

URBAN HEIGHT RESTRICTIONS WITHOUT LAW A PHILADELPHIA STORY

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*Oh to realize space! The plenteousness of all, that there are no bounds,
To be of the sky, of the sun and moon and flying clouds, as one with them.*

- Whitman, quoted in Edmund Bacon's *Design of Cities*¹

I. INTRODUCTION

“In Philadelphia, they called it ‘a gentlemen’s agreement.’ By common consent, all buildings would defer to the statue of the founder of the City of Brotherly Love – no structure would rise higher than the hat worn by the William Penn figure atop City Hall.”² Penn watched “over a city of contrasts, of nearby office towers and distant factories, of stable neighborhoods, and crumbling ghettos, of both growth and decay.”³ On the night of December 12, 1986, amidst an orchestrated fireworks display, 1,500 guests looked up at One Liberty Place from a party at the Philadelphia Art Museum.⁴ A towering synthesis of granite, glass, and metal evocative of Manhattan’s Chrysler Building, the skyscraper soared above City Hall and the Philadelphia skyline.⁵ The Gentleman’s Agreement⁶ had finally been broken.

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¹ EDMUND N. BACON, *DESIGN OF CITIES* (1974), at 15. “In these words Walt Whitman has given a great assignment to architecture.” *Id.*

² Jane Holtz Kay, *Putting a Lid on the Skyline*, *CHRISTIAN SCI. MONITOR*, Dec. 4, 1985, at 28.

³ Robbins, *infra* note 79.

⁴ Thomas Hine, *Liberty Place Adds a Symbol to the Skyline*, *PHI. INQUIRER*, Dec. 14, 1986, at B01.

⁵ Paul Goldberg, *Giving New Life to Philadelphia’s Skyline*, *N.Y. TIMES*, Nov. 15, 1987, at 41; *The Best of 1987, Philly’s Newest Needle*, *BUS. WK.*, Jan. 11, 1988, at 158 (“It soars 61 stories above the Philadelphia skyline, at once strikingly new yet echoing the past. Helmut Jahn’s One Liberty Place is a paean to romantic modernism. If New York’s Chrysler building were built today rather than in the 1920s, it might look very much like Jahn’s tower.”).

⁶ As a means of differentiation from gentlemen’s agreements in general, the Philadelphia Gentleman’s Agreement is capitalized and is often referred to as “the Gentleman’s Agreement” or “the Agreement.”

Approaching two decades since the breach, a new skyscraper will soon eclipse the height of One Liberty Place,⁷ yet much about the Agreement remains unresolved. How exactly did an informal understanding, not legally enforceable, nevertheless restrain skyscraper development in Philadelphia for so long? “Philadelphia’s aerial profile was [a] magic line, unprecedented in history, created not by law but by consensus.”⁸ Was the Gentlemen’s Agreement actually a manifestation of the collective will of Philadelphians? “Democratic government is premised upon legislative enactment of collective will as determined by majority voting.”⁹ Why did the Gentlemen’s Agreement arise in Philadelphia, when legislatively enacted zoning laws ostensibly seem the more sensible approach towards limiting skyscraper height, as successfully implemented in other cities?

“The skyline of the city has long been a dominant element in urban design and should be . . . a major determinant in city-building.”¹⁰ Through the enactment of zoning law, cities such as Washington, D.C have effectuated a symbolic or architecturally significant structure’s supremacy; this paper is a case study of a once operative height restriction without law. In the absence of law, skyline landmarks like the Gateway Arch in St. Louis have successfully tempered urges to build tall, yet perhaps none so explicitly as William Penn in Philadelphia. As the paradigmatic example of the operation and influence of a “no-law” urban height restriction, the Philadelphia story implicates city planning in an unconventional way.

To understand the Philadelphia Gentlemen’s Agreement is to understand the collective identity of Philadelphia itself: its culture, its history, and its people. Through a detailed analysis

⁷ See Ingra Saffron, *Not Much to Look At, On the Outside*, PHI. INQUIRER, Jan. 9, 2005, at B1 (“Liberty Property Trust, the developer that gave us Philadelphia’s tallest skyscraper in the go-go 80’s, is now ready to top itself with a 975-foot-high, glass-sheathed headquarters for Comcast Corp.”).

⁸ Charles Robb, *A Rouse-ing Tower Struggle: Should We Let a New Building Dwarf City Hall?*, PHI. DAILY NEWS, May 1, 1984, at 27 (internal quotations omitted).

⁹ Poindexter, *supra* note 12, at 492.

¹⁰ BACON, at 24.

of the impulses for the Agreement’s formation and continuance, this paper tells the story of how a truly unique restriction shaped the character of a city. I narrate the story through the lens of the law, using ideas of contract, property, and economics to deconstruct the demise of the Gentlemen’s Agreement, the rise of One Liberty Place, and the sudden emergence of the Philadelphia skyline. In doing so, I hope not to neglect the architectural nuances of the buildings involved—City Hall, PSFS, Liberty Place—and the human qualities of the characters—Edmund Bacon, William Rouse—which give meaning to much of the story. Equally important, cities such as Paris, Washington, and St. Louis provide the comparative framework necessary for understanding the Philadelphia story within the broader context of urban design.

The paper proceeds chronologically. “Origins as Identity” reviews the symbolic and architectural history of the Agreement. “Continuance as Identity” explores the Agreement’s function and structure, uniting the concept of gentlemen’s agreement with ideas of zoning and land use covenants. This section examines both “non-zoning” and “no-law” land use restrictions¹¹ within other municipalities, as well as the enforcement mechanisms specific to the Philadelphia Gentlemen’s Agreement. Detailing the political processes through which Liberty Place was approved, “Breach as Identity” identifies the prevailing conditions within and without Philadelphia that permitted (or compelled) contravention of the Agreement. “Post-Agreement Identity” evaluates the architectural, symbolic, and economic impacts of the breach in order to distinguish Philadelphia’s shifting contemporary image. Reflecting upon these several identities, the paper concludes by discussing the broader city-planning implications for no-law height restrictions such as the Philadelphia Gentlemen’s Agreement.

¹¹ The presence of alternative legal devices distinguishes “non-zoning” from “no-law” land use restrictions. Compare *infra* text accompanying notes 100-104 with *infra* text accompanying notes 114-128.

II. ORIGINS AS IDENTITY

“Distilled to its essence, zoning proclaims the supremacy of collective action over individual will . . . In commercial real estate development, zoning pits the individualism of American capitalism against deeply rooted notions of communal public good.”¹² There is a parallel “duality in the historical character of [Philadelphia], a duality symbolized by the sharply contrasting characters of the city’s two most famous sons: William Penn, who founded the city, and Benjamin Franklin, who founded . . . many of the city’s leading institutions.”¹³ Penn “was the contemplative humanitarian” while Franklin was the “utilitarian eager beaver.”¹⁴ The story of the Philadelphia Gentlemen’s Agreement is in some ways the natural struggle between these often-diverging qualities: a community’s literal and figurative elevation of humanitarian ideals set against individual desires of welfare maximization.

The symbolic underpinnings of the Agreement extend back several hundred years, to the founding of Philadelphia. “If ever one man created a city, William Penn created Philadelphia.”¹⁵

As a Quaker, Penn was prosecuted for his religious beliefs . . . While in prison he conceived the idea of a colony in the new world that would offer freedom from religious oppression. In 1681, Penn obtained a charter for his colony from King Charles II . . . Penn chose the name Philadelphia for its principal city, from the Greek word meaning city of brotherly love.”¹⁶

¹² Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U. L. REV. 445, 446 (1998).

¹³ FRANCIS MORRONE, AN ARCHITECTURAL GUIDEBOOK TO PHILADELPHIA (1999), at iv. “Franklin represented a certain inclination of the Philadelphia mind; Penn gave what was best to the Philadelphia heart.” *Id.*

¹⁴ *Id.* (quoting JOHN LUKACS, PHILADELPHIA: PATRICIANS & PHILISTINES, 1900-1950 (1982), at 43-44).

¹⁵ Mary Maples & Richard S. Dunn, *The Founding*, in PHILADELPHIA: A 300-YEAR HISTORY 1, 1 (Russell Weigley ed., 2001).

¹⁶ GROUP FOR ENVIRONMENTAL EDUCATION, INC., PHILADELPHIA ARCHITECTURE: A GUIDE TO THE CITY (1994), at 11 [hereinafter GUIDE].

Perhaps more so than any other colonial settlement, Philadelphia was specifically intended to offer personal and religious freedom.¹⁷

Alexander Milne Calder personified these ideals in his cast-iron statue of William Penn, which stands atop Philadelphia City Hall's tower.¹⁸ Penn is enormous; 37 feet tall and more than 53,000 pounds, the statue is "the largest single piece of sculpture on any building in the world."¹⁹ Completed in 1892, the statue stood in the courtyard of City Hall for two years until the city was finally able to hoist it atop the tower.²⁰ In addition to the freedoms associated with Philadelphia's founding, the symbolism of the statue encompassed more abstract principles. "The primacy of the colossal William Penn statue is an important civic gesture, a symbol that community, not commerce, is paramount."²¹ Schoolchildren were "told that the William Penn statute bears a hat because Mr. Penn refused to doff his hat to the English king. The hat is a symbol of the nation's ideal: The wishes of all the people supersede those of any one person or group."²²

Calder's statue of Penn became Philadelphia's "logo, the heart and soul of the city."²³ Longtime Philadelphia city-planner Edmund N. Bacon—the biggest proponent and propagator of the Gentlemen's Agreement²⁴—captured well the symbolic and architectural significance of the Penn statue: "how wonderful to have after all these years a magnet still holding down the city's

¹⁷ *Id.*

¹⁸ GROUP FOR ENVIRONMENTAL EDUCATION, INC., PHILADELPHIA'S BEST BUILDINGS (1994), at 21 [hereinafter "BEST"]. "The thing that gives City Hall its considerable frisson . . . is its sculpture program, perhaps the most extensive ever undertaken by one man for a single building . . . And the sculpture in not a load of conventional doodads; it's largely figurative work . . . allegorical figures of continents, arts, sciences, virtues and so on . . ."

MORRONE, *supra* note 13, at 11-12.

¹⁹ BEST, *supra* note 18, at 21.

²⁰ MORRONE, *supra* note 13, at 12.

²¹ Hine, *infra* note 191.

²² Eileen White, *Putting William Penn in the Shade*, WALL ST. J., May 15, 1987, at 28.

²³ *Id.*

²⁴ For a discussion of Bacon's role in promulgating the Agreement, *see infra* text accompanying notes 198-200.

center, to have a humanizing symbol, a sun around which Philadelphia revolves and looks to for sustenance.”²⁵

Bacon’s anchored vision of Philadelphia was consistent with Penn’s original design of the city, a rectangular grid of streets containing four large public squares and a central plaza.²⁶

“At the intersection of [Market] and Broad Streets, where City Hall now stands, Penn designated a central square or plaza of ten acres to be bordered by the principal public buildings”²⁷

Architect John McArthur began designing Philadelphia’s “magnificent town hall”²⁸ in the 1860’s, construction began in 1871, and City Hall was completed in 1901.²⁹ Bacon refers to City Hall’s location as the “the Intersections of the two 1683 William Penn axes.”³⁰

Intended to stand preeminent in Philadelphia, City Hall provided the Penn statue a 511-foot granite pedestal³¹ and was easily the city’s tallest building at the time of its completion.³² In fact, the Eiffel Tower and the Washington Monument were the only man-made structures in the world that were taller.³³ “When it was designed (during the early 1870s), City Hall tower set out to be the tallest structure [but the] Eiffel Tower and the Washington Monument were finished first”³⁴ Philadelphia’s endeavor was in some sense emblematic of a city that a century

²⁵ Editorial, *Towering Over All Comers, Penn Still Defines His City*, PHI. INQUIRER, Mar. 21, 1984, at A12.

²⁶ GUIDE, *supra* note 16, at 11. *See also* White, *supra* note 22 (“The fledgling American nation’s first urban planner laid out Philadelphia on a lush coastal plain between two rivers, with four center-city parks to enrich souls hardened by daily commerce.”).

²⁷ Maples & Dunn, *supra* note 15, at 7. *See also* Horace Sutton, *Philadelphia Story Adds Chapter*, WASH. POST, June 22, 1958, at C10 (“City Hall stands atop one of the five squares which Penn Gave to the city and the real estate it occupies was once a racetrack and later a gallow.”).

²⁸ White, *supra* note 22.

²⁹ MORRONE, *supra* note 13, at 9.

³⁰ BACON, *supra* note 1, at 268. “City Hall in Philadelphia marks a center created by the intersection of the regional north-south axis of Broad Street, and the westerly Market axis of William Penn. In this line, moving inland from the seminal point of the riverbank landing from the Old World, is a kind of microcosmic expression of the westerly movement of American development.” *Id.* at 305.

³¹ Thomas Hine, *Debating Penn’s Hat, and Raising the Roof in Phila*, PHI. INQUIRER, Apr. 1, 1984, at A01 (“One thing that is fairly certain is that the tower’s builders believed it would be pre-eminent.”).

³² Steven Salisbury, *Dwarfing Billy Penn: A Tale a Century Long*, PHI. INQUIRER, Dec. 12, 1999, at B01.

³³ *Id.*

³⁴ Hine, *supra* note 31.

earlier had lost to Washington its status as national capitol, and its status as Pennsylvania state capital to Harrisburg.³⁵

Nevertheless, Philadelphia City Hall retains the distinction of “world’s tallest masonry structure without a steel frame.”³⁶ And at the time of its design, it would have been difficult to anticipate that office buildings would be built taller in Philadelphia.³⁷

In 1891, only three years before the Penn statue was hoisted into place atop the tower, Louis Sullivan’s famed pioneering skyscraper, the Wainwright Building, opened in St. Louis. It stood 10 stories high. Given the technology of the time . . . they had every right to assume that the tower would remain the dominant building on the skyline. But during the next three decades, the technology of tall buildings advanced dramatically, and during the 1920s, New York’s Chrysler and Empire State Buildings each rose twice the height of the City Hall tower.³⁸

Amidst Philadelphia’s new skyscrapers,³⁹ it is now difficult to imagine City Hall as it once was: an absolutely dominating presence in the Philadelphia skyline. “City Hall is [now] a runt compared to cloud-piercing monoliths in . . . places as far-flung as Kuala Lumpur and Shanghai. And right here [in Philadelphia], the 37-foot statue of William Penn atop the tower now seems a waif lost in the menace of looming office buildings all around it.”⁴⁰ Even before the breach of

³⁵ Richard G. Miller, *The Federal City*, in PHILADELPHIA: A 300-YEAR HISTORY 155, 205 (Russell Weigley ed., 2001), at 205 (“Even the state capital was gone; in 1799 rural suspicion of the city combined with desire for a more central location to shift the state government to Lancaster, whence it moved again to Harrisburg in 1812.”).

³⁶ BEST, *supra* note 18, at 21.

³⁷ See Hine, *supra* note 31.

³⁸ *Id.* (quotations omitted). See ERIC P. NASH, MANHATTAN SKYSCRAPERS (1999), at 63, 75 (The Empire State Building (1931) stood at 1250 feet; the Chrysler Building (1930) at 1046 feet).

³⁹ See *infra* text accompanying notes 287-293.

⁴⁰ Salisbury, *supra* note 32.

the Gentlemen’s Agreement, clusters of 40-story high-rise buildings competed with Penn.⁴¹ The current skyline of Washington, D.C. is useful for visualizing the relative scale of Philadelphia buildings at the time of City Hall’s construction.⁴² At 555 feet, the Washington Monument (1884) is only 7 feet taller than Philadelphia City Hall, while the remaining buildings in D.C. remain low-rise.⁴³ With a few notable exceptions, all buildings within the District fall well short of the 288-foot United States Capitol.⁴⁴

Beyond providing Penn a central and lofty vantage point, City Hall itself was an important symbol to the city of Philadelphia: “a beacon in the distance, the city’s Brooklyn Bridge, its Eiffel Tower, its Big Ben.”⁴⁵ City Hall is “a remarkably monumental and lavish interpretation of Second Empire motifs and principles.”⁴⁶ The building contains over fourteen acres of floor space and is sometimes claimed to be the country’s largest municipal building.⁴⁷ The style and scale of City Hall was consistent with construction across the nation during the late nineteenth century. “[T]here was a building boom in courthouses . . . The typical style can be called neo-baroque and was not limited to courthouses. The capitol building in Albany, New York, City Hall in Philadelphia, and the Executive Office Building in Washington are other

⁴¹ Editorial, *Taking It All Back Liberty Place Turned Out to be a Swell Idea*, PHI. INQUIRER, Nov. 13, 1990, at A26 (“[A] host of look-alike, 40-story skyscrapers went up, modernist rectangular buildings that took full advantage of the then-prevailing height limits . . .”); *See infra* notes 154, 155.

⁴² Washington, D.C. enforces this relative scale through zoning law. For further discussion on Washington, D.C., *see infra* text accompanying notes 319-321.

⁴³ *See* Emporis: Washington, Buildings of the City, at <http://www.emporis.com/en/wm/ci/bu/?id=101047> (last visited Apr. 19, 2005).

⁴⁴ Washington National Cathedral, the Old Post Office Building, and the Basilica of the National Shrine of the Immaculate Conception are all taller than the Capitol, but fall well short of the Washington Monument. *Id.*

⁴⁵ *Towering*, *supra* note 25.

⁴⁶ MORRONE, *supra* note 13, at 9. For an overview on Second-Empire style, *see generally*, JOHN C. POPPELIERS, WHAT STYLE IS IT?: A GUIDE TO AMERICAN ARCHITECTURE (1995). The Second Empire style was inspired from Charles Garnier’s neo-baroque Opera Garnier, in Paris, built during Napoleon’s reign. *Id.* City Hall is considered one of the finest examples of Second Empire Style in the country. *Compare* BEST, *supra* note 18, at 21 (claiming City Hall as the finest example of the style) *with* White, *supra* note 22 (claiming City Hall as second only to Washington’s Old Executive Office Building).

⁴⁷ BEST, *supra* note 18, at 21. *But see* MORRONE, *supra* note 13, at 10 (City Hall looms enormous over its city, it is true . . .” However, “[i]n terms of square feet of floor space it is only about half the size of New York’s Municipal Building . . .”).

examples of the style.”⁴⁸ Designed to be of great size relative to their surroundings, those “coming to [such municipal buildings] for the first time are in awe, as they are supposed to be.”⁴⁹

Walt Whitman described the awe inspired by City Hall even before its completion and the placement of the Penn statue:

Returning home, riding down Market street . . . I got out to view better the new, three-fifths-built marble edifice, the City Hall, of magnificent proportions—a majestic and lovely show there in the moonlight—flooded all over, façades, myriad silver-white lines and carv’d heads and mouldings, with the soft dazzle—silent, weird, beautiful—well, I know that never when finish’d will that magnificent pile impress one as it impress’d me those fifteen minutes.⁵⁰

The grand scale and imperial design of Philadelphia City Hall was purposeful. “City Hall’s physical prominence when the century was young . . . embodied the belief that civic authority and responsibility should reside with elected representatives; private interests should stand down.”⁵¹ Less well known, however, is that City Hall also came to embody much about what was wrong with civic authority. “Sadie Alexander described the Philadelphia City Hall of the 1920s as a place where attorneys were kept waiting while clerks bargained for merchandise from the vendors who roamed the halls, and where the cost of filing routine legal papers or the service of process included a small bribe.”⁵² As not to overstate this point, the lasting symbolic impression of City Hall—and certainly the Penn statue—upon the city of Philadelphia was one of civic responsibility rather than municipal corruption.

