

University of Arkansas, Fayetteville

From the Selected Works of Howard W Brill

1974

Book Review: Space Adrift, Landmark Preservation and the Marketplace

Howard W Brill



Available at: https://works.bepress.com/howard_brill/10/

BOOK REVIEWS

SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE. By John L. Costonis. Urbana, Illinois: University of Illinois Press. 1974. Pp. xx, 207. \$10.00.

During his years as a zoning lawyer with a prominent Chicago firm, Professor John Costonis of the University of Illinois developed an appreciation of the architecture of the City of Chicago, an awareness of developmental pressures in the city, and a proposal to use those pressures to save architectural landmarks. *Space Adrift: Landmark Preservation and the Marketplace*, a publication for the National Trust for Historical Preservation, is a culmination of his work.

Professor Costonis first proposed his so-called "Chicago Plan" in a 1972 article in the *Harvard Law Review*.¹ This plan is based on a presumption that most urban landmarks have four common characteristics: (1) they "utilize only a fraction of the floor area authorized for their sites" under the applicable zoning ordinance; (2) they "are currently able to operate at a profit"; (3) they "tend to be grouped in . . . high land value commercial and service districts" and are of reasonably compact size; and (4) "municipal facilities and supportive services are also most heavily concentrated in these districts," allowing large numbers of people to use the space efficiently.² Factors (1), (3), and (4), however, often outweigh factor (2), making the land on which the landmark rests more valuable as a development site than as a moderately profitable enterprise. Professor Costonis proposes a mechanism by which the development potential of the landmark sites may be transferred to other sites, thus permitting the preservation of the older buildings.

Under the Chicago Plan the city would establish "development rights transfer districts" where urban landmarks are concentrated. The owner of a landmark would then have the option

1. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972). See also Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973). The Chicago Plan builds upon a 1961 New York City ordinance commonly referred to as the "New York Plan." See Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972).

2. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 589 (1972).

of transferring the unused development rights of the site—primarily permissible height and density standards—to other lots within the transfer district, subject to limits on increases in bulk and height and other planning controls prescribed by ordinance. The development rights could be transferred to another site owned by the landmark owner or sold to someone interested in developing a particular site. Following the transfer, the landmark owner would also be entitled to a real estate tax deduction as a result of the reduced value of the property caused by the loss of its development rights. Additionally, before the city would authorize the transfer, it would require the owner to grant to the city a “preservation restriction,” obligating both himself and future owners to maintain the landmark in a reasonable manner and to refrain from altering or demolishing it. If the landmark owner rejects the transfer option, the city would “condemn a preservation restriction and the landmark’s development rights. . . .”³ These development rights would then go into a “development rights bank” to be sold to developers of other lots as necessary to meet the acquisition costs of condemnation and other expenses.⁴

As Professor Costonis notes, cities have always had the power to condemn land in order to preserve urban landmarks.⁵ They have rarely used this power, however, because of impoverished municipal budgets. The goal of the Chicago Plan is therefore to eliminate the necessity for large scale expenditures of municipal funds. Indeed, the Plan is designed to force the development process itself, which has created the pressure on municipal landmarks, to bear the major share of the burden of preservation.

Examined from the standpoint of feasibility, however, several elements of the Plan present potential problems.⁶ For exam-

3. *Id.* at 590.

4. For a more comprehensive discussion of the specific elements of the Chicago Plan, see *id.* at 589-602.

5. Indeed, the power of eminent domain lies behind the Chicago Plan, but it is that power in its broadest sense—the power not only to condemn a fee, but also the increasingly discussed, if little utilized, power to condemn a property interest less than a fee. See, e.g., *Kamrowski v. State*, 31 Wis. 2d 256, 142 N.W.2d 793 (1966), in which scenic easements 350 feet in depth along the Great River Road were condemned, permitting the land to be used for farming and single family residences while barring the dumping of trash, erection of billboards, and destruction of vegetation. The Chicago Plan would include a similar preservation restriction.

6. It must be emphasized that in speaking of the Chicago Plan, Professor Costonis admits that there are various options within the Plan that are available to meet the practical needs and requirements of individual cities. For example, he suggests that a

ple, in comparing his plan with present zoning practices, the author explains the relationship between "bonus zoning" and the development rights transfers of the Chicago Plan. Under existing zoning codes, awards of bonuses are often made in the form of increased allowable height or bulk to construction projects that provide arcades, plazas, open areas, or setbacks. If bonus zoning were allowed within a development district, there would be a corresponding decrease in the marketability of development rights, for the builder might be able to obtain an added height allotment without purchasing development rights from a landmark owner. Perhaps adoption of the Plan should therefore be accompanied by alterations in zoning ordinances. Although Professor Costonis suggests this course of action, he also recognizes that such alterations may be politically impossible. This aspect of the Plan needs further thought, for unless the development rights are marketable, there will be no funds to pay the expenses of condemnation.

