-79, they might find some opportunities within their districts and, more significantly, those landmarks that are on the edge of districts would then be able to transfer across the street and out of the historic district. On the other hand, the existing exclusion protects historic districts from being ringed by very tall buildings as a result of TDR transfers. Furthermore, landmarks located in historic districts, unlike other landmarks, also benefit from protections against architecturally incompatible development on neighboring sites.

\*For more information about the requirements imposed on landmarked buildings, see <http://www.nyc.gov/html/lpc/html/home/home.shtml>.







## Case Study 2: Muhlenberg Library

The Muhlenberg Library is a publicly owned library located on the north side of 23rd Street, between 7th and 8th Avenues. Because the library's lot is within a relatively high density zoning district, the property could be developed with as much as 37,000 square feet of total residential or commercial building area. The city estimates that the library structure is only about 10,000 square feet, so the property has a significant amount of unused development rights, none of which it appears to have transferred in recent decades. If these rights were transferred under our exemplary program to other development sites, they could be used for approximately 27 additional new residential units (approximately 5 of which would be affordable under the example program we describe).

Figure 5 shows the Muhlenberg library and the surrounding blocks, calling out the potentially developable lots in contextual and non-contextual zones and historic districts. The library is adjacent to five potentially developable lots.<sup>24</sup> Because these lots are in the same zoning district as most of the library (the zoning is not shown on the map), the library could, in theory, transfer unused development rights via a zoning lot merger. There is also a potentially developable lot directly across West 23rd Street, which would be eligible to purchase development rights from the library through the landmark transfer program. However, all of these potentially developable lots eligible under existing programs are in contextual zones, which likely means their zoning envelope would be too restrictive to accommodate much additional bulk.

<sup>24</sup> One of these lots, located at 232 7th Avenue, is already slated for new residential development according to permits filed with the Department of Buildings. If this project is realized, this lot would no longer be a potentially developable lot.



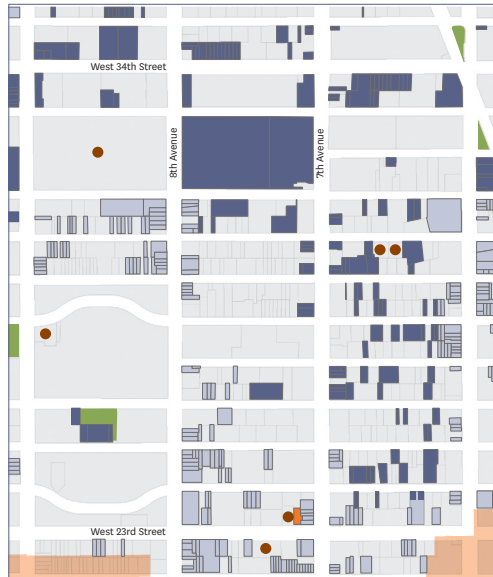
Liz Casey

The Muhlenberg Branch of the New York Public Library (“NYPL”) is one of 65 branches built from funds given to New York City by Andrew Carnegie. The three story brick and limestone building was renovated in 2000. In addition to print and media collections in English, Spanish, Chinese and Russian, the library provides regular education programming, including classes in language, poetry and painting, arts and crafts, and computer literacy. The Muhlenberg Branch of the NYPL caters events towards a wide age range, from story time for babies 0-18 months to MS Excel for Adults 50+. The library has a gallery space, where it hosts exhibitions for an inter-generational audience that parallel the NYC school curriculum, reflect current events, or showcase community work. It is a recruitment site for Workforce1, a project of New York City’s Department of Small Business Services that aims to match job seekers with work opportunities in their communities.

Under our hypothetical program, however, the library would have many more potential transfer options. As Figure 6 shows, the eligible transfer area would include lots facing one block of West 23rd and West 34th Streets (the closest wide, cross-town streets to the north and south) and several blocks of 7th and 8th Avenues (the wide avenues immediately to the landmark’s east and west, from West 23rd Street north to West 34th Street). This transfer area would include the



**Figure 5: Muhlenberg Library and Surrounding Blocks**



- Muhlenberg Library
- Landmark Buildings and Interiors
- Potentially Developable Lots Not In Contextual District
- Potentially Developable Lots in Contextual District
- Designated Historic Districts
- Parks
- Blocks

Source: Furman Center analysis of PLUTO and the Zoning Resolution.

six potentially developable lots already eligible to purchase development rights under the existing programs, as well as 90 additional potentially developable lots. Moreover, 38 of these additional possible buyers are located in non-contextual zoning districts, so may be able to use TDRs that other sites couldn't use. Our example program therefore appears to offer meaningful new opportunities for the library to transfer its unused development rights.<sup>25</sup>