⁴⁸ Geoffrey C. Hazard, Jr., *The County Courthouse No Longer Looms Over the Community*, 51 SMU L. REV. 1559, 1559 (1998).

⁴⁹ *Id.*, at 1560 (“The exterior features include height and size relative to the other structures in the area . . .”).

⁵⁰ WALT WHITMAN, PROSE WORKS (1892).

⁵¹ Salisbury, *supra* note 32.

⁵² Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-1960*, 87 CORNELL L. REV. 1405, 1429 (2002).

An informal pact—the Philadelphia Gentlemen’s Agreement—came to signify Penn’s hegemony: “By ‘gentlemen’s agreement’ Penn remains highest. It is a supremacy that must be maintained”⁵³ The mandate was clear: no building in Philadelphia was to exceed the height of the William Penn statue atop Philadelphia City Hall, 548 feet above the city.⁵⁴ Yet for a covenant that profoundly influenced America’s fifth most populous metropolis,⁵⁵ the Agreement’s formation was startling vague. “One of the most curious aspects of the tradition is that a record of its beginnings seems to be lost. Histories of the city appear to be silent about when people first became conscious that the pre-eminence of the tower . . . was something that should be preserved.”⁵⁶ There has been some suggestion that Edmund Bacon, longtime director of the City Planning Commission, was the originator of the Agreement.⁵⁷ Others suggest that the construction of the Pennsylvania Savings Fund Society Building was the catalyst: “The gentlemen’s agreement had been the standard, traditionalists said, since before World War II, when the PSFS building’s landmark sign topped out at 491 feet in deference to its neighbor, William Penn.”⁵⁸

George Howe’s 36-story Pennsylvania Savings Fund Society Building is an architectural wonder in its own right.⁵⁹ “PSFS is a masterpiece; it is the finest 20th-century building in [Philadelphia] and one of the most important examples of the International Style in the

⁵³ Editorial, *The Real Issue in Topping Penn*, PHI. INQUIRER, Apr. 5, 1984, at A22.

⁵⁴ MORRONE, *supra* note 13, at 12.

⁵⁵ U.S. BUREAU OF THE CENSUS, Table 22. Population of the 100 Largest Urban Places: 1990 (Internet Release date: June 15, 1998), available at <http://www.census.gov/population/documentation/twps0027/tab22.txt> (last visited Apr. 19, 2005) (as of 1990, Philadelphia had a population of 1,585,577).

⁵⁶ Hine, *supra* note 31.

⁵⁷ See *infra* text accompanying notes 195-198.

⁵⁸ Michael Capuzzo, *Breaking Through Phila.’s Skyline*, PHI. INQUIRER, Sept. 5, 1986, at D01. *But see* Hine, *supra* note 31 (“There does not seem to be any evidence, however, that the height of the tower restrained PSFS’s builders. Only during the 1950s and 1960s did it become a conscious restraint.”).

⁵⁹ MORRONE, *supra* note 13, at 9.

country.”⁶⁰ In the PSFS Building, Philadelphia continued to own a part of skyscraper history despite its height restriction. “Philadelphia boasted a reputation for having the most modern building in the country. The [PSFS] building was completed in 1932 and serves as an example of what was once considered the most modern office building in the country.”⁶¹

In fact, because of PSFS’s important role in shaping the Philadelphia skyline, the Gentlemen’s Agreement has sometimes been interpreted as limiting construction to the height of the building (491 feet rather than 548 feet).⁶² Although the height of PSFS proved influential in upholding the Agreement,⁶³ this interpretation is problematic. Center Square II actually rose taller than PSFS upon its completion in 1972.⁶⁴ As described in 1967, the Center Square complex was to “consist of two ultramodern towers, one 32 stories high and the other 38 stories, to be erected in the block bounded by 15th, 16th, Market, and Ranstead Streets.”⁶⁵ Not until the mid-1980’s did much of the public even realize that Center Square was taller than PSFS. “Although the west tower of Center Square is 526 feet from the ground to its parapet . . . Standard reference books list the height of the tower at 491 feet.”⁶⁶ Under the PSFS interpretation, Center Square would have been in breach far before One Liberty Place. More importantly, the purpose of the Gentlemen’s Agreement was to preserve the supremacy of Penn,

⁶⁰ BEST, *supra* note 18, at 22.

⁶¹ Natalie Kostelni, *Metamorphosis of a Skyline*, PHI. BUS. J., Jan. 7, 2000 (“The building not only offered air conditioning throughout and the most modern Venetian blinds of the day, it had 85,000 square feet of glass covering 65 percent of the wall space that created unbroken expanses of windows.”). See GUIDE, *supra* note 16, at 109 (“This was also the second building in the country to be air conditioned.”).

⁶² See Hine, *supra* note 31 (“In 1932, the PSFS Building rose two blocks east of City Hall to a height of 491 feet, which became the magic figure that has been used to define the ceiling for Philadelphia office buildings ever since.”).

⁶³ The Philadelphia Redevelopment Authority later imposed a 491 foot-height height limit for projects that required the city’s power of eminent domain. This had the effect of limiting high-rise height not just to 548 feet, but to the height of PSFS. See *infra* text accompanying note 159-166.

⁶⁴ Emporis: Centre Square II, Philadelphia, at <http://www.emporis.com/en/wm/bu/?id=117921> (last visited Apr. 19, 2005).

⁶⁵ *News of Realty: 2 Office Towers Rising*, N.Y. TIMES, Nov. 29, 1967, at 77.

⁶⁶ Hine, *supra* note 31 (internal quotations omitted). Including its transmission tower, Center Square actually rises 592 feet. *Id.* Under this interpretation, Center Square actually contravened the Gentlemen’s Agreement regardless of the exact height limitation.

not the PSFS building. A 548-foot height ceiling therefore seems the more cogent and consistent interpretation of the Gentlemen's Agreement.⁶⁷

III. CONTINUANCE AS IDENTITY

The Agreement's nebulous origins leaves open to debate whether Philadelphia's unique height ceiling was a gentlemen's agreement at all. Whether the Philadelphia Gentlemen's Agreement suits its celebrated title depends on the definition of the gentlemen's agreement, a concept which itself is ambiguous. The ambiguity lies in the binding mechanics: "A gentlemen's agreement is an agreement which is not an agreement, made between two persons, neither of whom is a gentleman, whereby each expects the other to be strictly bound without himself being bound at all."⁶⁸

The concept is not actually so abstruse. Although gentlemen's agreements are not contracts and do not create legal obligations,⁶⁹ the concept falls within the general realm of contract theory. "[W]hat in every other sense would be considered a binding contract could, by use of appropriate language, be transformed into a gentlemen's agreement evidencing a moral obligation, enforceable only by the sanction of honor rather than the processes of law."⁷⁰ Specifically, the requirement of mutual assent⁷¹ implicates the gentlemen's agreement:

[T]he concept of an agreement that, by virtue of the parties' consent, is to be enforced "in honor" only is familiar enough. Under the consent theory of contracts, it can be stated as

⁶⁷ The Agreement might also be interpreted as limiting construction to Penn's feet (511 feet).

⁶⁸ Herbert Bernstein & Joachim Zekoll, *The Gentleman's Agreement in Legal Theory and in Modern Practice: United States*, 46 AM. J. COMP. L. 87, 87 (1998).

⁶⁹ See Gregory Gosfield, *It's a Question of What's Binding: A Look at Letters of Intent*, 13-AUG. BUS. L. TODAY 55, 55 (2004). See also SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1.3 (3rd ed. 1957) ("Thus, for example, an instrument which expressly states that it is a gentleman's agreement or otherwise not a binding commitment will generally not be treated as creating contractual duties, although it is nevertheless an agreement.").

⁷⁰ Wendell H. Holmes, *The Freedom Not to Contract*, 60 TUL. L. REV. 751, 752 (internal quotations omitted) ("[R]egardless of the form of his promise, so long as a party manifests with sufficient clarity his intention not to be bound, then no legally enforceable obligations can result.").

⁷¹ See, e.g., *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954) ("An agreement or mutual assent is of course essential to a valid contract.").

a principle: Where parties agree completely on all the terms of a normal nominate contract but also clearly and unequivocally agree that this is to produce no legal consequences but is to be binding in honor only, then it will not be legally enforceable.⁷²

Inherent to the gentlemen's agreement concept is that "the freedom of contract carri[e]s with it a correlative freedom not to contract."⁷³ The gentlemen's agreement can hence be described as a consciously *non-legal* arrangement. Though some types also tend to be *illegal*,⁷⁴ gentlemen's agreements are not inherently illegal. To avoid confusion, the term can be more clearly defined as "a category of agreements which, without being illegal, opt for deliberate no-law."⁷⁵

The Philadelphia Gentlemen's Agreement was not codified into law, and relied only on mechanisms outside of the law, such as honor and industry norms, to sustain. Counterfactually, specific developers might each have benefited from a mutual height restriction, and formed a gentlemen's agreement in order to obtain this benefit. Alternatively, specific developers might have each formed such an agreement with the city government. Either hypothetical arrangement would be gentlemen's agreements. Gentlemen's agreements restricting land use are actually not uncommon. For instance, in Everett, Washington,

An era of gentlemen's agreements and handshake contracts is to blame for the city's plan to sell off a valuable piece of open space donated as parkland 66 years ago, neighbors say. When Kate and H.D. Cooley transferred water-view property . . . to the city in 1927 for a token \$1, they neglected to specify in writing that the land should remain as a park. .

⁷² Bernstein & Zekoll, *supra* note 68, at 88.

⁷³ Holmes, *supra* note 70, at 753 ("The logic would seem irrefutable: if all contracts are promises, then those promises that create contracts can be negated by express declarations that they do not bind the promisor.").

⁷⁴ Because of illegal tendencies, the term gentlemen's agreement sometimes has a negative connotation. "For example, a plaintiff in a civil rights case may try to prove that the defendants, pursuant to an illegal agreement—mockingly referred to as a 'gentleman's agreement'—consented not to hire or promote members of a particular race." Bernstein & Zekoll, *supra* note 68, at 87.

⁷⁵ *Id.* at 87-88 (internal quotations omitted); see also BLACK'S LAW DICTIONARY 695 (7th ed. 1999) ("An unwritten agreement that, while not legally enforceable, is secured by the good faith and honor of the parties.").

. . They did things back then with a handshake. Everybody knows it's been a park. It was donated as a park . . . Residents say they had city permission, but no legal documents were written.⁷⁶

Unlike in Everett, no specific party actually agreed to the Philadelphia Agreement, which applied to developers in general. The height restriction persisted for generations, binding developers not even in existence at the conception of the Agreement. The Agreement has even been described as a symbolic pact between the city of Philadelphia and William Penn himself.⁷⁷ Only this much is clear: the restriction applied to any developer in the world who at any time wished to construct a building within Philadelphia.

In this sense, Philadelphia's restriction more closely resembles a municipal ordinance than a gentlemen's agreement.⁷⁸ Philadelphia city council never passed an ordinance incorporating the Agreement, yet it functioned much like a zoning ordinance. "An invisible plane extending outward from [City Hall's] peak has long been a ceiling that developers here have respected . . ." ⁷⁹ Comprehensive zoning generally includes height limitations for buildings, which—unlike a gentlemen's agreement— would apply to any developer wishing to build within the city of Philadelphia.⁸⁰

Zoning serves a *positive* economic purpose—the prevention of negative externalities through separation of land uses—but also "carries implicit *normative* notions of societal good."⁸¹

As it has evolved, modern zoning law has more to do—in some instances—with . . .

'communal aesthetics' than it has to do with harm prevention . . . Broad laws,

⁷⁶ Diane Brooks, *Handshake Deal Blamed For Selling of View Parkland*, SEATTLE TIMES, June 1, 1993, at B1.

⁷⁷ White, *supra* note 22 ("Philadelphia also made a pact with its father.").

⁷⁸ See Mathews Municipal Ordinances § 1A:1 (2004) ("An ordinance is a legislative enactment made by the corporate authorities of a municipal corporation . . . it may be a governmental exercise of the power to control the conduct of the public—establishing rules which must be complied with, or prohibiting certain actions or conduct.").

⁷⁹ William Robbins, *Philadelphians Split on Curbing Building Height*, N.Y. TIMES, April 14, 1984, at 22.

⁸⁰ BLACK'S LAW DICTIONARY 1613 (7th ed. 1999).

⁸¹ Poindexter, *supra* note 12, at 469.

cobblestone historical districts, and a distinctive skyline are examples of communal aesthetics. These serve to satisfy citizens' need for belonging to a certain place and to be surrounded by a familiar, comforting, and reassuring cityscape.⁸²

The normative societal good produced by the Gentlemen's Agreement was the value to Philadelphia of retaining Penn's preeminence. For example, Penn's supremacy provided the Philadelphia skyline an architectural anchor and the Philadelphia population a sense of history and identity. Remarkably, Penn's symbolic significance also coincides with a basic premise of zoning law: individual interests must sometimes submit before the community's wellbeing.⁸³

The most significant way in which the Philadelphia Agreement differed from zoning was that it did not employ the law to realize its purpose. As gentlemen's agreements are the no-law corollary to contract, the Philadelphia Agreement was essentially the no-law corollary to a zoning ordinance restricting height. Gentlemen's agreements are a familiar example of a no-law arrangement, and it is in this sense understandable why Philadelphia's height restriction is commonly understood as a gentlemen's agreement. Therefore, let us not be overly-semantic in discussing no-law land use restrictions.

In fact, the enforcement mechanisms at work may be very similar. Although gentlemen's agreement's lack legal enforceability, they are often in some sense binding. Longevity is not necessarily an aberrant characteristic of gentlemen's agreements, which can sometimes prove

⁸² *Id.* at 447. For an overview of the legality and evolution of zoning premised on aesthetics, see Chad Lamer, *Why Government Policies Encourage Urban Sprawl and the Alternatives Offered by New Urbanism*, KAN. J. L. & PUB. POL'Y 391, 393-395 (2004).

⁸³ Compare *supra* text accompanying notes 15-17 with Poindexter, *supra* note 12, at 446 (quoting *Cochran v. Preston*, 70 A. 113, 114 (Md. 1908)) ("An imaginary person, living in such a state of nature, would be at liberty to use his land as he pleased, to build on it to any height . . . without restraint. But as man was formed for society, and is incapable of living alone, organized society is essential to his well-being and happiness, and every person who enters society must give up a part of his so-called natural rights and liberties for the benefit of the community.").

more effective than legal contracts.⁸⁴ There are several explanations for the binding phenomenon. For instance, “freedom from contract, especially the immunity from formal sanctions, can breed other more informal norms of behavior, emerging from individuals’ sense of fairness, dignity, and trust.”⁸⁵ Furthermore, where a “market is organized to promote the low cost and rapid intraindustry dissemination of information about reputation . . . reputation bonds [can] create intraindustry norms that function as a deterrent to breach of contract . . .”⁸⁶ Some industries may even employ private sanctioning systems that “can almost always be enforced completely outside the legal system.”⁸⁷ Cartels, which cannot invoke the legal system to enforce price-fixing contracts,⁸⁸ may nevertheless formulate agreements secured through a combination of these enforcement mechanisms.⁸⁹ Even in the Everett park example,⁹⁰ one can imagine a different outcome whereby the custom and honor associated with maintaining the public park was so great that it prevented breach of the gentlemen’s agreement. While the performance-securing system may vary, gentlemen’s agreements often have a binding and enduring effect notwithstanding lack of legal enforceability.

Even absent an “actual” gentlemen’s agreement, “in many contexts people look primarily to norms, not to law, to determine substantive entitlements.”⁹¹ Within the context of land use, Philadelphia is hardly the only municipality in which a restriction has been successfully

⁸⁴ See, e.g., Bernstein & Zekoll, *supra* note 68 at 89 (“In the United States, the traditional rules and institutions [of the diamond industry] endured over time and demonstrated their superiority to the established legal regime.”)

⁸⁵ Omri Ben-Shahar, Symposium Foreword, *Freedom from Contract*, 2004 WIS. L. REV. 261, 262 (2004).

⁸⁶ Bernstein & Zekoll, *supra* note 68, at 89.

⁸⁷ *Id.*

⁸⁸ See *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 654 (C.A.7 (Ill.) 2002) (“price fixing is a per se violation of the Sherman Act”).

⁸⁹ See generally, Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515.

⁹⁰ See *supra* text accompanying note 76.

⁹¹ ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991), at 141 (For example, “norms of fair dealing constrained the behavior of Wisconsin business firms as much as substantive legal rules . . .”).

implemented through a “purported” gentlemen’s agreement rather than through law. For example, in 1981, the small town of Bethlehem Connecticut rejected

an ordinance that would delegate zoning authority to the existing Planning Commission . . . thus insuring that Bethlehem will remain - at least for a while - one of a handful of unzoned Connecticut towns. For years Bethlehem, largely a farming community, had operated under a ‘gentlemen’s agreement’ with developers. . . . Developers . . . would submit a plot plan to the Planning Commission who . . . would approve or reject it. Rejected developers tended to honor the commission’s decisions and withdrew their plans . . .⁹²

In Bethlehem, tradition and honor seemed to explain the longevity of the purported gentlemen’s agreement. In contrast, citizens of Rocky Mount, Virginia used intimidation to enforce a “gentlemen’s agreement to keep the three districts unzoned.”⁹³ The Board of Supervisors originally “voted 4-3 to zone the three districts, but reversed its decision after members of the crowd stood and protested. At that point . . . a captain with the Sheriff’s Department . . . took a stance closer to the supervisors”⁹⁴

Gentlemen’s agreements have even been used between neighboring cities to determine borders. “Olathe officials said Overland Park broke a ‘gentlemen’s agreement’ calling Pflumm Road the dividing line between the two cities when it approved annexation of a 70-acre tract Monday.”⁹⁵ Though the agreement was ultimately breached, it might have been effective under

⁹² Laurie A. O’Neill, *Small Town Rejects Zoning for the 6th Time*, N.Y. TIMES, Mar. 22, 1981, at Section 11, Page 2 (quotations omitted).

⁹³ Lon Wagner, *Fear Still Effective in Politics, Intimidation Stops Zoning*, ROANOKE TIMES, Dec. 17, 1992, at B1 [hereinafter *Intimidation*]. See also Lon Wagner, *Zoning Foes Speak Referendums in Districts Sought*, ROANOKE TIMES, Dec. 16, 1992, at B1 (“Speaker after speaker Tuesday chastised the board . . . for pursuing zoning despite a 1988 ‘gentlemen’s agreement’ not to do so until residents of each district requested it.”).

⁹⁴ *Intimidation*, supra note 93.

