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## Preserving Rockefeller Center

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# Preserving Rockefeller Center

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VISITORS TO MIDTOWN MANHATTAN seem to gravitate toward Rockefeller Center's Art Deco embellished low-rise buildings along Fifth Avenue. Farther west down the promenade, past the Channel Gardens, is the famous sunken plaza with Prometheus and, during winter months, an ice skating rink. At Christmas, Prometheus shares the spotlight with an enormous Christmas tree. Radio City Music Hall lurks behind the towering skyscraper located at 30 Rockefeller Plaza.<sup>1</sup> More than just architecture and decoration give the many buildings in Rockefeller Center a unified sense of place. An era of American history binds together the limestone walls of what to the steely eye of a real estate economist might appear to be an under-built urban site.

Preserving Rockefeller Center as America's quintessential urban landmark has become a matter of world-wide interest. In 1989 a Japanese real estate conglomerate purchased control over the corporation which owns the **New York City landmark. At about the same time, plans to transfer development rights from the landmark to a new Rockefeller Center building resulted in the creation of an additional layer of protection for some of the older parts of Rockefeller Center. The Japanese investment was extensively, even sensationally, reported in the press.<sup>2</sup> Plans for the new building, Rockefeller Plaza West, have also been the subject of extensive public comment.<sup>3</sup> But**

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1. For many years this central building was known as the RCA Building. Because of yet another corporate reorganization, it has been renamed the G.E. Building.

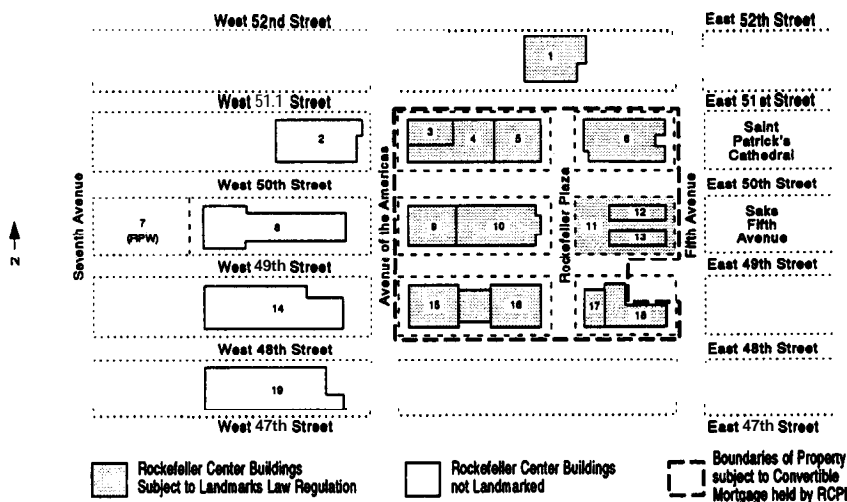
2. See discussion and sources cited, *infra* at notes 227-48.

3. See, e.g., Paul Goldberger, *A Gesture To the "Good" Rockefeller Center*, N.Y. TIMES, May 21, 1990, H:32.

### the story of the legal side of preserving Rockefeller Center has yet to be told.

This article will tell that story. Its purpose is to consider certain aspects of landmark preservation which link together the Center, the development rights transfer and the Japanese purchase. The first section will discuss the Rockefeller Center landmark and highlight certain aspects of its background. The next section will explain the complex transfer of development rights which generated additional landmark preservation measures for Rockefeller Center. The main part of the article will explore the innovative legal mechanisms employed in the new landmark preservation scheme. The following section will focus on the relationship between these new landmark preservation measures and a foreign investor's acquisition of control over the corporate owner of Rockefeller Center. The article concludes by examining the significance of the remarkable landmark preservation efforts at Rockefeller Center.

### Map 1. Rockefeller Center



#### Key to Locations

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Warner Communications Building</li> <li>2. Time &amp; Life Building</li> <li>3. 1270 Avenue of the Americas</li> <li>4. Radio City Music Hall</li> <li>5. Associated Press Building</li> <li>6. International Building</li> <li>7. Rockefeller Plaza West (RPW building site)</li> <li>8. Exxon Building</li> <li>9. 1250 Avenue of the Americas</li> </ol> | <ol style="list-style-type: none"> <li>10. G.E. Building</li> <li>11. Sunken Plaza</li> <li>12. British Empire Building</li> <li>13. La Maison Francaiso</li> <li>14. McGraw Hill Building</li> <li>15. Simon &amp; Schuster Building</li> <li>16. Ten Rockefeller Plaza</li> <li>17. One Rockefeller Plaza</li> <li>13. Manufacturers Hanover Trust</li> <li>19. Celene Building</li> </ol> |
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## I. The Rockefeller Center Landmark

Physically, Rockefeller Center is a group of nineteen buildings owned or managed by Rockefeller Group, Inc. As Map 1 indicates, Rockefeller Center extends from the east side of Fifth Avenue to the west side of the Avenue of the Americas (Sixth Avenue) between Forty-seventh and Fifty-second streets. Rockefeller Plaza West, to be built on the east side of Seventh Avenue between Forty-ninth and Fiftieth Streets, is expected to be the twentieth, and last, addition to the **Center**.<sup>4</sup> The oldest parts of Rockefeller Center are concentrated in the three blocks bounded by Fifth and Sixth Avenues and Forty-eighth and Fifty-first Streets. The parts of the Center along Fifth Avenue are smaller in scale and have more decoration than other portions of the Center. The sunken plaza offers an oasis of open space, from below ground level to the sky.

Not all of the Rockefeller Center buildings are included within the **designated Rockefeller Center Landmark**. Only the parts constructed before 1955 were eligible for landmark status at the time the Rockefeller Center landmark was designated in 1985.<sup>5</sup> References to the 'Rockefeller Center Landmark' are usually to the exterior landmark, which includes the outside of twelve of the Center's **buildings** (indicated by the shaded areas on Map 1), as well as open spaces and sculpture. As an exterior landmark, Rockefeller Center is a bit unusual because it comprises several structures and spaces designated as a single **landmark**.<sup>6</sup> In addition, the interiors of some of the buildings within Rockefeller Center, such as Radio City Music **Hall**,<sup>7</sup> the International **Building** Lobby,<sup>8</sup> and 30 Rockefeller **Plaza**<sup>9</sup> are also designated as interior **landmarks**. The older part of Rockefeller Center is at least

4. THE ROCKEFELLER GROUP ANNUAL REVIEW (1989) [hereinafter 1989 ANNUAL REVIEW].

5. Under the New York City Administrative Code § 25-302n, prospective landmarks become eligible for landmark designation after thirty years.

6. The designation includes the exteriors of the following: the Warner Communications Building (formerly the Esso Building), 1270 Avenue of the Americas, Radio City Music Hall, the Associated Press **Building**, the International **Building**, with the **statue** of Atlas in the courtyard, the RCA (now **G.E.**) Building, the RCA **Building** West (1250 Avenue of the Americas), the sunken plaza with the skating rink and the statue of Prometheus, the British Empire Building, the Promenade and Channel Gardens, La Maison Francaise, the Simon & Schuster Building with its addition at 1230 Avenue of the Americas, 10 Rockefeller Plaza (formerly the Eastern Airlines Building), and 1 Rockefeller Plaza (formerly the **first** Time & Life Building). The Landmark Site includes five lots. Landmarks Preservation Commission, Designation List No. 455, LP-1446 (Apr. 23, 1985) [hereinafter Rockefeller Center Designation Report] 7.

7. Landmarks Preservation Commission, Designation List No. 114, LP-0995 (Mar. 28, 1978).

8. Landmarks Preservation Commission, Designation List No. 455, LP-1449 (Apr. 23, 1985).

9. Landmarks Preservation Commission, Designation List No. 455, LP-1448 (Apr. 23, 1985).

doubly landmarked, since it was also designated as a National-Historic Landmark two years after its designation as a New York City Landmark. Of these landmarks, only four of the buildings (30 Rockefeller Plaza, 1250 Avenue of the Americas, the British Empire Building, and La Maison **Frank**cake), some of the open areas (the sunken plaza, the Promenade, and the Channel Gardens), and the lobby of 30 Rockefeller Plaza are protected under the newly devised landmark maintenance program discussed below.<sup>10</sup>

When the New York City Landmarks Preservation Commission<sup>11</sup> designated the exterior of Rockefeller Center as a New York City landmark in 1985, the Commission concluded that the Center "has a special **character**, special historical and aesthetic interest and value as part of the development, heritage, and cultural characteristics of New York City."<sup>12</sup> The Commission particularly found that "among its important qualities, Rockefeller Center ranks among the grandest architectural projects ever undertaken in the United States, [and] that, unprecedented in scope and inspired in its planning, it created a new symbolic and physical center for New York."<sup>13</sup> The Commission also noted "that the developers of Rockefeller Center consciously strove for high quality and achieved a harmonious integration of art and architecture, planning and plantings, that has become the model against which all subsequent efforts and city shaping have been **judged**."<sup>14</sup> The Designation Report declares

that Rockefeller Center, now 50 years old, is recognized by common consensus as the heart of New York; that as a great unifying presence in the chaotic core of midtown Manhattan, it provides dramatic views, great architecture, visionary planning, and much art, combining to form an active oasis for the metropolis; and that, **internationally** renowned and locally beloved, Rockefeller Center has become so inextricably **intertwined** with the very concept of New York that it is now impossible to imagine the city without it.<sup>15</sup>

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10. See Map 3, *infra*, for an illustration of the differing levels of landmark preservation under the new program of continuing landmark maintenance.

11. The New York City Landmarks Preservation Commission was established in 1965. The Commission's structure and powers are governed by Chapter 74 of the New York City Charter (1990). The Landmarks Law, which the Landmarks Preservation Commission administers, is Chapter 3 of Title 25 of the New York City Administrative Code, "Landmarks Preservation and Historic Districts." Certain responsibilities of the Landmarks Preservation Commission are governed by the New York City Zoning Resolution, notably the special permit procedures which affect landmarks. New York City Zoning Resolution sections 74-7.1 and 74-7.9. The Landmarks Preservation Commission has eleven Commissioners including at least three architects, one historian, one city planner or landscape architect, and one realtor. The commission is required to include at least one resident of each borough. Only the chair of the Commission, who is appointed by the mayor, is a full-time paid city employee. The Commission also has about seventy staff members, including architects, architectural historians, restoration specialists, archaeologists, city planners, lawyers, and other administrative and clerical personnel.

12. Rockefeller Center Designation Report, *supra* note 6, at 269.

13. *Id.* at 269.

14. *Id.*

15. *Id.* at 270.

It is difficult to imagine a more ringing testimonial.

Two years later, the U.S. Department of the Interior expressed similar admiration in designating Rockefeller Center as a National Historic **Landmark**.<sup>16</sup> The Department of the Interior's statement accompanying the Center's designation described Rockefeller Center as "one of the most successful urban planning projects in the history of American architecture. . . . At the height of the Great Depression, . . . it integrated the arts of architecture, city planning, landscape architecture and sculpture on a scale never achieved before."<sup>17</sup>

Rockefeller Center was not designated as a landmark until twenty years after the Center's 1930s buildings became eligible for landmark designation. There appear to be many reasons why the Commission waited so long to designate Rockefeller Center. Until the mid- **1980s**, the older parts of the Center continued to be held by entities owned by the Rockefeller Family Trusts. It seemed unlikely that the family of John D. Rockefeller, Jr., would fail to preserve what had become a monument to one of the patriarchs of their famous family. John D. Rockefeller, Jr., and his family had played a major role in preservation efforts in Colonial Williamsburg and elsewhere in the United States. Moreover, the management of Rockefeller Center widely promoted the careful maintenance of the Center's buildings, spaces, and art **works**.<sup>18</sup> For example, in 1963 the Prometheus statue was regilded for a third time in less than thirty years.<sup>19</sup> In short, during the **1960s**, private preservation efforts may have seemed sufficient to preserve Rockefeller Center's character and cachet. The Center simply may not have appeared to need landmark designation when the Landmarks Preservation Commission was created in 1965.

By the **1970s**, the Center had already received the American Institute of Architects' first Twenty-Five-Year Citation for architectural excellence.\* In 1976 the American Institute of Architects selected **Rockefel-**

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16. NATIONAL REGISTER OF HISTORIC PLACES 1966-1988, National Conference of State Historic Preservation Officers, National Park Service, American Association for State and Local History 473 (1989). The December 23, 1987, designation refers to two criteria justifying the Center's landmark status: that it is "associated with events that have made a significant contribution to the broad patterns of our history" and that it "embod[ies] the distinctive characteristics of a type, period, or method of construction, . . . ." *Id.* at xiv. The federal statute which establishes the National Register is 16 U.S.C. § 470 (1992).

17. *Four N. Y. Sites Named Landmarks*, CRAIN'S NEW YORK BUSINESS, Feb. 1, 1988, at 21.

18. DAVID LOTH, *THE CITY WITHIN A CITY: THE ROMANCE OF ROCKEFELLER CENTER* 124-41 (1966).

19. WALTER KARP, *THE CENTER: A HISTORY AND GUIDE TO ROCKEFELLER CENTER* 121 (1982).

20. CAROL H. KRINSKY, *ROCKEFELLER CENTER 198-99* (1978). The citation concludes with a salute "[T]o a project so vital to the City and alive with is people that it remains as viable today as when it was built." *Id.* at 199.

ler Center as the second most significant architectural achievement in the nation's first two hundred years.<sup>21</sup> That same year, the Center's management began an extensive program to clean the facades of the original buildings in the **complex**.<sup>22</sup> From a regulatory standpoint, through most of the 1970s the Landmarks Preservation Commission was reluctant to designate additional commercial structures until application of the New York City Landmarks Law to the outcome of the litigation with Penn Central over Grand Central Station was **resolved**.<sup>23</sup>

Public concern about the preservation of Rockefeller Center came to the forefront in 1978 when Rockefeller Center Inc. announced plans to demolish Radio City Music Hall.<sup>24</sup> The New York City Landmarks Preservation Commission responded by designating the interior of Radio City Music Hall as an interior **landmark**.<sup>25</sup> By 1983 the Commission began to hold hearings on landmark designation of the exterior of the Center. Final approval of landmark designation for the exteriors of all the buildings in the Center then eligible for designation came in April 1985, shortly before a convertible mortgage was placed on most of the Center.<sup>26</sup>

## II. Rockefeller Center's History

The story of how Rockefeller Center was built is celebrated in **print**,<sup>27</sup> in video,<sup>28</sup> and even in **song**.<sup>29</sup> This is not the place for an extensive recounting of that interesting history. However, there are three **intri-**

21. First place went to Thomas Jefferson's design for the University of Virginia. **KARP**, *supra* note 19, at 121.

22. *Id.* at 121.

23. Carter B. Horsley, *City's Landmark Policies in Crossfire of Criticism*, **N.Y. TIMES**, July 27, 1980, § 8, at 1.

24. Menachem Z. Rosensaft, Note, *The New York City Landmarks Preservation Law as Applied to Radio City Music Hall*, 5 **COLUM. J. ENVTL. L.** 316, 326 (1979).

25. Landmarks Preservation Commission, Designation List No. 114, **LP-0995** (Mar. 28, 1978).

26. Landmarks Preservation Commission, Designation List No. 455, LP-1446 (Apr. 23, 1985). See *infra* at notes 96-110 for a discussion of the convertible mortgage held by a real estate investment trust (**REIT**), Rockefeller Center Properties, Inc.

27. See, e.g., **WILLIAM H. JORDY**, 4 **AMERICAN BUILDINGS AND THEIR ARCHITECTS** (1976); **LOTH**, *supra* note 18; **KARP**, *supra* note 19; **SAMUEL E. BLEEKER**, **THE POLITICS OF ARCHITECTURE** (1981); and **New York: Rockefeller Center**, **ART DIGEST**, May 1982. There are several useful bibliographies. See Rockefeller Center Designation Report, *supra* note 6, at 273, for a bibliography. An even more extensive bibliography appears in **KRINSKY**, *supra* note 20, at 214-17. See also **ALAN BALFOUR**, **ROCKEFELLER CENTER: ARCHITECTURE AS THEATER** 243 (1978) for additional bibliography.

28. "One Man's Recollections" (1982), an interview with Walter Kilham, Jr., regarding the construction of the center.

29. George and Ira Gershwin, "They all laughed," from *Shall We Dance* (1937). The song begins, "They all laughed at Christopher Columbus." The reference to Rockefeller Center is: "They all laughed at Rockefeller Center/ Now they're fighting to get in. . . ."

guing aspects of Rockefeller Center's history which are worthy of mention here, because they foreshadowed certain attributes of Rockefeller Center's new preservation system. These historical aspects concern the land, the **finance**, and the design of Rockefeller Center. None is quite what a casual observer might expect.

