Transferable Floor Area Scheme

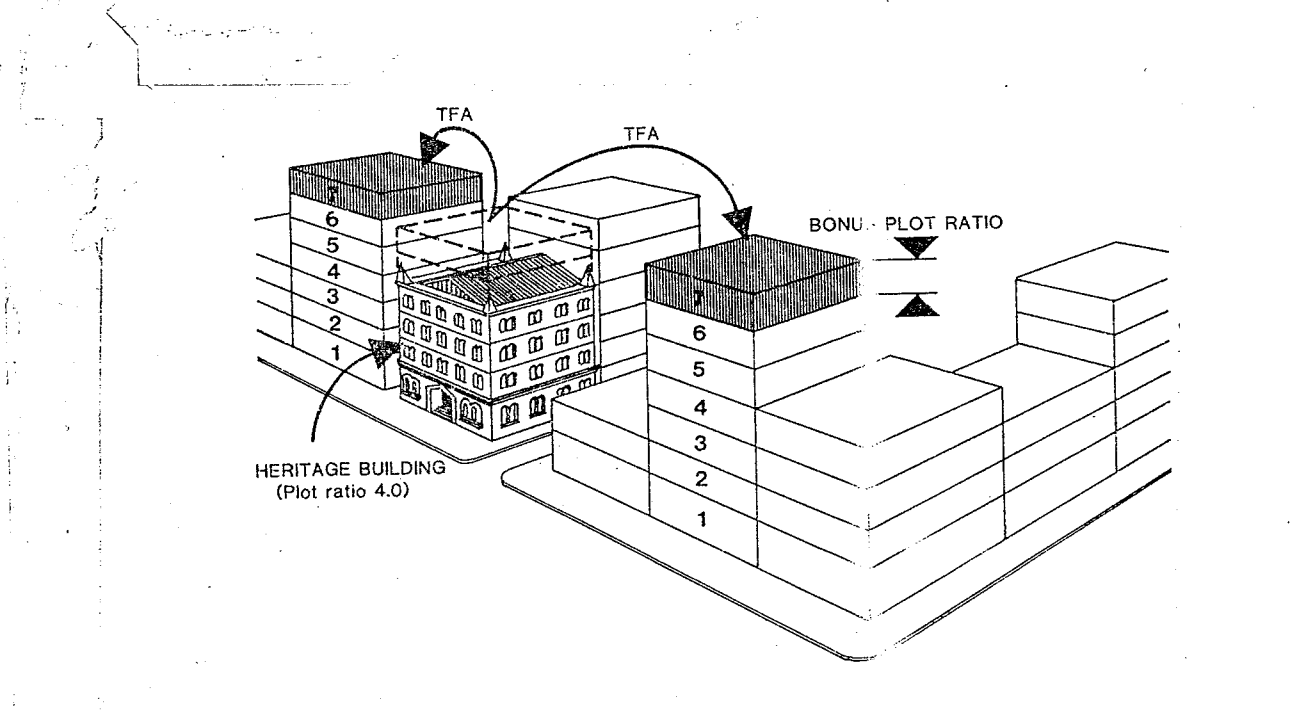
As the Transferable Floor Area (TFA) scheme operates within the ***plot ratio*** provisions of the City of Adelaide Plan 1986-91, it is necessary to understand this system in order to carry out TFA calculations.

The plot ratio of a property is the ratio of the floor area of the building to the land area of the site. The City of Adelaide Plan stipulates two plot ratios for each Precinct -

- ***Basic Plot Ratio***, representing the 'basic' development potential of a site, and,
- ***Maximum Plot Ratio,*** representing the highest possible development potential of a site.

The difference between the two ratios is called the ***Bonus Plot Ratio***.

Developers wishing to develop beyond the Basic Plot Ratio (utilising Bonus Plot Ratio) must provide some community or City benefit, as required by the City of Adelaide Plan. Purchasing Transferable Floor Area is one of the principal means by which developers obtain Bonus Plot Ratio. The TFA scheme therefore operates within the Bonus Plot Ratio system.



The amount of TFA available from a heritage property is the difference between the applicable Basic Plot Ratio and the actual plot ratio of the heritage-listed building, expressed in floor area.
In the example shown above, the heritage building has four levels covering the whole of the site. Therefore, the actual plot ratio is 4.0.
In this hypothetical case, the permitted Basic Plot Ratio is 6.0 and the Maximum Plot Ratio is 7.0. The difference between these ratios - 1.0 - represents the Bonus Plot Ratio which is shaded in this example as the TFA transferred.

