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# PRIVATIZING CREATION OF THE PUBLIC REALM: THE FRUITS OF NEW YORK CITY'S INCENTIVE ZONING ORDINANCE

MATTHEW J. KIEFER\*

PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE. By Jerold S. Kayden. John Wiley & Sons, Inc., New York. 2000. Pp. 348.

**Abstract:** New York City's 1961 zoning ordinance granted property owners specified floor area bonuses for creating publicly accessible street-floor plazas and arcades. The author traces the origins and evolution of the ordinance and examines the over 500 "privately owned public spaces" which it has produced since 1961. The author concludes that a high proportion of these spaces are of only marginal value, due mostly to a lack of clearly articulated design and maintenance standards, and that nearly half of the spaces are out of compliance with the legal requirements regarding design, public accessibility, and maintenance that govern them. Marrying careful legal and historical research with close empirical observation, the book highlights the difficulties inherent in making private actors the agents of public policy.

## INTRODUCTION

In recent decades, forces shaping the physical form of American cities have become increasingly complex. The balance between private gain and public planning and policy goals has shifted as American cities have increasingly sought ways to privatize responsibility for creating pieces of the public realm. In doing so, they have departed from the classical paradigm of city building in which the public sector sets the template for growth by building streets, utilities, parks and civic amenities, and the private sector, through the operation of the free market, fills the spaces in between.

An early, novel, and influential example of this trend toward privatization is New York City's 1961 zoning ordinance.<sup>1</sup> For the first

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time, the 1961 ordinance limited building density by establishing a maximum ratio of permitted floor area to the area of a zoning lot (termed “floor area ratio”). The ordinance also granted property owners an increase in the total floor area otherwise allowed in exchange for providing public plazas or arcades. *Privately Owned Public Space: The New York City Experience*, written by Jerold S. Kayden in cooperation with the New York City Planning Department and the Municipal Art Society of New York, examines the fruits of this now 40-year-old ordinance.<sup>2</sup> The book provides a report card on how successful this specific ordinance has been in producing usable spaces, as well as a broader analytical model for evaluating how well land use regulation achieves its desired results.

The value of these quasi-public urban spaces seems particularly appropriate for examination in a volume devoted to the work of Jane Jacobs. Kayden’s book reflects both a Jacobsian emphasis on observation—on “how cities work in real life”<sup>3</sup>—and a Jacobsian skepticism of public initiatives as tools for good city-making. New York City’s 1961 incentive zoning ordinance could be viewed as an example of the misguided city planning strategies Jacobs attacks so cogently in her seminal book, *The Death and Life of Great American Cities*, published the year the ordinance was adopted. Kayden’s book also builds on the empirical methods of the urbanologist William H. Whyte, who used time-lapse photography and close observation to analyze how New Yorkers use public spaces.

Whyte attacked incentive zoning as a give-away to developers leading to the creation of largely useless spaces.<sup>4</sup> Kayden, an Assistant Professor of Urban Planning at the Harvard Graduate School of Design who is trained as both a lawyer and a planner, is too much the scholar to jump to such sweeping conclusions. Kayden defines privately owned public space as “a physical place located on private property to which the owner has granted legally binding rights of access and use to members of the public, most often in return for something of value from the city to the owner.”<sup>5</sup> Although most of the spaces examined in the book were created in exchange for zoning

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<sup>1</sup> New York, N.Y., Board of Estimate, Zoning Resolution, (adopted Dec. 15, 1960; effective Dec. 15, 1961).

<sup>2</sup> See generally JEROLD S. KAYDEN, *PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE* (2000).

<sup>3</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 4 (1961).

<sup>4</sup> See generally WILLIAM H. WHYTE, *CITY: REDISCOVERING THE CENTER* (1988).

<sup>5</sup> KAYDEN, *supra* note 2, at 21.

bonuses, some were provided by building owners as conditions of discretionary zoning approvals. Others were mandated by zoning resolution in certain districts to qualify for as-of-right development. Regardless of the legal mechanism responsible for the creation of these spaces, the author likens their legal status to an easement held by the public on private property.

Part I of the book documents the history and evolution of the zoning ordinance's provisions regarding these privately owned public spaces, describes the ordinance's legal requirements for each type of space in detail, and establishes a classification system for the resulting spaces. This provides the necessary context for Part II, which is, in a sense, the heart of the book: a detailed evaluation of each of the more than 500 privately owned public spaces created since 1961, organized geographically. Kayden concludes that a high proportion of these spaces are of only marginal value, due mostly to a lack of clearly articulated standards. Worse yet, nearly half of the spaces are out of compliance even with the often inadequate design, maintenance and operational requirements that apply to them. How Kayden reaches these conclusions is an interesting and important story for those interested in how land use regulation shapes cities for good or ill.