#### A. Rockefeller Center's *Land*

**The** land on which Rockefeller Center was built was not raw, vacant land. It was the site of an old and interesting, if a bit run-down, neighborhood dating back to the middle of the nineteenth century.<sup>30</sup> Before Rockefeller Center rose on the site, over 200 four-story mid-nineteenth century brownstone homes and shops existed on the three original blocks bounded by Fifth and Sixth Avenues and Forty-eighth and **Fifty-first Streets.**" Photographs taken before site preparation for Rockefeller Center began show a low-rise, mostly residential district nestled among taller buildings. The nineteenth century brownstones were fairly uniform in height, setback, and use, because Columbia University, which owned the acreage at the time it was developed, had placed restrictive covenants regarding such matters in the leases of the lots before they were **developed.**<sup>32</sup> By today's standards, these somewhat **down-at-the-heels** brownstones might well have merited preservation as an historic **district**<sup>33</sup> or landmark." Ironically, creation of the Rockefeller Center landmark required the sacrifice of this older historic neighborhood with its own remarkable history and architectural **integrity.**<sup>35</sup>

Most of the land in the three blocks was leased from Columbia

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30. Early in the nineteenth century, the land had been the site of a famous botanical garden. After the Civil War, the area became the home of prominent New Yorkers, including the journalist, E.L. **Godkin**, and even the notorious abortionist, Madame Restell. During Prohibition, the neighborhood became the heart of New York's infamous "Speakeasy Belt."

31. Rockefeller Center Designation Report, *supra* note 6, at 120.

32. **LOTH**, *supra* note 18, at 22.

33. See, e.g., Upper East Side Historic District, Landmarks Preservation Commission, Designation List No. LP-1051 (May 26, 1981) and the Upper West Side Central Park West Historic District, Landmarks Preservation Commission, Designation List No. LP-1647 (Apr. 24, 1990).

34. See, e.g., City & Suburban Homes, Landmarks Preservation Commission, Designation List Nos. LP-1692 and LP-1694 (Apr. 24, 1990).

35. See, **LOTH**, *supra* note 18, at 7-28. Some residents resisted having their homes destroyed in the site clearance for Rockefeller Center. Among the resisters was a lawyer, William Nelson Cromwell, one of the founding partners of the firm of **Sullivan & Cromwell**. Cromwell tenaciously refused to leave his home at No. 12 West **Forty-ninth Street**. He lived there until he died in July of 1948 at the age of ninety-four. **KARP**, *supra* note 17, at 62-65. The lot where the Cromwell home once stood is still in separate title owned by Rockefeller Group, Inc. Leased to RCP Associates it now underlies part of the Manufacturer's Hanover Trust Building. **ROCKEFELLER CENTER PROPERTIES, INC.**, **PROSPECTUS** 28 (Sept. 12, 1985) [hereinafter 1985 **PROSPECTUS**].



University at the time Rockefeller Center was **built**.<sup>36</sup> Site preparation for Rockefeller Center meant removing some 4,000 tenants and 228 **structures**.<sup>37</sup> This is the very type of land redevelopment which Rockefeller Center's landmark preservation system is, in part, designed to prevent. But the landmark maintenance program goes beyond preventing bulldozers from razing the Center's landmark structures in the way the earlier brownstones had been obliterated. Rockefeller Center's new landmark preservation system also establishes elaborate mechanisms to prevent the sort of deterioration which had doomed the old brownstone neighborhood even before it was demolished so that Rockefeller Center could be built.

### B. Rockefeller Center's Financing

More than just an interesting prototype for urban redevelopment, Rockefeller Center is a symbol of the civic-minded side of American private enterprise. Rockefeller Center was built despite, or perhaps because of, the economic hardships of the Great Depression. The scale of private investment required to build the Center was unprecedented. Rockefeller Center's estimated construction cost of \$125 million was more than the construction cost of Boulder Dam, which was built in the West at about the same **time**.<sup>38</sup> Unlike the federally financed dam project in the West, Rockefeller Center was entirely privately **financed**.<sup>39</sup> Even more than Boulder Dam, it put people to work. An estimated 75,000 people worked directly on the construction of Rockefeller Center, with at least twice that number working off site with supplies and support

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36. In 1985, **the** Center's owners bought out Columbia University's reversion for \$400 million. The former Columbia University land is currently owned by RCP Associates, a limited partnership of which Rockefeller Group, Inc. (**RGI**) owns half and Radio City Music Hall Productions (**RCMP**) owns half. RCMP is a wholly owned subsidiary of RGI. A small portion of the land under the Manufacturers Hanover Trust Building is owned by RGI. This is the lot where the home of W.N. Cromwell once stood. See *supra* note 35. Another part of the land under the Manufacturers Hanover Trust Building is owned by a church. 1985 PROSPECTUS, *supra* note 35, at 27-28. See *infra* note 112, for an explanation of the leases of these **parcels** to Rockefeller Center Properties.

37. For the most part, Rockefeller's real estate agents acquired the building site for Rockefeller Center as lessees of Columbia University. They waited for **existing** leases to expire or bought up unexpired leases, and then demolished the existing **brownstone** structures.

38. See JOSEPH E. STEVENS, **HOOVER DAM** (1988). PAUL L. KLEINSORGE, **THE BOULDER CANYON PROJECT: HISTORICAL AND ECONOMIC ASPECTS** (1940).

39. KRINSKY, *supra* note 20, at 11-12. In 1931, to secure \$65 million in construction financing (at 5 % interest) Rockefeller mortgaged the Columbia University lease to the Metropolitan Life Insurance Company. *Id.* at 56-57. **KARP**, *supra* note 19, at 27.

services. 40 Countless others worked for suppliers and manufacturers of the materials which went into the construction project.<sup>41</sup> At the ceremony celebrating the completion of the last of the Center's original buildings in 1939, the head of the Building and Construction Trades Council, Thomas A. Murray, thanked John D. Rockefeller, Jr., for providing jobs to union members "at a time when, frankly, our members very badly needed work."<sup>42</sup> Mayor Fiorello La Guardia praised both the buildings and their public-spirited, taxpaying sponsor.

Ironically, John D. Rockefeller, Jr., created Rockefeller Center almost by chance. The construction project was, in many ways, an exercise in serendipity. Rockefeller did not begin the project intending to build Rockefeller Center.<sup>43</sup> And he certainly did not intend to finance the entire construction project himself.<sup>44</sup> Rockefeller had agreed to assemble land for a new home for the Metropolitan Opera—a development intended to be called Metropolitan Square.<sup>45</sup> Rockefeller was not an opera aficionado. But he did know Manhattan real estate.<sup>46</sup> So, as of October 1, 1928, he agreed to lease most of the three blocks needed for Metropolitan Square from Columbia University for a minimum term of twenty-four years, with options for three twenty-one year renewals, at an initial annual rent of \$3.6 million per year.<sup>47</sup> The company he organized to accomplish the project, Metropolitan Square Corporation, was to be responsible for land assembly: removing the existing tenants and structures and purchasing lots along Sixth Avenue which had been sold by the University.<sup>48</sup> Metropolitan Square Corporation would then sublease the land to other developers, who would build their own buildings.<sup>49</sup> But Rockefeller agreed to be personally and individually liable to Columbia for the ground rent.<sup>50</sup> After the stock market crash of

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40. **LOTH**, *supra* note 18, at 71.

41. *Id.* at 76.

42. *Id.* at 174.

43. **RAYMOND B. FOSDICK**, **JOHN D. ROCKEFELLER, JR.: A PORTRAIT** 262-65 (1956).

44. *Id.* at 263-64.

45. **BALFOUR**, *supra* note 27, at 15-19.

46. **KRINSKY**, *supra* note 20, at 24-25.

47. *Id.* at 35.

48. To acquire the lots along Sixth Avenue, Rockefeller created an anonymous affiliate, humorously named the Underel Holding Corporation, because the lots to be acquired were under the shadow of the elevated railway which then ran along Sixth Avenue. **KRINSKY**, *supra* note 20, at 42-43.

49. **LOTH**, *supra* note 18, at 36; **FOSDICK**, *supra* note 43, at 263-64, quoting from the address by John D. Rockefeller, Jr., at the opening of the gymnasium at Rockefeller Center, September 30, 1939.

50. **KRINSKY**, *supra* note 20, at 36; **FOSDICK**, *supra* note 43, at 265.

October 29, 1929, the Metropolitan Opera pulled out of the project on December 4, 1929.<sup>51</sup>

John D. Rockefeller, Jr., was left with a long-term lease the reason for which had evaporated. Existing uses were bringing in no more than \$300,000 in annual rental income against his commitment to pay Columbia \$3.6 million a year for at least the next two **decades**.<sup>52</sup> Financial advisers told Rockefeller that it could *cost* as much as an additional \$200 million to finance development of the **land**.<sup>53</sup> Nevertheless, as he explained later, Rockefeller chose "to go forward with it in the definite knowledge that **I** myself would have to build and finance it alone without the immense impetus that the new opera house would have given and with no escape from the fact that under the changed conditions it would be necessary to improve all the land in order to lease it, thus involving immense capital outlays never contemplated."<sup>54</sup> The development of Rockefeller Center is an example of how land carrying costs can force development. Rockefeller chose to sink even more capital into the project, rather than default on his agreement regarding the lease. **He** had no alternative but to draw on his own private wealth for that **capital**.<sup>55</sup>

Continuation of such public-spirited private investment in the maintenance of Rockefeller Center is the central purpose of Rockefeller Center's new landmark preservation measures. Worry that new investors might neglect, radically change, or limit public access to Rockefeller Center as a cultural resource was a major cause of concern when a Japanese real estate conglomerate acquired a controlling interest in the company which owns Rockefeller Center in 1989." The Center's new preservation system is designed to assure that private investment in the maintenance of Rockefeller Center's cultural values will continue, whoever owns or controls the property.

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51. The Opera cited difficulties and delays in getting the site cleared of recalcitrant tenants as a major reason. **LOTH**, *supra* note 18, at 41.

52. According to one of the architects, Raymond Hood, there was a twenty-year cancellation and reappraisal clause. Raymond M. Hood, *The Design of Rockefeller Center*, 56 **ARCHITECTURAL FORUM** 1 (Jan. 1932).

53. **LOTH**, *supra* note 18, at 42.

54. **FOSDICK**, *supra* note 43, at 264. The contract for the lease was actually signed December 31, 1928. Rockefeller Center Designation Report, *supra* note 6, at 14.

55. David **Loth** recounts the poignant story of a shaken and obviously tired Rockefeller explaining to his architects that he had not been able to sleep the night before because of worries about financing the project. He added with what must have been real sadness, "I just sold Standard Oil of New York [stock] at \$2." **LOTH**, *supra* note 18, at 73. **As** noted, *supra* note 39, **Rockefeller** also secured construction financing from the Metropolitan Life Insurance Company.

56. See discussion in text *infra* notes 227-48.

### *C . Rockefeller Center 's Design*

The celebrated design of Rockefeller Center was also an exercise in pragmatism. Created through a practical collaborative process, the Center's architectural design was not conceived by any one person as a single aesthetic concept. No one architect or firm created the architecture of Rockefeller **Center**.<sup>57</sup> Rather, a group of firms called the Associated Architects worked together to draw up designs and plans for buildings which would attract tenants who would provide rental **income**.<sup>58</sup> So that rental income would begin as soon as possible, buildings were designed and constructed as rapidly as **possible**.<sup>59</sup> That took a coordinated group effort. Even the art and decoration which adorns the Center's buildings was chosen by a **committee**.<sup>60</sup>

It was the leasing and real estate side of the project which determined what types and sizes of buildings and spaces the architects would design. Overall project management was in the hands, not of an architect, but of a lawyer who had gone into the construction business, John R. **Todd**.<sup>61</sup> Although the primary objective of the evolving project was to maximize the financial return, there were also concerns about the beauty of the buildings and spaces. <sup>62</sup> Before the stock market crash in October of 1929, John D. Rockefeller, Jr., noted in a memorandum found in the family archives, "While the prime consideration in this enterprise must be its **financial** success, the importance of a unified and beautiful architectural whole must be constantly kept in mind, and attained, to the

57. Hood, *supru* note 52, at 1-12.

58. For example, a large oval building, ridiculed as Rockefeller's "oilcan," was not built after the Chase National Bank pulled out as a prospective tenant. It was replaced by the two low buildings, the British Empire Building and La Maison **Francaise**, which face each other across the Channel Gardens. It appeared that shop frontage around the two smaller buildings would provide better rental opportunities. **KRINSKY**, *supra* note 20, at 57-59.

59. **KARP**, *supra* note 19, at 17-24.

60. **BALFOUR**, *supru* note 27, at 148-52. **LOTH**, *supra* note 18, at 106-07. The most famous of the art works commissioned, was a controversial mural by Diego **Rivera**, which no longer exists. The mural, "Man at the Crossroads Looking with Uncertainty but with Hope and High **Vision** to the Choosing of a Course Leading to a New and Better Future," was painted as a fresco in the lobby of 30 Rockefeller Plaza. As **Rivera** completed the **fresco**, the central figure emerged as a portrait of Lenin. When the Rockefeller Center Corporation could not secure **Rivera's** agreement either to change the central figure to a less controversial representation or to remove the mural to a different location, the mural was destroyed. The story of the struggle between the artist and Rockefeller Center's management is detailed in **KRINSKY**, *supra*, note 20, at 181-91.

61. John R. Todd was a successful developer of commercial real estate in Manhattan. Before his work on Rockefeller Center, he had been responsible for such famous buildings as the Cunard and **Graybar** Buildings. Rockefeller Center Designation Report, *supru* note 6, at 13-16. **KARP**, *supra* note 19, at 19.

62. Hood, *supru* note 52, at 1-3.

fullest extent possible compatible with an adequate return on the investment.'<sup>63</sup> Rockefeller felt that good design would attract good tenants, and they, in turn, would result in good rental **income**.<sup>64</sup> The original brochure for Rockefeller Center celebrated the Center as "bringing beauty and business into closer companionship. . . ."<sup>65</sup>

The search for tenants came first. Architecture and design came **second**.<sup>66</sup> Communications and international trade themes were ingenious means to induce groups of businesses to lease space at what eventually came to be known as Rockefeller **Center**.<sup>67</sup> The complex was at first called Radio **City**.<sup>68</sup> The lucky break of signing the RCA company, which had been split off from General Electric after **an anti-trust** settlement, established a communications theme for the Radio City group on western portions of the **site**.<sup>69</sup> Later, an international theme was added for the buildings along Fifth Avenue in an effort to attract to the Center another large group of prospective tenants, those in the import trade.<sup>70</sup> John D. Rockefeller, Jr.'s long-standing interest in international trade paid off as he worked through his Washington, D.C., connections to secure special import privileges for tenants at Rockefeller Center. He arranged for samples of imported goods displayed at Rockefeller Center to avoid pre-paid duty. Import tariffs were imposed only when and if the imported goods were **sold**.<sup>71</sup> This special import treatment was an added inducement for international trading companies to rent space at Rockefeller Center.

Rockefeller Center was not exactly designed as a "theme park." But its developers skillfully attracted tenants through the use of elements of design and decoration organized around commercial motifs. In September 1939 at the opening of the gymnasium at the Center, John D. Rockefeller, Jr., explained, "We sought to develop new tenants by creating British, French, Italian, International and other special **build-**

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63. Memorandum dated August 28, 1929, *quoted in* KRINSKY, *supra* note 20, at 30.

64. *Id.* at 70-71, 77-78.

65. M. R. Werner, *Radio City: From Real Estate to Art*, THE ATLANTIC MONTHLY 468 (Apr. 1933). The brochure from which the quotation is taken somewhat quaintly described Rockefeller Center as kindred in spirit to the Taj Mahal.

66. BALFOUR, *supra* note 27, at 13-14.

67. LOTH, *supra* note 18, at 70.

68. Werner, *supra* note 65, at 468-76.

69. LOTH, *supra* note 27, at 47-57.

70. BALFOUR, *supra* note 18, at 42-49.

71. KRINSKY, *supra* note 20, at 67.

ings. We brought together as tenants various business groups such as radio, banking, oil, publications, etc., and their allied interests.”“\*

Because the economics of the project drove the design aspects, the architectural result embodies considerable variety, as well as an organic interrelationship among the elements. The Center reflects cooperation and compromise among architects, construction managers, leasing agents, tenants, and lawyers. It is precisely this same type of cooperative process which is essential to make Rockefeller Center’s new landmark preservation system work.

### III. Transferring Development Rights at Rockefeller Center

Creation of Rockefeller Center’s new landmark preservation program accompanied New York City’s approval of a transfer of development rights from a portion of the **landmark**.<sup>73</sup> Nothing quite like the lifting of over a half-million square feet of potential development from a landmark and shifting that potential development a couple of blocks away has ever before been approved.<sup>74</sup> As Map 2 illustrates, the distance between the Fifth Avenue landmark transferor lot and the Seventh Avenue transferee site, **where** Rockefeller Plaza West will be built, is striking. Moreover, because the Exxon Building was sold to Mitsui Fudosan, Inc., in 1986, a straight-line transfer is not possible. The development rights will have to take a more circuitous route. The half million square feet of potential development will move from a portion of the landmark adjacent to Fifth Avenue, diagonally across the intersection of Rockefeller Plaza and Forty-ninth Street to 10 Rockefeller Plaza. The development rights will then move west along Forty-ninth Street through the Simon & Schuster Building to the Avenue of the Americas. The landmark’s development rights next will move farther west, across the Avenue of the Americas, to the McGraw-Hill Building. From the back of the McGraw-Hill Building the development rights will recross Forty-ninth Street to the southeast corner of the Rockefeller Plaza West site. This indirect route is available because section 74-79 of the Zoning Resolution defines lots as “**adja-**

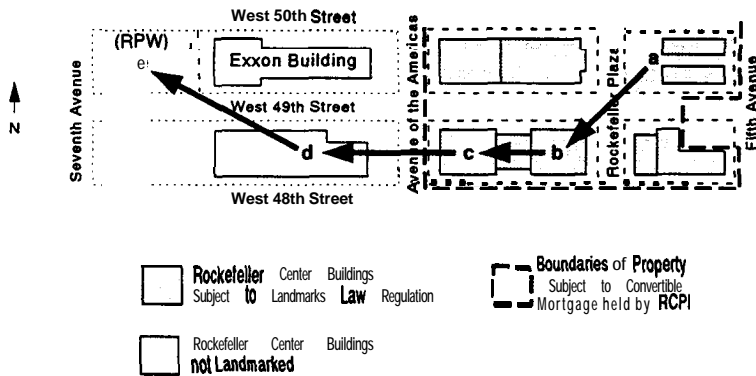
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72. FOSDICK, *supra* note 43, at 266.