The potential amount of Transferable Floor Area is therefore the difference in plot ratio (2.0), multiplied by the site area.

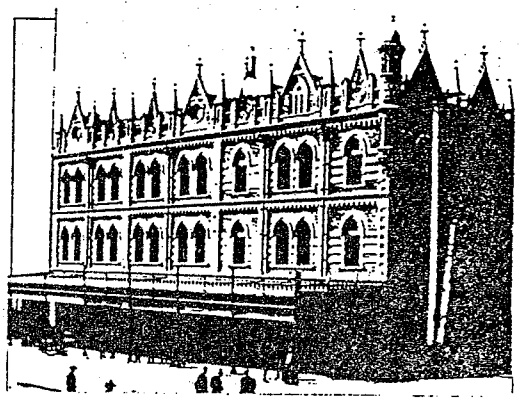
$$\left[\frac{\text{Basic Plot Ratio}}{6.0} - \frac{\text{Actual Plot Ratio}}{4.0}\right] \times \text{Site Area (sq m)} = \text{Transferable Floor Area (sq m)}$$

The example above shows that it is possible to transfer TFA to more than one development site. The maximum amount of TFA that can be transferred will depend not only of the amount of TFA available from the heritage property, but also on the allowable Bonus Plot Ratio on the development site.

Financial Incentives for Heritage Conservation

The incentives scheme is intended to encourage and assist the owners of privately held, heritage-listed properties to undertake conservation work. The form of assistance is primarily through Grants and Rate Rebates, with the City of Adelaide's commitment to this important initiative being $224,000 in 1990-91.

(The scheme also assists with the preparation of Conservation Plans for those properties subject to major re-development or held in multiple ownership.)



1990/91 Budget
$224,000

Eligibility

To be eligible, owners are only required to undertake a minimum of $1,000 on conservation work. "Conservation work" includes restoration, structural repairs (e.g. re-roofing, salt damp correction), maintenance, and even painting of a building included on the Register of City of Adelaide Heritage Items.

Subsidy Level

Both the grants and rate rebate schemes provide a subsidy of 20 cents in the dollar of expenditure on conservation work. The maximum assistance depends on the type of property. For commercial buildings (including tenanted residential buildings), the maximum rate rebate is 100 per cent of the rate liability of the heritage property or $15,000, whichever is the lesser. For those properties receiving a rate concession, such as community organisations and churches, the assistance is in the form of a grant to a maximum of $5,000. For owner-occupied residences, the maximum grant is $2,000.

Applying for Assistance

Requests for assistance should be made by letter, detailing the work proposed, the anticipated expenditure and an indication of when the work will be undertaken. Approved grants, or rate rebates, are subject to the standard conditions that the work be inspected (to ensure that work is satisfactorily completed) and that verification of costs be provided. The subsidy is issued promptly after the inspection.

It should be noted that any work that alters the appearance of a heritage building requires planning approval and that any structural changes require Building Act approval. However, application fees for conservation work will be waived.

SOURCE: CITY OF ADELAIDE PLAN - GENERAL PRINCIPLES

P17 TRANSFERABLE FLOOR AREA

(1) The Council may in accordance with the principles set out hereunder and subject to Principle 19, permit the owners of a conservation site (donor site) to transfer floor area from that site for use on another site (recipient site) to enable the floor area for the purposes of development, on the recipient site to be increased.

(2) Subject to principle 17(4) floor area available for transfer from a donor site shall be equal to the difference between:

(a) the floor area calculated by multiplying the site area of the donor site by the basic plot ratio applicable to the precinct or that part of the precinct in which the donor site is situated; and

(b) the floor area of the Item or Items included on the register of the City of Adelaide Heritage item and situated upon the donor site;

provided that no floor area shall be available where the floor area under subclause *(a)* exceeds the floor area under subclause *(b)* by less than 100 square metres or where the floor area under subclause *(a)* is less than the floor area under subclause *(b)*.

(3) When the council has agreed to permit an owner to transfer floor area pursuant to principle 17 (1) from a conservation site to a recipient site it shall concurrently with the granting of the said permission record that fact by registering the said transfer in its Register of Development Rights. The transfer of the floor area shall not take effect until the agreement referred to in principle 17 (10) has been registered as a memorial on the relevant Certificate of Title pursuant to Section 39d of the City of Adelaide Development Control Act.