## I. HISTORY AND EVOLUTION OF ORDINANCE

The story of how land use regulation has shaped American cities begins, of course, with comprehensive zoning, which in turn began with New York City's 1916 zoning resolution, the nation's first comprehensive zoning ordinance.<sup>6</sup> This was the era of the "race to the sky" when advances in building technology were leading to ever bigger buildings.<sup>7</sup> In response to the resulting densification of parts of Manhattan, the 1916 zoning resolution attempted to preserve light and air at street level by mandating streetwall setbacks increasing as building height increased, resulting in the distinctive ziggurat shape of many early twentieth century Manhattan buildings. New York City began studying a rewrite of this zoning as early as 1948, culminating in the adoption of its 1961 zoning resolution.

The 1961 resolution's strategy for preserving light and air at street level was more strategic: developers in certain specified geo-

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<sup>6</sup> New York, N.Y., Board of Estimate and Apportionment, Building Zone Resolution (July 25, 1916).

<sup>7</sup> See, e.g., SARAH BRADFORD LANDAU & CARL W. CONDIT, *THE RISE OF THE NEW YORK SKYSCRAPER 1865-1913* (1996).

graphic areas willing to build street-level public spaces on their building lots could earn a floor area bonus ranging from four square feet in medium-density districts to ten square feet in high-density districts for each square foot of plaza, and from two to three square feet of bonus for every square foot of arcade. These bonuses were “as of right,” obtainable upon filing plans with the Building Department demonstrating that the bonus had been correctly calculated and that the minimal plaza or arcade standards had been met.

There is little in the historical record to indicate how these particular ratios were arrived at. It is clear, however, from the proliferation of such spaces after 1961 that the formula for the quid pro quo was, if anything, too generous. In the ensuing years, individual building proposals occasioned zoning amendments to allow new forms of bonus-earning space. These included elevated plazas, through block arcades, covered pedestrian spaces, sunken plazas and open-air concourses.

#### *A. Plaza Reforms of 1975–1977 and Other Changes*

In response to mounting criticism about the uneven quality of as-of-right plazas, in 1975, the City replaced them in most commercial areas with three separately defined spaces: the urban plaza, the sidewalk widening, and the open-air concourse. More rigorous design and locational rules were established, and amenities such as seating, night lighting, trash receptacles, identifying signs, trees and decorative paving were required. Also, retail or service establishments were required to occupy at least half of the building frontage along the space. Building service facilities, such as parking spaces, driveways, loading docks and exhaust vents, were prohibited.

New administrative procedures were equally important. Detailed design plans now needed to be certified by the City Planning Commission Chair. Two enforcement mechanisms were also added: the developer was required to record a restrictive declaration restating legal obligations regarding the space and to post a performance bond to secure ongoing operational and maintenance obligations. Two years later, the City amended the ordinance with regard to residential plazas in parallel fashion, dividing them into three categories: primary space, usable residual space, and visual residual space. Eventually, residential plazas were also subjected to certification review.

The work of William H. Whyte played a role in these plaza reforms. Whyte, both at the behest of the New York City Planning Department and on his own initiative, conducted extensive “time and

motion studies” to analyze how people actually used existing public spaces, including incentive plazas. Many of his conclusions (for instance, deriving the height and depth of horizontal surfaces required for them to be useful for seating purposes) were incorporated into the design standards of these revisions.

The revisions have continued to evolve since 1977. Additional categories of bonusable space were created, and in 1996 as-of-right plazas were eliminated altogether as part of a broader trend to encourage “tower on a base” instead of “tower in a plaza” developments. These as-of-right plazas, which had become the signal progeny of the 1961 ordinance, turned out to have several urban design deficits, particularly when grouped according to the happenstance of the market. While an individual plaza surrounded by tall, zero-lot-line buildings may be an amenity, a succession of plazas, such as exists along Sixth Avenue in Midtown, breaks up the street wall, drains life from the street, and creates “confused and irregular” spaces.<sup>8</sup>

#### B. *As-of-Right vs. Discretionary Review*

Since its inception, the ordinance has specified three different approval processes for these spaces. First, spaces which can proceed as of right, based on compliance with specified standards, date from the original as-of-right plazas and arcades in the 1961 ordinance. Second, the 1975 plaza reforms provide for a certification process by the chair of the City Planning Commission, a planning official. This certification involves limited discretion in determining compliance with design standards somewhat more detailed than as-of-right standards. Finally, some spaces require approval of the City Planning Commission or other public body after a public hearing. These truly discretionary approvals are reserved for the most important spaces where precise design standards are difficult to articulate.