73. The portion of the landmark from which the development rights will transfer is block 50 of Lot 1265, hereinafter referred to as the “transferor lot.” It is the location of the British Empire Building, La Maison Francaise, the Promenade, the Channel Gardens, and the Sunken Plaza.

74. David W. Dunlap, *Commercial Property: Rockefeller Center; the Labyrinthian Path to Building a 55-Story Tower*, N.Y. TIMES, Sept. 9, 1990, § 10, at 21.

## Map 2. Transfer of Development Rights at Rockefeller Center



### Steps in Approved Transfer of 506,360 Square Feet of Development Rights

- a: Landmark Transferor Lot  
Sunken Plaza (left side)  
British Empire Building (top right)  
La Maison Francaise (bottom right)
- b: Ten Rockefeller Plaza
- c: Simon & Schuster Building
- d: McGraw Hill Building
- e: Receiving Lot: Rockefeller Plaza West (Building Bite)

cent” if they are in the same fee ownership and connected geographically through a chain of similarly owned lots.<sup>75</sup> Similar ownership, was necessarily broadly construed to make this transfer possible.

Another unusual aspect of the Rockefeller Center transfer of development rights is the fact that permission was granted to transfer develop-

75. Section 74-79 provides:

For the purposes of this Section, the term “adjacent lot” shall mean a lot which is contiguous to the lot occupied by the landmark building or one which is across a street and opposite to the lot occupied by the landmark building, or, in the case of a corner lot, one which fronts on the same street intersection as the lot occupied by the landmark building or other structure. It shall also mean in the case of lots located in C5-3, C5-5, C6-6, C6-7 or C6-9 Districts a lot contiguous or one which is across a street and opposite to another lot or lots which except for the intervention of streets or street intersections form a series extending to the lot occupied by the landmark building or other structure. All such lots shall be in the same ownership. . . .

New York, N.Y., Zoning Resolution, § 74-79. Ownership for these purposes is defined in the section 12-10 definition of “zoning lot.”

ment rights from only a portion of the **landmark**.<sup>76</sup> The transfer will take development rights only from the transferor lot, rather than from the landmark as a whole. Because the landmark's development rights are not aggregated, the development rights of the rest of the Center will remain unaffected by the transfer to Rockefeller Plaza West. Only the transferor lot and, more indirectly, two adjacent buildings (30 Rockefeller Plaza and 1250 Avenue of the Americas) will feel the effects of this transfer of development rights from the Rockefeller Center landmark.

*A. Transfers of Development Rights  
from New York City Landmarks*

Permission to transfer development rights from the Rockefeller Center landmark was granted through approval of a special permit under section 74-79 of the New York City Zoning Resolution. Among the requirements for a section 74-79 special permit is the landmark owner's formal, binding commitment both to permanent restrictions on future development of the landmark site, and to a program of continuing maintenance of the landmark." This special permit mechanism for transferring development rights from landmarks played a role in decisions, both by the New York Court of Appeals\* and the U.S. Supreme Court,<sup>79</sup> upholding New York City's landmark regulation of Grand Central Station. The Rockefeller Center transfer of development rights is a particularly interesting example of how such transfers can work.

In spirit, at least, transferring development rights has been a part of New York City zoning for much of this century. For example, during the 1930s when Rockefeller Center was built, the applicable zoning requirements provided variable building size and height limitations depending on a structure's setbacks and whether it abutted a wide or narrow street. But if a tower covered only 25% of the lot area, it could

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76. The lot bounded by Fifth Avenue, Rockefeller Plaza and 49th and 50th Streets, instead of the entire Rockefeller Center landmark, which covers four additional zoning lots. See Map 1.

77. New York, N.Y., Zoning Resolution § 74-79. Section 74-792 contains a number of additional conditions and limitations. Two other sections of the New York City Zoning Resolution require similar formal commitments to continuing landmark maintenance. Section 74-711 authorizes permits for modifications of use and bulk regulations for designated landmarks and properties within historic districts. Section 74-7 12 regulates development and enlargement of buildings on landmark sites within certain midtown districts. Slightly different procedures apply, but the requirement of a program of continuing landmark maintenance is similar. This program is commonly referred to as a "PCLM."

78. *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977).

79. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).



be built to any height.<sup>80</sup> Under this 25 % tower rule for skyscrapers, 30 Rockefeller Plaza (now the G.E. Building) rose to seventy stories and a height of 850 feet.<sup>81</sup> In a general sense, unrealized potential development above the other 75 % of the lot justified approval of the skyscraper's tower on a quarter of that lot.

After New York City adopted the floor area ratio<sup>82</sup> approach to regulating the physical volume of buildings in 1961, building size was measured in terms of square feet of floor area.<sup>83</sup> Moreover, New York City's 1961 Zoning Resolution also allowed enhanced building size ("bonuses") in exchange for public amenities, such as open space.<sup>84</sup> For example, on the west side of the Avenue of the Americas the three nonlandmark buildings added to Rockefeller Center during the 1970s (the Exxon, McGraw-Hill and Celanese Buildings) increased their otherwise allowable height because they provided open plazas. Unused development potential above the plazas justified allowing taller buildings.

Gradually, New York City evolved a zoning system which allowed development rights measured in floor area to be transferred from one building to another within a single zoning lot, and later from one zoning lot to another. Transfers of development rights from landmarks under section 74-79 of the Zoning Resolution, are among the most far-ranging

80. New York, N.Y., Zoning Resolution (1916). See KRINSKY, *supra* note 20, at 16-21, for a discussion of zoning regulation affecting construction of Rockefeller Center. For a discussion of the evolution of New York City zoning from the point of view of transferring development rights, see Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOKLYN L. REV. 867 (1984).

81. THE STORY OF ROCKEFELLER CENTER 19 (1987).

82. Section 12-10 of the New York City Zoning Resolution defines "floor area ratio" as "the total floor area on a zoning lot, divided by the lot area of that zoning lot. (For Example, a building containing 20,000 square feet of floor area on a zoning lot of 10,000 square feet has a floor area ratio of 2.0.)" New York, N.Y., Zoning Resolution § 12-10.

83. In New York City's Zoning Resolution, "Floor area" refers to "the sum of the gross areas of the several floors of a building or buildings, measured from the exterior faces or exterior walls or from the center lines of walls separating two buildings." It specifically includes basements, attics, elevator shafts, and the like. New York, N.Y., Zoning Resolution § 12-10. Floor area is also the usual basis for charging rent for commercial space in New York City.

84. For a discussion of this bonusing technique, see Norman Marcus, *Air Rights Transfer in New York City*, 36 LAW & CONTEMP. PROBS. 372 (1971). Ada Louise Huxtable was a relentless critic of such zoning bonuses. Ada L. Huxtable, *The Problems of Zoning*, N.Y. TIMES, Dec. 13, 1980, §2, at 25; Ada L. Huxtable, *New York's Zoning Law is Out of Bounds*, N.Y. TIMES, Dec. 14, 1980, § 2, at 41. See also Thomas J. Lueck, *The Bulk-for-Benefits Deal in Zoning*, N.Y. TIMES, July 23, 1989, § 10, at 1.

85. See JAMES M. PEDOWITZ, *AIR RIGHTS, AIR SPACE, AND TRANSFERABLE DEVELOPMENT RIGHTS*, PLI No. 269 (1985) and Marcus, *supra* note 84 (regarding the history of how this trans-lot transfer process evolved).

applications of this technique. The transfer of development rights approved for Rockefeller Center is a noteworthy example of such transfers .

### B . *Rockefeller Center's Transfer of Development Rights*

The Rockefeller Center transfer of development rights was approved by the City Planning Commission on May 2, 1990,<sup>86</sup> and by the Board of Estimate on May 24, 1990.<sup>87</sup> Earlier, as required under section 74-79 1 of the Zoning Resolution, the Landmarks Preservation Commission considered two aspects of the proposal to transfer development rights: (1) whether there would be a harmonious architectural relationship between the proposed building and the landmark and (2) whether the program of continuing landmark maintenance was adequate.” The Landmarks Preservation Commission held hearings on these issues on April 25, 1989, and October 3 1, 1989, and favorably reported on both aspects of the proposal at the time the draft Environmental Impact Statement was approved on December 19, 1989.<sup>89</sup> The Landmarks Preservation Commission concluded in its report to the City Planning Commission that the program of continuing landmark maintenance “was satisfactory . . . and that it would contribute to assuring the preservation of those buildings and improvements of the Rockefeller Center Landmark comprising the Sending Site Landmarks and 30 Rockefeller Plaza. ”<sup>90</sup> Copies of the legal documents drafted to embody the program were attached to the resolutions of the City Planning Commission and the Board of Estimate approving the special permit.

There are a number of conditions on the special permit authorizing the transfer of development rights from the Rockefeller Center landmark.”

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86. Calendar No. 57, File No. C 890639 ZSM (May 2, 1990).

87. Resolution of the Board of Estimate, May 24, 1990, Calendar No. 12, File No. **C890639** ZSM, 28-40 [hereinafter Board of Estimate Resolution]. Since New York City's new Charter became effective, September 1, 1990, the City Council grants final approval, rather than the Board of Estimate.

88. New York, N.Y., Zoning Resolution § 74-792.5.

89. Letter from David F. M. Todd, Chair, Landmarks Preservation Commission, to Hon. Sylvia Deutsch, Chair, City Planning Commission (Dec. 19, 1989) (LPC #89-2083, CR #90-0014, contained in the files of the Landmarks Preservation Commission and the City Planning Commission).

90. *Id.* at 2.

91. In addition to the program of continuing landmark maintenance, other conditions on the special permit include specifications regarding the architectural design of the new building to reflect and complement the existing landmark, provision of public open space, construction of a new subway entrance, and development of a 43,500-square-foot rehearsal studio complex to serve the needs of the nearby theater district. Board of Estimate Resolution, *supra* note 87, at 32-39.

After the landmark's development rights transfer to Rockefeller Plaza West, they will remain contingent on continuing performance of these obligations, among which is the program of continuing landmark **maintenance**.<sup>92</sup> Use of the roughly 506,380 square feet of development rights transferred to Rockefeller Plaza West (more than a third of the new building's 1.3 million square feet of total floor area) will in future depend upon compliance with the program of continuing landmark maintenance.<sup>93</sup> The Board of Estimate's Resolution approving the special permit specifically provides that, if the conditions are not met, the permit and the transfer which it authorizes are revocable by the City Planning Commission, after notice to the owner of the new **building**.<sup>94</sup> Even after Rockefeller Plaza West is occupied, the City Planning Commission is authorized to seek revocation of the new building's certificate of occupancy if the Rockefeller Center landmark is not maintained as promised in the program of continuing landmark **maintenance**.<sup>95</sup> However, the purpose of the program of continuing landmark maintenance is not to threaten Rockefeller Plaza West with permit revocation, or re-transfer of the development rights, but rather to motivate performance of practical measures necessary to preserve the Rockefeller Center landmark.

### *C . Rockefeller Center's Convertible Mortgage*

The Rockefeller Center transfer of development rights will transfer development rights from a portion of the Rockefeller Center landmark on which there is a \$1.32 billion convertible mortgage to a site and new building which will not be subject to the mortgage.<sup>96</sup> The mortgage is convertible in the sense that it is accompanied by an option to convert the loan to equity ownership in a future general partnership created to own the now-mortgaged portion of Rockefeller Center.<sup>97</sup> This **convert-**

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<sup>92.</sup> *Id.* at 40.

<sup>93.</sup> *Id.*

<sup>94.</sup> *Id.* This resolution and the precise terms of the program of continuing landmark maintenance are referred to in the Transfer Instrument, which will be recorded on the title to the transferor property and the title to Rockefeller Plaza West. See discussion in text, *infra* at notes 221-26.

<sup>95.</sup> *Id.* at 40.

<sup>96.</sup> See Maps 1 and 2, on which the Rockefeller Plaza West site is outside the boundaries of the property subject to the mortgage.

<sup>97.</sup> According to the zoning lot certification dated April 9, 1990, attached to the program of continuing landmark maintenance, **RCPI's** interests are an "option to purchase premises as in Reel 1510, page 102 and . . . mortgages in Reel 352 page 231 and Reel 615 page 6 as consolidated." Exhibit B to the Declaration and Easement attached to the May 24, 1990, Resolution. The conversion option is exercisable on

ible mortgage is the principal asset of a publicly held company, Rockefeller Center Properties, Inc. (**RCPI**), which was formed in 1985 to function as a real estate investment **trust**.<sup>98</sup>

Development rights, such as those transferred from the Rockefeller Center landmark under the special permit, were expressly excluded from the property encumbered by the mortgage.<sup>99</sup> Since the half-million square feet of development rights to be transferred from the transferor lot within the landmark to Rockefeller Plaza West were not part of the security for the loan from RCPI, removal of these unencumbered development rights would not affect the security interest held by RCPI. However, the transfer of development rights will also result in imposition of the program of continuing landmark maintenance, discussed below, which will affect mortgaged parts of the landmark.<sup>100</sup> As a result, under New York City's Zoning Resolution, RCPI is a party in interest with regard to the transferor lot and is required to subordinate its mortgage to the program of continuing landmark **maintenance**.<sup>101</sup> To meet this requirement, RCPI executed a Waiver and Subordination dated May 1, 1990, which will be recorded on the title to the transferor lot

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December 31, 2000, or in the event of a default on the mortgage. The new partnership which would then **own the** now-mortgaged portions of Rockefeller Center is to terminate on September 30, 2169, unless dissolved earlier.

98. 1985 PROSPECTUS, *supra* note 35, at 33.

99. **RCPI's** 1985 *Prospectus* repeatedly refers to the landmark status of the property securing the mortgage and option and carefully states with regard to the development rights:

Under existing zoning regulations, there is allocable to the zoning lots comprising the Property the right to develop up to approximately 1.4 million square feet of floor area in excess of the floor area presently constructed thereon. These excess development rights may be transferred under certain circumstances to properties in adjacent blocks or, with the approval of the New York City Landmarks Preservation Commission . . . , used to construct additional floor area within the Property. The Borrower has reserved the right to transfer these rights. . . . These development rights. . . are excluded from the Property, and the Company will not obtain any economic benefit from them.

1985 PROSPECTUS, *supra* note 35, at 28.

100. British Empire Building, La Maison **Francaise**, the Promenade, Channel Gardens, Sunken Plaza, and the G.E. Building and 1250 Avenue of the Americas. Lots 50 and 1001-1 109 of Block 1265. Only the title to lot 50 is burdened by the landmark maintenance program. Lots 1001-1 109 which comprise 1250 Avenue of the Americas and the G.E. Building (an office condominium) are the subject of a separate Agreement which does not run with the land. See Map 3, *infra*, and discussion of the program of continuing landmark maintenance, below.

101. The New York City Zoning Resolution requires each party in interest in the title to a lot from which development rights will transfer either to execute or to waive its right to execute the documents creating the program of continuing landmark maintenance and to subordinate its interests to the servitudes which constitute that program. New York, N.Y., **Zoning** Resolution, §§ 74-79 and 12-10.

at the time the development rights **transfer**.<sup>102</sup> The purpose of this Waiver and Subordination is the survival of the obligations of the program of continuing landmark maintenance in the event of mortgage foreclosure.

Aside from providing for continuation of the landmark maintenance program if the RCPI mortgage is foreclosed, the Subordination Agreement by its terms does "not in any manner otherwise subordinate, limit or affect any of the rights or privileges of the Mortgagee [RCPI] under the mortgage or at law. . . ."<sup>103</sup> In particular, liens or security interests of the city or of the Landmarks Conservancy (holder of private servitude interests under the program of continuing landmark maintenance) are subordinated to RCPI's "mortgage lien and all amendments, modifications, supplements, extensions, restatements, and renewals thereof and all advances **thereunder**."<sup>104</sup> Potential claims of third-party creditors of the city or of the Conservancy are similarly subordinated to RCPI's mortgage lien.<sup>105</sup>

However, as will be discussed in detail below, the program of continuing landmark maintenance also includes a variety of nonmonetary restrictions and obligations which will bind RCPI's security interest in the transferor lot when construction begins on Rockefeller Plaza West. The impact of these restrictions and obligations on RCPI's interest is uncertain. Since the program of continuing landmark maintenance is intended to have a positive effect on the quality of the property which serves as the mortgage security, the landmark maintenance program should have a potentially beneficial impact on RCPI's security interest.<sup>106</sup> Moreover, the loan agreement requires the landmark's owners,

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102. The potential need for such a Waiver and Subordination agreement appears to have been contemplated at the time RCPI was formed and the mortgage was entered into. RCPI's 1985 *Prospectus* noted: "The Company [RCPI] has agreed to execute such documents and provide such information as may be required to effectuate the transfer or utilization by the Borrower [RGI affiliates] of **the** development rights. . . ." 1985 *PROSPECTUS*, *supra* note 35, at 40.