(4) Where a transfer of floor area away from the donor site in accordance with principle 17 (2) is registered in the Register of Development Rights pursuant to principle 17 (3), the floor area available for transfer from that conservation site shall be reduced by an amount equal to the floor area transferred in area lots not less than 100 sq.m. until the floor area available for transfer is reduced to zero.

(5) The donor site and the recipient site to which floor area is sought to be transferred must both be within the same district as established in principle 2.

(6) Donor sites must be located within the Core or Frame Districts.

(7) Where land is in the ownership of the Corporation of the City of Adelaide or the crown or any statutory authority which is not bound by the provisions of the City of Adelaide Development Control Act or is held on behalf of or for the benefit of any of the aforesaid floor area from such land cannot be transferred to a recipient site.

(8) A recipient site to which floor area is sought to be transferred must not be a conservation site.

(9) The total floor area to be built upon a donor site shall not exceed the basic plot ratio for that site less any floor area registered on the Register of Development Rights as transferred from that donor site, but if bonus provisions specified in the Statement of Desired Future Character for that donor site permit a higher plot ratio by means other than the transfer of floor area then the total floor area may include such bonus.

(10) The Council shall, as a condition of approving the transfer of floor area pursuant to principle 17 (1), require the owner of the donor and recipient site to enter into an agreement with the Council pursuant to and in accordance with Section 39 *(d)* of the City of Adelaide Development Control Act upon such terms and conditions as the Council may specify.

SOURCE: CITY OF ADELAIDE DEVELOPMENT CONTROL ACT, 1976

Agreements relating to preservation or development of land

39d. (1) The Council may enter into an agreement with any person relating to the development, preservation or conservation of land within the municipality of which that person is the owner.

(2) The Council has power to carry out on private land any works for which provision is made by agreement under this section.

(3) An owner of land shall not enter into an agreement under this section without the consent of all other persons having a legal interest in the land.

(4) The Registrar-General shall, on the application of the Council made with the consent of the owner of the land, register such an agreement and enter a memorial of the agreement on the certificate of title or other instrument of title to the land.

(5) Where a memorial of an agreement has been entered under subsection (4), the agreement is, on transfer of title to the land, binding on, and enforceable by or against, the successors in title to the owner who entered into the agreement.

(6) The Registrar-General shall, if satisfied on the application of the Council or the owner of the land that an agreement in relation to which a memorial has been entered under this section has been rescinded or amended, enter a memorial of the rescission or amendment on the certificate of title or other instrument of title to the land.

(7) An agreement under this section may provide for remission of rates that would otherwise be payable to the Council on the land but except as so provided such an agreement does not affect the statutory obligations of an owner of land.

City of Adelaide

Procedure for Transacting Transferable Floor Area

VENDOR of TFA
(Donor)

PURCHASER of TFA
(Recipient)

1 Verifies the available amount of TFA by certified survey plan

1 Nominates the Recipient (development) site. Can obtain planning consent before or after the TFA transfer, but should determine the floor space required

2 Vendor and purchaser enter private contractual agreement for TFA transfer. Agreement should be subject to:
1. The approval by Council for use of TFA.
2. Acceptance by the donor and the recipient of the terms of a Section 39(d) agreement.

3 The contractual agreement is forwarded to the Council with the TFA application form for approval of the TFA transaction

4 Council approval is subject to the donor and the recipient entering a Section 39(d) agreement with the Council.
Approval is entered in the Council's Register of Development Rights.

5 A Section 39(d) agreement is executed by the three parties; donor, recipient and the Council.

6 The transfer takes effect when the Section 39(d) agreement is registered as a memorial on the Titles of both the donor and recipient sites.
Settlement of the transaction may take place upon lodgement of the Section 39(d) agreement for registration

7 Final details of the transaction and the adjustment of development rights for both sites are entered in the Council's Register of Development Rights

Department of Planning and Development
April 1989

SUBMISSION ON THE USE OF TRANSFERABLE TITLE RIGHTS (AMALGAMATION UNITS) IN THE PROPOSED MOUNT LOFTY RANGES MANAGEMENT PLAN

Under the Mount Lofty Management Plan it is considered that the continued expansion of the population of the townships of the Mount Lofty ranges is undesirable because of the impact of that population on the natural resources of the Ranges and the increased demand for the provision of services in an area with generally, high infrastructure costs. The proposed action to rectify this is to prohibit the division of residential land in all townships other than in Victor Harbour, Port Elliot, Middleton and Goolwa, except for the holders of "transferable title rights".