⁹⁵ Brandon Babcock, *Overland Park Annexes Area West of Pflumm*, Kansas City Star, Nov. 13, 2004, at 8.

other circumstances. The annexed land “will house a multimillion-dollar youth soccer complex . . . If it were something else, Overland Park would have observed the unofficial boundary.”⁹⁶

Because gentlemen’s agreements (both purported and actual) governing land use are not uncommon,⁹⁷ the Philadelphia Gentlemen’s Agreement might be characterized more usefully through the mechanisms of its enforcement, its means of continuance. Penn’s preeminence endured until 1986, and City Hall remained the pinnacle of the Philadelphia skyline for over ninety years;⁹⁸ “generations accepted it as a moral consensus, more powerful than law.”⁹⁹

Although no-law height restrictions remain unexplained formally, legal scholars beginning with Bernard Siegan in the 1970’s have shown that zoning law may be unnecessary to achieve segregation of land use.¹⁰⁰ Alternative legal devices—such as restrictive covenants and nuisance laws—may obviate zoning law for this purpose.¹⁰¹ “If the presence of manufacturing and commercial establishments lowers residential land values by more than the gain in non-residential values, then the Coase Theorem suggests that landowners in the affect area have an incentive to collectively ensure that the land be residential.”¹⁰² Assuming low transaction costs, residential landowners could collectively negotiate restrictive covenants (or alternatively purchase the land in question) thereby preventing the externalities associated with the commercial or industrial land use. Siegan showed that “land use patterns in Houston, which is

⁹⁶ *Id.*

⁹⁷ For another example of a gentlemen’s agreement governing land use, see Deborah Kelly, *Foes Appear to Block River Road Firehouse*, RICHMOND TIMES DISPATCH, Nov. 17, 1989, at B1.

⁹⁸ Robbins, *supra* note 79 (“For nearly a century the hat with its curling bronze brim, crowning a statue standing atop the City Hall tower with its head 548 feet in the air, has been a lid, so to speak, over Philadelphia development.”); William K. Stevens, *Reshaping Philadelphia’s Skyline*, N.Y. TIMES, May 4, 1986, at Section 3, Page 6 (“For more than 90 years, the statue has dominated the skyline.”).

⁹⁹ White, *supra* note 22.

¹⁰⁰ See generally, BERNARD SIEGAN, LAND USE WITHOUT ZONING (1972).

¹⁰¹ Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. Rev. 681, 685 (1973). See generally SIEGAN, *supra* note 100.

¹⁰² Donald P. McMillen & John P. McDonald, *Land Use Before Zoning: The Case of 1920’s Chicago*, 29 REG’L SCI. & URB. ECON. 473, 474 (1999)

the only major city in the United States left without a zoning ordinance, are not much different from those in other large cities.”¹⁰³

As exemplified in Houston, high-rise buildings may cluster into downtown city cores,¹⁰⁴ in a sense limiting height elsewhere in the city. Notably, clustering may occur completely absent the law (*i.e.*, without alternative legal devices such as covenants). “[A]gglomeration economics are likely to provide commercial firms the incentive to locate away from residential districts . . . Externalities are unlikely to be serious if non-residential firms find it profitable to locate near similar establishment.”¹⁰⁵ For example, prior to zoning “manufacturing clustering was the rule in Chicago.”¹⁰⁶ Nevertheless, clustering alone fails to explain the persistence of a demarcated citywide ceiling; absent zoning or an alternative legal restriction, there exists no height limitation within high-rise clusters.

Here it is worth mentioning that Philadelphia, like all major American cities except Houston, had zoning laws that prohibited skyscrapers in some areas of the city. In fact, “for all practical purposes, we may assume zoning is a universal feature of local government in the United States”¹⁰⁷ “Several sections of Center City, including the Independence Mall area and Benjamin Franklin Parkway, [were] covered by special zoning districts, with their own height limitations and design controls.”¹⁰⁸ However, zoning did not establish a citywide height

¹⁰³ *Id.* For the complete study of Houston see generally SIEGAN, *supra* note 100.

¹⁰⁴ See SIEGAN, *supra* note 100. (“It is difficult to define the limits of the downtown area, or central business district (CBD) of Houston, although there is an area of tall buildings . . . that delimits its core.”). *But see Wide Open Spaces Could Be Near End For Texans*, VANCOUVER SUN, Oct. 27, 1993, at A19 (“With no laws separating residential, business and industrial areas from each other, Houston is full of neighborhoods that mix all three. A cluster of bungalow homes is split by a convenience store, a church is dwarfed by a skyscraper next door.”).

¹⁰⁵ SIEGAN, *supra* note 100.

¹⁰⁶ McMillen & McDonald, *supra* note 102, at 474.

¹⁰⁷ Bradley C. Karkkainen, ZONING: A REPLY TO CRITICS, 10 J. Land Use & Envtl. L. 45, 46 n.6 (citing WILLIAM A. FISCHER, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS (1985)) (“By some estimates, 9,000 municipalities, large and small, in every region of the country and representing at least 90% of the nation’s population, have zoning schemes in place.”).

¹⁰⁸ Ron Goldwyn, *Goode Seen Backing Tall-Building Zone*, PHI. DAILY NEWS, June 8, 1984, at 3.

limitation,¹⁰⁹ and in many areas Philadelphia's zoning code permitted construction of buildings taller than City Hall, "the actual limits depending on various design features, such as the amount of open space provided at ground level on the same building site."¹¹⁰ In fact, there were "more than two dozen available Center City sites on which current zoning would allow a building higher than City Hall."¹¹¹ Therefore, preexisting zoning laws could not alone have prevented a developer from constructing a skyscraper.

In addition to enacted zoning laws, numerous bills that incorporated the terms of the Gentlemen's Agreement were proposed but never passed. "In 1963, a bill was introduced in the City Council to limit the height of new buildings to 450 feet, but this was not enacted."¹¹² In fact, a flurry of proposed legislation tended to follow any proposed construction in contravention of the Gentlemen's Agreement.¹¹³ Without the hindsight knowledge that no such legislation would be enacted, developers had to seriously consider the legislative response to their proposals.

Although threat of legislative response may have some deterrence effect, social forces provide an alternative explanation for the persistence of no-law land use restrictions.

One option for handling externalities from neighborly land uses is to adopt a laissez faire distribution of property rights, and rely upon social forces rather than governmental action to control land use decisions. This policy has more to commend it than first appears; legal sanctions are among the least civilized ways of handling conflicts between neighbors. Socially harmful behavior generally has been most effectively controlled by

¹⁰⁹ *Id.*

¹¹⁰ Bob Warner & Gar Joseph, *Builder Sees City Height Limit as Old Hat*, PHIL. DAILY NEWS, Apr. 6, 1984, at 3.

¹¹¹ Thomas Hine, *Round and Round on How High to Build*, PHIL. INQUIRER, Apr. 26, 1984, at C01.

¹¹² Hine, *supra* note 31.

¹¹³ *See, e.g.*, Warner & Joseph *supra* note 110.

socialization of the young, not the coercive force of law. If manners cannot deter certain antisocial behavior . . . that behavior may not be efficiently controllable at all.¹¹⁴

Essentially, “the wish of landowners to show good manners to their neighbors” works as a voluntary system of internalization.¹¹⁵ Sometimes, neighborly manners are embodied explicitly through a gentlemen’s agreement. For example, in Chesapeake, Virginia, two companies signed “land conservation understandings, described by one activist as like gentlemen’s agreements. They merely pledge to leave undeveloped land alone. No strings attached. The understandings are signed documents, good for five years, with options for renewal. But they are not legally binding.”¹¹⁶ Importantly, social norms need not only influence the segregation of land use; a height restriction—especially one premised on community identity—might persist through social norms.

The efficacy of such social norms depends on the characteristics of the setting; the most conducive societies “tend to be small, long-lived, and stable in population.”¹¹⁷ “These characteristics foster more uniform acceptance of moral and aesthetic codes and allow stronger social sanctions against violations.”¹¹⁸ Indeed, the small towns of Bethlehem, Connecticut and

¹¹⁴ Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 685 (1973).

¹¹⁵ *Id.* at 779. “Manners are of more importance than law. Upon them, in a great measure, the laws depend. The law touches upon us but here and there, and now and then. Manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine us, by a constant steady uniform insensible operation, like that of the air we breathe in.” *Id.*, at 685 n.16.

¹¹⁶ Scott Harper, *River Group’s Easy Going Ways Earn Protection of Lad Parcels*, VIRGINIA PILOT & LEDGER STAR, Dec. 7, 2001, at B1 (quotations omitted). Cf. David Lieber, *DER To Tighten Restrictions on Bethayres Landfill Site*, PHI. INQUIRER, June 23, 1986, at H17. In response to “numerous complaints about continued bad odors from constituents who live in the landfill area . . . the actions would formalize current arrangements between the landfill owners and the DER, under which the landfill owners will clean up the site. [A DER spokesman] compared the informal arrangements to a gentlemen’s agreement. He added, What we want to do is get them under the letter of the law, rather than doing it informally.” *Id.* (internal quotations omitted).

¹¹⁷ “The historic beauty of Italian villages, or cities in the Netherlands and Switzerland, is undoubtedly attributable in large part to the smallness, antiquity, and stability of the societies that contain them . . . The United States, a young, large country with a highly diverse and mobile population is less able to produce good neighbors through social sanctions . . .” Ellickson, *supra* note 114, at 685-86.

¹¹⁸ *Id.* at 685.

Rocky Mount, Virginia ostensibly fit these criteria.¹¹⁹ In contrast, the city of Everett, Washington, with 95,990 residents, “is the county seat of one of the fastest-growing counties in the nation.”¹²⁰ Although Philadelphia was the fifth-largest metropolis in the United States, manners nevertheless played a significant role in enforcing the Agreement.¹²¹ City-planner Edmund Bacon famously characterized Penn’s supremacy as the “crowning achievement of 300 years of self-discipline and restraint”¹²² One possible explanation for this phenomenon is that Philadelphia was “more attuned to architectural symbolism than most cities.”¹²³

In several other large American cities, social norms have promoted—albeit less explicitly than in Philadelphia—similar deference. This seems to occur where a structure’s supremacy is crucial to a city’s identity. For example, like Philadelphia, the city of St. Louis is alert of architectural symbolism,¹²⁴ treasuring the preeminence of its skyline landmark: the Gateway Arch.¹²⁵ “St. Louis passed an ordinance limiting the height of buildings so the Arch would dominate the skyline. The ordinance covers the area bounded by the Mississippi River, Chouteau, Broadway and M.L. King (then Franklin Avenue). Buildings can not be taller than 306 feet within the zone.”¹²⁶ However, like Philadelphia, St. Louis set no citywide height

¹¹⁹ See generally Wagner, *supra* note 93; O’Neill, *supra* note 92. See also Town of Rocky Mount Virginia, at <http://www.rockymountva.org/> (last visited April 19, 2005); Bethlehem Home Page, at <http://www.ci.bethlehem.ct.us/> (last accessed April 19, 2005).

¹²⁰ City of Everett, Washington Official Web Site, at <http://www.everettwa.org/> (last visited April 19, 2005).

¹²¹ U.S. BUREAU OF THE CENSUS, *supra* note 55.

¹²² Hine, *supra* note 31.

¹²³ Thomas Hine, *infra* note 261.

¹²⁴ See generally E.F. Porter Jr., *Tradition! City Tells Architects to Honor Past*, ST. LOUIS POST-DISPATCH, Nov. 13, 1988, at 4F. (“Shortness may be an advantage: tall buildings diminish the Gateway Arch.”).

¹²⁵ See Robert W. Duffy, *Are St. Louisans Concerned About the Downtown Cityscape? You Bet They Are.*, ST. LOUIS POST-DISPATCH, Dec. 15, 1996, at 01B (noting that, from many views, a newly constructed courthouse “appears to bisect the Gateway Arch, which is the city’s most prominent monument.”); John M. McGuire, *What’s All The Fuss, Jury Still Out on the City’s Newest Skyscraper*, ST. LOUIS POST-DISPATCH, Oct. 6, 1996, at 18 (“[T]he most common complaint is that it blocks the view of the Gateway Arch for Highway 40-64 commuters. It will be the fourth-tallest building downtown, rising just 63 feet lower than the stainless steel monument.”)

¹²⁶ *What’s Inside?*, ST. LOUIS POST-DISPATCH, Sep. 10, 2000, at B16.

limitation.¹²⁷ Nevertheless, respecting the height supremacy of the Arch, no developer has built taller. “Though St. Louis has no prohibition against topping the Arch . . . There’s an attitude in this city that you don’t want to overpower this monument.”¹²⁸

However, when the Metropolitan Life Insurance Building was completed in 1989, it stood only several feet shorter than the Arch.¹²⁹ “[F]or the developer to claim it exercised restraint could be regarded as a little disingenuous, for what difference does eight feet really make? The building as it is successfully masks a view of the Arch from the northwest.”¹³⁰

Likewise, the “773-foot Norwest Corp. headquarters in Minneapolis . . . [was designed] 2½ feet shorter than the nearby IDS Center, the city skyline’s dominant icon . . . It didn’t make sense to be taller for the sake of being taller . . .”¹³¹ Minneapolis and St. Louis may be contrasted with Washington, D.C., where all other structures are far shorter than the Washington Monument, as enforced through zoning.¹³² Instead, the construction patterns of these cities resemble Philadelphia, where in 1972 Center Square fell just shy of William Penn’s feet.¹³³

Within and without Philadelphia, tradition likely helped propagate these construction patterns. “In Philadelphia, tradition holds, nothing rises higher than Billy Penn’s hat. In

¹²⁷ E.F. Porter Jr., *Metropolitan Square: Treasure or Commonplace?*, ST. LOUIS POST-DISPATCH, Nov. 13, 1988, at 4F. “It is not true, though popularly believed, that city zoning regulations bar any structure taller than the Arch anywhere downtown. The absolute height restriction applies only in the area of Martin Luther King Bridge and Chouteau Avenue, and between Broadway and the Mississippi River. West of Broadway, building heights are governed by an intricate formula modeled on the Manhattan skyscraper code that allows a developer to add height in exchange for provided setbacks, stepbacks, an open space, a plaza and even an atrium.” *Id.*

¹²⁸ See Robert Guenther, *Developers Rise Above Urge to be Tallest on City Skyline*, WALL ST. J., Aug. 20, 1986, at 17. “The Metropolitan Life Insurance Co.’s 593-foot Metropolitan Square in St. Louis . . . will edge out Southwestern Bell Telephone’s new headquarters by six feet as the tallest building in Missouri; but it won’t challenge the 630-foot Gateway Arch as the city’s premier landmark.” *Id.* (quotations omitted). The Gateway Arch remains the tallest building in the city. See Emporis: St. Louis, at <http://www.emporis.com/en/wm/ci/bu/?id=102345> (last visited Apr. 19, 2005).

¹²⁹ Guenther, *supra* note 128. See also Emporis: St. Louis, Metropolitan Square, at <http://www.emporis.com/en/wm/ci/bu/?id=127235> (last visited Apr. 19, 2005).

¹³⁰ Porter, *supra* note 127.

¹³¹ *Id.* (quotations omitted). See Emporis: Minneapolis, Buildings of the City at <http://www.emporis.com/en/wm/ci/bu/?id=101331> (last visited September 26, 2005) (showing that the IDS building remains the tallest building in the city).

¹³² See *supra* text accompanying notes 42, 43; *infra* note 320.

¹³³ *Supra*, text accompanying note 64.

Philadelphia, tradition is serious business.”¹³⁴ In one sense, tradition only circularly explains the Agreement’s persistence: the Agreement’s persistence *was* a tradition. Though tradition is not a stand-alone enforcement mechanism, it often serves to reinforce pre-existing norms.

Determining whether to build above Penn required cost-benefit analysis; a rational developer would not commence a project if it did not anticipate a net benefit. Social sanctions—ostracism, shame, loss of reputation—have distinct costs incumbent upon a breacher.¹³⁵ The cost of breaching the Gentlemen’s Agreement included both social sanctions as well as any other cost unique to constructing a skyscraper taller than Penn.¹³⁶ But “to assume people are rational does not presuppose that they endlessly calculate their every move. Because deliberation is time-consuming and endless innovation is risky, a rational actor may choose a course of action, not by calculating from scratch, but rather by drawing upon *general cultural traditions . . .*”¹³⁷ A custom—such as Philadelphia’s Gentlemen’s Agreement—serves as a cost-benefit approximation.

The approximation need not be accurate to have a prohibitive effect. Relying on custom reduces “decision-making costs, but actors who rely on [custom] will tend to lag in adapting to changes in their surroundings.”¹³⁸ “Lags occur because people can rationally choose to reduce decision-making costs by imitating prevailing customs and not paying close attention to the advent of new information . . .”¹³⁹ There is little incentive to be the first developer to perform—or update—the cost-benefit analysis of breaching the Gentlemen’s Agreement; there is

¹³⁴ William G. Connolly, *Northeast Journal, Penn’s Hat Tips in Philadelphia*, N.Y. Times, May 19, 1985, at 46.

¹³⁵ See, e.g., Bernstein & Zekoll, *supra* note 68, at 89 (“In the diamond industry, ‘trust’ and ‘reputation’ have an actual market value.”).

¹³⁶ For example, there was a “hold-out” cost of accumulating the land necessary to building a skyscraper, discussed *infra* text accompanying notes 173, 174.

¹³⁷ ELLICKSON, *supra* note 91, at 157 (emphasis added).

¹³⁸ *Id.*

¹³⁹ *Id.*, at 255. This phenomenon is perhaps most well known within the context of negligence in tort law. See, e.g., *The T.J. Hooper*, 60 F.2d 737, 740 (C.A.2 1932) (noting that “a whole calling may have unduly lagged in the adoption of new and available devices.”).

a distinct first-mover disadvantage for the initial breacher. Here, a developer has incentive to let another developer bear the expense of the cost-benefit analysis, as well as the risk of mistake in calculation; if successful, the developer could then free-ride off of this work, without calculation expense and with lesser risk. Hence, conditions in Philadelphia could potentially have evolved such that building beyond Penn was worthwhile, while the Gentlemen’s Agreement continued to faultily signal the opposite to developers.

The honor associated with upholding Penn’s supremacy in the skyline was one factor that was reinforced through tradition.¹⁴⁰ Because honor and dignity are highly personal—they have individualistic and non-transparent values—the effects of this mechanism on developers are speculative. Each developer may have individually determined that the potential payoff from building above Penn was not worth the personal loss of honor. Because honor may be difficult to quantify, developers who felt it dishonorable to build higher than Penn may have abided without performing this calculus; some developers may have felt that cost-benefit analysis was inappropriate where honor was involved. Alternatively, a developer may not have felt direct obligations of honor, but not wanting to risk shame imposed by other industry members, the developer might nevertheless adhere. Perhaps the most intriguing possibility is that *no* developer actually felt direct obligations of honor.¹⁴¹

¹⁴⁰ Similar to a gentlemen’s agreement, Philadelphia’s restriction was often allied with concepts of honor. *See, e.g.,* Russell Cooke & William W. Sutton Jr., *City Council Endorses Tower Plan - Builder Awaits Goode’s Decision*, PHI. INQUIRER, May 18, 1984, at A01 (describing the Agreement as “a height limit honored by ‘gentlemen’s agreement.’”); George Anastasia, *City Considers Letting Skyline Top Penn’s Hat*, PHI. INQUIRER, Mar. 30, 1984, at A01 (describing the Agreement as “a ‘time-honored tradition’”).

¹⁴¹ Consider the following hypothetical. Lest they potentially face shame by the industry, risk-averse developers adhere until an initial developer signals “no honor” through breach. The collective adherence then signals “honor” to each developer. Each developer hence refrains, amplifying the false “honor” signal. A first-mover disadvantage would propound the scenario. For example, shame may be costly for the first breach developer, but once a precedent to build higher than Penn has been established, this cost may disappear because the Agreement is defunct. Indeed, later skyscrapers built beyond Penn received relatively little resistance or controversy. *See infra* text accompanying note 295.