103. Waiver and Subordination (May 1, 1990) [hereinafter Subordination Agreement] 2. The Subordination Agreement is among the documents attached to the Board of Estimate Resolution, *supra* note 87.

104. *Id.* at 2.

105. *Id.*

106. In connection with a discussion of the obligation to maintain Radio City Music Hall's landmark interior under the Landmarks **Law**, RCPI's 1985 *Prospectus* took **the** position that "[t]he Company believes that the Center and therefore the Borrower benefit from ownership of a landmark like the Music Hall as they do from other amenities in the Property. " 1985 *PROSPECTUS*, *supra* note 35, at 28. With regard to the Center's landmark status, the 1985 *Prospectus* also noted: "As a result of these [landmark] designations, alteration, demolition and reconstruction of the Property will under most circumstances be subject to approval of the Landmarks Commission." *Id.*

not RCPI, to bear the cost of maintaining the property in good condition and to engage in a capital improvements program involving expenditure of at least \$197.6 million for general repairs and maintenance of the Center by the end of the year 2000.<sup>107</sup> As a result, the cost of enhanced landmark maintenance is likely to be borne by the owners of Rockefeller Center for the duration of the mortgage.<sup>108</sup>

Assuming that RCPI decides to exercise the equity option,<sup>109</sup> RCPI would then hold a 71.5 % partnership interest in the landmark, parts of which would remain subject to the program of continuing landmark maintenance.<sup>110</sup> Whether the landmark preservation program will make the conversion option more or less valuable, is an open question. If one assumes that the program of continuing landmark maintenance will enhance the value of the property, then the program would make the rights acquired under the option (a 71.5 % share of a new partnership owning Rockefeller Center) more valuable than these rights would have been without the program. On the other hand, there are costs and potential liabilities which accompany the program. Much depends on how well the program of continuing landmark maintenance works.

#### IV. Program of Continuing Landmark Maintenance

Rockefeller Center's program of continuing landmark maintenance will take legal effect when construction begins on Rockefeller Plaza West, the new building eligible to receive additional development rights under the special permit. At present, the landmark maintenance program exists in the text of two attachments dated May 1, 1990, which accompanied the resolution approving the special permit." These two **attach-**

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at 29. The new program of continuing landmark maintenance will add an assessment and enforcement role for **the** Conservancy as well as a higher standard of landmark maintenance (sound first-class condition).

**107. *Id.* at 26.**

108. If the equity option is not exercised, the loan matures December 31, 2007. *Id.* at 40.

109. The exercise date is December 31, 2000, or earlier if there is a default. The **1985 Prospectus** indicates that the RCPI board anticipates a shareholder vote on the decision whether or not to exercise **the** equity option. *Id.* at 40.

110. The transferor lot would remain bound by **the** Declaration and Easement which run **with** the land. The Agreement would continue to bind the two central buildings only if its obligations were assumed by a transferee, such as **the** new partnership to be formed if and when RCPI exercises its equity option.

111. Board of Estimate Resolution, *supra* note 87. The Resolution and its attachments are contained in **the** files regarding Special Permit application number C 890639 ZSM, in the City Planning Commission and in the Landmarks Preservation Commission.

ments contain a group of preservation servitudes which constitute the program of continuing landmark maintenance required under New York City Zoning Resolution § 74-79 for a special permit allowing transfer of development rights from a landmark. Before considering these preservation servitudes, it is important to understand the roles of the various parties to the program of continuing landmark maintenance.

A. *Parties to the Rockefeller Center Program of Continuing Landmark Maintenance*

The Rockefeller Center program of continuing landmark maintenance operates within a triangular arrangement. On one side of the triangle, is the City of New York, acting primarily through the Landmarks Preservation Commission, with a supporting role played by the City Planning Commission. On the second side, is a private nonprofit organization, the New York Landmarks Conservancy (for simplicity referred to as "the Conservancy"). On the third side, completing the triangle, is the current owner of the Rockefeller Center landmark, RCP Associates, a limited partnership controlled by Rockefeller Group, Inc. (for simplicity, referred to as "the Center's owners"), with RCPI holding its convertible mortgage interest in the background.\* Each side has a slightly different role to play in preserving Rockefeller Center. For the program to work, all sides must cooperate in carrying out the landmark preservation enterprise outlined in the program of continuing landmark maintenance.

New York City's role in the Rockefeller Center landmark preservation program is affected by the fact that the city has two types of functions: as regulator and as servitude-holder. The nature of the city's regulatory functions results from the fact that Rockefeller Center is a designated landmark.<sup>113</sup> The Landmarks Law requires that designated landmarks, such as Rockefeller Center, be maintained in good condition, and prohibits alteration or demolition of the landmark without the

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112. The interrelationship among RCP Associates, its general partner Rockefeller Group, Inc. (RGI) and various RGI affiliates is extremely complex. According to RCPI's 1985 *Prospectus*, aside from the G.E. Building, which is an office condominium, most of the landmark is leased to a general partnership, Rockefeller Center Properties, which is 99% owned by RCP Associates, with the other 1% split evenly between Rockefeller Group, Inc. and Radio City Music Hall Productions, Inc. RCP Associates is owned by RGI (50%) and Radio City Music Hall Productions, Inc. (50%). Radio City Music Hall Productions, which leases Radio City Music Hall, is a wholly owned subsidiary of Rockefeller Group Inc. 1985 *PROSPECTUS*, *supra* note 32, at 27-28. See *supra* note 36 for an explanation of the various ownership interests in Rockefeller Center's land. RCPI's mortgage is discussed, *supra*, at notes 96-108.

113. These designations are discussed in *the* text, *supra* at notes 5-26.

approval of the Landmarks Preservation Commission.<sup>114</sup> With regard to the various servitude rights conveyed to the city under the Declaration, Easement and Agreement, the Landmarks Preservation Commission is generally the agency designated to act for the city.<sup>115</sup> However, the power to revoke the special permit authorizing the transfer of development rights from the landmark to the new building rests with the City Planning Commission.<sup>116</sup> The decision to seek revocation of the new building's certificate of occupancy, if the Center's owners do not meet their obligations under the program of continuing landmark maintenance, also resides with the City Planning Commission.<sup>117</sup>

The role of the Conservancy is nominally that of the primary holder of the preservation servitudes created in the Easement and Agreement. These documents actually impose on the Conservancy at least as many obligations as rights. Since the Conservancy owns no land, the nonprofit organization's rights and obligations are necessarily held in gross. The Conservancy's rights generally involve inspection and enforcement of the landmark maintenance program. "The Conservancy's numerous responsibilities involve working with the Center's owners in making continuing assessments of the condition of the landmark, requiring repairs as necessary, and making reports on the condition of the landmark."<sup>118</sup> To help defray the cost of performing these obligations, the Conservancy holds an endowment of \$200,000 contributed by the Center's owners. The interest from the endowment is designated to help pay the Conservancy's costs in meeting its obligations under the Easement and Agreement.<sup>119</sup> The Conservancy will also receive from the Center's owners an annual fee of \$25,000 to pay for technical and legal services which the Conservancy will provide.<sup>120</sup>

The primary role of the Center's owners under the program is to

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114. N.Y. City Admin. Code § 25-305(a)(1).

115. **Declaration** of Program of Continuing Landmark Maintenance, Block 1265, Lot 50, Borough of Manhattan 7, 19 (May 1, 1990) [hereinafter Declaration]; Preservation Easement, Exhibit D to Declaration of Program of Continuing Landmark Maintenance, Block 1265, Lot 50, Borough of Manhattan 6, 29 (May 1, 1990) [hereinafter Easement]; Preservation Agreement between RCP Associates and the New York Landmarks Conservancy 7, 36 (May 1, 1990) [hereinafter Agreement].

116. Board of Estimate Resolution, *supra* note 87, at 40.

117. *Id.* at 40.

118. Declaration, *supra* note 115, at 7; Easement, *supra* note 115, at 6-24; Agreement, *supra* note 115, at 7-25.

119. Declaration, *supra* note 115, at 7; Easement, *supra* note 115, at 6-24; Agreement, *supra* note 115, 7-25.

120. Resolution of the City Planning Commission, May 2, 1990, Calendar No. 57 (file no. C 890639 ZSM), at 26.

121. *Id.* at 26. Easement, *supra* note 115, at 24-25; Agreement, *supra* note 115, at 26.



maintain specified portions of the landmark to the satisfaction of the Conservancy and the Landmarks Preservation Commission.<sup>122</sup> In addition, the owners are also obligated to pay administrative and enforcement costs of the program, through the endowment contribution and annual fee paid to the Conservancy.<sup>123</sup> The Center's owners' extensive **affirmative** obligations to make annual reports on the landmark's condition, to repair and to maintain the landmark, and to pay money, are the more legally controversial parts of the program. Enforceable under New York State's conservation easements statute, ECL § 49-0305, which abrogates most of the common law rules restricting such servitudes, these affirmative obligations on the part of the Center's owners are the main mechanism for Rockefeller Center's continuous process of landmark **maintenance**.<sup>124</sup>

### B. *Preservation Servitudes*

The program of continuing landmark maintenance will operate as a complex matrix of restrictions and obligations superimposed over the regulatory requirements of the New York City Landmarks Law. The program of continuing landmark maintenance embraces a wide variety of controversial types of legal rights and obligations in the nature of easements, covenants, and equitable servitudes. Modern real estate practice sometimes lumps all of these arrangements together and calls them "servitudes."<sup>125</sup> In the landmark preservation context, such landmark protection measures are appropriately called "preservation servitudes."

As the following sections explain in detail, documents described as a "Declaration" and an "Easement," as well as an "Agreement," form parts of Rockefeller Center's program of continuing landmark maintenance. The Declaration and Easement, which will run with the title to the transferor lot, are intended to benefit city-owned land, the

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122. **Compliance** with the **preservation** servitudes will rest **primarily** with **RCPI** Associates, **which**, under the **terms** of the mortgage to RCPI, **bears responsibility** for maintenance of the mortgaged property in good condition. Tenants occupying the landmark are protected against unreasonable interference under the program, provided they abide by their obligations under the Landmarks **Law**. **RCPI's involvement has so far** been limited to executing the Subordination Agreement discussed *infra* at notes 159-62. When and if RCPI exercises its option to become owner of the mortgaged property, it may take on a more active role with regard to the program of continuing landmark maintenance.

123. Resolution of the City Planning Commission, *supra* note 120, at 26.

124. Declaration, *supra* note 115, at 4-12; Easement, *supra* note 115, at S-25; Agreement, *supra* note 115, at 4-32.

125. See **RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES**, xxi-xxii (Tent. Draft No. 1, Apr. 5, 1989) [**hereinafter SERVITUDES RESTATEMENT, T.D.** 11.

city, and a nonlandowning private **organization**.<sup>126</sup> The Declaration describes its contents as a grab bag of “restrictions, covenants, obligations, easements, and agreements.”<sup>127</sup> The Agreement, which **incidentally** contains easements, states that the parties “covenant and agree.”<sup>128</sup> The rights and obligations under the program are both affirmative and negative. They are held by public agencies and by private entities, and sometimes by both. They form a heterogenous mix of land-use arrangements which, in traditional terms, would be described as both **appurtenant**<sup>129</sup> and in **gross**.<sup>130</sup> The Agreement regarding maintenance of the central buildings, would not, in conventional terms, be a servitude at all because the Agreement does not by its terms attach to land **ownership**.<sup>131</sup> It takes the form of a contractual arrangement between RCP Associates and the Conservancy. But these preservation

126. Declaration, *supra* note 115, at 22; Easement, *supra* note 115, at 1, 21. The Declaration also expressly benefits RCP Associates, the declarant. Declaration, *supra* note 115, at 19.

127. *Id.* at 3.

128. Agreement, *supra* note 115, at 4.

129. Appurtenant servitudes **usually** refer to land-use arrangements the benefits of which are attached to land ownership. The notion of appurtenance derives from the law of easements and refers to the running of an easement to benefit a dominant parcel of land. An appurtenant easement automatically benefits successive owners of that dominant estate. The burdens of appurtenant easements are sometimes also described as appurtenant because they attach to the title of the land known as the servient estate and bind successive owners of that land. But appurtenant easements are generally defined by the appurtenance of their benefits. 4 POWELL ON REAL PROPERTY ¶ 405 (Rohan, ed. 1985), A. JAMES CASNER, 2 AMERICAN LAW OF PROPERTY § 8.6 (1952). Traditionally, real covenants were by nature **appurtenant** because of privity and “touch and concern” requirements. Equitable servitudes are usually appurtenant to a dominant estate. But requiring the benefits of equitable servitudes to be appurtenant to a dominant estate has been a matter of considerable theoretical debate. See A. JAMES CASNER, *supra* at § 9.32.

130. When a servitude is in gross, the benefits of the arrangement are not attached to possession or ownership of land. The benefits belong to a person or entity, irrespective of that person’s or entity’s land ownership. The notion of servitudes in gross derives from **the** law of easements, as does the notion of appurtenant servitudes. Traditionally, real covenants could not be held in gross because of privity and “touch and concern” requirements. The legitimacy of equitable servitudes in gross has been a matter of scholarly debate. See A. JAMES CASNER, *supra* note 129, at § 9.32. The revised *Servitudes Restatement* recognizes the general legitimacy of all types of servitudes in gross. SERVITUDES RESTATEMENT, T. D. 1, *supra* note 125, at xxi-xxii.

131. Servitudes are ordiily characterized by the quality of succession with land title. Succession means that either the burden, the benefit, or both the burden and the benefit of a servitude run with landownership to successive owners. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, (Tent. Draft No. 2, Apr. 5, 1991) [hereinafter SERVITUDES RESTATEMENT, T.D. 2] ix. Because the Agreement does not by its terms run with the title to any land on either the benefit or the burden side, it more closely resembles a conventional contract than a servitude. However, both the benefit and the burden of **the** Agreement are expressly assignable and, in the context of the program of continuing landmark maintenance, this contractual arrangement operates as part of the system of preservation servitudes.

servitudes do not draw such distinctions. Fitting no one conventional servitude category, the enterprise which these documents create comprises an interdependent group of landmark preservation rights and obligations designed to co-exist with the requirements of the New York City **Landmarks** Law.

Many aspects of the landmark maintenance program's legal techniques would have been unthinkable, and probably unenforceable, under traditional legal doctrines designed to restrict the enforceability of restrictions attached to land titles. More expansive modern servitudes doctrines, such as those adopted by the American Law Institute in the new *Restatement (Third) of Property: Servitudes*,<sup>132</sup> contemplate precisely the type of complex arrangement embodied in Rockefeller Center's new landmark preservation program. One reason for interest in the Rockefeller Center preservation servitudes is that they provide a sophisticated, large-scale model illustrating the application of liberalized servitudes rules such as those suggested in the revised *Servitudes Restatement*.

However, it is not proposals for reform of servitudes law, but rather a New York State **statute**,<sup>133</sup> which eliminates traditional legal barriers to these preservation servitudes. Enacted in 1983 and amended in 1984, New York's conservation easements statute authorizes public bodies and not-for-profit conservation organizations to hold as "conservation easements," various types of servitude rights related to historic and architectural preservation and conservation.<sup>134</sup> Under ECL § 49-0303, a conservation easement may be "an easement, covenant, restriction or other interest in real property . . . which limits or restricts development, management or use of such real property for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance of amenities of **the** real

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132. Tentative Draft No. 1, containing an outline of the project, was approved by **the American Law Institute** in May 1989. **SERVITUDES RESTATEMENT**, T.D. 1, *supra* note 125. Tentative Draft No.2 was approved by the American Law Institute in May 1991. **SERVITUDES RESTATEMENT**, T. D. 2, *supra* note 131.

133. N.Y. Emtl. Conserv. Law § 49-0301, *et seq.* (McKinney's 1992) [hereinafter referred to as the "*conservation easements statute*" and cited as ECL § 49-0301, *et seq.*]. ECL § 49-0301 declares a general "state policy of conserving, preserving and protecting its environmental assets and natural and man-made resources," in particular, "the preservation of areas which are significant because of their historical, . . . **architectural or cultural amenities.**" Stated purposes of the statute include: "[M]aintenance, enhancement and improvement of recreational opportunities, tourism, community attractiveness, balanced economic growth and the quality of life in all areas of the state." "

134. ECL § 49-0303 (1).

property in a manner consistent with the public policy and purpose” of the conservation easements statute.<sup>135</sup>

Although conservation easements are required to comply with the statute of **frauds**,<sup>136</sup> and are subject to eminent domain, New York’s conservation easements statute exempts conservation easements from a wide variety of common law doctrines which traditionally defeated servitude enforcement. Among the common law doctrines inapplicable to conservation easements under the statute are “adverse possession, **laches**, estoppel or waiver.”<sup>137</sup> Moreover, statutory provisions, aside from those regarding eminent domain, will not defeat conservation easements unless a particular statutory provision expressly states its intent to do so.<sup>138</sup> In particular, the conservation easements statute states that

It is not a defense in any action to enforce a conservation easement that:

- (a) It is not appurtenant to an interest in real property;
- (b) It can be or has been assigned to another holder;
- (c) It is not of a character that has been recognized traditionally at common law;
- (d) It imposes a negative burden;
- (e) It imposes an **affirmative** obligations upon the owner of any interest in the burdened property, or upon the holder;
- (f) The benefit does not touch or concern real **property**; or
- (g) There is no privity of estate or of contract.<sup>139</sup>

These seven traditional common-law defenses, which may prevent enforcement of nontraditional servitudes, simply do not apply to New York’s statutory conservation easements, such as those embodied in the Rockefeller Center program of continuing landmark maintenance.