RESTRICTIONS ON LAND DIVISION

Restrictions vary depending on whether or not the subject land is within or outside the Mount Lofty Ranges Water Protection Area, within or outside a designated township and within or outside areas designated Water Resource Sensitive.

THE PROCESS OF IMPLEMENTING THE AMALGAMATION UNIT SYSTEM

"Amalgamation Units" are created by amalgamating parcels of land together. A certificate will be issued for each amalgamation unit created and they can be sold for example,

by rural landholders to buyers for use with a title created for a new allotment inside a town.

"Clustered" allotments can be created for every two originally held, have an area of between 0.5 to 3 hectares but not on land designated as Water Resource Sensitive.

The result of the concept is that some land will be severely affected by the restrictions and some other land will be less affected. Preliminary research by valuers has shown an expected 50% loss in value of the value before the scheme was mooted, is common.

The Mount Lofty Management Plan states three arguments to justify the use of Transferable Title Rights or Amalgamation Units. These will be considered in turn.

ARGUMENT ONE

"The requirement to purchase transferable title rights will increase the cost of developing residential land thereby restricting the population expansion" - p122.

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I submit that this will not happen. If the purchase of TTRs cost more than the marginal cost of acquiring new allotments previously that marginal cost in the long run will force land values to fall commensurate to the extra cost. Therefore in the long run, there will be the same total cost and the same supply and demand as before the new scheme (assuming everything else to be equal).

On the other hand as will be shown below under "distortions to the real estate market" there is no guarantee that the marginal cost of the Amalgamation Units will rise. This is because the cost of Unit Entitlements will ultimately, be decided by the law of supply and demand.

ARGUMENT 2

The requirement to purchase Transferable Title Rights will create a viable market for the sale of such "rights" out of the rural areas in the Water Supply Protection Zone - p122.

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It is difficult to see what advantage such an objective will have. More importantly there are legal problems with TTRs and the scheme will distort the real estate market.

LEGAL PROBLEMS WITH TTRs

Transferable Title Rights as proposed by the Plan are similar "creatures" to "Transferable Floor Space Rights" as used in the City of Adelaide.

However, they have been found not to be interests in land. In *Depsun v Tahore* (1990) NSW Conv R 55-523 the purchaser of a city building agreed with the vendor that after completion of the sale the vendor would retain the right to sell the "floating" floor space rights which attached to the subject site.

McLelland J held that the mortgagee was entitled to an order that the caveat be removed because it disclosed no

caveatable interest in the land. He held that the rights were "clearly personal and not proprietary".

Similarly in *The Uniting Church v Immer* (Unreported, Young J, Supreme Ct of NSW), 1990) in which his honour held that the attempt to transfer the transferable floor space rights failed (under the particular circumstances of the case) because they not proprietary. The Council, in keeping a register of transferable floor space did not create any proprietary interest.

Although neither case gave detailed reasoning for their decision it is clear that the "right" exists only pursuant to town planning regulation. The vendor is only taking advantage of a Government "concession" designed to alleviate any injury caused by the change in planning law.

They possess a unique character, being peculiar to and arising out of a specific site and damages for breach of an agreement to transfer them may be very difficult to estimate.

Therefore, the government should pass legislation to make such property an interest in land. Only when this is done is it likely that a proper real estate market can be established for such rights with the full protection of indefeasibility of title and the ability to lodge caveats.

DISTORTION TO THE REAL ESTATE MARKET

A number of problems arise with the use of Transferable Title Rights as they affect the real estate market.

The Plan promotes a "pooling" of all units at the same time on a central register. This would result in a dramatic increase the supply side of the real estate market. At the same time demand will not increase and will possibly, fall after the Plan has come into operation.

Therefore, a large and sudden supply of units will cause their value to fall compared to a more orderly release onto the market.

The value of the units will be an "average value" of "in globo" allotment values throughout the Mount Lofty area. In times of poor demand the value of the units will be very low the problem being compounded by the artificially high supply.

ARGUMENT 3

"The movement of transferable title rights from the rural areas of the Water Supply Protection Zone to the townships will more equitably spread the impact of development constraints amongst land owners" - p123.

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The major problem with this argument is the same as for argument 2. The scheme will distort the real estate market and such distortions generally, will make the scheme less equitable.