There is an inherent problem with each such model of enforceability; developers based outside of Philadelphia—indifferent to the Agreement’s significance—would suffer no loss of dignity by constructing a skyscraper that surpassed Penn. That is, “exogenous developers” were essentially immune to loss of honor. If the premise of enforcement was merely honor, one would expect an exogenous developer to have breached. The fact that a Philadelphia developer eventually broke the Gentlemen’s Agreement¹⁴² suggests that honor was not the only enforcement mechanism at play.

Unlike harm to honor, both endogenous and exogenous developers were susceptible to reputational harm. Two brands of reputational losses could ensue from a breach of the Gentlemen’s Agreement: intra-industry (among developers), or inter-industry (between the developer and the Philadelphia community). Inter-industry reputational harm—the more intuitive cost of building beyond Penn—could directly or indirectly manifest in potential lessees’ unwillingness to rent office space from the breaching developer. That is, a potential lessee might directly esteem the Gentlemen’s Agreement and thereby wish to disassociate from the breacher. Alternatively, potential lessees might wish to disassociate themselves from the breacher lest they suffer the resultant reputational harm of disenfranchising their own Philadelphia customers. Indeed, the “concern ran through the city’s business community. [There was] a feeling in the business community - whatever they feel privately - that they don’t want to be the ones accused of selling out for a profit a city with a great tradition”¹⁴³ During the mid-1980s, several pre-breach polls indicated that Philadelphians were strongly opposed to building above City Hall. “An informal Daily News poll . . . showed Philadelphians opposed by more than 2-1 to buildings

¹⁴² See *infra* note 203.

¹⁴³ Huntly Collins, *At Firms’ Top, A Silence Over Penn*, PHIL. DAILY NEWS, May 13, 1984, at A01.

taller than Penn’s hat.”¹⁴⁴ One “poll taken . . . showed that 59 percent of the population of Philadelphia oppose[d] buildings higher than City Hall tower.”¹⁴⁵ Breaching developers could potentially alienate a large portion of Philadelphia’s population. Exogenous developers—interlopers within the Philadelphia community—seem particularly prone to vilification.

Intra-industry reputational harms tend to occur where industry cooperation is necessary, or where there are incentives to build trust in order to collude and prevent competition, as in a cartel.¹⁴⁶ Game theory illustrates that it may have been important for a developer to establish a trustworthy reputation within the Philadelphia development industry. Consider a nonrecurring arrangement between D1 and D2. The model captures the entire industry, because D1 represents a single developer (Developer 1), and D2 represents all other developers. “Break” represents breaking the Gentlemen’s Agreement (building a skyscraper taller than Penn). “Abide” represents adhering to the Gentlemen’s Agreement (refraining from building a skyscraper taller than Penn).

D1↓ D2→	Break	Abide
Break	(1, 1)	(3, 0)
Abide	(0, 3)	(2, 2)

There are two assumptions: (1) skyscrapers are costly to construct (more costly per square foot of office space than less tall buildings); and (2) skyscrapers are prestigious sites for companies to locate, and provide, *ceteris paribus*, a competitive advantage over less tall high-rise office buildings (*i.e.*, all other factors, such as rental rates and vacancy rates, remain the same).

By building a skyscraper when no other developer does, Developer 1 incurs costly construction, but could gain a significant enough competitive advantage to more than offset the

¹⁴⁴ Warner & Joseph, *infra* note 226. See also Robbins, *supra* note 79 (In “an informal phone-in poll conducted by The Philadelphia Daily News . . . [c]allers opposed breaking the height barrier by 3,809 to 1,822.”).

¹⁴⁵ *Towering*, *supra* note 25. But see *infra* text accompanying note 267.

¹⁴⁶ See generally Leslie, *supra* note 89.

cost, and therefore extract a higher payoff than refraining from building above Penn. By building a skyscraper when another developer does, Developer 1 incurs costly construction costs, but at least is not at a competitive disadvantage against all other developers, and therefore extracts a higher payoff than refraining. Hence, Developer 1's greatest payoff occurs when he breaks the gentlemen's agreement while Developer 2 abides by the agreement. In fact, regardless of whether D2 breaks or abides, D1's payoff is greater if he break the Gentlemen's Agreement than if he abides. Because D2 has an identical payoff structure, all developers will break the agreement, and each player will receive a payoff of 1. This outcome is called the Nash Equilibrium of the game.¹⁴⁷ Note that if both players had abided, they would have each received a payoff of 2, which is greater than the Nash Equilibrium payoff; this phenomenon is known as the Prisoner's Dilemma.¹⁴⁸ Because this is a nonrecurring game, the value of trust is essentially zero; Developer 1 has no incentive to instill trust in other developers that he will abide by the Agreement during future iterations of the decision-making process. If this was an infinitely recurring game, however, there would be a value in maintaining reputation within the industry as an abider. If all developers trusted one another and abided,¹⁴⁹ each could receive a greater payoff in future iterations. A developer would not breach even though the "break" payoff would be higher in iteration one, because the developer's reputation would be lost, the Gentlemen's Agreement would be defunct, and all future payoffs would be one instead of two. Hence, a trustworthy reputation can be valuable.¹⁵⁰

¹⁴⁷ Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL'Y REV. 1, 27 (2004) ("Nash equilibrium describes the state of affairs in which each player, knowing what the other player's actions will be, cannot improve her own situation by changing her actions.").

¹⁴⁸ See John Shepard Wiley Jr., *Reciprocal Altruism: Antitrust and the Prisoner's Dilemma*, 86 Mich. L. Rev. 1906, 1915 (1988).

¹⁴⁹ For a discussion of trust and its role in solving the prisoner's dilemma, see Leslie, *supra* note 89, at 528-531.

¹⁵⁰ Here, reputation is worth the summation of continued medium payoffs minus the summation of one large payment and continued small payments. By the tenth round, the differential would be $(10*2) - [(3*1) + (9*1)] = 8$.

Although this model is important because it identifies a non-obvious yet important cost of breach, it seems far-fetched that the development industry consciously used the Gentlemen's Agreement as a means to collude and limit competition in the market for high-rise office building. Moreover, collusion agreements are generally not self-enforcing; cartels implement monitoring and private-enforcement mechanisms to secure performance.¹⁵¹ Like tradition, trust was not an enforcement mechanism which worked in isolation.

One implicit assumption of the trust game is that there was sufficient demand to accommodate skyscraper development in Philadelphia, yet there is evidence that developers believed otherwise. “[T]he convention was motivated more by financial than aesthetic considerations. There was no economical reason for building more than about 40 storeys [sic] high. First, people were unwilling to put together enough land, and second they thought there wasn't the demand for office space.”¹⁵² Under this view, the Agreement sustained simply because developers could not profitably construct a skyscraper. Although the market for office space in Philadelphia clearly played a significant role in preventing breach, the point is easily overstated:

For years, the economics of Philadelphia office market made it foolhardy for a builder to even consider breaking with tradition. The barren rows of modern office buildings that line Market Street and JFK Boulevard west of City Hall have provided enough space within the existing height limit to accommodate the demand for new offices, which has come mainly from local companies expanding or relocating within the city.¹⁵³

¹⁵¹ See generally, Leslie, *supra* note 89.

¹⁵² Roderick Oram, *How They Broke The Mould And Went Over Penn's Head*, FIN. TIMES (London), Jan. 19, 1988, at 26. The unwillingness to assemble land goes to the hold-out problem, *infra* notes 173, 174.

¹⁵³ Peter T. Leach, *Philadelphia: Rouse Towers Aim to Break Mold And Revivify Center City Streets*, N.Y. TIMES, May 12, 1985, at section 12, page 22.

Yet developers continued to construct multiple high-rise buildings in Philadelphia during the 1970's.¹⁵⁴ For example, the 40-storey 1818 Market Street was completed in 1974 at a height of 500 feet, only 11 feet below the statue of Penn.¹⁵⁵ A contravening skyscraper could potentially supply no more square footage of office space than a building which nipped Penn's heels, while providing more space at the ground. "The Linpro building likely would surpass the Penn statue by only a few stories . . . the building will contain 800,000 square feet of space. Several Center City buildings have used up 800,000 square feet without surpassing the height limit."¹⁵⁶ The reason why developers resisted building beyond Penn was not that the market could not theoretically absorb the office space supplied by a skyscraper,¹⁵⁷ but because developers could supply such office space without breaching the agreement and incurring the related costs. National Land & Investment Co. presumably felt it economically viable to build beyond Penn when in the mid-1960's it proposed a 57-story building "on Market Street, one block west of city hall."¹⁵⁸ However, the proposal "was dropped after it ran afoul of the city's skyscraper rule."¹⁵⁹

¹⁵⁴ *E.g.*, Emporis: 2000 Market Street, Philadelphia, at <http://www.emporis.com/en/wm/bu/?id=117917> (last visited Apr. 19, 2005) (2000 Market Street was completed in 1973 at a height of 435 feet); *infra* note 65, 66 (Center Square II, completed in 1973, stands at 526 feet; Center Square I stands at 417 feet); Emporis: The Cigna Annex, Philadelphia, at <http://www.emporis.com/en/wm/bu/?id=117927> (last visited Feb. 21, 2005) (The Cigna Annex, completed in 1975, stands at 384 feet).

¹⁵⁵ "1818 Market Street was "the tallest building completed in Philadelphia during the 1970s." Emporis: 1818 Market Street, Philadelphia, at <http://www.emporis.com/en/wm/bu/?id=117841> (last visited Feb. 21, 2005).

¹⁵⁶ Gary Thompson, *Now It's a Rouse Race, Competitor Plans to be First with Sky-high Tower*, PHI. DAILY NEWS, Aug. 31, 1984, at 39 ("The building will probably be right at the statue, only slightly higher. We're not looking to build a huge monument like some people"). *See also* Hine, *supra* note 4 ("It is true that the entire Liberty Place development does not exceed in square feet of floor space what could have been built on the site without exceeding the height limit; the development is just distributed differently.").

¹⁵⁷ Narrower statements seem safe. "The conservative way of life here has kept the city from being over-built . . . It has kept supply and demand in better balance." Oram, *supra* note 152 (quoting William Rouse).

¹⁵⁸ Glynn D. Mapes, *William Penn Remains On Top in Philadelphia Despite Skyscrapers*, WALL ST. J., Nov. 29, 1967, at 8.

¹⁵⁹ *Id.* *See also* Hine, *supra* note 31 ("[A] development was proposed for 15th and Market Streets that would have towered over City Hall, which sparked controversy within the administration of Mayor James H.J. Tate.").

National Land instead constructed Center Square,¹⁶⁰ after “the Philadelphia Redevelopment Authority gave final approval to the development plans.”¹⁶¹

In fact, the National Land proposal led to perhaps the greatest single barrier to constructing beyond Penn. “After that battle, a 491-foot height limit was written into the Redevelopment Authority’s urban-renewal plan for Center City. However, this restriction applies only to developments that involve the Redevelopment Authority. No law prevents other developers from going higher.”¹⁶² The purpose of the Redevelopment Authority

is to arrange for the elimination of blighted areas which are beyond the control of normal regulatory processes by acquiring such properties through the power of eminent domain granted it, planning redevelopment projects for them in conjunction with private firms, and aiding in financing them through the issuance of its own bonds.¹⁶³

Importantly, the Redevelopment Authority’s 491-foot limitation only applied to developers who “need the city’s power of eminent domain to help assemble a site.”¹⁶⁴ “[T]here [were] no such limits on development of tracts that builders [could] assemble on their own.”¹⁶⁵

The Authority’s power of eminent domain derives from Pennsylvania’s Urban Redevelopment Law,¹⁶⁶ the purpose of which—unlike the Housing Authorities Law—was not

¹⁶⁰ See *supra* text accompanying note 65.

¹⁶¹ *News of Realty*, *supra* note 65.

¹⁶² Hine, *supra* note 31 (emphasis added).

¹⁶³ Redevelopment Authority, at <http://www.phila.gov/phils/docs/inventor/graphics/agencies/A161.htm> (last visited Apr. 19, 2005). See also Redevelopment Authority, Mission Statement, at <http://www.phila.gov/rda/index.html> (last visited Apr. 19, 2005; September 26, 2005) (“The Redevelopment Authority utilizes its powers of eminent domain (condemnation) to facilitate the reuse of vacant, tax-delinquent and blighted property throughout the City.”).

¹⁶⁴ *Height Tradition Threatened*, ENGINEERING NEWS-RECORD, April 26, 1984, at 14. See also Warner & Joseph, *supra* note 110 (“The existing Center City urban renewal plan includes a 491-foot height limit for developments, like Rouse’s proposal, that need government assistance in acquiring all the necessary parcels of property.”)

¹⁶⁵ Warner & Joseph, *supra* note 110,

¹⁶⁶ 35 P.S. § 1701 (1945, May 24, P.L. 991) (“An Act to promote elimination of blighted areas . . . creating public bodies corporate and politic to be known as Redevelopment Authorities; authorizing them to engage in the elimination of blighted areas and to plan and contract with private, corporate or governmental redevelopers for their redevelopment; providing for the organization of such authorities; defining and providing for the exercise of their

merely to clear city slums.¹⁶⁷ One purpose of the statute is to ameliorate areas deemed blighted “because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or the lack of proper light and air and open space, or because of the defective design and arrangement of the buildings thereon, or faulty street or lot layout, or economically or socially undesirable land uses.”¹⁶⁸ The Redevelopment Law’s definition of “blight” is quite broad, giving “wide scope to municipalities in redesigning and rebuilding such areas within their limits as, by reason of the passage of years . . . and types of building construction, no longer meet the economic and social needs of modern city life and progress.”¹⁶⁹ Any proposed development must also be a bona fide element of a true plan for urban renewal, as the “Redevelopment Authority has no power to condemn property, under guise of urban renewal, for a private, not public purpose.”¹⁷⁰

Use of the Redevelopment Authority’s power of eminent domain would be beneficial in amassing the land necessary to build a skyscraper within Center City. Although a developer could theoretically purchase property without such assistance, this would entail transaction costs of bargaining individually with a multitude of private individuals, each of whom owns a necessary land fragment. Additionally, the developer would likely face a hold-out problem. While some property owners would be willing to sell to a skyscraper developer at their true reservation value (how much their property is worth to them), some owners—especially those

powers and duties, including the acquisition of property by purchase, gift or eminent domain . . . conferring certain duties upon local planning commissions, [and] the governing bodies of cities.”).

¹⁶⁷ *Schenck v. City of Pittsburgh* 364 Pa. 31, 37, 70 A.2d 612, 615 (Pa. 1950) (“The fundamental purpose of both these acts was the same, namely, the clearance of slum areas, although the Housing Authorities Law aimed more particularly at the elimination of undesirable dwelling houses whereas the Urban Redevelopment Law is not so restricted.”).

¹⁶⁸ 35 P.S. § 1702 (1945, May 24, P.L. 991).

¹⁶⁹ *Schenck*, 70 A.2d 612.

¹⁷⁰ *Golden Dawn Shops, Inc. v. Redevelopment Authority of City of Philadelphia*, 3 Pa.Cmwlt. 314, 282 A.2d 395 (1971) (holding that plaintiff had a right to an evidentiary hearing on whether “the condemnation of its land was undertaken not for the purpose of replanning a blighted area but in order to acquire ‘prime commercial land for development by John Wanamaker and the Philadelphia Saving Fund Society.’”).

approached last—might attempt to extract from the developer a greater payment. These owners recognize that property on the proposed skyscraper site is critical: the project cannot commence without their property. Owners therefore have incentive to “hold out” and demand a higher payment from the developer. An “inefficiency results if the artificially-high prices (or strategic refusals to deal) prevent assembly of the interests [by the developer] who values them more highly. Importantly, the strategic behavior . . . can be anticipated rather than actual, discouraging a would-be assembler from bothering to incur the cost of attempting an assembly.”¹⁷¹

Holdout behavior imposes externalities on other people in two ways. First, it generates costs that are borne in part by the would-be entitlement assembler, rather than wholly by the holdout. The assembler cannot simply take the holdout at her word when she says she will not sell at a particular price, for this could be a strategic ploy. Hence, the assembler must spend time and effort attempting to determine the true reservation prices of all the fragment holders before she can determine whether the deal is viable. Second, if the transfer of the fragment does not occur, the opportunity cost associated with unfulfilled gains from trade are not wholly internalized to the holdout, but instead destroy surplus that would otherwise be enjoyed by the would-be assembler and all of the other fragment holders who are now precluded from engaging in mutually-beneficial trades leading to entitlement assembly.¹⁷²

In practice, the hold-out problem is a huge impediment to constructing a skyscraper.

“Developers trying to assemble a site . . . for a big project are just about certain to encounter [holdouts] every time . . . Holdouts can add millions of dollars to the cost of a project or even kill

¹⁷¹ Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 928 (2004).

¹⁷² *Id.* at 928-29 (“To put it another way, the fact that a deal does not occur will hurt the holdout, but the pain will be shared by all of the other would-be parties to the transaction who would otherwise reap benefits from the deal.”).

it altogether.”¹⁷³ The dilemma and its effects are pervasive: “holdouts may have shaped the nation’s skylines almost as much as architects . . . If it weren’t for holdouts . . . Manhattan’s Empire State Building might stand across the street.”¹⁷⁴

While it is true that “real estate developers and others are frequently able to assemble such parcels by using buying agents, option agreements, straw transactions, and the like[.]”¹⁷⁵ these methods rely on secrecy. The fragmented buyers must be ignorant of the plan to assemble the entire lot, such that they are unaware that they can benefit from holding out. The secrecy problem is one reason why the government must often rely on the power of eminent domain in its acquisitions of property.¹⁷⁶ Similarly, Philadelphia’s height tradition would likely prevent any developer’s attempt at secrecy; any plan to build taller than Penn would garner immediate media attention.

The state’s power of eminent domain can resolve the hold-out dilemma.¹⁷⁷ Here, the Redevelopment Authority could take ownership of the fragmented land¹⁷⁸ subject to reasonable compensation to each fragment owners,¹⁷⁹ and a private redeveloper could then purchase the land from the Authority.

¹⁷³ Joanne Lipman, *The Holdouts: Owners Who Stay Put Play a Part in Shaping the American Skyline*, WALL ST. J., May 22, 1984, at 1 (“Some holdouts stay put for love of their property. Others just want money, what developers call ‘real estate ransom.’”).

¹⁷⁴ *Id.* (“Holdouts carved two corners out of Manhattan’s Rockefeller Center, forced San Antonio’s Frost National Bank to build around a Western-hat store and transformed San Francisco’s Ramada Renaissance Hotel into a U-shaped building wrapping around a smaller hotel.”). Holdout behavior also occurs in Philadelphia. *E.g.*, Thompson, *supra* note 156 (“Linpro does not own all the land at the 19th and Market site. The owners of an adult bookstore and an X-rated movie theater are holding out for a higher price.”).

¹⁷⁵ Thomas W. Merrill, *The Economics of Public Use*, 2 CORNELL L. REV. 61, 81 (1986).

¹⁷⁶ *Id.* at 82 (“[G]overnments, at least in an open society like the United States, are not very good at keeping secrets. Moreover, even if governments could keep secrets, the combination of secret land acquisitions and the need to buy off holdouts raises a serious danger of corruption.”).

¹⁷⁷ For a discussion of eminent domain and the hold-out problem, *see generally* Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091 (1997).