The conservation easements statute also provides for broad enforcement rights. ECL § 49-0305 provides that conservation easements are enforceable against the owner of burdened property by the conservation easement’s “grantor, holder or by a public body or any not-for-profit conservation organization designated in the easement as having a third party enforcement right.”<sup>141</sup> These specific provisions authorizing third-party enforcement rights exempt conservation easements from the stranger-to-the-deed rule long-followed by New York courts. This is

135. *Id.*

136. N.Y. Gen. Oblig. Law § S-703 (McKinney’s 1992); ECL § 49-0305 (1), *supra* note 133.

137. ECL § 49-0305 (5), *supra* note 133.

138. *Id.*

139. *Id.*

140. The “seven deadly sins” of traditional servitudes law.

141. ECL § 49-0305 (5), *supra* note 133.

the rule which does not allow use of a single conveyance to transfer an easement to a recipient other than the grantee of the conveyance.” In *Estate of Thomson*, the New York Court of Appeals underscored that the reason for this rule was New York’s overriding “public policy favoring certainty in title to real property, both to protect bona fide purchasers and to avoid conflicts of ownership, which may engender needless litigation.”<sup>143</sup> Without the New York conservation easements statute, the rule would require that each entity intended to have enforcement rights be given those rights independently in a direct conveyance to that party.

In the complex triangular servitude arrangement which constitutes the Rockefeller Center program of continuing landmark maintenance, grants of servitude enforcement rights to third parties form a distinctive feature of that program. Were the stranger-to-the-deed rule applied to the variety of rights which will exist under the program, rather odd consequences might result. That is because New York’s stranger-to-the-deed rule applies only to easements and not to covenants and other similar servitudes.<sup>144</sup> For example, some, but not all, of the servitudes granted to the city in the Preservation Easement (which is a conveyance from the Center’s owners to the Conservancy) might be invalid under the stranger-to-the-deed rule, because the city is not a party to the Easement. Absent the New York conservation easements statute or incorporation of the terms of the Easement into the Declaration (a document to which the city is a party), some of these third-party rights would be invalid. In particular, application of New York’s stranger-to-the-deed rule to the city’s back-up rights in the Preservation Easement would create something of a puzzle. Some of these back-up rights (for example, those relating to covenants and restrictions regarding landmark preservation and maintenance) would be valid and others (for example, those relating to easements for access) would not be valid, depending on how the rights were categorized. This aspect of Rockefeller Center’s preservation servitudes provides an interesting illustration of why a single rule allowing third-party enforcement of all types of servitudes is essential in the context of large-scale servitude arrangements. The *Restatement (Third) of Property: Servitudes* § 2.6 rejects application of the stranger-to-the-deed rule to any type of servitude.<sup>145</sup>

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142. *Estate of Thomson v. Wade*, 509 N.E.2d 309 (N.Y. 1987).

143. *Id.* at 310 (quoting *Matter of Violi*, 482 N.E.2d 29, 32 (N.Y. 1985)).

144. *Vogeler v. Alwyn Improv. Corp.*, 59 N.E. 886 (N.Y. 1928).

145. “The benefit of a servitude may be created in favor of persons who are not parties to the transaction, and in favor of the holders of estates, or other interests in land, that are not owned by parties to the transaction.” *SERVITUDES RESTATEMENT*, T. D. 1, *supra* note 125, § 2.6(c).

### C. *The Legal Documents*

Operation of the Rockefeller Center program of continuing landmark maintenance will depend on five legal documents attached to the city's approval of the special permit authorizing transfer of development rights from the Rockefeller Center landmark. Four of these **five** documents are contained in the Declaration.<sup>146</sup> The other is a separate Preservation Agreement.<sup>147</sup> To understand how the program is designed to work, it is important to consider separately each of these five documents .

#### 1. DECLARATION OF PROGRAM OF CONTINUING LANDMARK MAINTENANCE

The Declaration is the longest of the five documents.<sup>148</sup> It outlines a group of commitments from the Center's owners with regard to maintenance of the portion of the Rockefeller Center Landmark between Forty-ninth and Fiftieth Streets and between Rockefeller Plaza and Fifth Avenue (the transferor lot). This is where Prometheus, the sunken plaza, La Maison **Francaise**, the British Empire Building, the Promenade, and Channel Gardens are located. The Declaration will take effect when it is recorded and indexed against the transferor lot at the time the development rights transfer from the landmark to the site for Rockefeller Plaza **West**.<sup>149</sup> That transfer will occur when the special permit is exercised in securing a foundation permit for the new building. The Declaration is intended to run with the land and to bind future owners of the transferor lot.<sup>150</sup>

**Primarily** designed to be held in gross by the city, the Declaration's benefits are also appurtenant to city-owned **land**.<sup>151</sup> Moreover, the **declarant**, RCP Associates, also has the right to enforce the Declaration, which includes among its stated purposes "protecting the value and desirability of the Subject Property for historic preservation purposes."<sup>152</sup> The Declaration is open-ended as to duration, but provides that it "shall automatically terminate upon the recision of the Premises [the transferor lot] as a landmark site designated" by the Landmarks Preservation Commission and the approval of the Landmarks **Preserva-**

146. Declaration, *supra* note 115.

147. Agreement, *supra* note 115.

148. The Declaration runs to about ninety double-spaced pages. The actual terms of the servitude obligations appear on about twenty-seven of these pages. Not all of the provisions included in the Declaration can be discussed here.

149. Declaration, *supra* note 115 at 17, ¶ 6.1. See discussion of the Transfer Instrument *infra*, at notes 221-225.

150. *Id.* at 4.

151. It "shall inure to the benefit of all land, including land owned by the City . . . lying within a one-half mile radius of the burdened land." *Id.* at 3-4.

152. *Id.* at 1.

tion Commission, the City Planning Commission and RCP Associates.<sup>153</sup> It may also be modified or canceled with the approval of the Landmarks Preservation Commission and the City Planning Commission.<sup>154</sup>

The Declaration begins with several pages of preamble (the “Witnesseth” and “Whereas” recitals) which identify the affected property and parties. These preliminary sections have potential legal importance in illuminating the intentions and purposes behind the Declaration should it require interpretation by a court. In particular, references to the landmark designations should bring to bear on future interpretation of the Declaration, the contents of the landmark designation reports which discuss at length the significance of the Rockefeller Center landmark, and its more important features. Substantive landmark maintenance obligations fill only three double-spaced pages within the Declaration. Many of the provisions on these three pages are devoted to listing the transferor lot’s landmark features, including buildings, gardens, the “sunken plaza/skating rink” and three pieces of statuary: “Prometheus,” “Youth,” and “Maiden.”

The heart of the program is the Center’s owners’ commitment “to preserve, repair and maintain in a sound, first-class condition the exterior portions of the Buildings and all interior portions of the Buildings which, if not so maintained, may cause or tend to cause the exterior portions of the Buildings to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair. . . .”<sup>156</sup> This **sound-first-class-condition** standard of maintenance, is also used in both the Preservation Easement and the Preservation Agreement, discussed below. It requires a higher standard of maintenance than the “good repair” standard set by the regulatory provisions of the Landmarks Law.<sup>157</sup> Although there is virtually no decisional law interpreting this maintenance standard in the context of landmark preservation, “sound, first-class condition” has been used as a maintenance standard in other

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153. *Id.* at 17, ¶ 6.1.

154. *Id.* at 18, ¶ 7.1.

155. *Id.* at 5-6, ¶ 2.2.

156. *Id.* at 4-5, ¶ 2.2.

157. N.Y. City Admin. Code § 25-311. The Baseline Report prepared by the Preservation Consultant discussed, *infra* at notes 179-8 1, reflects a practical application of these standards. The Preservation Consultant’s report describes the landmark as in good repair, but suggests the need for additional preservation measures to bring the property up to sound, first-class condition. *Id.*

contexts, notably commercial real estate finance and leasing.<sup>158</sup> For example, in litigation over hotel leases, the meaning of a first-class condition standard of maintenance has on occasion been at issue.<sup>159</sup> The Declaration's sound-first-class-condition standard is more demanding than the customary "good condition and repair" frequently required in real property leases<sup>160</sup> and in mortgages.<sup>161</sup>

In addition to these affirmative covenants to repair, to preserve and to maintain the transferor lot in sound, first-class condition, the Declaration contains a specific restriction that the subject property will not be altered in violation of the terms of the Declaration or the provisions of the Landmarks Law.<sup>162</sup> This restriction against alteration of the landmark seems on the surface simply to reinforce restrictions against alteration and demolition of landmarks already applicable under the New York City Landmarks Law. However, if the Landmarks Law were changed or if portions of that law were held unenforceable by a court, the separately enforceable servitude obligations created by the Declaration would continue independently to prevent alteration or demolition of the landmark features on the transferor lot, as long as they remain designated landmarks. Conversely, were the Declaration's restrictions to be removed, regulation under the Landmarks Law would be unaffected.

The Declaration conveys to the city, acting through the Landmarks Preservation Commission, an easement to enter the transferor lot for monitoring and enforcement purposes.<sup>163</sup> Moreover, the terms of the Preservation Easement, discussed below, are incorporated by reference as part of the Declaration, to which the Easement is attached as Exhibit D. Incorporation of the Easement into the Declaration directly conveys rights to enforce the Easement to the city and avoids

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158. See, e.g., JEROME D. WHALEN, **COMMERCIAL GROUND LEASES** 174-75 (1988); J.S. GROSS, **ENCYCLOPEDIA OF REAL ESTATE LEASES** 175 (1980) (Article I of a sample ground lease form). For example, a construction loan may provide that the "Mortgagor shall constantly maintain [improvements] in first-class condition. . . ." Model loan provision in Real Estate Development and Construction Financing 1988 (PLI 305) 77 (materials presented by Jack A. Marino, Jr.).

159. See, e.g., *The Equitable Trust Company of New York v. Majestic Hotel Company*, 188 N.E. 31 (N.Y. 1933); *Royal St. Louis v. United States*, 578 F.2d 1017 (5th Cir. 1978).

160. G. Van Ingen, Annotation, *Extent of Lesser's Obligation Under Express Covenant us to Repairs*, 20 A.L.R.2d 1331 (1951).

161. The mortgage to RCPI, for example, contains a "good repair" maintenance standard. 1985 PROSPECTUS, *supra* note 35, at 35.

162. Declaration, *supra* note 115, at 6, ¶ 2.3.

163. *Id.* at 7, ¶ 2.5.



the stranger-to-the-deed rule discussed **above**.<sup>164</sup> Other provisions of the Declaration relate to such practical matters as insurance<sup>165</sup> and what is to be done in cases of emergency.<sup>166</sup> Should landmark structures be substantially destroyed, the Declaration imposes no servitude obligation to reconstruct them. However, “[a]ny new building which may be constructed on the Premises shall be maintained in accordance with this Declaration . . . .”<sup>167</sup>

The Declaration states that “**Declarant** acknowledges and agrees that under current provisions of the Zoning Resolution if **Declarant** is in **default** in the performance of any of its obligations under this Declaration, . . . such default may constitute the basis for denial or revocation of the certificate of occupancy of any building constructed on the Adjacent Parcel [the site for Rockefeller Plaza West] pursuant to the Special Permit or for revocation of the Special Permit. . . .”<sup>168</sup> Once it is recorded at the time construction begins, the Declaration will provide record notice that occupancy of the new building is and will remain contingent on continuing performance of the obligations contained in the Declaration. Required recordation of the Transfer Instrument, discussed below, will result in cross-reference to these obligations in the chain of title to the Rockefeller Plaza West site, as well as the title to the transferor lot.<sup>169</sup>

The Center’s owners consent to administrative, equitable, and legal enforcement of the Declaration and to payment of the city’s administrative expenses and attorneys fees in the event of successful court enforcement against violations of the Declaration.<sup>170</sup> The Declaration disclaims the creation of any enforceable rights in persons or entities other than the city and the declarant (RCP Associates), aside from the rights of the Conservancy under the Easement.<sup>171</sup> This provision appears to preclude owners or occupants of the Rockefeller Plaza West site from enforcing the Declaration in order to protect the development rights received from the transferor lot. However, the interlocking ownership interests of

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164. These rights to enforce the Basement could become important should the city need to step in as a back-up grantee. See discussion, *infra* at notes 196-203.

165. Declaration, *supra* note 115, at 9-12, ¶ 4.

166. *Id.* at 12-17, ¶ 5.

167. *Id.*, at 11, ¶ 4.2.

168. *Id.* at 19, ¶ 7.2.

169. The Transfer Instrument is exhibit C to the Declaration of Program of Continuing Landmark Maintenance, Block 1265, Lot 50, Borough of Manhattan (May 1, 1990) [hereinafter Transfer Instrument]. The same text is Exhibit B to the Preservation Agreement.

170. *Id.* at 20, ¶ 8.3.

171. *Id.* at 19, ¶ 8.3.

Rockefeller Group, Inc. and its subsidiaries might, as a practical matter, result in enforcement by RCP Associates (the **Declarant**) against future owners of the transferor lot.<sup>172</sup>

## 2. PRESERVATION EASEMENT

The Preservation Easement is designed to work in tandem with the Declaration to make the program of continuing landmark maintenance an operating reality. Both documents relate to the same portion of the Rockefeller Center landmark (the transferor lot) and share a similar purpose: assuring a sound, first-class standard of landmark preservation. However, the Easement creates a different type of arrangement and involves different parties. The Easement establishes a working relationship between the Center's owners and the private not-for-profit corporation, New York Landmarks Conservancy.<sup>173</sup> The rights and obligations conveyed by the Easement are reciprocal in nature and have much more detail than those in the Declaration. The Easement outlines an intricate cooperative process through which the parties to the Easement will continuously assess the condition of landmark features of the transferor lot and will arrange for maintenance and repairs necessary to keep this portion of the Rockefeller Center landmark in sound, first-class condition.<sup>174</sup>

Like the Declaration, the Easement will be recorded on the title to the transferor lot at the time the development rights transfer from the landmark to the Rockefeller Plaza West site. Incorporated by reference in the text of the Declaration,<sup>175</sup> the Easement is attached to the Declaration as Exhibit D. The text of the Easement runs to about forty double-spaced, typewritten pages including a preamble, similar to that in the Declaration, which explains the purposes and intentions of the parties. But the arrangement under the Easement is more complex than that contemplated by the Declaration.

Part of the Easement's complexity results from efforts to coordinate the landmark maintenance program with maintenance requirements under the mortgage held by RCPI.<sup>176</sup> The Easement's landmark **preserva-**

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172. See *supra* notes 36 and 112, for the outlines of some of those interlocking interests.

173. As discussed *infra* at notes 196-203, the Easement also provides for a back-up, derivative interest in the city.

174. This is the same exacting standard of landmark maintenance as that required under the Declaration. See *supra* discussion in text at notes 156-61.

175. Declaration, *supra* note 115, at 7, ¶ 2.5.

176. See *supra* discussion in text at notes 96-10. Among the terms of that convertible mortgage is a provision which requires a yearly physical assessment of the property by Cushman & Wakefield Realty Advisors, an affiliate of Rockefeller Group, Inc. Easement, *supra* note 115, at 3-4. 1985 PROSPECTUS, *supra* note 35, at 49, 76.

tion program is superimposed on a physical inspection and maintenance program required under the mortgage. The Easement requires that the Center's owners retain a preservation consultant (architect, engineer or firm with experience and expertise regarding historic properties) to make an additional, independent evaluation of landmark features of the transferor lot. The preservation consultant's landmark assessment report, called an Annual Condition Statement is intended to be a supplement to the yearly physical assessment required under the mortgage.<sup>177</sup>

Beyond establishing an overall landmark preservation objective of "sound, first-class condition,"<sup>178</sup> the Easement's objective is to create a dynamic, cooperative enterprise. It sets up cyclical procedures through which the Center's owners and the Conservancy will continuously evaluate, plan and carry out a maintenance program for the covered portions of the Rockefeller Center landmark. Time limits are set. Even a system for dispute resolution is established. More than a stand-still agreement that the Center's owners will not change the landmark, the Easement specifies a continuing process of affitive measures to place and to maintain the landmark in a sound, first-class condition.

The enterprise began in April 1990, just before the Easement was signed, with submission of a baseline report regarding the landmark. Titled "A Manual for the Maintenance and Preservation of the Central Blocks," the baseline report establishes the format for the Annual Condition Statements.<sup>179</sup> It also describes certain repairs necessary "to bring the Buildings into sound, first-class condition in accordance with acceptable historic preservation standards."<sup>180</sup> The report describes the landmark as in a "good" state of repair, but suggests a number of measures needed to bring the landmark up to the **sound-first-class-condition** standard. It mentions the need to improve such matters as pointing and caulking, patching, metal maintenance, and a schedule for washing the facades.<sup>181</sup>

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177. The annual physical condition reports have been prepared by **Cushman & Wakefield** since 1985 in connection with the convertible mortgage held by RCPI. The Preservation Consultant's "Annual Condition Statement" will in future be an additional section attached to Cushman & Wakefield's annual physical condition report regarding the mortgaged parts of Rockefeller Center. Easement, *supra* note 115, at 6-7, ¶ 2.1.

178. *Id.*, at 5, ¶ 1.1. See discussion of the "sound, first-class condition" standard of maintenance in text, *supra* at notes 156-59.