A second element which deserves consideration is the control of development rights transfers. Unlike the New York Plan, which limited transfers to adjacent property, the Chicago Plan permits transfers of development rights to any lot within a development district.⁷ The author realizes that these transfers must be subject to certain controls, but in determining who will exercise these controls he is caught between a distaste for the use of mechanical formulas in urban planning and the equally distasteful discretion that is endemic in zoning procedures. In response to this problem, the New York Plan required approval of rights transfers by an architectural planning commission to ensure that additions were compatible with existing structures. A similar procedure should be considered for inclusion in the Chicago Plan.

Professor Costonis wishes, however, to limit the exercise of

transfer of development rights might be limited to a particular district or might be permitted to outlying areas. Also he suggests that the transfer of development rights in some instances might proceed directly from the landmark owner to the developer, thus bypassing any development bank.

7. Professor Costonis discusses the feasibility of permitting transfer outside the district and in this regard discusses the Georgetown, District of Columbia, problems. He originally discarded the idea of transfer outside of the district, but his more recent *Yale Law Journal* article suggests that under some circumstances he would consider it feasible and advisable. Costonis, *Development Rights Transfer: An Exploratory Essay*, *supra* note 1, at 90.

municipal control over the transfer of development rights, and as one means of doing this he distinguishes between major and minor increases in density. Major increases would be subject to more stringent municipal reviews, and ultimately certain sensitive areas within a transfer district might be barred from any development transfers at all. Professor Costonis also recognizes that increasing density in an area places tremendous burdens upon utility systems, transportation systems, and similar municipal services. He would require⁸ that the planning commission consider these services and ensure that the developer purchasing the development rights is committed to providing these services and related amenities. Again one must ask whether development rights will be in such demand and so marketable as to permit these additional restrictions and additional costs to be placed upon the developers. Furthermore, only if developers are required to obtain development rights solely from the development rights bank rather than the landmark owner will such controls be realistic. Therefore, direct transfer of development rights from owners to developers should probably be barred.

Professor Costonis emphasizes that the purpose of the Chicago Plan is to tax the cost of landmark preservation to the development process itself. For this reason, the book gives detailed information on methods of appraising development rights, marketing development rights, and determining appropriate tax reductions for buildings whose development rights are either donated, purchased or condemned. Traditionally the test for the market value of an interest in land less than a fee, such as an easement, has been the difference between the market value of the land before and after the easement is imposed. Because development rights are not so easily evaluated, however, the author presents a complex formula for determining the value of development rights. He recognizes, though, that the potential value of the building, both under the Plan and under the law of condemnation, is measured by the highest and best use of the land, including the possibility of bonuses resulting from the zoning code. Therefore, one must again ask whether the adoption of the Plan must be accompanied by alterations in zoning ordinances to exclude bonuses within development districts.

Throughout the text, Professor Costonis emphasizes that the Chicago Plan is not intended as a cure-all. Rather, it is designed

8. *Id.* at 124 n.203.

as a complement to other types of preservation programs and is to be used particularly when there are financial or practical obstacles to outright governmental ownership of land.⁹ In the concluding chapter, however, the author raises the question whether the concepts of the Plan might serve as an effective tool in other areas of land use planning. For example, could the development rights that exist on residential property surrounding historical sites for national monuments be condemned? Would condemnation of development rights on land surrounding the Gettysburg National Battlefield have barred the construction of the controversial tower on the very edge of the historical preserve? Certainly in many cases more limited approaches, such as the "historical district" zoning used in New Orleans and in Springfield, Illinois, will accomplish the same goals. But when traditional zoning runs the risk of being ruled confiscatory by the courts, the condemnation of development rights may be an appropriate and relatively inexpensive alternative.

Professor Costonis' Plan has been developed for the Chicago Loop, but in reality it suggests a new tool of land use through the concept of development rights—a tool that avoids both the risk of confiscatory zoning and the cost of outright condemnation of fee estates. Provided that state enabling statutes are adopted,¹⁰ the Chicago Plan, or more appropriately the Costonis Plan, may serve a variety of municipal purposes. The unknown factors, as the author points out, are the nature and foresight of municipal leadership and the economic feasibility of the Plan. For these reasons, despite Professor Costonis' expert analysis and the almost algebraic formulas developed, only experience will show whether the concept of development rights and transfer districts will actually work.

HOWARD W. BRILL

Member, Illinois Bar
Rock Island, Illinois

9. By spotlighting such buildings as the Monadnock Building in Chicago's Loop, he makes the point that these older buildings are economically alive and can provide the amenities of urban life that the sterile facade of contemporary architecture often does not. Professor Costonis would prefer these buildings not only preserved, but used; only as a last resort from both a planning standpoint and a cost standpoint would he favor outright governmental ownership.

10. See, e.g., ILL. REV. STAT. ch. 24, § 11-48.2-1 *et seq.* (Smith-Hurd Supp. 1974) (the Illinois Historical Preservation Enabling Act with the 1971 amendments).