¹⁷⁸ For a discussion of the constitutionality of eminent domain under a redevelopment scheme, *see generally* *Berman v. Parker*, 348 U.S. 26 (1954).

¹⁷⁹ For a discussion of the methods for calculating reasonable compensation, *see generally* *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979). *See also* *State of New Jersey v. Caoili*, 621 A.2d 546 (N.J. 1993).

If the hold-problem was irresolvable without assistance from the Redevelopment Authority, the Authority's restriction might be depicted "de facto zoning."¹⁸⁰ That is, this government action would have the effect of a zoning ordinance, even though not formally recognized as such. The viability of this characterization seems to hinge upon how much credence one gives to the act/omission distinction.¹⁸¹ That is, the Authority did not impose a rule prohibiting construction in contravention of the Agreement; it merely refused assistance to such a project. In fact, the Authority could withhold support from any proposal it deemed an unsuitable renewal project. Construction height might be one objection to a renewal project, as building above a certain height—or violating an important tradition—could be detrimental to Philadelphia. Tradition should not be overlooked as a consideration in a city's policies towards eminent domain; "in reviewing municipal government acts performed under the city's police and eminent domain powers, courts [have] been influenced by 'current usage and custom' as well as popular opinion."¹⁸² Although the Redevelopment Authority's rule against building above 491 feet would be an omission rather than an act of eminent domain, the importance of custom in the Authority's decision-making processes remains well taken.

Importantly, the Redevelopment Authority's decision-making does not operate in isolation. Rather, the agency reviews "the recommendations of the *planning commission* for redevelopment of any area and [makes] its own additional investigations and recommendations

¹⁸⁰ "De facto zoning" is not often mentioned in legal literature. For a rare mention and example of de facto zoning, see Orlando E. Delogu, Samuel B. Merrill, & Philip R. Saucier, *Some Model Amendments to Maine (and Other States') Land Use Control Legislation*, 56 ME. L. REV. 323, 341 (2004).

¹⁸¹ The act-omission distinction is important in many areas of the law. For a discussion within the context of criminal law, see generally Patricia Smith, *Legal Liability and Criminal Omissions*, 5 BUFF. CRIM. L. REV. 69 (2001).

¹⁸² Mark Fenster, *A Remedy on Paper: The Role of Law in the Failure of City Planning in New Haven, 1907-1913*, 107 YALE L.J. 1093, 1113 n.112 (citing Frank Backus Williams, *The Law of City Planning and Zoning* 19-20 (1922)).

thereon”¹⁸³ The Authority must then “submit the redevelopment proposal to the planning commission for review.”¹⁸⁴ From there, the planning commission must

certify to the *governing body* its recommendation on the redevelopment proposal, either of approval, rejection or modification, and in the latter event, specify the changes

recommended At the hearing the governing body shall afford an opportunity to all persons or agencies interested to be heard and shall receive, make known and consider

recommendations in writing with reference to the redevelopment proposal. The

governing body shall [then] approve or reject the redevelopment proposal as submitted.¹⁸⁵

City Council could therefore withhold redevelopment support for any construction project that would contravene the Gentlemen’s Agreement. Hence, invoking the city’s power of eminent domain could effectively require maneuvering through three separate municipal bodies: (1) the Philadelphia Redevelopment Authority; (2) the Philadelphia City Planning Commission; and (3) Philadelphia City Council.

The primary functions of Philadelphia City Planning Commission—“land use controls, facilities planning, and physical planning”¹⁸⁶—have always been advisory. One function of the Commission is to prepare a comprehensive plan for the city, which it then submits to the Mayor and City Council.¹⁸⁷ Although the Planning Commission prepares zoning laws, City Council

¹⁸³ 35 P.S. § 1709 (emphasis added); 35 P.S. § 1710 (emphasis added) (The Authority “prepare[s] a redevelopment proposal for all or part of any area certified by the planning commission to be a redevelopment area and for which the planning commission has made a redevelopment area plan . . .”).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* “Upon approval by the governing body of the redevelopment proposal, as submitted by the Authority, the Authority is authorized to take such action as may be necessary to carry it out.” *Id.*

¹⁸⁶ Philadelphia City Planning Commission, at <http://www.philaplanning.org> (last visited Apr. 19, 2005). The agency’s function has been “greatly enlarged by an equal emphasis on non-physical development issues such as economic development, human services delivery, and housing policy.” *Id.*

¹⁸⁷ “The City Planning Commission shall prepare and adopt, from time to time modify, and have custody of a comprehensive plan of the City showing its present and planned physical development The Commission shall transmit the Physical Development Plan or any part and any modification thereof to the Mayor and to the Council.” Philadelphia Home Rule Charter, 351 PA ADC § 4.4-600 (1951).

approval is necessary to pass a zoning ordinance,¹⁸⁸ such that the Planning Commission could not alone create a law which embodied the Gentlemen’s Agreement. However, City Council could not enact such a law without the recommendation of the Planning Commission. Conversely, City Council could not enact a law that directly overrode the Redevelopment Authority’s 491-foot criterion for eminent domain. “The Council shall not enact any bill which shall in any manner affect any zoning ordinance, the Physical Development Plan of the City . . . or any bill which would authorize the acquisition or sale of City real estate without first receiving the recommendation . . . of the City Planning Commission.”¹⁸⁹ The rationale behind this requirement was “to prevent hasty and ill-advised legislation adversely affecting City development. It will assure that the council will receive the expert advice of the commission whose special function is the planning of City development.”¹⁹⁰

While in some cities such a requirement might not have had teeth, the Philadelphia City Planning Commission was in fact incredibly influential in upholding the Gentlemen’s Agreement. “Developers with good sites made their case for taller buildings. But eventually they were convinced that breaking the gentlemen’s agreement that the base of the William Penn statue on City Hall tower should be the ceiling for development would be too much trouble.”¹⁹¹ Edmund N. Bacon, the city planner often credited with revitalizing Center City during the mid-twentieth century,¹⁹² was executive director of the Philadelphia City Planning Commission from

¹⁸⁸ “The City Planning Commission shall prepare proposed zoning ordinances, which may embody regulations and maps, and amendments thereto, and submit such proposed zoning ordinances and amendments thereto to the Mayor for transmission to the Council.” 351 PA ADC § 4.4-601.

¹⁸⁹ 351 PA ADC § 2.2-307 (emphasis added) (“The approval of the Commission shall be presumed unless its recommendations are received within thirty days.”).

¹⁹⁰ *Id.* (annotation).

¹⁹¹ Thomas Hine, *Office Buildings of the Future May Eclipse William Penn*, PHI. INQUIRER, Apr. 17, 1983, at H12.

¹⁹² Capuzzo, *supra* note 58. *But see* Inga Saffron, *City Planner’s Legacy Not the Sweet Deal WHY? Sells*, PHI. INQUIRER, Sep. 23, 2004, at D01 (“WHYY perpetuates the uncritical hero worship that has surrounded him since his autocratic reign as Philadelphia’s master builder in the ‘50s and ‘60s . . . Instead of exploring Bacon’s mixed legacy

1949 to 1970.¹⁹³ “Bacon had a greater impact on the planning and development of his hometown [Philadelphia] than any individual except Robert Moses in New York and Daniel Burnham in Chicago . . . he had created a noble logical diagram that had the power to stir the blood.”¹⁹⁴

However, Bacon left a mixed legacy; though credited with the revitalization of Society Hill, “his dull City Hall plazas, blank-walled buildings and highway canyons left it forever scarred.”¹⁹⁵

“Bacon is descended from Quakers who arrived in Philadelphia more than 300 years ago. The tone has always been very strong in Bacon’s thinking.”¹⁹⁶ Suitably perhaps, Bacon was an unmatched advocate of Penn’s supremacy throughout his tenure as director of the Planning Commission, and beyond.¹⁹⁷ To the Philadelphia press, Bacon was the authoritarian enforcer of the Agreement: “the protector - some say the originator - of the height-limit tradition,”¹⁹⁸ the man who enforced the height-tradition “almost single-handedly.”¹⁹⁹ During the 1950’s and 1960’s, Bacon was said to have “forcefully deterred developers building higher than William Penn,”²⁰⁰ but determining the actual extent of Bacon’s influence proves difficult.

Even his role as executive director of the Planning Commission . . . was carried out through persuasion rather than authority, since that body is conceived as an adviser to other city agencies but has little power to do things on its own. “People always think I exercised political power,” Bacon said. “They’re wrong. I had a personal policy that I would always support the policies of the administration I was working for.” Yet Bacon

- which left Philadelphia with a revived Society Hill neighborhood, but dead zones around City Hall and Penn’s Landing.”).

¹⁹³ Cooney, *infra* note 259

¹⁹⁴ BACON, *supra* note 1 (cover quotation of Alexander Garvin, *The American City*).

¹⁹⁵ Saffron, *supra* note 192 (For example, “Bacon’s beloved, mile-long shopping concourse [along Market Street] is a dark, foreboding failure.”).

¹⁹⁶ Hine, *Savoring the Cities’ Vitality*, PHIL. INQUIRER, Feb. 26, 1984, at H01.

¹⁹⁷ See Capuzzo, *supra* note 58. Long after Bacon resigned as director of the Planning Commission, he “filled newspaper editorial pages with long, impassioned pleas to uphold the agreement that Bacon said he had inherited from [Philadelphia’s Victorian ancestors . . . and William Penn.” *Id.* (internal quotations omitted).

¹⁹⁸ Hine, *supra* note 31.

¹⁹⁹ Capuzzo, *supra* note 58.

²⁰⁰ Hine, *supra* note 111.

was far from a yes man. Mayors came and went, but Bacon usually prevailed. “I always dealt with the future beyond that which interested the current administration,” he said.

“When they progressed to what I was working with, I had staked out the territory, and they generally went down the route that I had laid out.”²⁰¹

However, possessing a “bull dog will and bullying personality,”²⁰² it seems likely that Bacon’s self-depiction of his influence understates considerably the substantial pressure he exerted upon developers.

IV. BREACH AS IDENTITY

Philadelphia developer Willard Rouse III²⁰³ did not share in Bacon’s vision of Philadelphia. Rouse realized that Philadelphia, “along with the nation’s Northeast generally, [was entering] a period of economic expansion - after some painful years of moving away from manufacturing toward services and information.”²⁰⁴ In March 1984, Rouse proposed “to build two Center City office towers of 55 to 65 stories rising from a hotel and retail complex connecting Market and Chestnut streets between 16th and 17th.”²⁰⁵ “As for the pre-eminence of William Penn’s statue, Rouse contended it was already lost from that section of the city. ‘If you stood at Rittenhouse Square right now and looked for William Penn, I suspect you would not find him . . . You just can’t see William Penn from that quadrant of the compass.’”²⁰⁶

²⁰¹ Hine, *supra* note 196.

²⁰² Saffron, *supra* note 192.

²⁰³ Rouse & Associates was based in Malvern, Pennsylvania, just outside of Philadelphia. *Tradition Threatened*, *supra* note 164. For a discussion of William Rouse and the influence of his buildings in Philadelphia, see Inga Saffron, *The Limits of Success*, PHI. INQUIRER, June 1, 2003, at C01; Stevens, *infra* note 204. See also, W. Rouse, 60, *Built Modern Philly Skyline*, NEWSDAY, May 29, 2003, at A39.

²⁰⁴ William K. Stevens, *supra* note 145 (“There [was] also the question of whether Philadelphia’s new robust economy will translate into a continuing strong construction and development market.” However, “the city’s downtown office-occupancy rate of about 90 percent [was] the third-highest among big cities, after Boston and New York.”).

²⁰⁵ Robb, *supra* note 8.

²⁰⁶ See Warner & Joseph, *supra* note 110.

Indeed, much of the symbolism of Penn’s supremacy was already lost amidst “a stubby tide of undistinguished office buildings already [lapping] just shy of Penn’s pantaloons.”²⁰⁷ City Hall did “not appear to be taller than the buildings around it, and the view of the Penn statue [was] obscured from most vantage points.”²⁰⁸ This observation called into question whether the Gentlemen’s Agreement—a flat height limit—was even the proper approach towards preserving Penn’s symbolic importance; a goal-oriented zoning law, one that permitted skyscrapers while preserving view corridors, might better realize this purpose.²⁰⁹ Nevertheless, through the Gentlemen’s Agreement, Penn arguably remained supreme to Philadelphians from a psychological standpoint.²¹⁰

The Philadelphia Foundation for Architecture convened the initial forum on the Gentlemen’s Agreement issue,²¹¹ pitting two prior friends—developer Rouse and former city-planner Bacon—against one another. Bacon, long since retired from the City Planning Committee, argued vehemently against the Rouse project:

“Here is what Rouse’s two towers would look like next to City Hall,” declared Bacon, displaying a sketch of the skyline, skyscraper shapes looming high above Penn’s statue. “Do you think the property owner next to City Hall doesn’t have the same rights that Rouse has, once the line is broken? “We’re not talking about a statue of William Penn,” Bacon declared. “We are talking about a fundamental center of the city. Everything has

²⁰⁷ *Towering*, *supra* note 25.

²⁰⁸ Hine, *supra* note 31. “Indeed, only along Broad Street and the Benjamin Franklin Parkway in Center City, and from a few more-distant places, such as Belmont Plateau in Fairmount Park and Interstate 95 entering the city from the north, is the City Hall tower the dominating landmark Philadelphians tend to think it is.” *Id.*

²⁰⁹ See Robin Clark, *Another Approach to Height Limits*, PHI. INQUIRER, May 14, 1987, at B03. Bacon felt that such an approach would “merely lull people into a false sense of security that it would protect the dignity of City Hall, and in reality it wouldn’t.” *Id.* (internal quotations omitted).

²¹⁰ Hine, *supra* note 31 (“The pre-eminence of Penn and the tower is largely a psychological phenomenon, but the mere fact that it is psychological does not mean that it is unimportant.”).

²¹¹ Hine, *supra* note 111. Rouse was the chairman of the foundation. *Id.*

got to have a sense of the center. If you let that go, you let the whole darned thing fall to pieces. If you dislodge that center, you become a rootless city.”²¹²

Yet Bacon’s Penn-centric²¹³ view of Philadelphia was disputable. “City Hall could have been the real center of the city, but it didn’t happen . . . [T]he commercial center of the city was west of City Hall and the next developments in that area will pull the city down or pull it up.”²¹⁴

So set in motion a citywide debate. “In other cities, such an argument might simply be a zoning matter, one that would excite few passions. But here, crashing through the height barrier raises issues about the identity of the city, its physical and emotional character and what kind of city it might become.”²¹⁵ Despite the deep-seated emotions involved, the dialogue was for the most part conducted with reciprocated tolerance, respect, and curiosity of opposing viewpoints.²¹⁶

Initially it seemed that the Planning Commission would, in effect, determine whether to permit breach of the Gentlemen’s Agreement.²¹⁷ Philadelphia mayor Wilson Goode requested that the Planning Commission “help advise the city Redevelopment Authority, which ha[d] been

²¹² Robb, *supra* note 8. (internal quotations omitted). The forum discussion was both revealing and scathing. Consider the following dialogue:

“Weinstein [New York urban-designer]: I don’t know of a city that combines the splendor and amplitude of the great civic gestures of the past with such a mediocre new environment.

Bacon: It’s prospering beautifully, despite the comments from New York, and it has changed beautifully, and the sense of center has been retained, and it has all worked out together in a wonderful way, and to destroy it now is a tragedy beyond dimension.”

Poses [Philadelphia restaurateur]: I’d like to challenge the idea that Center City is thriving. That’s true if you’re a law firm, or an office worker, or an office building developer. But at night Center City dramatically changes. I’m concerned about the night-time vitality of Center City, which now is missing, and I think the Rouse project has a shot of addressing that.” *Id.*

²¹³ See *supra*, text accompanying note 26.

²¹⁴ Hine, *supra* note 111 (quotations omitted).

²¹⁵ Hine, *supra* note 31. See also Thomas Hine, *In the Debate on Penn’s Hat, Lofty Questions About the City Are Raised*, PHI. INQUIRER, May 6, 1984, at F01.

²¹⁶ Dan Rottenberg, *Topping Billy Penn: A Civilized Discussion*, PHI. INQUIRER, May 5, 1984, at A09 (“Most Philadelphians seem genuinely curious to learn whether taller buildings represent a step forward or backward, and so the dialogue has proceeded in an atmosphere of tolerance and mutual respect. With the exception of . . . Bacon . . . most Philadelphians, including Rouse, have come to these debates not so much to argue as to listen with fascination to the arguments of others.”).

²¹⁷ See Anastasia, *supra* note 140.

asked by Rouse to help assemble the land package for the project.”²¹⁸ To evaluate the proposal, the Commission sponsored a televised conference consisting of both a public forum and panel discussions.²¹⁹ Ultimately, the Planning Commission declined to make a recommendation on the Rouse proposal, instead proposing a “study, lasting no more than a year, be undertaken to draw up a new overall plan that would govern the construction of buildings in Center City.”²²⁰

Meanwhile, City Council had stepped into the intensifying debate. “City Councilman David Cohen . . . blasted a forthcoming mayoral conference on the controversial issue . . . calling it an attempt by the City Planning Commission to steal the City Council’s legislative power.”²²¹

“We think it’s a legislative duty and has nothing to do with an appointive agency like city Planning,” [Councilman] Blackwell said last night. “No one has been coming to Council to see what we think about this.” Asked if the Planning Commission, whose members are appointed by the mayor, has more expertise to deal with issues like limits on building height, Blackwell replied: “Hogwash. If they have more expertise, let them run for office.”²²²

Blackwell’s statement was inaccurate. Though City Council had the power to prevent Rouse’s proposal construction through enactment of a zoning ordinance, the Philadelphia Home Rule Charter required the Planning Commission’s recommendations to do so.²²³

In this case, the Planning Commission’s recommendation of a year-long study was unacceptable both to Rouse (who required a response within approximately one month)²²⁴ and

²¹⁸ Charles Robb, *Panels to Eye Cap of Billy Penn’ Hat*, PHI. DAILY NEWS, Apr. 20, 1984, at 7.

²¹⁹ *Id.* See also Robb, *supra* note 8. “Three five-member panels were scheduled to spend 90 minutes exploring issues of urban design, economic development, and image and tradition raised by the Rouse proposal. The public will then get its say from 4:15 to 5:30 p.m. and again from 7 to 9 p.m.” *Id.*

²²⁰ Michael E. Ruane, *Goode: Plan to Top Penn Will Get A Speedy Review*, PHI. INQUIRER, May 5, 1984, at A01.

²²¹ William W. Sutton, Jr., *Councilman Blasts Mayor’s Panel On Building Heights*, PHI. INQUIRER, Apr. 28, 1984, at B03.

²²² Bob Warner, *Council Tosses Hat Into Ring*, PHI. DAILY NEWS, Apr. 4, 1984.

²²³ *Supra* text accompanying note 189.