179. This baseline report was prepared by Platt and Bayard Architects. "A Manual for the Maintenance and Preservation of the Central Blocks" (Apr. 24, 1990) [hereinafter Baseline Report]. Copies were provided to the Landmarks Preservation Commission, the City Planning Commission and the Conservancy.

180. Easement, *supra* note 115, at 6-7, ¶ 2.1. Baseline Report, *supra* note 179.

181. Letter dated April 24, 1990, on unnumbered pages, designated as "Preservation Consultant's Report" at the end of the Baseline Report, *supra* note 179.

The basic mechanism for continuous assessment and maintenance of the landmark is the Annual Condition **Statement**.<sup>182</sup> If the Annual Condition Statement reveals the need for maintenance or repairs, the Center's owners must propose a Maintenance Program designed to make the needed repairs or to perform necessary maintenance. Each Condition Statement and Maintenance Program is subject to detailed review by the Conservancy. 'The Conservancy will send copies of its reports to the Center's owners, the chair of the Landmarks Preservation Commission and the chair of the City Planning Commission. There are specified time limits for these reports and for responses from the Center's owners.<sup>183</sup> The Easement also grants to the Conservancy a limited easement for physical entry necessary to make inspections and to perform necessary work, although it is expressly subordinate to the rights of "tenants, subtenants and other occupants" of the landmark building.<sup>184</sup> The terms of this servitude (under traditional categories, a limited affirmative easement in gross) restrict the Conservancy's inspections to no greater frequency than once every six months.

Among the more interesting aspects of the Easement are the provisions regarding enforcement and alternative dispute resolution. Disagreements between the Center's owners and the Conservancy regarding landmark maintenance are to be resolved by the Landmarks Preservation Commission, if the owner applies for such resolution within ninety **days**.<sup>185</sup> If the Conservancy determines that maintenance work is necessary, but the owner does not perform it and does not seek resolution of the dispute by the Landmarks Preservation Commission, the Easement sets up an enforcement procedure. That procedure begins with the Conservancy sending a notice of breach to the Landmarks Preservation Commission, as well as to the owner and holders of mortgage interests in the **property**.<sup>186</sup> If neither the owner nor the mortgagees **perform** necessary landmark maintenance work, the Conservancy may elect either to undertake the work itself or to seek a court order **compel-**

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182. Easement, *supra* note 115, at 6-9, ¶ 2. The Baseline Report, discussed *supra* notes 179-81, sets up the format for **these** Annual Condition Statements.

183. For example, within four weeks of receiving an Annual Condition Statement, the Conservancy must file a written report regarding whether the Condition Statement is complete, whether the owner is satisfying its maintenance obligations under the Declaration, and whether a proposed Maintenance Program will ensure the continued preservation of the landmark. The Center's owners have four weeks to respond to the **Conservancy's** report on the Condition Statement. Supplemental reports and responses are on a two-week schedule. Easement, *supra* note 115, at 7-9, ¶ 5 2.3-2.4.

184. *Id.* at 21-22, ¶ 5.

185. *Id.* at 17-18, ¶ 4.5.

186. *Id.* at 18, ¶ 4.6.

ling the owner to do the **work**.<sup>187</sup> If the Conservancy chooses to do the work itself, the costs of the work are to be reimbursed by the owner within sixty days. If not reimbursed, these costs become a lien on the property.<sup>188</sup> The Easement articulates the various procedural steps in elaborate detail. Such a clearly **defined** process, with precise steps and definite timetables, is designed to prevent neglect or avoidance of maintenance necessary for the preservation of the landmark.

The Easement also sets up a separate set of procedures for more thorough Periodic Inspections by a preservation architect to monitor the condition of the landmark in a more detailed fashion every five years.<sup>189</sup> The process through which the owner selects the independent Preservation Architect from a list proposed by the **Conservancy**<sup>190</sup> and the procedures for that Preservation Architect to make reports and provide maintenance plans are similar to the detailed processes regarding Annual Condition **Statements**.<sup>191</sup> The object of these processes is for the Center's owners and the Conservancy to agree about and for the owners to perform all the work necessary to maintain the landmark in sound, first-class condition.

The Conservancy can assign its rights and duties under the Easement to a substitute grantee, but only after notice to the Center's owners, the chair of the Landmarks Preservation Commission and the chair of the City Planning **Commission**.<sup>192</sup> The terms of the Easement allow the Conservancy to assign its rights and obligations only to the Landmarks Preservation Commission or, with the consent of the Center's owners and the chair of the Landmarks Preservation Commission, another nonprofit entity with expertise in the field of historic **preservation**.<sup>193</sup> Such provisions for assignment to substitute grantees are common features of conservation **easements**.<sup>194</sup> One reason for these assignment provisions is to help assure that the Easement is perpetual, as required

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187. *Id.* at 19, 14.6. The Preservation Easement expressly provides for equitable remedies in the form of prohibitory and mandatory injunctions should there be material violations of the Easement's commitments for which damages would be an inadequate remedy. *Id.* at 39, ¶ 21.

188. *Id.* at 21, ¶ 4.8. The Subordination Agreement specifically does not subordinate RCPI's security interest to such liens. Subordination Agreement, *supra* note 103, at 2.

189. Easement, *supra* note 115, at 9-12, ¶ 3.

190. *Id.* at 10, ¶ 3.2.

191. *Id.* at 11, ¶ 3.2.

192. *Id.* at 25-29, ¶ 9.

193. *Id.* at 26-27, ¶ 9.2.

194. Chapter 9 of **THE CONSERVATION EASEMENT HANDBOOK** 111-19 (Janet Diehl and Thomas S. Barrett, eds. 1988) explains in detail the practice of providing for substitute and back-up grantees in conservation easements.

under section 170 of the Internal Revenue Code regarding charitable deductions for the value of conservation easements.<sup>195</sup> Paragraph 10 of the Easement also provides for the Landmarks Preservation Commission to “immediately exercise” the Conservancy’s rights and obligations under the Easement, if there is no other enforcement agent.<sup>196</sup> The objective of such provisions is to make certain that there is no lapse in enforcement and that the Easement is perpetual as required under the Internal Revenue Code, if a charitable deduction is taken for the value of the easement.

An interesting technical legal issue regarding potential application of the rule against perpetuities arises because of this automatic **back-up-grantee** provision. Described as “Action in Lieu of **Conservancy**,”<sup>197</sup> the back-up grantee provision is intended to operate as an executory interest in the Easement’s servitude rights and obligations. As a result, the specter of the rule against perpetuities arises. The Easement describes four possible contingencies which could automatically shift the Conservancy’s rights and obligations under the Easement to the Landmarks Preservation Commission: (1) assertion by the Center’s owners that any part of the Easement is unenforceable by the Conservancy or its assigns, (2) notice of assignment to the Landmarks Preservation Commission by the Conservancy, (3) inability to identify a substitute grantee, or (4) nonperformance of the Conservancy’s **obligations**.<sup>198</sup> The resulting automatic shift in ownership of the Easement to the Landmarks Preservation Commission is intended only to be temporary, since the Landmarks Preservation Commission’s back-up rights “shall *ipso facto* terminate upon the installation of a Substitute. . . .”<sup>199</sup> If characterized in future interest terms, this provision would appear to create a shifting executory interest in an easement, subject to an executory limitation. Each of the four contingencies which could cause the transfer of ownership of the Easement to the back-up grantee could well occur long after the end of lives-in-being (no measuring life is apparent) plus twenty-one years.

To the extent that the rule against perpetuities is applied to invalidate easements which take effect in the indefinite future as executory interests, automatic back-up interests, such as that held by the Landmarks Preservation Commission under the Easement, could be invalid. The

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195. 26 U.S.C. § 170(h)(5)(A).

196. *Easements* *supra* note 115, at 29-30, ¶ 10.

197. *Id.* at 29, ¶ 10.

198. *Id.* at 29, ¶ 10.1.

199. *Id.* at 29, ¶ 10.1.

revised *Servitudes Restatement* has taken the questionable position that such interests may be subject to invalidation by the rule against perpetuities. The revision's black-letter states in section 3.3 that "The rule against perpetuities does not apply to servitudes or powers to create servitudes."<sup>200</sup> But Comment (a) states that this general rule of inapplicability "does not, however, apply . . . to ownership of present servitudes in gross."<sup>201</sup> The implications of the comment for the type of servitude interest exemplified by the back-up interest in the Preservation Easement held by the Landmarks Preservation Commission are ominous. Back-up grantee interests in conservation servitudes are normally held in gross. Since these interests are quite common and have not been questioned on perpetuities grounds, the statement in the comment seems dubious. The black letter statement that the rule against perpetuities does not apply to servitudes at all, appears to articulate a better approach. Since the main purpose of the rule against perpetuities is to prevent indefinite suspension of ownership, application of the rule to nonpossessory use rights and requirements seems **anomalous**.<sup>202</sup>

Although the precise issue has not been decided, New York courts would probably not apply the rule against perpetuities to assess the validity of back-up interests under a conservation easements such as that held by the Landmarks Preservation Commission. Bather, the logic of *Metropolitan Transportation Authority v. Bruken Realty Corporation*<sup>203</sup> indicates that New York courts would be more likely to evaluate these back-up interests under the unreasonable restraints on alienation doctrine. In *Bruken Realty*, the New York Court of Appeals found a preemptive option held by a public agency to be enforceable because it was reasonable in light of the beneficial purpose it served. The court declined to apply the rule against perpetuities to that option because the rule seemed unduly inflexible in the context of sophisticated commercial and governmental transactions, such as the air rights transfer involved in *Bruken Realty*. Since the Landmarks Preservation Commission's

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ZOO. SERVITUDES RESTATEMENT, T. D. 2, *supra* note 131, § 3.3.

201. *Id.*, at cmt. a.

202. Comment "a" seems to be based on decisions regarding options cited in the Reporters Note. Options do have the capacity to divest ownership and to become possessory and are better candidates than such servitudes as conservation easements for application of the rule against perpetuities. Even with regard to options, an analysis based on restraints on alienation appears to offer a better means of assessing validity than does the rule against perpetuities. Such an analysis is more flexible and responsive to real concerns raised by the particular factors involved in a specific transaction than the inflexible rule against perpetuities. *Metropolitan Transportation Authority v. Bruken Realty Corporation*, 492 N.E.2d 379 (N.Y. 1986), discussed below, illustrates the application of such an approach.

203. *Id.*

back-up interest in the Easement is similarly held by a public agency and serves the beneficial public purpose of preserving a designated landmark, a similar restraints-on-alienation approach, instead of application of the rule against perpetuities, would probably result in a conclusion favoring its validity. Such an approach seems more responsive both to real concerns regarding suspension of alienability of land ownership, and to the need for flexibility in the treatment of **servitudes**.<sup>204</sup>

### 3. SUBORDINATION AGREEMENT

At the end of the Declaration is a short document, dated May 1, 1990, titled a "Waiver and Subordination." The Subordination Agreement waives RCPI's right to execute the Easement and Declaration and subordinates RCPI's interest in the transferor lot to the Declaration and Easement. For the purposes of the section 74-79 special permit to transfer development rights from a landmark, RCPI is party in interest with regard to the transferor **lot**.<sup>205</sup> As a result, RCPI was required either to execute or to waive its right to execute the Declaration and Easement before the special permit allowing the transfer of development rights could be approved. As noted earlier, RCPI's 1985 Prospectus indicated that it had "agreed to execute such documents and provide such information as may be required to effectuate the transfer or utilization by the Borrower of the development rights. . . ."<sup>206</sup>

Presumably, RCPI did not execute the Declaration and Easement because it was not interested in becoming directly bound by the program of continuing landmark maintenance. The "sole purpose" of RCPI's Subordination Agreement is stated to be "providing for the continuation of the Easement and Declaration in the event of any foreclosure of such [RCPI's] mortgage **lien**."<sup>207</sup> RCPI's other rights and privileges under the mortgage or at law are expressly reserved from subordination. In particular, no claim asserted by third-party creditors of the city or the Conservancy (or their successors in interest) and no lien or security

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204. Even if the rule against perpetuities were applied to shifting ownership of present servitudes in *gross*, as the revised *Servitudes Restatement* suggests, most back-up grantee interests in conservation servitudes would probably escape invalidation under the charity-following-a-charity exception to the rule. See **RESTATEMENT (SECOND) PROPERTY: DONATIVE TRANSFERS § 1.6**. For the purposes of the charity-following-a-charity exception to the rule, a municipality would probably be treated as a **charity** in the context of conservation **easements**. See *Christ's Hospital v. Grainger*, 16 Sim. 83 (Ch. 1848). In *Grginger*, a case not involving a servitude, the chancellor found an executory interest in **the city** of London valid under the **charity-following-a-charity** exemption.

205. New York, N.Y., **Zoning** Resolution § 12-10.

206. 1985 **PROSPECTUS**, *supra* note 35, at 40.

207. Subordination Agreement *supra* note 103, at 2.



interest in favor of the city or the Conservancy is to have priority over the mortgage lien or any extensions, advance modifications, or renewals of the mortgage. As a result, the Subordination Agreement appears to subordinate **RCPI's** interests only to the continuation of nonmonetary restrictions and obligations contained in the Declaration and Easement, in the event of foreclosure of the mortgage. Some of the implications of the Subordination Agreement for the RCPI interests were discussed above in connection with the transfer of development **rights**.<sup>208</sup>

#### 4. PRESERVATION AGREEMENT

A separate Preservation Agreement, approximately fifty pages in length, sets up processes for continuous assessment and maintenance of a different part of the Rockefeller Center landmark: 1250 Avenue of the Americas and 30 Rockefeller Plaza (the G.E. Building). The interior landmark portions of the lobby of 30 Rockefeller Plaza are also covered by the **Agreement**.<sup>209</sup> For convenience, these buildings are referred to as "the central buildings," to distinguish them from the transferor lot to which the Easement applies. The central buildings are adjacent to the transferor lot and provide a visual backdrop for its landmark features. This physical relationship, together with the architectural relationships between the central buildings and those on the transferor lot, made additional protection for the landmark's central buildings appropriate.

Many of the terms of the Agreement are similar to those of the Easement. The landmark maintenance standard—sound, first-class condition—is the **same**.<sup>210</sup> However, unlike the Easement and the Declaration, the Agreement does not run with the land. It is a bilateral contractual agreement regarding maintenance of the central buildings. The parties to this contractual arrangement are the Conservancy and RCP Associates, the current owner of the fee or reversionary fee in the central buildings. The city, acting through the Landmarks Preservation Commission and the City Planning Commission, also has a role to play. RCP Associates's obligations and rights under the Agreement continue only as long as RCP Associates retains ownership of fee interests in the central buildings.<sup>211</sup> Even though the Agreement does not run with

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208. See *supra* discussion in text at notes 101-10.

209. Agreement, *supra* note 115, at 6, ¶ 1.2 (viii).

210. *Id.* at 4, ¶ 1.1.

211. **RCPI's 1985 Prospectus** indicates that the convertible mortgage held by RCPI contemplates formation of a new partnership if and when the equity option is exercised on or before December 31, 2000. 1985 **PROSPECTUS**, *supra* note 35, at 42-46. If this occurs, ownership of the central buildings would transfer from RCP Associates to the new partnership at that time. See note 213, *infra*.

ownership of the central buildings, the Agreement requires RCP Associates to assign its rights and obligations under the Agreement to successors in ownership of its interests in the central **buildings**.<sup>212</sup> The Agreement also requires RCP Associates to provide notice of the Agreement to any successor or assign of the central buildings and to “require any successor or assign . . . to execute an agreement expressly assuming all of the obligations and duties” of the current owner under the Preservation **Agreement**.<sup>213</sup> The Preservation Agreement limits RCP Associates’ liability to the interest in the central buildings held by RCP Associates, or by its assignees, during the time of their respective **ownership**.<sup>214</sup> However, RCP Associates would retain personal liability for any breaches of its agreement to require assumption of the Preservation Agreement by future owners of its interests in the central **buildings**.<sup>215</sup>

Much of the Agreement is nearly identical to the Easement. The operation of the Agreement, through **Annual** Condition Statements, Maintenance Programs, and Periodic Inspections, parallels the procedures set up in the Easement. Indeed, the baseline report discusses the parts of the landmark covered by the Agreement along with those parts covered by the Declaration and Easement in a single report. As was the case with regard to the Easement, the Conservancy’s role under the Agreement is that of a private inspection and enforcement agency, continuously assessing the condition of the central buildings in the **landmark**.<sup>216</sup> The Conservancy also has the power to require or to perform maintenance and repairs necessary to maintain the central build-

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212. Agreement, *supra* note 115, at 40–41, ¶ 14.20. As **noted above**, the most likely transfer **would** be to the new partnership described *supra* at note 211.

213. Agreement, *supra* note 115, at 41, ¶ 14.2. There is an exception for the New York City Industrial Development Agency and provision for equitable allocation, if the fee interests in the central buildings are owned by more than one entity. *Id.*

If RCPI’s equity option is exercised on or before December 31, 2000, as described in the 1985 *Prospectus*, the most likely successor will be a new partnership (to be formed when the equity option is exercised) of which RCPI would own a 71.5% share. According to RCPI’s 1985 *Prospectus*, the new partnership’s managing partner “generally responsible for making and implementing all decisions for the Partnership” is expected to be Rockefeller Group, Inc. It was Rockefeller Group, Inc. which signed **the Agreement** as general partner of RCP Associates. 1985 *PROSPECTUS*, *supra* note 35, at 43.