<sup>25</sup> The library building is owned by the city, so the city would receive proceeds of any TDR sale. The city could agree to provide the proceeds to the library, which it appeared to do recently as the Brooklyn Public Library system pursued a plan to sell two library branches to raise money for needed repairs across the library system. Maloney, J. (2013, June 20). Brooklyn Public Library Aims to Raze Brooklyn Heights Branch. *The Wall Street Journal*. Retrieved from <http://online.wsj.com/>

**Figure 6: Eligible TDR Transfer Area for Muhlenberg Library Under Hypothetical Program**



- Muhlenberg Library
- Potentially Developable Lots Not In Contextual District
- Potentially Developable Lots in Contextual District
- Blocks

Source: Furman Center analysis of PLUTO and the Zoning Resolution.

**Table 3: Number of Potentially Developable Lots Eligible to Purchase TDRs from Muhlenberg Library**

	In Contextual Zoning Districts	In Non-contextual Zoning Districts
Existing Zoning Lot		
Merger Provisions	5	0
Existing Landmark Transfer Program	6	0
With our example TDR Program	58	38



## Conclusion

Despite the many limitations on their use, TDRs are an important and well-established part of the New York City real estate market, allowing developers to build larger and taller on some sites, while permanently preserving smaller-scale development on other sites. In several instances, the city has allowed TDRs to be transferred more freely in discrete neighborhoods to advance various policy goals. Further, the landmark transfer program, while not widely used because it is so restrictive, provides precedent for targeted programs to loosen transfer rules on a city-wide basis.

The city's severe shortage of affordable housing requires that policymakers seek innovative new strategies for producing more units, and there may be an opportunity for an expanded TDR program to serve as one such strategy. Although any policy change that allows for more (and larger) development is bound to be controversial, TDRs present considerable untapped potential. Our initial analysis of one hypothetical example of a new program, which looks only at the unused development rights of individually designated landmarks, suggests that creative, careful thinking could help produce thousands of new affordable housing units while simultaneously providing the owners of landmarks access to new resources to invest in preservation and maintenance of their buildings. Many of these landmark TDRs are stranded under the current zoning rules, so would remain unused unless the rules are changed. But a thoughtfully crafted plan could help ensure that those TDRs are used in a way that balances the burdens of new development on receiving sites with the benefits of new affordable housing, landmark preservation, and permanently reduced density on granting sites. Of course, far more analysis would be needed to fully assess the advantages, disadvantages, and implementation challenges for this or any

other proposed change to the city's regulation of TDRs. We offer this hypothetical example and analysis only as a first step in what we hope will be a new exploration of innovative land use policies to help address the city's chronic shortage of housing.

## Methodology and Notes

Our estimates of unused development rights for landmarks and other lots are based on lot-level data in the city's Primary Land Use Tax Output (PLUTO) dataset and a Furman Center analysis of the Zoning Resolution. We account for development rights transfers covered by our 2003-2011 dataset, but not for any earlier or subsequent transfers.

We developed our criteria for identifying potentially developable lots by analyzing lots that were redeveloped in recent years. Most redeveloped lots have been relatively old commercial buildings or small residential buildings that were substantially underbuilt in relation to their lot's zoned capacity. Most have fewer than 20 units (likely due to the cost of removing rent-regulated residential tenants). Although we typically use 50 percent as our threshold for identifying underbuilt lots in other contexts, we use 75 percent for this analysis because the development sites would be acquiring additional development rights from the landmark (i.e., the maximum effective ratio will be less than 75 percent when counting any acquired zoning capacity).

We identify potentially developable lots by using the PLUTO variables for building age, building use, lot size and building size and our own estimates of the maximum FAR based on an analysis of the Zoning Resolution.



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*\*Co-authors Vicki Been and John Infranca completed work on this policy brief during their time as NYU Furman Center employees. However, at the time of the brief's publishing in March 2014, neither are employed by the NYU Furman Center. As of March 2014, Vicki Been is the Commissioner of the New York City Department of Housing Preservation and Development, and John Infranca is Assistant Professor of Law at Suffolk University Law School and Research Affiliate at the NYU Furman Center.*

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## About the Furman Center

The Furman Center for Real Estate and Urban Policy is a joint center of the New York University School of Law and the Robert F. Wagner Graduate School of Public Service at NYU. Since its founding in 1995, the Furman Center has become a leading academic research center devoted to the public policy aspects of land use, real estate development, and housing.

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