City Council (which wanted to make an immediate legislative decision). Because the approval of the Planning Commission's is presumed if a recommendation is not made within thirty days, and the Commission's recommendation was only to delay a true recommendation, approval could arguably be presumed after thirty days.²²⁵ In reality, this analysis never occurred; formal process was largely ignored. At the outset, City Council was hostile towards Rouse's proposal. Two separate bills were introduced to limit building height, one of which was spearheaded by current Philadelphia Mayor then Councilman John F. Street.²²⁶

At issue was not only Penn's symbolic elevation, but the preservation of Center City's human scale, the characteristic which purportedly made Philadelphia a "livable" city.²²⁷ Mayor Goode's office was flooded with letters and calls: "They don't want us to become a New York, Atlanta, Chicago or Dallas, [Goode] said. They want us to remain livable. They don't want tall buildings to change our skyline."²²⁸ In truth, skylines may have "very little to do, for example, with that often-praised Philadelphia quality of 'human scale.' It can be present or absent in buildings three stories tall, or 38, like those built under the gentlemen's agreement, or 60, like the new skyscraper generation. It all depends on what happens at the first few levels, down where the people are."²²⁹ Countering livability concerns in this fashion, Rouse assured that "his plan

²²⁴ Ruane, *infra* note 230.

²²⁵ *Supra* note 189.

²²⁶ Bob Warner & Gar Joseph, *Bills Would Put a Lid on Building Height*, PHI. DAILY NEWS, April 6, 1984, at 3 ("One, proposed by Councilman John Street, would restrict new construction to 491 feet, the height of the PSFS building . . . The other bill, prepared by Council President Joseph E. Coleman, calls for a 526-foot limit, even though Coleman later told reporters he has no personal opinion on the subject. ").

²²⁷ See Warner & Joseph, *supra* note 110 ("Street, sponsor of a 491-foot legal limit, issued a news release saying he wanted to preserve the scale and fabric of the already-developed core of the city."); Ruane & Hine, *infra* note 230 ("'We are a very livable city,' Goode said in an interview. 'We have unique characteristics. . . . What we're struggling with now is whether or not we want to be what we are or be something different.'"). See also Stevens *infra* note 264.

²²⁸ William W. Sutton, Jr., *Goode Offers Quick Action on Towers*, PHI. INQUIRER, May 16, 1984, at A01 (quotations omitted).

²²⁹ Hine, *supra* note 4.

actually would open up more space and create a space that is human.”²³⁰ Further, Rouse noted that the lower levels of the project would be replete with “retail space for new restaurants, health clubs, cinemas, fashion stores and other retail outlets.”²³¹

Although Bacon pled to City Council that that the regular people of Philadelphia were in favor of a height limitation,²³² his assertion was not clear-cut. Historic preservationists supported the legislation, as did neighborhood civic groups from in and around Center City, for which Rouse’s skyscraper would obstruct views of Penn.²³³ Furthermore, several public opinion polls did indicate that a majority of the Philadelphia population was, at least initially, against building beyond Penn.²³⁴ Perhaps in fear of alienating population segments regardless of the stance taken, the voice of the Philadelphia business community was largely absent from the debate.²³⁵ However, some Center City business owners were clearly against the limitation: “the symbolism of the so-called gentlemen’s agreement was negative . . . There is something in Philadelphia that is threatened by standing tall, and this is reflected in its paucity of entrepreneurs, of venture capital, of high-fashion retailers . . .”²³⁶ Some politicians saw Rouse’s proposal as a means to help revivify not only Center City, but outlying city neighborhoods.²³⁷

²³⁰ Michael E. Ruane & Thomas Hine, *Of Height, Penn’s Hat and People*, PHI. INQUIRER, May 2, 1984, at A01.

²³¹ Collins, *supra* note 143.

²³² Russell Cooke, *Debate Over Penn’s Hat Goes to Council*, PHI. INQUIRER, May 11, 1984, at B01.

²³³ *Id.*

²³⁴ *Supra* note 144. *But see infra* text accompanying note 267.

²³⁵ Collins, *supra* note 143. *Cf.* Peter Binzen, *Informally, Executives Consider Height Limit*, PHI. INQUIRER, May 13, 1984, at A12 (quoting the varying opinions of 26 local business leaders, some of whom declined to express an opinion).

²³⁶ *See, e.g.,* Hine, *supra* note 111 (quotations omitted).

²³⁷ *See, e.g.,* Ruane & Hine, *supra* note 230 (The “former director of Philadelphia’s Office of Housing and Community Development . . . proposed lifting the height ban, but suggested that 20 percent of the profit and 100 percent of the taxes from the sections of buildings higher than the current ban go to neighborhood development programs. The suggestion drew applause from the audience. Goode indicated later that he was impressed with the idea and called it a “an interesting, innovative and creative approach.”).

Moreover, labor groups recognized the short and long-run employment potential of Rouse's proposal.²³⁸ Overall, public opinion on the subject was quite mixed.²³⁹

Yet the potential economic impact of the Rouse proposal was decidedly positive, and would prove to be the biggest influencing factor in Liberty Place's construction.

According to a study by the city Planning Commission staff, Rouse's \$600 million project would provide 11,839 jobs at the site. Of those, 10,890 would be office jobs, with an estimated 40 percent, or 4,356, to be new office jobs added to the local economy. The remaining jobs - a projected 523 in retailing and 426 in the proposed hotel - all would be new, according to the study. In addition, the project would create temporary construction jobs and permanent, indirectly related jobs. The Planning Commission study did not count these additional jobs, but city planners estimate that they would be substantial. For city tax coffers, the project would mean an additional \$15.1 million annually, \$4.2 million of that in wage taxes and \$10.9 million in property taxes By comparison, the study found that the existing companies at the site now generate \$640,000 in taxes annually and provide 293 jobs, all of them in retailing.²⁴⁰

Rouse's proposal also had the potential to stimulate retail business in the area,²⁴¹ and attract companies to Philadelphia as a regional headquarters.²⁴² Rouse purposefully did not emphasize

²³⁸ Cooke, *supra* note 232.

²³⁹ For further discussion of varying public opinion, see Debbie M. Price, *Penn's Hat the Height of Contention – To Natives Penn Stands Tall Enough*, PHI. DAILY NEWS, May 2, 1984, at 5.

²⁴⁰ Collins, *supra* note 143.

²⁴¹ "Besides its job-creating and tax-generating benefits, city planners believe, Rouse's . . . project offers other important economic payoffs . . . It offers an opportunity for us on Chestnut Street to bring life to the street 18 hours a day - which would have a significant spinoff on other businesses in the area . . . By and large, the retail community is in favor of the proposal . . . Anything that attracts people to Center City is a boon to Chestnut Street . . . the Rouse project would [also] complement - and not compete with - the retailers east of City Hall." *Id.* (internal quotations omitted).

²⁴² Oram, *supra* note 152.

the economic benefits, which were for the most part self-evident, and in this way provided less rhetorical fodder for his critics (*i.e.*, accusations of selling out tradition for profit).²⁴³

Nevertheless, the proposal was perhaps inevitably criticized in this manner: “The decision to dwarf for all time City Hall’s tower and to erase the profile of William Penn from Philadelphia’s singular skyline must not be made on the basis of builders’ ambitions, developers’ profits or tax revenues or progress. . . . It is a decision that would tamper, finally, with more than the city’s skyline. It would tamper with its soul.”²⁴⁴ But Rouse’s rhetoric was artful, skillfully calculated to win over the city of Philadelphia. For example, in response to Bacon’s slippery slope argumentation—that Rouse’s proposal would lead to uncontrolled development—Rouse responded: “I guess I’ve got more faith in mankind . . . That same argument says . . . we can’t do any number of things which are basically urban problems. *That says Philadelphia can’t, and I say Philadelphia can.*”²⁴⁵

Suddenly it seemed, Philadelphia City Council reversed completely its stance.²⁴⁶ In a startling switch of position, Councilman John Street dropped his proposed height bill,²⁴⁷ and instead sponsored a “resolution that urges ‘all appropriate agencies’ in the city to clear the path for the Rouse & Associates project to be built at 17th and Market Streets.”²⁴⁸ Street stated that the Rouse proposal was a “serious economic development that we just can’t pass up,” and that

²⁴³ Collins, *supra* note 143 (“Since he unveiled his project . . . Rouse has promoted it mostly from the standpoint of its design and urban amenities, not from the standpoint of economic development . . . ‘The jobs are self-evident. And clearly when someone as strong as Edmund Bacon . . . opposes the project, we’d be accused of rape by playing up the jobs involved in the project.’”).

²⁴⁴ *Towering*, *supra* note 25.

²⁴⁵ Cooke, *supra* note 232 (emphasis added, quotations omitted). Bacon’s slippery slope argumentation was also criticized from an economic standpoint. “The specter of an overnight sprouting of giant office towers is an illusion because the market will not support it.” Hine, *supra* note 111.

²⁴⁶ See Editorial, *Goode Faces Billy’s Hat: An Imperative for Planning*, PHI. INQUIRER, May 16, 1984, at A14.

²⁴⁷ Russell Cooke & William W. Sutton, *Council Endorses Tower Plan – Builder Awaits Goode’s Decision*, PHI. INQUIRER, May 18, 1984, at A01. There was some suggestion that Street’s sudden flip-flop was bribe induced, which Street denied vehemently. *Id.*

²⁴⁸ William W. Sutton, *Council: Lift Penn’s Hat Limit – Majority Endorses Rouse*, PHI. INQUIRER, May 15, 1984, at A01.

preventing “the development might send a very negative signal throughout the country that we don’t want development.”²⁴⁹ “How can you oppose putting men and women to work?” said Councilman Francis X. Rafferty. Billy Penn was a great guy, a great guy in his day, but he’s not a god. . . . If he was around today . . . he would support us.”²⁵⁰ Street’s non-binding resolution passed easily, by a vote of 14-2.²⁵¹ City Council then “passed a bill designating Rouse the developer of a portion of the site he wants to build on. The measure also authorized the Redevelopment Authority to help Rouse assemble a portion of the site, at 17th Street along the 1600 block of Market Street.”²⁵² “Council backing [was] tantamount to approval of the project . . . because the council, as the city’s legislative body, has the last word on city development.”²⁵³

Nevertheless, the proposal was in effect contingent upon Mayor Goode’s endorsement, perhaps as symbolic seal of approval of breaching the Agreement.²⁵⁴ Rouse indicated that his decision to proceed with his proposal was dependent upon Goode’s decision.²⁵⁵ Before he would make a decision, Goode wanted more information on the proposed building’s financing, minority job creation, occupants, and design aesthetics.²⁵⁶ Goode felt “the height limit should be exceeded only if the proposed design results in a building that will at once enhance local pride and bring national and international acclaim to”²⁵⁷ the city of Philadelphia. Yet even Edmund Bacon recognized that Goode would ultimately endorse the Rouse proposal;²⁵⁸ in response, he

²⁴⁹ *Id.*

²⁵⁰ Cooke & Sutton, *supra* note 140 (internal quotations omitted).

²⁵¹ *Id.*

²⁵² Ron Goldwyn, Bob Warner & Carolyn Acker, *Goode Seen Backing Tall Building Zone*, PHI. DAILY NEWS, June 8, 1984, at 3.

²⁵³ Sutton, *supra* note 248 (quoting Street).

²⁵⁴ Cooke & Sutton, *supra* note 140.

²⁵⁵ *Id.*

²⁵⁶ Sutton, *supra* note 228.

²⁵⁷ *Id.* (internal quotations omitted).

²⁵⁸ Tom Cooney, *Highly Upset, Bacon Resigns*, PHI. DAILY NEWS, June 7, 1984, at 4.

resigned from the Philadelphia Commission on the 21st Century.²⁵⁹ Indeed, soon afterwards, Goode proposed an ordinance designating a “Center City Overlay Zone”²⁶⁰ within which there would be no height limitation. In actuality, this proposal did nothing beyond effectively endorsing the Rouse proposal. “With great fanfare, Mayor Goode proposed a bill to create a skyscraper zone west of City Hall. This was allowed to quietly die. There was, in fact, no legal impediment to exceeding the height limit, except on sites assembled by the Redevelopment Authority.”²⁶¹

Rouse had convinced the Philadelphia city government, but he still had to convince financial backers to fund the construction of his proposed skyscrapers. Although this initially proved difficult,²⁶² Rouse eventually found a \$235 million equity partner in the “Teachers’ Insurance and Annuity Fund of New York, a private pension fund”²⁶³

With financing in place, only the design and construction of Rouse’s skyscraper remained before the overshadowing of Penn and the breach of the Gentlemen’s Agreement. Rouse enlisted Helmut Jahn, world-renowned architect and “avowed apostle of the skyscraper and bigness,”²⁶⁴ to design the two towers.²⁶⁵ A “post-modern shaft of blue-and-gray granite,”²⁶⁶ the

²⁵⁹ *Id.* “I find it impossible, Bacon wrote, to put my heart into considering the 21st century while the city and our manner of working together is being ruined in the 20th . . . He said he came to his decision after the mayor had revealed . . . support for the proposal which would destroy for all time the dominance in our skyline of the historic center of our city” *Id.* (quotations omitted).

²⁶⁰ Ron Goldwyn, *Delighted Rouse Already Sky-Scraping*, PHI. DAILY NEWS, June 14, 1984, at 5; *see also* Editorial, *In Allowing Skyscrapers, A Greater Duty is Taken On*, PHI. INQUIRER, June 17, 1984, at C06; Thomas Hine, *An Opportunity to Change – From the Ground Up*, PHI. INQUIRER, June 14, 1984, at A02.

²⁶¹ Thomas Hine, *The Legacy of a Broken Agreement*, PHI. INQUIRER, May 8, 1994, at N01 (“Mayor Goode was eager for something that would show that the city was prospering under his leadership.”).

²⁶² Gary Thompson, *Rouse Dilemma: Find Dough or Eat Crow, No Financing Lined Up for Skyscraper, He Says*, PHI. DAILY NEWS, Sep. 19, 1984, at 39 (“Thus far, attempts to find financial backers have been frustrated, but Rouse insisted he is not discouraged. ‘I can assure you that the project will be built,’ said Rouse”).

²⁶³ Stevens, *supra* note 98.

²⁶⁴ William K. Stevens, *Center City’s Charm and a Hole in the Ground*, N.Y. TIMES, Oct. 2, 1985, at 20; *see* James S. Russell, *It’s Helmut Jahn’s Moment*, ARCHITECTURAL RECORD, May 1, 2004, at 96 (“When last seen in America, Jahn was restlessly penning spec office towers that were built in his firm’s home city of Chicago, as well as in New York, Philadelphia, and Houston. He would drop conical tops or Deco spires on them, and drape them with streamlined curves. He personified the flamboyant and real estate obsessed 1980s, appearing on magazine covers in Al Capone-inspired double-breasted suits.”).

first skyscraper would be named One Liberty Place. Jahn's design helped to sway public opinion of the project: "A poll by The Philadelphia Daily News showed 53.3 percent of its readers thought the building—some architects say it looks like a slicker version of the Chrysler Building—was good enough to break the unofficial height ban."²⁶⁷ "Jahn, from his architect's viewpoint, [saw] One Liberty Place as much-needed relief for a skyline that at present is not very interesting. 'It's a progressive development . . . I think it's going to set a standard for years to come.'"²⁶⁸ Acutely aware of the symbolic importance of One Liberty Place, Rouse spared no expense in its construction: "The granite we're using has never been used on the exterior of a building this size because it's so expensive."²⁶⁹ Beyond aesthetics, One Liberty Place was to be an exemplar of modern technology,²⁷⁰ much like the PSFS building some fifty years prior. "By shaping our visions and defining our dreams, certain buildings become landmarks, said a slick, blue Rouse promotional brochure. This is the promise of Liberty Place."²⁷¹

Construction began in May of 1985.²⁷² "Philadelphia Mayor W. Wilson Goode headed a large contingent of government, business, and cultural leaders attending the groundbreaking ceremony"²⁷³ Two year after construction began, the unfinished skyscraper eclipsed Penn:

²⁶⁵ *Plans, Bid Calls: Pennsylvania*, ENGINEERING NEWS-RECORD, Dec. 6, 1984, at 38. "Murphy/Jahn . . . is preparing preliminary plans for 1.2-million-sq-ft office building, (Phase I), and 700 underground parking spaces, 100,000-sq-ft to 110,000-sq-ft of retail space, 250-room luxury hotel, condominium units and an additional 1-million-sq-ft of office space, (Phase II), 1650 Market St., Philadelphia, planned by Rouse & Associates, 1900 Market St., Philadelphia 19103. Total estimated cost, \$600 million." *Id.* For further discussion of Jahn's design for One Liberty Place and its potential impact on the Philadelphia skyline, see Thomas Hine, *City's New Look is a Reworking of an Old Design*, PHI. INQUIRER, May 14, 1985, at A06.

²⁶⁶ Stevens, *supra* note 145.

²⁶⁷ William G. Connolly, *supra* note 134.

²⁶⁸ Stevens, *supra* note 264.

²⁶⁹ Stevens *supra* note 145.

²⁷⁰ *How Students Learn to Love Engineering*, ARCHITECTURAL RECORD, March 1993, at 16 ("Building setbacks conceal heating elements that keep the sloped glass roofs free of ice and snow. Other unique engineering techniques include super-cold air to minimize air-conditioning duct size, compartmentalized air-conditioning units on each floor, the use of returned chilled water for tenant condenser water use, and a high-voltage electrical distribution system with double-ended substations for flexibility and reliability.").

²⁷¹ Capuzzo, *supra* note 58 (internal quotations omitted).

²⁷² *Rouse & Associates; Launches Huge "Liberty Place" Development in Downtown Philadelphia*, BUS. WIRE, May 13, 1985.

On Friday, Aug. 29 [1987] (historians have yet to determine whether it was morning or afternoon), Philadelphians sped out of town for the Labor Day weekend, autumn winds blew in, blue steel flashed in the sky, and an invisible line connecting Philadelphia to the cosmos, the man-made to the infinite, was shattered for eternity. Philadelphia's skyline - and soul, some say - would never be the same. Hardly anybody noticed; Philadelphia was thinking three-day weekend. So it was that the "gentlemen's agreement" . . . was quietly broken by developer Willard G. Rouse 3d. The sky did not split open, and bronze William Penn didn't dive off his pedestal . . . "Wow," said Barbara Kaplan, executive director of the city's Planning Commission. "And the whole city didn't fall down. I didn't even notice."²⁷⁴

V. PHILADELPHIA'S POST-AGREEMENT IDENTITY

So began the post-Agreement era in Philadelphia. Upon its completion, One Liberty Place stood 960 feet tall, 412 feet taller than City Hall.²⁷⁵ Outside of Philadelphia, the skyscraper met with almost universal acclaim.²⁷⁶ For instance, architecture critic Paul Goldberger wrote a glowing review of One Liberty Place in the New York Times:

One Liberty Place is now finished, and the startling thing is that it is not only far and away the best tall building Mr. Jahn has ever designed, it is the best tall building that has been built in Philadelphia in more than 50 years - surely the finest skyscraper this city has seen since [the PSFS building]. . . The skyline of Philadelphia, far from being destroyed

²⁷³ *Id.* At the groundbreaking, "Rouse declared, 'We're sending a signal to the country. . . . Once again, Philadelphia can be recognized as the greatest city in the country.'" Capuzzo, *supra* note 58.

²⁷⁴ Capuzzo, *supra* note 58.

²⁷⁵ GUIDE, *supra* note 16, at 132.