214. Agreement, *supra* note 115, at 42, ¶ 14.4 and 14.5.

215. *Id.* at 43, ¶ 14.6. Covenants in the convertible mortgage held by RCPI restrict transfer of the property outside of Rockefeller Group, Inc. affiliates before the exercise of the equity option. 1985 *PROSPECTUS*, *supra* note 35, at 37.

216. The Agreement creates two access easements in gross to facilitate inspection; Agreement, *supra* note 115, at 22–24, ¶ 5, 27–29, ¶ 9. These easements do not run with the land, since the Agreement does not.

ings in sound, first-class **condition**.<sup>217</sup> The Agreement is assignable by the Conservancy and provides for back-up rights in the Landmarks Preservation Commission similar to those created in the **Easement**.<sup>218</sup>

Although the Agreement does not run with the land under the central buildings, and will not be recorded in the land records, its provisions require that it be filed with the Building Department and that all permit applications regarding the central buildings refer to it.<sup>219</sup> The Agreement also makes clear that the special permit transferring development rights from the Rockefeller Center landmark to Rockefeller Plaza West, as well as the certificate of occupancy of the new building incorporating those development rights, will remain contingent on continuing performance of the landmark maintenance program in the Agreement.<sup>220</sup> Since failure of RCP Associates, or its assignees, to meet the obligations in the Agreement could jeopardize continued use of the development rights transferred **from** the landmark to the new building, the owners and occupants of Rockefeller Plaza West should be keenly interested in avoiding violations of the Agreement. Because the Agreement operates as a contract, a third-party-beneficiary theory might be available to the owners of Rockefeller Plaza West, should these nonparties to the Agreement want to enforce the Agreement to protect their rights against revocation of the special permit. It is, of course possible that there are, or will be, special arrangements, or side agreements, between RCP Associates and the owners of Rockefeller Plaza West, which will assure performance under the Agreement.

#### 5. TRANSFER INSTRUMENT

The Transfer Instrument is the shortest of the legal documents. In many ways it is the most important and unusual of the documents which comprise the program of continuing landmark maintenance. The full title of the Transfer Instrument is "Transfer of Development Rights and Notice of Restrictions Pursuant to Section 74-79 of the Zoning Resolution of the City of New York."<sup>221</sup> An identical five-page document is attached both to the Declaration and to the Agreement. The parties are RCP Associates (owner of the landmark transferor lot) and three entities: Rock-Forty-Ninth, Inc., Jated Corp., and Rockefeller

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217. *Id.* at 13-22, ¶ 4.

218. *Id.* at 36-39, ¶ 12.

219. *Id.* at 48, ¶ 22. As a result, although the Agreement does not run with the land, its rights and obligations run **with** the regulatory permission embodied in the special permit which allows the transfer of development rights from the landmark.

220. *Id.* at 46, ¶ 19.2.

221. Transfer Instrument, *supra* note 169.

Center Management Corporation, which together own the site for Rockefeller Plaza West.

The Transfer Instrument is important because recording it formally sets the program of continuing landmark maintenance in motion. The Transfer Instrument is unusual because it operates as a conveyance of regulatory rights, rather than of more conventional real property interests, such as air rights or an easement for light and air.<sup>222</sup> Such a Transfer Instrument is required under section 74-79 of the Zoning Resolution for special permits transferring development rights from landmarks. Section 74-793 requires that the Transfer Instrument be recorded on the land title, not only of the affected portions of the landmark (the transferor lot), but also of the receiving lot (Rockefeller Plaza West).<sup>223</sup>

Recordation of the Transfer Instrument at the time construction begins on Rockefeller Plaza West will have three consequences. First, it will transfer development rights to a **maximum** of **506,379.52** square feet of floor area from the transferor lot to the Rockefeller Plaza West site. Second, it will provide record notice that the development rights of the transferor lot have been permanently and irrevocably reduced by the amount transferred. Third, it will provide record notice of the restrictions contained in the Declaration, Easement, and Agreement to successors in interest in the landmark transferor lot and the Rockefeller Plaza West site.

The Transfer Instrument's recitals that the obligations embodied in the program of continuing landmark maintenance are preconditions for the transfer of development rights from the landmark to the Rockefeller Plaza West site make clear that these conditions will accompany the landmark's development rights to the site for the new building when the special permit is exercised. Item E of the Transfer Instrument's Preamble notes that, once transferred, the "Development Rights may only be used pursuant to the Special Permit and a certain restrictive declaration required by the special permit."<sup>224</sup> The Board of Estimate Resolution which approved that special permit expressly made it conditional on continuing performance under the Declaration, Preservation Easement, and Preservation Agreement. Failure to observe the obligations in the program of continuing landmark maintenance would be grounds for the City Planning Commission to seek revocation of the

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222. See James M. Pedowitz, *Transfers of Air Rights and Development Rights*, 9 REAL PROP., PROB. & TRUST J. 183 (1974).

223: New York, N.Y., Zoning Resolution § 74-793.

224. Transfer Instrument, *supra* note 169, at 2.

special permit and certificate of occupancy of Rockefeller Plaza West.<sup>225</sup>

Once the Transfer Instrument is recorded, the development rights transferred from the landmark to Rockefeller Plaza West will remain contingent on performance of the promises in the Declaration and Easement regarding continuing landmark maintenance. Even though Rockefeller Plaza West will not, strictly speaking, be directly burdened by the landmark maintenance obligations, development rights contained in the building will depend on compliance with required landmark maintenance. Since the development rights to be transferred under the **special** permit represent more than a third of the floor area of the new building, use of a substantial portion of the new building will be contingent on continuing performance under the terms of the program of continuing landmark maintenance. As a result, the owners of Rockefeller Plaza West will have a strong interest in maintenance of the parts of the Rockefeller Center landmark covered by the program. Whether the Transfer Instrument may result in their being able to enforce the program is a question complicated both by the terms of the Declaration and Easement, which appear expressly to exclude such enforcement rights, and by the interlocking ownership of the Rockefeller Center landmark and Rockefeller Plaza West.<sup>226</sup>

## V. The Japanese Purchase

As details of the development rights transfer and the program of continuing landmark maintenance were being worked out during the closing months of 1989, Mitsubishi Estate Company agreed to pay \$846 million for a 51% controlling interest in Rockefeller Group, Inc.<sup>227</sup> There is no indication that Mitsubishi Estate Company's investment had any direct

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225. Board of Estimate Resolution, *supra* note 87, at 40, ¶ 11.

226. Section 8.1 of the Declaration states that persons other than the city, **declarant**, and with regard to the Easement, the Conservancy, have no rights to enforce the restrictions. Declaration, *supra* note 115, at 19. In contractual terms, the owners of Rockefeller Plaza West are not expressly named as beneficiaries of the Agreement or any other part of the landmark maintenance program. Nevertheless, the reason for creating the program of continuing landmark maintenance was to make possible the use of some of the landmark's development rights by transferring them to Rockefeller Plaza West.

227. Rockefeller Group, Inc. (**RGI**) is the general partner of RCP Associates, which owns the Rockefeller Center landmark, subject to the convertible mortgage held by RCPI, as well as the site for Rockefeller Plaza West. Two additional purchases of shares in RGI increased the Mitsubishi Estate Company's stake in RGI to 80%. The Japanese company's total investment in RGI has amounted to approximately \$1.373 billion. **Mitsubishi Lifts Rockefeller Stake**, N.Y. **TIMES**, July 13, 1991, at 19. According to Jonathan Burton, the additional purchases "by Mitsubishi Estate Company were generated when the Rockefeller interests exercised two options to sell. Jonathan Burton, **Getting Our at the Top**, 148 **FORBES**, No. 10, Oct. 28, 1991, 149-50.

impact on the landmark preservation efforts described in this article. Nor is there any indication that landmark preservation efforts had any effect on the Mitsubishi Estate Company's acquisition of control over Rockefeller Center's corporate **owner**.<sup>228</sup> Whether there should have been more discussion of landmark preservation efforts at Rockefeller Center in connection with the Japanese purchase remains an intriguing question.<sup>229</sup> In light of the highly negative public reaction to the 1989 Japanese purchase, discussion of the program of continuing landmark maintenance might well have been to Mitsubishi Estate Company's advantage. In any event, the relationship between the foreign purchase and landmark preservation raised several interesting issues.

When Mitsubishi Estate Company's investment in Rockefeller Center was announced in October 1989, there was a painful public outcry not only in New York City, but all over the United States. Press accounts reflect a howl of protest as reports of the deal "hit a raw **nerve**."<sup>230</sup> The American public's reaction was described in terms of shock, sadness, and sometimes anger at the "loss" of a key part of American culture to what were typically described as predatory aliens bent on "bagging" American real estate **trophies**.<sup>231</sup> Even the usually staid *Christian Sci-*

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228. The potential for transferring development rights to enhance the development **potential** of the Seventh Avenue site for Rockefeller Plaza West would have been an **attractive** aspect of acquisition of an equity stake in Rockefeller Group, Inc. The fact that the development rights would transfer from landmark portions of Rockefeller Center which are subject to **RCPI's** convertible mortgage to property not subject to the mortgage may have rendered equity investment in Rockefeller Group, Inc., somewhat more attractive. If RCPI exercises its equity option, the share of Rockefeller Group, Inc., in the landmark portions of Rockefeller Center will fall to around 28.5%. Neither the development rights nor the Rockefeller Plaza West site is subject to this reduction in ownership by means of **the** exercise of the equity option. Jonathan Burton, *supra* note 226, at 150.

229. The **application** for the **special permit** allowing transfer of **development** rights from the **landmark**, including an-early version of the program of **continuing** landmark maintenance, had been filed March 1, 1989, more than half a year before the Mitsubishi Estate **Co.'s** agreement to invest in Rockefeller Group, Inc. **was** announced on November 1, 1989. By mid-December 1989, the program of continuing landmark maintenance was largely in place. The Landmarks Preservation Commission reported favorably on the landmark-related aspects of the transfer of development rights proposal on December 19, 1989. Mitsubishi Estate **Co.'s** purchase was completed April 3, 1990, shortly before the **Planning** Commission approved the special permit authorizing the transfer of development rights. 1989 **ANNUAL REVIEW**, *supra* note 4, at 3.

230. *Japanese Acquire Real Estate, Suspicion in U.S.*, LA. TIMES, Dec. 19, 1989, at D8.

231. For example, consider the headlines of the following stories: William F. Buckley Jr., *The Japs Capture Rockefeller Center*, NATIONAL REVIEW, Dec. 8, 1989, at 53; *Buy America while Stocks Last*, THE ECONOMIST, Dec. 16, 1989, at 63; James **Barron**, *Huge Japanese Realty Deals Breeding Jokes and Anger*, N.Y. TIMES, Dec. 18, 1989, at **B1**; *Japanese Acquire Real Estate, Suspicion in U.S.*, LA. TIMES, Dec. 19, 1989, at D8; Richard Cohen, *Kicking Away Our Patrimony*, WASH. POST, Nov. 3, 1989, at A21.

ence *Monitor* carried such tasteless headlines as "Will the Rockettes Wear **Kimonos?**"<sup>232</sup> Immediately after the deal was announced, the New York Times reported sales of T-shirts saying "Welcome to Wokafellar Center" outside 30 Rockefeller **Center**.<sup>233</sup> Wry jokes from television comedians, such as David Letterman and Johnny Carson, were echoed in cynical remarks from ordinary people. For example, a Nissan salesman suggested to the New York *Times* that "they're getting back at us for the atomic bomb."<sup>234</sup> New York City Mayor Ed Koch responded to this visceral, and sometimes outright racist, reaction by calling it "xenophobic." Mayor Koch reminded New Yorkers that Rockefeller Center was "not going **anywhere**."<sup>235</sup> The American Civil Liberties Union reported that "verbal assaults against Japanese-Americans had surged since the Rockefeller Center **deal**."<sup>236</sup> Commentators from William F. Buckley, Jr. to Richard Cohen to Hobart **Rowen** reminded Americans that the Japanese investment in Rockefeller Center was symbolic of the serious economic results of the trade imbalance with Japan. Instead of blaming the Japanese for investing in Rockefeller Center, these commentators suggested, bleakly, that Americans should blame themselves. All in all, public reaction from Americans in general and New Yorkers in particular was strong and negative.

The American public seems to have misunderstood a number of details regarding the deal. To begin with, the 1989 transaction was not the first sale of interests in Rockefeller Center to outsiders. As early as 1982, reports circulated that the managers of the Rockefeller Trusts wanted to sell at least a half interest in Rockefeller Group, Inc., in order to diversify the trust's assets." In 1985 RCPI acquired the \$1.3 billion convertible mortgage on the **landmark**.<sup>238</sup> In 1986, Rockefeller Group, Inc., sold the Exxon building to Mitsui Fudosan, Inc., for \$6 10 mil-

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232. *Will the Rockettes Wear Kimonos?*, CHRISTIAN SCI. MONITOR, Nov. 7, 1989, at 20.

233. *Huge Japanese Realty Deals Breeding Jokes and Anger*, N.Y. TIMES, Dec. 18, 1989, at B1.

234. *Id.*

235. *Rockefeller Center Deal by Japanese Firm Draws Mixed Reaction in N. Y.*, L.A. TIMES, Nov. 1, 1989, at D6.

236. *Huge Japanese Realty Deals Breeding Jokes and Anger*, N.Y. TIMES, Dec. 18, 1989, at B1.

237. *Paul Betts, Restructuring Plan for Rockefeller Complex*, FINANCIAL TIMES, Feb. 5, 1982, at I4.

238. The convertible mortgage held by RCPI is discussed, *supra* at notes 96-1 10. See Douglas H. Walter and Paul A. Strasen, *Rockefeller Center Properties, Inc.*, 64 TAXES 13 (Jan. 1986), for details regarding the structure of the transaction and its tax consequences.

lion.<sup>239</sup> By 1989, with the value of Manhattan real estate high, the Rockefeller Trust's managers decided to sell a major share of Rockefeller Group, Inc., the corporate general partner of the limited partnership which owns Rockefeller **Center**.<sup>240</sup> The stated purpose of the sale was to enable the trust to reinvest in other types of assets to diversify the trust's portfolio. Mitsubishi Estate Company, a company with investment capital and a reputation for long-term investment and conservative management, seemed a natural purchaser.

Contrary to the public's image of an aggressive predatory purchaser, Mitsubishi Estate Company did not seek out the investment in Rockefeller Center. According to the management of Rockefeller Group, Inc., the Rockefeller Family Trusts privately offered the investment to Mitsubishi Estate Company in September 1989.<sup>241</sup> Others have suggested a somewhat more complex scenario. Michael Lewis describes what he calls the Japanese "acquisition of Rockefeller Center" as "actually a turf war" between two rival Japanese companies, Mitsubishi and **Mitsui**.<sup>242</sup> According to Lewis, the Rockefeller family approached Mitsubishi toward the end of 1988. When a November 15, 1989, deadline for bids was announced in September 1989, Mitsubishi and Mitsui began to compete. Eventually, Mitsubishi's \$846 million bid for 51 percent of Rockefeller Group, Inc. preempted Mitsui's bid, which according to Lewis would have been somewhere in the range of \$400 million. Lewis somewhat cryptically concludes, "Proving that Mitsubishi Estates overpaid for Rockefeller Center to avoid humiliation at the hands of its rivals is difficult. On the other hand, would anyone care to argue the opposing **case?**"<sup>243</sup>

Another misconception about the Japanese purchase was that it was a purchase of Rockefeller Center, itself. In fact, the title to the Rockefeller

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239. Iver Peterson, *Foreign Inroads Aside, Manhattan Is Still American*, N.Y. **TIMES**, Nov. 12, 1989, § 4, at 6. The Exxon building remains part of the Center for management purposes, although it is no longer owned by Rockefeller interests.

240. Burton, *supra* note 227, at 149-50. Newspaper accounts indicate that the 1989 Rockefeller Center deal was scaled down from a purchase of 80 % of Rockefeller Group, Inc. to 51% in an effort to mollify adverse public reaction. N.Y. **TIMES**, Nov. 1, 1989, at D1, D7. **RCPI's 1985 Prospectus** indicates that "Rockefeller interests . . . will maintain at least a 20% interest (direct or indirect) in the ownership of the Property during the period" before exercise of the conversion option by RCPL. 1985 **PROSPECTUS**, *supra* note 35, at 37. By mid-July 1991 Mitsubishi Estate Company had raised its stake in RGI to 80% at a total cost of approximately \$1.37 billion. See *supra*, note 227.

241. James Sterngold, *Many Japanese Wary on Mitsubishi U. S. Deal*, N.Y. **TIMES**, Nov. 1, 1989, at D7, col. 4. Daniel Sneider, *Tokyo Buyouts: 1st Hollywood, Now Rockefeller Center*, **CHRISTIAN SCI. MONITOR**, Nov. 1, 1989, at 3.

242. **MICHAEL LEWIS**, **PACIFIC RIFT** 75 (1991).

243. *Id.* at 75.



Center landmark has been unaffected by Mitsubishi Estate Company's purchase of an increasing equity stake in the corporate general partner of the limited partnership which owns Rockefeller Center. What Mitsubishi Estate Company purchased in 1989 was not Rockefeller Center, at least not directly. Rather, the purchase was of a 5 1% controlling interest in the corporation which owns and manages Rockefeller Center through affiliates. Even when Mitsubishi Estate Company increased its stake in RGI to **80%**, the title to the landmark real estate remained in RCP Associates, subject to **RCPI's** convertible **mortgage**.<sup>244</sup> Mitsubishi's additional purchases did not cause nearly the public consternation its original purchase of control over RGI generated in 1989.