The use of amalgamation units is an attempt at some compensation for the loss in value caused by the scheme. However, this submission argues that the use of such schemes is not the best or most equitable method of compensation.

Compensation theory states that the affected owner after receiving compensation is no worse off than he/she was before the scheme came into operation - *Pastoral Finance v The Min* (1914) AC 1083. The most equitable way of compensating the affected owner is the use of the "injurious affection" method as was used by Cumberland County Council

for the Sydney region. The compensation was assessed under s342AC (now defunct) of the Local Government Act 1919.

DEPRIVATION OR REGULATION

Whether or not an owner of land affected by a planning control should receive full compensation depends largely on whether or not the control is mere regulation or "deprivation" - *Freestone v Parramatta City Council* (1974), I submit that with large losses in land value caused directly by the operation of the Plan, it should be treated as deprivation.

The question then becomes one of whether or not Transferable Title Rights are sufficient compensation for such deprivation. For the reasons outlined above it would appear that the prices to be obtained will not be equivalent to the loss in value of such allotments and further, the monies received as "compensation" will not be paid at the date the Plan comes into operation.

For example, the affected owner may have to wait some time until a buyer is found for his/her Amalgamation Units. Compensation should be paid as at the date the scheme comes into effect because good compensation theory states that the effect of the scheme must be ignored - *Point Gourde v Sub-Intendent Of Crown Lands* (1947) AC 565.

Full compensation for compulsory taking is recognised in other legislation such as the Lands Acquisition Act. Further, full compensation for injurious affection is allowed under the Western Australian planning act.

The Planning Act 1982 under s65 allows rate relief for land reserved for future acquisition until he/she is fully compensated by acquisition by the appropriate authority. However, the owner can force acquisition under the Land Acquisition Act 1969 if he/she can prove certain "hardship" from the reservation - s65(6),(7). Therefore, the current legislation shows an ambivalent attitude towards compensation for a detrimental change in land use. On the one hand s65 provides only for rate relief until the land is resumed but s65(6),(7) provides not only for compensation due to any injurious affection but in some cases more, as under the Land Acquisition Act the compensation payable is "special value to the owner."

PROBLEM OF ACCOUNTABILITY

If the above compensation rules are not adopted in planning schemes then the planning authority is encouraged to zone away land use rights instead of resuming land and thus, having to pay full compensation. The authority becomes less

accountable for it's planning actions as the results are costed.

INCREASE IN VALUE OF MARGINAL LANDS

Further distortion occurs because the Amalgamation Units are produced on marginal and poor quality land for example, rough land near Prospect Hill which can only be subdivided on paper only. Nevertheless, as the basis for the generation of units is only the area of the original allotment, such land will increase in value as the units generated will be worth as much as those generated by good land suitable for residential purposes.

Such market distortions will lead to inequities as it cannot be assumed that the owner of such marginal lands deserves such a "windfall" profit. Many such owners own large and viable farms and "transfer of wealth" arguments which seem to be implied in the Plan may well not be equitable.

Further, if the Plan is attempting to transfer wealth it should clearly state such an objective.

RECOMMENDATION FOR THE USE OF A COMPENSATION FOR INJURIOUS AFFECTION SCHEME INSTEAD OF A TRANSFERABLE TITLE RIGHTS SCHEME

Injurious affection has its origins in resumption legislation and cases as part of determining "special value to the owner" - *Bingham v CCC* (1954) The Valuer April 1955, 308. A typical scheme should allow for the recovery of betterment for example, s342AF, s342AG of the Local Government Act 1919 (NSW).

Such a scheme will truly compensate the affected owner as at the date of the scheme's operation based on a basic compensation principle that the affected owner is no morse off after implementation of the scheme than he/she was before. The affected owner is not disadvantaged by a possible downturn in the market place and the "flooding" of the market with Amalgamation Units.

The method of calculation if the difference between a "before and after" valuation has been well settled by a number of court cases including *Bingham.* The valuer can determine the injurious affection suffered with a high level of certainty.

Under the injurious affection scheme the authority is forced to pay for land affected. This makes the authority accountable to the public and government as it will be required to carry out a "benefit cost" analysis before implementing restrictive land use schemes.

It is submitted that the cost of compensation should be offset by a "betterment" on the "windfall" profits of an upward change in zone similar to the Betterment Tax which has been used successfully in the North Western suburbs of Sydney. This would result in a well rounded and properly taxed and properly funded town planning scheme.

DAVID HARVEY
05.07.92