²⁷⁶ See *Philly's Newest Needle*, *supra* note 5; Paul Gapp, *Philadelphia Stories: Jahn Skyscraper Breaks Height Taboo With Taste*, CHI. TRIBUNE, DEC. 11, 1988, at 18 ("Designing the tallest new skyscraper in a traditionally low-skyline city such as Philadelphia poses a considerable design challenge as well as a special sort of responsibility. Helmut Jahn has met that challenge with grace and glitter, giving Philadelphia a 915-foot office tower that is a splendid urban centerpiece and probably the best tall building the Chicago architect has yet produced.").

by One Liberty Place, is in fact given new life by this building . . . There can be no question, then, that this building is far too good to be dismissed in Philadelphia as the violator of the urban order. It transcends the old order, and establishes a new one, at a level of quality good enough to justify throwing away the old . . . Now, this city's skyline again has a symbol, and a better one than most American downtowns. It is true that this symbol is no longer the public, civic one that it had been for 100 years in Philadelphia - that the private realm now commands the skyline here, as it does almost everywhere else. But City Hall, one of the great public buildings in America, is still there, still great, and still at the critical center of the city. The only thing that has been lost is the illusion that William Penn was lording over all. And are we not better off with a private symbol that is clear and convincing than with a public one that has been weak and compromised?²⁷⁷

In contrast, the immediate reaction was tepid within Philadelphia, where One Liberty Place was received with a cautious mix of apprehension and approval. Said Philadelphia architecture critic

Thomas Hine:

From long distances, it is easy to mistake One Liberty Place for the barely visible City Hall. While the appropriation of civic imagery by something so meaningless as an office building is discomfitting, this elision from one tower to another is not necessarily all bad.

²⁷⁷ Goldberger, *supra* note 5. Goldberger's article really deserves to be read in its entirety; it offers bar none the most comprehensive, nuanced, and well-written description of One Liberty Place, providing a thorough context of Philadelphia's skyline at the time of the skyscraper's completion. See also Paul Goldberger, *Proud of its Height, A New Tower Rules Over Seattle*, N.Y. TIMES, Nov. 27, 1988, at section 2, page 36 ("The new . . . building has an importance that goes far beyond Seattle itself, for like Helmut Jahn's recent One Liberty Place in Philadelphia, this is one of those rare instances in which a downtown office tower big enough to transform a city's skyline is actually a good piece of architecture."); Paul Goldberger, *Architecture View: The Year's Best*, N.Y. TIMES, Dec. 12, 1987, at section 2, page 34 ("One such success is another building finished this year, the One Liberty Place tower in Philadelphia, which is actually the biggest building in its city and among the better towers in any American city in some years.").

The new taller tower reinforces the city's sense of a center, something that was lost when earlier office buildings blocked the view of City Hall.²⁷⁸

Arguably, Philadelphia's apprehension was merely tangential to the construction of One Liberty Place and the transformation of the skyline. That the magic of skyscraper would not suddenly solve Philadelphia's numerous troubles was a sobering realization. Undeniably, One Liberty Place drew greater attention to the city's already conspicuous woes: "Liberty Place and City Hall illustrate economic growth in the face of governmental decay . . . Can the former continue if the latter persists?"²⁷⁹ The physical disrepair of the scaffold-covered City Hall²⁸⁰ completed the analogy: "It is sad to see the city's great civic edifice stand crippled while speculative ventures soar into the sky: It is all too symbolic of the severe deterioration of the city's public realm."²⁸¹ Yet One Liberty Place conversely provided hope for change and progress, both in the public and the private sector.²⁸² The skyscraper's "break with the past, carried out at such a high standard of excellence, offered Philadelphia a symbol of new possibilities and civic pride."²⁸³

Furthermore, Mayor Goode and City Council followed through with a goal-oriented zoning ordinance designed to protect view corridors of Philadelphia's original skyline symbol.²⁸⁴

²⁷⁸ Hine, *supra* note 4. ("One Liberty Place is undeniably large . . . But its impact is not as disturbing or as unbalancing to the city's overall image as were, for example, Boston's John Hancock Building or Minneapolis' IDS Center, two distinguished buildings that stuck out like sore thumbs for years . . . One Liberty Place is right at the center of an already large concentration of quite tall office buildings. It stands just about at the core of this stubble, organizing the uninspiring commercial agglomeration into a complete visual composition and appearing like a mountain among the foothills.").

²⁷⁹ William K. Stevens, *Philadelphia Hopes Rise by 60 Stories*, N.Y. TIMES, Dec. 14, 1986, at Section 1, Part 2, Page 40 ("Then came the March 1985 confrontation between the police and the radical group Move that led to the police bombing of Move's headquarters and the ensuing fire that killed 11 people and destroyed 61 homes. The incident destroyed the city's new image in many minds, and Philadelphia has since endured a chain of public misfortunes like racial violence, corruption scandals, disclosures of government inaction, and ineptitude.").

²⁸⁰ *Id.*; Hine, *supra* note 4.

²⁸¹ Hine, *supra* note 4.

²⁸² Stevens, *supra* note 279.

²⁸³ BEST, *supra* note 18, at 25.

²⁸⁴ Roger Kohn, *Regulating the Reach for the Sky*, PHI. INQUIRER, Jan. 12, 1987, at B01; Thomas Hine, *City Starts Anew to Regulate the Height of its Buildings*, PHI. INQUIRER, June 21, 1987, at K12; Toni Locy, *City Hall Power of Tower Ordinance Protects Vantage Points of William Penn Statue*, PHI. DAILY NEWS, Nov. 29, 1989, at 03.

“The ordinance . . . designates three areas where various height restrictions will be enforced to ensure unobstructed views of City Hall and the statue of William Penn atop it[:]

[1] The southeast quadrant of Center City, to prevent construction of tall buildings that would obstruct the backdrop of the tower when viewed from the Benjamin Franklin Parkway.

[2] The sight lines to City Hall from Interstate 95 and the Vine Street Expressway.

[3] The immediate vicinity of City Hall.”²⁸⁵

Perhaps out of a certain nostalgia for the Gentlemen’s Agreement and the principles it so eloquently embodied, Philadelphia’s protective zoning ordinance would later become known as the “Ring of Respect.”²⁸⁶

Outside of the Ring, skyscrapers soon sprung up all over Center City, each towering above William Penn. Completed three years later, Two Liberty Place used “similar architectural vocabulary [as its counterpart One Liberty Place] but in a more subdued fashion.”²⁸⁷ Yet the skyscraper was far less successful than the original: “Two Liberty Place has been turned into as much of a slab as a tower, with a spire that looks as if it was plopped awkwardly on top instead of having grown naturally out of the building’s overall form, as does the spire of the first tower.”²⁸⁸ However, the pyramid-crested Mellon Bank Center completed in 1990 was a triumph: “it is already clear that this building is the strongest contender with One Liberty Place for possession of the skyline - and a tower that in many ways, despite its lower height, will play

²⁸⁵ Locy, *supra* note 284.

²⁸⁶ Inga Saffron, *Can’t Developers Just Get Along? Cooperation Would Improve Meridian Site*, PHI. INQUIRER, June 11, 2004, at E01 (“Of course, it’s more fun if you pronounce it in a boxing bum’s accent - Duh Ring of Respeckt!”).

²⁸⁷ GUIDE, *supra* note 16, at 133.

²⁸⁸ Paul Goldberger, *Philadelphia Carves Out a New Skyline*, N.Y. TIMES, June 24, 1990, at section 2, page 31. “Complicating the situation was the decision to make the second tower almost, but not quite, as tall as the first. One Liberty Place is not the kind of minimalist tower that would benefit in any case from having a twin, like the World Trade Center in Manhattan; it would be better off standing alone, or given a distinctly different, smaller brother. But giving it one that is nearly as tall only looks odd. The best hope is that the whole thing will look from a distance like two identical towers, distorted by perspective.” *Id.*

Philadelphia's Empire State Building to Mr. Jahn's Chrysler."²⁸⁹ In 1991, the red-granite terraces of the Bell Atlantic Tower rose 53 stories²⁹⁰ as "the last of the four very tall office buildings to be designed . . ." ²⁹¹ Three additional skyscrapers—each taller than Penn yet undersized beside Philadelphia's new monoliths—filled out the newly transformed skyline: One and Two Commerce Square, identical buildings designed by I.M. Pei (1987, 1992);²⁹² and the sky-blue Independence Blue Cross Tower (1990).²⁹³

Philadelphians overwhelmingly loved their new skyline. The Philadelphia Inquirer—which had written a scathing editorial decrying Rouse's proposal and supporting the Gentlemen's Agreement—printed an apologetic editorial six years later, praising the results. "Perhaps the best thing that can be said for the old 'gentleman's agreement' is that by the time Philadelphia was ready to build really tall buildings, post-modern architecture had come into vogue. Each new addition to the skyline has a distinct personality."²⁹⁴ Even Edmund Bacon was not "totally negative about the result. Though the decision to exceed the height of City Hall was 'unfortunate' and lost forever Penn's idea 'that the center of the city belongs to all the people,

²⁸⁹ *Id.* For a discussion of height issues which resurfaced with the release of plans for the Mellon Bank Center, see Thomas Hine, *Plans For A 2d Skyscraper Give Rise to the Height Issue Again*, PHI. INQUIRER, Aug. 10, 1986, at H01.

²⁹⁰ *Id.* at 134; For more on the plan for construction of the Bell Atlantic Tower, see Thomas Hine, *A Monolith in the Works For 18th St.*, PHI. INQUIRER, Mar. 20, 1988, at F01. See also Anthony Gnoffo, Jr., *Buildings With Style by Design*, PHI. INQUIRER, Apr. 9, 1989, at I01

²⁹¹ *Id.*

²⁹² GUIDE, *supra* note 16, at 130. See also Thomas Hine, *Imposing Addition to the City*, PHI. INQUIRER, OCT. 25, 1987, at J01. "This 40-story, \$185 million building at 21st and Market, for which a twin is eventually planned, is not so much a soaring thing as a sitting one. The elevated logo is an odd touch because, although it repeats a geometric motif employed throughout the building, it seems a bit raffish for such a conservative-looking edifice. It's like a banker wearing a funny hat at his class reunion." *Id.*

²⁹³ Emporis: Independence Blue Cross Tower, Philadelphia, at <http://www.emporis.com/en/wm/bu/?id=117949> (last visited Ap. 19, 2005).

²⁹⁴ Editorial, *Taking it All Back, Liberty Place Turned Out to be a Swell Idea*, PHI. INQUIRER, Nov. 13, 1991, at A26. "One of the best things about breaking the height limit is that . . . there's been no real downside. Views of City Hall tower were already obliterated from the west by the earlier generation of tall buildings; what's important is to preserve the major "view corridor" down the Parkway, and that's being done. The new buildings are taller, but no denser, than the old; they use up more air, but less ground. And that preserved ground is generally being put to good public use." *Id.*

and not to any individual or corporation,' Bacon still thinks the resulting buildings have character."²⁹⁵

After the building boom of the late 1980's and early 1990's ended, Philadelphia's skyline remained largely unchanged for over a decade. No new building exceeded the height of City Hall,²⁹⁶ and the Gentlemen's Agreement largely fell out of popular discourse in Philadelphia. There do remain some devout critics of Liberty Place and the breach of the Agreement, as exemplified in Francis Morrone's 1999 book on Philadelphia architecture:

The two zigzag towers by the enfant terrible of Chicago architecture now dominate the Philadelphia skyline. That is the most significant aspect of these buildings, rendering moot any other questions of their architectural quality . . . As disturbing as these building themselves is that certain fashionable Philadelphians mistake Jahn's and Rouse's exhibitionism for chic, and do not realize that Helmut Jahn skyscrapers are nowadays so numerous around the world that they confer no status at all upon a city (if they ever did).²⁹⁷

Notably, Morrone is not a Philadelphian and his disapproval is not necessarily representative of what most Philadelphians currently feel.²⁹⁸ In fact, whatever attention Philadelphians currently pay to the Gentlemen's Agreement is less related to city planning than to Philadelphia's sports woes. The city has not won a major sports championship since the decision to build One Liberty

²⁹⁵ John Corr, *Sizing up the Skyline, The New Center City Has Taken Shape, and So Have Opinions About Which Spires Most Inspire. Here, Prominent Philadelphians Share Their Views*, PHIL. INQUIRER, June 28, 1991, at D01. ("The top of Mellon Bank is extremely interesting - frankly, I think it's far superior to the top of Liberty Place," said [Bacon.] "And the top of Bell Atlantic is also excellent. It actually follows a tradition established before the international style - those terrible, flat-topped buildings - came in the 1940s.").

²⁹⁶ See Emporis, Philadelphia: Buildings of the City, at <http://www.emporis.com/en/wm/ci/bu/?id=101032> (last accessed Apr. 19, 2005).

²⁹⁷ MORRONE, *supra* note 13, at 162. "I don't think it matters if the Empire State Building or the Chrysler Building had been put there. Some vital part of the city's should—one of the last things that made Philadelphia better than other American cities—was forever lost in the reckless decision to allow this skyward development." *Id.*

²⁹⁸ "Some readers . . . may find me presumptuous for . . . criticizing so many aspect of Philadelphia . . . But what I say is heartfelt . . . There is a Philadelphia I love . . . It is not in all case the Philadelphia that many residents of that city profess to love." *Id.*, at iv.

Place, an affliction commonly dubbed by Philadelphia's die-hard sports fans as the Curse of Billy Penn (only half jokingly).²⁹⁹ For all purposes relevant to city planning, Philadelphia has essentially moved beyond its Gentlemen's Agreement identity.

Now, after a decade which saw virtually no skyscraper construction, developers are once again building tall. For example, construction began in January 2005 on the Comcast Center; upon its completion in 2007, the skyscraper will overshadow even One Liberty Place.³⁰⁰ "The 57-story skyscraper, at 975 feet, would be the city's tallest. It would be the first new Center City office tower since Two Commerce Square . . ."³⁰¹ Though there was some controversy surrounding the Comcast Center, the construction decision failed to evoke an emotional reaction reminiscent of Liberty Place. "Sheathed in vertical bays, the otherwise square and conformist Comcast Center" did meet with light architectural criticism.³⁰² However, criticism primarily focused on office vacancy rates and on the 43 million dollars of taxpayer funding for the skyscraper.³⁰³ With most experts agreeing on the long-term economic benefits of the project,³⁰⁴ the controversy was not a serious impediment to construction. Gone was the all-encompassing public dialogue present during the debate over Liberty Place.

²⁹⁹ See Darren Everson, *Penn Hex Towers Over Philly Fans*, N.Y. DAILY NEWS, Feb. 7, 2005, at 65 ("Apparently, the decision to break with tradition came with consequences. As the Eagles, Sixers, Phillies and Flyers have played in vain ever since, it has been said that Penn put a hex on the city's sports teams."). See also Robert W. Keidel, *Eagles' Super Bowl Loss Certainly Fits Pattern*; PHI. INQUIRER, Feb. 10, 2005, at D02. But see Stan Hochman, *CURSES! Each Team's Cursed in its Own Way*, PHI. DAILY NEWS, Nov. 30, 2004, at 74 (stating that the misfortune has been "coincidence, not curse.").

³⁰⁰ Henry J. Holcomb, *It's A Go For Comcast's Tower*, PHI. INQUIRER, Jan. 4, 2005, at A01

³⁰¹ Henry J. Holcomb, *A Tall Order*, PHI. INQUIRER, Jan. 6, 2005, at C01.

³⁰² Saffron, *supra* note 7. "Comcast Center will be big and boring, its goodies hidden inside." *Id.* Although Edmund Bacon was not part of the public dialogue, one might easily conjecture his disapproval of the architectural design of the building. "All too often, we establish a typical floor and repeat it mindlessly upward—all though ceasing before the sky is reached." Bacon, *supra* note 1, at 24.

³⁰³ See Andrew Cassel, *Let's Be Grateful For Comcast Pork*, PHI. INQUIRER, Jan. 5, 2005, at C01; Marcia Gelbert, *\$30 Million Grant Woos Comcast*, PHI. INQUIRER, Dec. 3, 2004, at B01; Mark Clothier, *Comcast HQ to Top Skyline of Philadelphia*, SEATTLE TIMES, Jan. 4, 2005, at C3.

³⁰⁴ See Holcomb, *supra* note 301.

Driven not only by demand for business space but by residents' demand for living space, Philadelphia's current construction boom differs from the Liberty Place-era construction in another important respect. For example, The St. James, completed in 2004, is now Philadelphia's tallest residential tower at nearly 500 feet.³⁰⁵ Though not as publicized as the Liberty Place construction, The St. James may well mark the beginning of an equally important transformation of the city.

Something is happening to the low-rise city. Philadelphia, the preserve of the rowhouse, is going vertical at its core. Hardly a month goes by that a developer isn't floating a plan to squeeze a 30- or 40-story residential tower into the tight blocks of Center City. Many of these proposals are pie in the sky, but at least eight projects are in serious motion, and they promise to remake more than the skyline. Because the skyscraper is the most modern of buildings, the sprinkling of new towers is sure to add a potent dash of modernity to a city that holds dear its sober red-brick traditions. The new skyscrapers are taller and bulkier than the earlier generations of Philadelphia high-rises: Blame buyers' demands for soaring ceilings and on-site parking.³⁰⁶

In stark contrast to previous generations, Philadelphia's post-Agreement identity is one in which its citizens are willing to sacrifice its low-rise heritage for cosmopolitan amenity. And though

³⁰⁵ Emporis: The St. James, Philadelphia, at <http://www.emporis.com/en/wm/bu/?id=134078> (last accessed Monday, September 26, 2005).

³⁰⁶ Inga Saffron, *Designs on the High Life*, PHI. INQUIRER, Jan. 9, 2005, at E1. "The good news in Philadelphia is that the new skyscrapers are a largely stylish and urbane group - especially compared with designs in other downtowns. Despite some clumsy assemblages of historical parts, most have the virtue of clean, sleek lines. A few even aspire to artful design. One reason for the improved designs is that today's tall buildings cater to monied buyers with cosmopolitan tastes, unlike the utilitarian towers built during Philadelphia's second wave of high-rise construction, from the late 1960s through the '80s. Those were seen as residences for people who ultimately would move to the 'burbs." *Id.*

there has been some concern about this shift in identity among the architecturally savvy,³⁰⁷ it hardly rivals the popular debate over Liberty Place.

Interestingly, any genuine dialogue over skyscrapers seems to have shifted from the legislative or executive branches to the judicial branch of Philadelphia's city government. That is, perhaps the biggest impediment to skyscraper construction is no longer the City Council, City Planning Commission, or mayoral administration,³⁰⁸ but the city's court system. Most notably, Court of Common Pleas

Judge Matthew D. Carrafiello has come to the rescue of a sadly vanishing species: the forsaken Philadelphia pedestrian . . . [W]hen he overturned the zoning variances for a 50-story condo tower at 15th and Chestnut Streets, the judge didn't just cite a lot of inscrutable legal precedents: He also examined the project from the view of the guy on the street. "This project," he wrote, "will do nothing for this city" population whose simple joys may include little more than a safe stroll down Chestnut Street *or observing Center City's majestic skyline with our magnificent City Hall at its center.*" The judge was also concerned about the impact of an adjacent development, another super-tall condo proposed for the site of the former Meridian tower.³⁰⁹

VI. NO-LAW HEIGHT RESTRICTIONS AND CITY PLANNING

Through zoning, numerous cities have successfully imposed height restrictions that have preserved the architectural symbolism and aesthetic presence of a central or significant structure.

³⁰⁷ See Inga Saffron, *A Tall Order to Tie Height to History*, PHI. INQUIRER, Mar. 7, 2004, at C01 ("[B]lending tall, modern buildings into Philadelphia's dainty, historic rowhouse blocks isn't for the fainthearted. Every new project requires the city to choose between the economic benefits that come with change and the ones that come from protecting the city's overall historic patrimony - the quality that gives Philadelphia its unique identity.").