Reacting to reports of American outrage about the 1989 purchase, an anonymous Japanese business official suggested, "I think Japanese businesses should be more conscious about their moves to avoid apprehension from the American people."<sup>245</sup> Perhaps those involved in the deal misunderstood the important cultural values embodied in Rockefeller Center. The American public associates the Rockefeller name with philanthropy and with the public-spirited approach to capital investment symbolized by the building of Rockefeller Center. This association contrasted with a perceived lack of sympathy with and participation in community-service activities on the part of Japanese businesses. This perceived contradiction fueled fears that Mitsubishi Estate Company's purchase of Rockefeller Center would endanger the public values embodied in the **landmark**.<sup>247</sup>

In 1988 **the** Japanese business federation known as the Keidanren had suggested that lack of philanthropy on the part of Japanese businesses investing abroad "would be detrimental to their harmonious integration into host communities and would also invite unfavorable impacts and friction."<sup>248</sup> Japanese businesses in New York have in fact taken a

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244. If RCPI exercises its equity option on or before December **31, 2000**, Mitsubishi Estate Company's 80% share of RGI (July 1991) would result in the latter holding a 22.8 % interest in the portions of the Rockefeller Center landmark covered by the convertible mortgage. Richard D. Hylton predicts that conversion is unlikely "because the short-term value of the properties has dropped." Richard D. Hylton, *Reaping the Benefits of a Symbol of Wealth*, N.Y. TIMES, Feb. 16, 1992, at 16.

245. Steven R. Weisman, *Japanese Are Concerned About Rockefeller Deal*, N.Y. TIMES, Nov. 1, 1989, at D7.

246. Richard D. Hylton, *Rockefellers Trying to Keep a Fortune from Dissipating*, N.Y. TIMES, Feb. 16, 1992, at 1; and Richard D. Gylton, *A Legacy of Giving Enormous Amounts to charities*, N.Y. TIMES, Feb. 16, 1992, at 16.

247. See James Flanigan, *Mitsubishi-Rockefeller Deal is a Good Sign*, L. A. TIMES, Nov. 1, 1989, at D4; Sam Roberts, *Japanese Work to Link Business with Philanthropy*, N.Y. TIMES, Mar. 12, 1990, at B1.

248. *Id.* at B1.

number of affitiive steps to overcome this ‘ ‘philanthropy -gap,’ ’ such as active participation in the New York City Partnership, a voluntary organization concerned with corporate social responsibility. A specific example of these efforts occurred just five days before the Rockefeller Center deal was announced, when Mitsubishi and other Japanese companies sponsored a fundraiser which brought the Takarazuka Dance Troupe to Rockefeller Center. That event netted \$100,000 for the United Way of New York City.<sup>249</sup> In addition to these types of philanthropic projects, enthusiastic commitment to the cultural respect embodied in landmark preservation offers a particularly effective way for foreign investors to generate good will in the communities in which they make real estate investments.

It is, therefore, somewhat surprising that, in announcing the Japanese investment in Rockefeller Center, no reference seems to have been made to landmark preservation. Rockefeller Center had been a designated landmark since 1985, Radio City Music Hall’s interior since 1978. Moreover, additional measures to protect the Rockefeller Center landmark were clearly on the horizon, even though the program of continuing landmark maintenance was not in final form when the Japanese company’s agreement to invest in the Center was announced in October 1989. Discussion of these landmark preservation measures at the time of the Mitsubishi Estate Company’s 1989 investment might have helped to calm public concerns that Rockefeller Center would be neglected or radically changed.

Rockefeller Center’s program of continuing landmark maintenance was, of course, required as a precondition for permission to transfer development rights from the landmark to Rockefeller Plaza West. Nevertheless, the program provides a model for additional voluntary efforts to preserve important architectural, cultural and natural features. Enthusiastic voluntary participation in this type of landmark preservation is an effective way for outside investors, especially those from abroad, to evidence both a commendable capacity for corporate philanthropy and genuine concern about community values. Such qualities inspire greater confidence in the otherwise suspect motives of real estate investors, particularly those from outside the community. Such landmark preservation efforts demonstrate the type of sensitivity to local culture which is likely to make communities more receptive to and cooperative with outside investors.

Skepticism about the willingness and ability of foreign investors,

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249. *Id.*

such as Mitsubishi Estate Company, to make necessary investments in and appropriate judgments about the preservation of such an important American landmark as Rockefeller Center remains a problem for investors. Rockefeller Center's program of continuing landmark maintenance is a promising strategy for dealing with such mistrust. The long-range cooperative enterprise among the Center's owners, the Conservancy, and the **Landmarks** Preservation Commission is a particularly helpful structure for carrying out responsible stewardship of landmark properties like Rockefeller **Center**.<sup>250</sup>

## VI. The Significance of Preserving Rockefeller Center

Rockefeller Center's new landmark preservation system represents more than just a useful strategy for combatting fears regarding acquisition of landmark property by outside investors. The highly sophisticated legal techniques used in preserving Rockefeller Center are important in their own right. **In** the long run, the legal aspects of preserving Rockefeller Center are likely to be more significant than Mitsubishi Estate Company's \$1.37 billion, 80% stake in the company which owns Rockefeller Center. Among these legal aspects, three warrant special mention: the transfer of development rights, the complex of multiple servitude arrangements, and the various landmark preservation measures.

First, the transfer of development rights which generated the program of continuing landmark maintenance will itself constitute a significant legal event. Just the fact that such a large and complicated transfer of development rights was approved is important in light of continuing legal attacks on the New York City Landmarks Law as an unconstitutional taking of property rights from landmark **owners**.<sup>251</sup> Despite the fact that both the U.S. Supreme Court and the New York Court of Appeals have found landmarks' development rights and their potential transfer to be of real value, landmark owners complain that transfers of development rights from landmarks exist only in theory, and lack practical reality. Approval of the special permit authorizing the **Rocke-**

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250. For example, as an equity owner of Rockefeller Group, Inc., Mitsubishi Estate Company would have participated in the initial \$200,000 contribution to the Conservancy which endows the Rockefeller Center Preservation Easement and Agreement. Planning Commission Resolution, *supra* note 120, at 26. Now an 80% majority owner of RGI, Mitsubishi Estate Company will bear a **significant** responsibility for carrying out the program of continuing landmark maintenance.

251. See, e.g., *St. Bartholomew's Church v. City of New York*, 914 **F.2d** 348 (2d Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991).

feller Center transfer of development rights demonstrates that it really is possible to transfer valuable development rights from a landmark. Cooperation among the Landmarks Preservation Commission, the City **Planning** Commission, the Conservancy and the Center's owners made approval of the complex terms of this transfer possible. The consultative process embodied in the landmark preservation program will be a continuing reflection of that cooperative spirit.

Early in the history of transfers of development rights, in a case not involving a landmark, Judge Breitel belittled transferrable development rights as "loose-ended" and a "contingency-ridden **arrangement**."<sup>252</sup> He warned against "disembodied abstractions of man's ingenuity, [which] float in a limbo until restored to reality by reattachment to tangible real property."<sup>253</sup> At that time, Judge Breitel did not seem at **all** optimistic about the prospects for their terrestrial reattachment of such abstractions. He feared that **transferrable** development rights would be "subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action."<sup>254</sup> In a subsequent case involving the Grand Central Station landmark, Judge Breitel saw the prospect of transfers of development rights from landmarks in a quite different light: "These substitute rights are valuable, and provide significant, perhaps 'fair', compensation for the loss of rights above the [landmark] terminal **itself**."<sup>255</sup> Approval of **the** Rockefeller Center transfer of development rights seems to substantiate Judge Breitel's later, more optimistic, views regarding the practical, realizable value of transferrable development rights from **landmarks**.<sup>256</sup>

The second important legal aspect of the Rockefeller Center program of continuing landmark maintenance is its sophisticated use of modern

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252. Fred F. French *Inv. Co. v. City of New York*, 350 N.E.2d 381, 388 (N.Y. App. 1976).

253. *Id.* at 388.

254. *Id.*

255. *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1278 (N.Y. 1977).

256. Critics of New York City's process for transferring development rights from landmarks may argue that the process is overly contrived and that the complicated transfer approved for the Rockefeller Center landmark reveals the difficulty and unlikelihood of other such transfers. The circuitous chain of ownership forged for the Rockefeller Center development rights transfer may appear to have been available only because of the fortuitous circumstance that the McGraw Hill Building has not been sold. Indeed, the far-flung development rights transfer approved for Rockefeller Center under section 74-79 of the Zoning **Resolution** may be nearly impossible to replicate. If so, **modifications** of the chain of ownership requirement, in situations where other factors link the transferor and receiving lots, may well be in order.

servitude techniques. The complex system of procedural and-substantive rights employed in preserving Rockefeller Center provides an excellent example of the flexibility and refinement which modern servitude techniques can bring to the solution of practical real estate problems. In the complicated transaction creating the Rockefeller Center servitudes, abandonment of traditional common law doctrines restricting easements, real covenants, and equitable servitudes appears to have worked well. This flexible system of cooperative rights, encompassing procedural systems for agreement and even dispute resolution, seems to be particularly effective in the highly focused context of landmark **preservation.**<sup>257</sup>

Third, and finally, Rockefeller Center's new program of continuing landmark maintenance provides an opportunity for insight into potential differences among some of the specialized legal techniques used in landmark preservation. Map 3 shows the different types of landmark preservation at Rockefeller **Center.**<sup>258</sup> These differing levels of landmark preservation present an interesting experimental model for future study of the relative efficacy of different types of landmark preservation techniques. The new program of continuing landmark maintenance will affect various parts of the landmark in different ways. Perhaps the most graphic way to consider how these different types of landmark preservation at Rockefeller Center are intended to work is to focus on the program's application to some specific features of the Rockefeller Center landmark.

Two brothers (Atlas and Prometheus) and an old man (Wisdom) provide useful guides. Each of them is a Rockefeller Center landmark feature. Map 3 shows where each is located. The famous statue of **Atlas,**<sup>259</sup> which stands in front of the International Building facing Fifth Avenue is simply regulated under the Landmarks Law as a feature of the designated Rockefeller Center landmark. Under New York City's

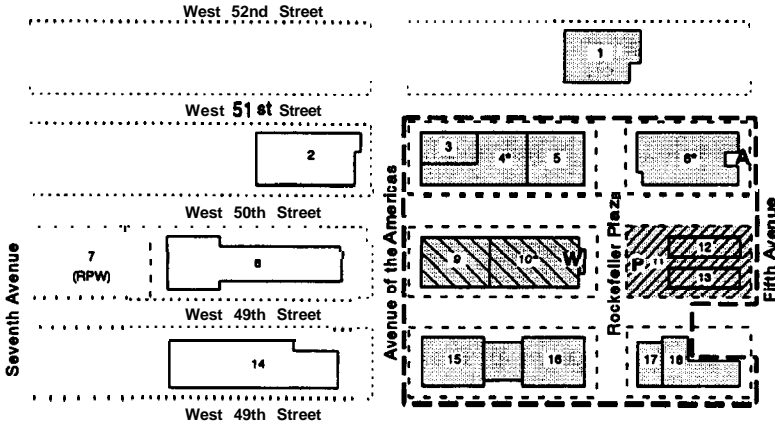
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257. *The revised Servitudes Restatement suggests that there is an especially strong public policy favoring enforceability of conservation and preservation servitudes.* *SERVITUDES RESTATEMENT*, T. D. 2, *supra* note 131, § 3.4, cmt. i. Without such a well defined context with a clearly defined purpose, it may be difficult to manage large systems of flexible servitude rights.

258. Rockefeller Center also contains newer buildings which are not designated as landmarks. For example, the regulatory requirements of the Landmarks Law currently have no impact on the fate of such newer structures as the Exxon and Celanese buildings. Nor does the program of continuing landmark maintenance apply to them.

259. Atlas is a 15-foot-high bronze figure holding a huge armillary sphere with the signs of the zodiac. It was created by Lee Lawrie and installed in 1937. Atlas was a Titan in Greek mythology, as was his brother, Prometheus. After the Titans were defeated by Zeus, Atlas was condemned to bear the world on his shoulders. *THE STORY OF ROCKEFELLER CENTER: FROM FACTS TO FINE ARTS* (1987) 29.






### Map 3. Types of Landmark Preservation at Rockefeller Center



Key to Locations

1. Warner Communications Building
  2. Time & Life Building
  3. 1270 Avenue of the Americas
  4. Radio City Music Hall\*
  5. Associated Press Building
  6. International Building\*
  7. Rockefeller Plaza West (RPW building site)
  8. Exxon Building
  9. 1250 Avenue of the Americas
  10. G.E. Building\*
  11. Sunken Plaza
  12. British Empire Building
  13. La Maison Francaise
  14. McGraw Hill Building
  15. Simon & Schuster Building
  16. Ten Rockefeller Plaza
  17. One Rockefeller Plaza
  18. Manufacturers Hanover Trust
- Interior and Exterior Landmark

Landmark Features Discussed in Text

- A • Atlas
- P • Prometheus
- W • Wisdom
-  Rockefeller Center Buildings subject to Declaration and Easement as well as Landmarks Law Regulation
-  Rockefeller Center Buildings subject to Preservation Agreement as well as Landmark Law Regulation
-  Rockefeller Center Buildings Subject to Landmarks Law Regulation
-  Rockefeller Center Buildings not Landmarked
-  Boundaries of Property Subject to Convertible Mortgage held by RCPI

landmark regulation, Atlas must be maintained in good condition and can not be altered or destroyed without permission from the Landmarks Commission. But the program of continuing landmark maintenance will not apply to Atlas. On the other hand, the famous Prometheus statue, which is the focal point of the sunken plaza, is among the most protected

of Rockefeller Center's landmark **features**.<sup>260</sup> Without the new preservation program, Prometheus would be regulated, like his brother Atlas, as a designated landmark feature, required to be maintained in good condition under the Landmarks Law and protected against alteration or destruction without permission of the Landmarks Preservation Commission. The new preservation program will provide Prometheus with additional protection through both the Declaration held by the city, and the Preservation Easement held by the Conservancy. This additional protection, requiring a higher standard of maintenance in sound, **first-class** condition, will be potentially perpetual because both the Declaration and Easement run with the land on which Prometheus stands. Yet a third legal status applies to the old man, "Wisdom," which is the central figure in the glass panel above the entry to 30 Rockefeller **Plaza**.<sup>261</sup> Wisdom will be subject to an intermediate level of landmark protection. This landmark feature is regulated under the Landmarks Law, as are the sculptures of Prometheus and Atlas. Wisdom also will be protected under the Agreement between Rockefeller Center's owners and the Conservancy. Unlike Prometheus' protection under the Declaration and Easement, the Agreement does not require perpetual maintenance of Wisdom in sound, first-class condition, since the Agreement does not run with the land where Wisdom is located.

Different legal consequences result from these various types of landmark preservation. Different practical consequences may follow. For example, the new program of continuing landmark maintenance will require that both Prometheus and Wisdom be maintained in sound, first-class condition. Prometheus will be so maintained forever; Wisdom will be protected as long as RCP Associates or assignees of the Agreement own 30 Rockefeller Plaza. Not covered by the new landmark maintenance program, Atlas will be only regulated under the New York City Landmarks Law which requires that the statue be maintained in 'good repair.'<sup>262</sup> At present, each of these three landmark features

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260. Prometheus is an 18-foot-high bronze figure covered in gold leaf. The figure stands on a pedestal encircled by a band containing the signs of the zodiac. Like his brother Atlas, Prometheus was a Titan in Greek mythology. On the red granite wall behind the figure is a quotation from **Aeschylus**: "Prometheus, teacher in every art, brought the fire that **hath** proved to mortals a means to mighty ends." It was created by Paul **Manship** and installed in **January** of 1934. *Id.* at 36.

261. Wisdom was sculptured from limestone and cast in glass. It was created by Lee Lawrie and installed in 1933. Wisdom, which stands between limestone panels representing light and sound, embodies the "creative power of the Universe, interpreting the laws and cycles of the cosmic forces to man and ruling all man's activities. The compass in his hand marks on the glass screen below the cycles of light and sound, **two** of the cosmic forces." *Id.* at 41.

262. New York, N.Y., Admin. Code § 25-311.

appears solid and well-maintained. In future, the passage of time may reveal whether the different types of legal protection set forth in the Declaration, Easement, and Agreement will result in visibly different levels of landmark preservation at Rockefeller Center.

In the near term, systematic attention to first-class maintenance of parts of Rockefeller Center may well become the practical standard of maintenance for the entire landmark. However, in the more distant future, especially in the event ownership or management of some of the buildings within Rockefeller Center is transferred, the results of different maintenance requirements might become apparent. One possible result could be a more lax attitude toward the condition of parts of the landmark, such as Atlas, which would not be covered by the program of continuing landmark maintenance. Over time, the appearance of Prometheus as compared with that of Wisdom may also reveal whether a landmark maintenance obligation which runs with the land is, in fact, longer-lived than a similar contractual commitment.

In the long run, the significance of Rockefeller Center's landmark preservation measures will be seen in the faces of Atlas, Prometheus, and Old Man Wisdom, as well as in the appearance of Rockefeller Center's many other landmark features. If the new preservation measures work out as well as they were planned, the Rockefeller Center landmark will remain as it is, the heart of New York City, delighting, inspiring, and informing future generations, whoever invests in ownership of Rockefeller Center.