³⁰⁸ See Inga Saffron, *Protecting Buildings, and Pedestrians*, PHI. INQUIRER, Dec. 21, 2004, at E01 ("[T]he Street administration and its planning, zoning and historic boards are often willing to jettison anything old for anything new and then call it economic development . . .").

³⁰⁹ *Id.* (emphasis added). Philadelphia's walking-friendly nature is also an important tourist draw. See Bartley Kives, *Filling Up in Philly*, WINNIPEG FREE PRESS, September 4, 2004, at E1.

The city of Paris, France is the paradigmatic example:

For a city whose trademark is a tall building, one of the most striking things about Paris is its lack of tall buildings. Eiffel Tower apart, there are few skyscrapers in the French capital . . . The present rules ban new buildings taller than 37 metres (12 floors) in the outer districts of the city and anything larger than 25 metres (eight floors) in the centre.³¹⁰

Not unlike One Liberty Place, the Eiffel Tower itself met with strong initial resistance.³¹¹ “A petition signed by prominent writers, musicians, artists, and architects questioned the tower’s right to a permanent place in the skyline”³¹²

Created to rival Paris,³¹³ St. Petersburg, Russia has a similarly low skyline.³¹⁴ “The Romanovs insisted that no building in the city should be higher than the three-storey Winter Palace, an edict that helped create St Petersburg’s italianate, low-rise streetscapes.”³¹⁵

[T]he Construction Codex of 1844 prescribed a limit of 23.5 meters across the city, equal to the height of the Winter Palace In 2004 the city administration adopted new building regulations which in effect partitioned St Petersburg into six zones. The limit on the upper range of construction was still pegged to 23.5 meters in the center, but the curb

³¹⁰ John Lichfield, *The Only Way is Up For Downtown*, INDEPENDENT (LONDON), Dec. 2, 2003, at 7 (“M. Delanoë, a popular and effective mayor, is also looking upwards. He has started to think aloud about lifting the ban, imposed in 1977, on the construction of tall buildings within the city boundaries.”).

³¹¹ “Many of the places which define Paris - the Eiffel Tower, the avenues radiating from the *toile*, the Grands Boulevards - were opposed and hated in their day.” *Id.*

³¹² LUCIEN HERVE, *THE EIFFEL TOWER* (2003), at 8-11. “Passionate devotees of the hitherto untouched beauty of Paris . . . protest with all out strength, with all our indignation, in the name of slighted French taste, in the name of the threatened art and history of France, right in the heart of our capital, or the useless and monstrous Eiffel Tower.” *Id.* at 9-10.

³¹³ Nick Cater, *A Glimpse Behind the Curtain*, SUNDAY MAIL (AUSTL.), Oct. 17, 2004, at E10 (“[I]n 1703 Peter the Great plunged his sword into the soggy ground and ordered the construction of a new Russian capital to rival Paris.”).

³¹⁴ Paul Abelsky, *Skyscraper Projects Given the Green Light by City*, ST. PETERSBURG TIMES, March 8, 2005, at http://www.sptimes.ru/archive/times/1050/news/b_15050.htm (last visited Apr. 19, 2005) (“In a city built on low-lying marshes, skyscrapers would resemble castles in the sky.”).

³¹⁵ *Id.*

decreased toward the city's periphery, reaching an absence of any cutoff mark in the suburbs.³¹⁶

The past height limitation has in effect preserved vistas of St. Isaac's Cathedral and the Peter and Paul Cathedral,³¹⁷ though the future of the St. Petersburg skyline is uncertain.³¹⁸

Within the United States, Washington, D.C. has preserved sightlines of the Capitol Building through zoning, and the Washington Monument has consequently retained its dominant position in the skyline.³¹⁹

The Height of Buildings Act of 1910 (HBA) regulates the height of buildings in the District of Columbia. The HBA provides that buildings may have a maximum height equal to the width of the street on which they front, plus an additional twenty feet.

Where a building fronts on a public space at the intersection of two or more streets, the height of the building is limited to the sum of twenty feet plus the width of the widest street.³²⁰

A federal law passed by Congress, the Height of Building Act was later incorporated into local zoning law by the District of Columbia.³²¹ "Height controls . . . have worked quite well in

³¹⁶ Abelsky, *supra* note 314.

³¹⁷ St. Isaac's Cathedral in St. Petersburg, Russia, at <http://www.saint-petersburg.com/virtual-tour/st-isaacs-cathedral.asp> (last visited Apr. 21, 2005) ("The dome of St. Isaac's Cathedral dominates the skyline of St. Petersburg and its gilded cupola can be seen glistening from all over the city."). See Emporis: Washington, Buildings of the City, at <http://www.emporis.com/en/wm/ci/bu/?id=101047> (last visited Apr. 21, 2005).

³¹⁸ See Abelsky, *supra* note 314 ("The larger question is whether or not the planned high-rises irrevocably change the city's famed skyline and compromise the delicate urban and natural environment.").

³¹⁹ For a discussion of the relative scale of buildings in Washington, D.C., see *supra* text accompanying notes 42, 43.

³²⁰ Charles W. Harris, *Conflicting Vistas in the Nation's Capital: The Case of the World Technology Trade Center*, 38 CATH. U. L. REV. 599, 632 (1989) (Additionally, "No buildings shall be erected, altered, or raised in any manner as to exceed the height of 130 feet on a business street or avenue as the same is now or hereafter may be lawfully designated, except on the north side of Pennsylvania Avenue between 1st and 15th Streets Northwest, where an extreme height of 160 feet will be permitted."); D.C. CODE ANN. § 6-601.05 (2001) (Formerly cited as DC ST 1981 § 5-405).

³²¹ Poindexter, *supra* note 9, at 454 (citing D.C. Mun. Regs. tit. 11, § 2510 (1995)). For a discussion of the actual application of Washington's zoning law, see generally *Techworld Development Corp. v. D.C. Preservation League*, 648 F.Supp. 106 (D.D.C. 1986).

Washington . . . Not only is the skyline preserved for monuments, but the continuity of the street is also saved.”³²² Similarly, in Madison, Wisconsin, “city and state leaders have wisely limited the height of buildings within one mile of the 284-foot [Wisconsin State] Capitol to 187.2 feet. The rule preserves views of the Capitol, featured on postcards and prints from myriad directions.”³²³

Given the success of zoning in other cities, why was Penn’s preeminence in Philadelphia contingent only upon a purported gentlemen’s agreement? Philadelphia did have parkway zoning restrictions that protected one important sightline of Penn, but City Council never enacted an absolute height restriction. One possible explanation is that Philadelphia was in truth beholden to commercial interests rather than the civic and community values supposedly embodied in the Gentlemen’s Agreement.

In retrospect, it seems evident that if the city had been serious about maintaining the prominence of William Penn, it should have restricted heights so that exceptionally tall buildings would be about half as tall as the city’s tallest - or only about 20 stories. Buildings of eight stories or fewer should have been the norm. In theory this could have been done, without even encroaching on the residential areas that are Center City’s greatest strength As a practical matter, tighter height restrictions for Philadelphia buildings may not have been possible. Developers want to get the maximum value out of the best sites, which in Philadelphia tend to be within a minute or two’s walk from City Hall. Buildings were growing up, not out. Washington, as a monumental city, was an

³²² Hine, *supra* note 191 (“Washington’s buildings have, individually, been architecturally undistinguished. But their individual failings are less significant than their collective success in fitting together as a pleasantly scaled, civilized city.”).

³²³ Editorial, *Keep Sky Barrier Near Capital Dome*, WIS. ST. J., Mar. 20, 2005, at B3. There has been recent debate over this height restriction, resembling the controversy in Philadelphia. “As Madison faces a boom in downtown building fueled by rapidly rising property values, it is also approaching a crossroads - some might say a crisis - in its visual identity.” Susan Troller, *How Tall Should Madison Skyline Be?*, CAPITAL TIMES, Oct. 12, 2004, at 3C.

anomaly. Philadelphia has not had the advantage of being the national capital for some time.³²⁴

Instead, squat office buildings were allowed to creep up to Penn, blocking sightlines and frustrating the architectural symbolism of City Hall. Inevitably, a skyscraper finally broke through the barrier, extinguishing the Gentlemen's Agreement. Under this view, the Gentlemen's Agreement merely embodied ideals for which Philadelphia lacked the will and wherewithal to codify legally, an empty gesture towards the supposed elevation of community values.

Yet for many years Philadelphia did exhibit considerable development restraint, and in some sense, the Gentlemen's Agreement was *more* symbolically credible because law was unnecessary. In contrast, developers in cities such as San Francisco and Boston exhibited little such self-restraint; legally imposed height restrictions consequentially became essential.³²⁵ Whereas the democratic enactment of zoning represents the will of a majority acting to restrain individual decision-making, the Gentlemen's Agreement arguably represented a more universal acceptance of an ideal. Edmund Bacon viewed cities as acts of will: "The form is determined by the multiplicity of decisions made by the people who live in it. In certain circumstances these decisions have interacted to produce a force of such clarity and form that a noble city has been born."³²⁶ "Because [democratic] codification of collective will is binding on dissenters it is distinct from a series of individual choices. Therefore . . . combining individual preferences into

³²⁴ Hine, *supra* note 191.

³²⁵ See Holtz Kay, *supra* note 2. "Boston . . . has announced growth policies that call for putting the lid on height. Other moves - a building moratorium in San Diego, zoning in Seattle to limit heights, and a design review process in downtown Portland, Ore. - also suggest the impulse . . . San Francisco has set height limits of 700 feet (roughly 70 stories) downtown, 550 feet (50 stories) outside the city center, and 50 feet (5 stories) in historically significant or scenic neighborhoods. It also required tall buildings to be tapered . . ." *Id.*

³²⁶ BACON, *supra* note 1, at 13 ("It is my premise that a deeper understanding of the interactions of these decision can give us insight necessary to create noble cities in our own day.").

a democratic society may have paradoxical results if we try to find the will of the majority.”³²⁷

In Philadelphia, the will of the majority did exert pressure upon individual decision-makers, but this pressure was limited to social and market forces. The only government embodiment of the Gentlemen’s Agreement was a refusal to aid in overcoming a preexisting market dilemma. Though the will of the majority certainly imposed social costs upon developers, individual developers retained decisional autonomy; should the cost-benefit analysis net positive, a developer was free to construct beyond Penn. The Gentlemen’s Agreement was a concrete expression of both the popularity and magnitude of the majority’s preferences; it served as a signal to individual decision-makers of the heavy costs associated with non-compliance with the majority. In this way, the Agreement both reinforced the will of the majority while retaining decisional autonomy of the individual; an enduring series of individual yet consistent choices maintained the Gentlemen’s Agreement.

In this way, the Gentlemen’s Agreement arguably circumvented “limitations inherent in the democratic enactment of individual preference.”³²⁸

Because communal aesthetics aggregate individual choice to construct the form of the city, social choice theory would dictate that we can never achieve a rational decision in zoning of communal aesthetics. As such, what ‘communal’ value does the final zoning decision offer? The value lies in the process used to come to the final zoning decision. The community meetings, the public participation, and the citizen initiatives all help to give voice to commonly shared norms and beliefs that residents want to see reflected in their cityscape. While the breadth and intensity of interests may vary within a given

³²⁷ Georgette C. Poindexter, *Collective Individualism: The City as a Legal Concept*, 145 U. PA. L. REV. 607, 657 (1997) (emphasis added).

³²⁸ Poindexter, *supra* note 9, at 492.

community, these variables need not be fatal to a legitimate and rational result. The norms, beliefs, and pressures are both internalized and reflected by the final decision.³²⁹

Yet whether the zoning enactment process actual constitutes participatory democracy is debatable. For example, Siegan argues that

“participatory democracy” is not an appropriate description of the public phase of zoning, even given the broadest definition of that concept. More people proportionately will be represented in the suburbs, but tenants, small businessmen, and employees will not usually be involved even though each had a significant interest in the outcome. More important, the zoning ordinance may directly or indirectly affect a great many . . . who may not even be aware of the proceedings Nor are many individuals in the city likely to participate unless they belong to some organization that enters the hearings, for although the public hearing bring out a great many interest groups and individuals, particularly those that exist for or thrive on such “civic” activities, they are of little concern to most of the people who do not feel affected by the proposed ordinance.³³⁰

In contrast, ordinary citizens participated in numerous public forums held on the Gentlemen’s Agreement issue.³³¹ Though interest groups came out in force, the voice of small businessmen and employees was not lost in the debate. Heavy publicity forced politicians to consider the preferences of their constituents, and the close scrutiny paid by the press helped insure that the

³²⁹ *Id.* For example, “Arrow’s Impossibility Theorem . . . asserts that individually transitive preferences, when aggregated, cannot guarantee a collectively rational outcome if the pure majoritarian voting is used . . .” *Id.* n.343 (citing Kenneth J. Arrow, *Social Choice and Individual Values* 3, 94-95 (1951)) (quotations omitted).

³³⁰ SIEGAN, *supra* note 100, at 11.

³³¹ For support of the following statements, *see generally* “Breach as Identity,” which details at length the debate over One Liberty Place.

City Council's decision was not illicitly influenced.³³² The debate over the construction of Liberty Place therefore appears to have constituted participatory democracy.³³³

Participatory democracy was an important element of Edmund Bacon's city-design philosophy. "[G]iven a clear vision of a design idea, the multiplicity of wills that constitutes our contemporary democratic process can coalesce into positive, unified action on a scale large enough to change substantially the character of a city."³³⁴ Legal devices such are one, but hardly the only, approach towards realizing the collective will of a city. Bacon hoped "to dispel the idea, so widely and uncritically held, that cities are a kind of grand accident, beyond the control of the human will, and that they respond only to some immutable law."³³⁵

Symbolic architecture is one manifestation of a city's collective will which, even absent law, may influence greatly the shape and character of a city. "To generate a sense of place, many localities have built such distinctive 'icons' as the St. Louis Gateway Arch, the Golden Gate Bridge, the Sydney Opera House, and even the Eiffel Tower. These are symbols of who we are as a place and a community. They enhance pride, self-esteem, and a sense of identity."³³⁶ In New York City, the height supremacy of any one particular is not crucial to the city's identity, as

³³² "In making a decision on zoning, the city council . . . may be motivated by one or any number of considerations. It may vote from what may be considered the 'highest' motive, the health, safety, and welfare of the 'people' as conceived by its members, or it may vote for the basest of reasons, the payment of graft. And there certainly are many other possibilities in between." SIEGAN, *supra* note , at 11.

³³³ City Council ultimately supported the Rouse proposal even though, at the time, a majority of Philadelphians supported the Gentlemen's Agreement. This outcome does not necessarily indicate a democratic failure; it simply raises the question of how a democratically elected representative should vote. That is, whether a lawmaker should vote according to constituents' actual current preferences; constituents' preferences given the information and expertise of the lawmaker; or what the lawmaker believes is in the best interest of her constituents. By the mid-1990's, public opinion of Liberty Place was quite positive; City Council had successfully anticipated the longer-term preferences of Philadelphia's constituents.

³³⁴ BACON, *supra* note 100, at 13.

³³⁵ *Id.*

³³⁶ Frank Benest, *Reconnecting Citizens With Citizens: What Is the Role of Local Government?*, PUB. MGMT., Feb. 1999, at 7.

the omnipresence of skyscrapers is in itself a place-making symbol.³³⁷ But for some architectural icons, height supremacy is prerequisite: the Washington Monument, the Eiffel Tower, and William Penn atop Philadelphia City Hall. To Edmund Bacon, losing “Penn’s pre-eminence would be to surrender Philadelphia’s unmistakable identity at the very time when faceless urban centers across America are striving mightily to create - through arches, towers, whatever - a sense of individuality.”³³⁸

Through zoning, cities such as Washington, D.C. have enacted strict height requirements to insure integrity of purpose, yet such structures are in some ways self-enforcing. Although Philadelphia City Hall is perhaps the most explicit example of the self-enforcing tendency, structures such as the Gateway Arch and the IDS building reveal a similar propensity to limit height. By constructing such monuments of identity, cities not only generate a sense of place, but can influence development of a city’s skyline without resorting to zoning or alternative legal devices. The efficacy of socially-enforced land use restrictions depends on community characteristics such as population size and stability. However, the efficacy of height norms seems dependent on community attunement to architectural symbolism more so than any other single characteristic. Urban height restrictions may hence exist even in the absence of zoning to that effect.

Height norms via architectural symbolism present a viable alternative for cities that are concerned about impulsive skyscraper development yet are hesitant to zone strict height limitations. At minimum, symbolic structures force developers to consider carefully the full range of impacts of proposed construction, slowing an otherwise rapid reach for the sky. Ideally,

³³⁷ See Fred Bruning, *The Next New York, Icons in the Sky*, NEWSDAY, Aug. 4, 2002, at E02 (“For the past half century, New York has been, in many ways, the capital of the world. And there is no more visible symbol of that status than the city’s spectacular skyline. There may be taller buildings elsewhere, but no city has more office towers packed into such confined space.”).

³³⁸ *Id.*

a height norm would also insure that a skyline symbol would be overshadowed only by worthy architecture, as in Philadelphia. Despite the absence of law, city government maintains an important role in city-planning dialogue. Without legally banning skyscrapers of a certain height, city government can discourage development by withholding valuable assistance, such as the city's power of eminent domain. City council also retains the power to impose at a later point a height limitation through zoning. Lastly, mayoral or city council endorsement of a skyscraper proposal may in practice remain essential as a symbolic seal of approval.

Nevertheless, architectural symbolism is clearly not a complete replacement for zoning. As exemplified in Philadelphia, St. Louis, and Minneapolis, developers may still build tall, challenging while not outright flouting the symbolic structure's height supremacy. High-rises of mediocre architectural quality may vertically cluster at a uniform height just below the symbolic structure. Ultimately, such high-rises can collectively divest the symbolism of the structure. At such a time, a structure's preeminence may fail to be self-enforcing, and a city must forcibly confront its collective identity.

Yet this need not be a negative outcome. As the controversy over Liberty Place illustrates, this confrontation may represent a truer form of participatory democracy. "A city is a living thing, which must grow and change, or become a kind of urban museum or themepark."³³⁹ The struggle over identity forces the citizens of a community to reevaluate both its urban form and the design ideas that organize and provide cohesion for this form.³⁴⁰

³³⁹ Lichfield, *supra* note 310.

³⁴⁰ Upon such reevaluation, the abandonment of an informal height norm is not necessarily a bad result. For example, architecture in Washington has in many ways suffered because of the continuance of the height restriction. "[T]he vista is bleak - block after block of the same kind of structure, the Washington office building. That building is like nothing else in the United States. It is a squat box, limited by zoning laws . . . The proportions of these 10- or 12- story boxes are awkward, making for a graceless structure even in the hands of the best architects. What pleasure these buildings give comes not from any specific aspect of their design but from the fact that there is not very much of any of them." Paul Goldberger, *A Monumental Problem*, N.Y. TIMES, Mar. 14, 1985, at B12.

We have seen how form grows out of design structure, these two representing two essential phases of the design process. There is a third and interrelated element namely architectural expression . . . The restraints or freedoms of architectural expression are determined by the role that the building plays in the larger design structure.

Edmund Bacon, in *Design of Cities*³⁴¹

³⁴¹ Bacon *supra* note 1, at 269.