These three approval processes demonstrate the recurring tension in land use regulation between competing desires for predictability and flexibility. As-of-right approval, although more efficient, is possible only where clear rules can be established and conformity can be easily determined. Discretionary review, though it allows greater flexibility and creativity in implementing the public policy objectives of the zoning resolution, also creates an administrative burden and

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<sup>8</sup> KAYDEN, *supra* note 2, at 16, (quoting Jonathan Barnett).

reduces predictability of outcome, highly valued by developers, who are, in this case, the agents of public policy.

In summary, as the ordinance has evolved, individual categories of public spaces have proliferated, each with more detailed design standards attached to them. The geographic areas within which certain specified spaces would be bonusable have been more carefully delineated, and the amount of the bonus has been more carefully calibrated. Greater public amenities have been required to enliven and increase the utility of spaces. This increased complexity has required more discretionary review and more attention to mechanisms to enforce owner obligations.

As Kayden makes clear in Part II of the book, while these reforms have generally improved the effectiveness of the incentive zoning program, they have not always produced useful spaces or ensured that owner obligations are performed.

## II. ASSEMBLING THE RECORD

The book's own evolution is itself an intriguing story—in a sense, an outgrowth of its own public/private partnership. Realizing that the City of New York lacked any comprehensive listing of the City's privately owned public spaces and the legal requirements governing them, in 1996 Kayden, the New York City Department of City Planning (which administers the ordinance), and the Municipal Art Society of New York (a private non-profit advocacy group) inaugurated "the New York City Privately Owned Public Space Project." The primary purpose of the project was to compile a comprehensive computerized database of these spaces. The first step—compiling a list of all such spaces—was surprisingly difficult since no comprehensive list was kept by any city department or agency. Thus, researchers undertook comprehensive field surveys of commercial and residential zoning districts in which zoning bonuses were ever allowed to identify all likely privately owned public spaces. These candidates were then cross-checked against the records scattered in the files of several city departments and agencies.

The next phase was the painstaking assembly of the documentary record, comprising several components. In a typical permit approval process, site plans, zoning computations and other materials are first submitted by the property owner in support of its application. Next, city approval-granting agencies issue written decisions, in the form of special permits, variances, or certifications; sometimes these original decisions are subsequently amended. Finally, restrictive covenants,

performance bonds or other instruments are furnished by the owner to satisfy approval requirements. For the book, each of these documents were analyzed to determine the legal requirements applicable to each space. Finally, following their entry into the database, data were verified by field visits and by certified mail letters to property owners asking them to confirm their accuracy.

The resulting database comprises just over 3.5 million square feet of space at 503 privately owned public spaces at 320 commercial, residential and community facility buildings. This area is equivalent to thirty average New York City blocks, or to the section of Central Park below 64th Street—a significant quantum of publicly accessible open space delivered at no direct cost to the public. This open space was leveraged by the authorization of approximately twenty million square feet of bonus floor area, of which sixteen million square feet have actually been constructed; that is equivalent to 1.6 World Trade Centers.

### III. EVALUATING THE SPACES

#### A. *The Central Question*

To grossly oversimplify the book's implicit central question, has the creation of 30 blocks of open space justified the addition of another 1.6 World Trade Centers? This formulation is of course simplistic, since the actual spaces and their bonus-earning host buildings are disaggregated, although they are overwhelmingly located in four areas of Manhattan: Downtown, Midtown, the Upper East Side and the Upper West Side. These concentrations are less the result of a city-wide comprehensive planning effort than a predictable consequence of privatization; the spaces have been produced only in areas where the real estate market makes the zoning bonus sufficiently valuable to offset the capital, administrative and ongoing maintenance costs of creating them.

In some cases, a more planning-based approach to locating such spaces has proved futile. For instance, the special Greenwich Street Development District south of the World Trade Center included a detailed parcel-by-parcel plan for linked pedestrian circulation spaces. The private market did not oblige, however, by developing each of the parcels necessary to provide the desired pedestrian network. Following some amendments targeted toward specific buildings, the City finally abolished the district entirely in 1998.

In any case, it may be preferable to reframe the principal question of whether the burdens of additional floor area are justified by



the benefits of the resulting public space. This formulation presumes that additional density is *per se* bad and that additional open space is *per se* good, while the reality is more complex. Additional density can produce an increased concentration of human activity which supports retail uses, rapid transit, and street life and in general reinforces the vitality of the city. Conversely, the resulting open space should not be viewed as a commodity to be maximized; the actual utility of these spaces is not based solely, or even primarily, on their size but rather on more subtle, context-driven factors such as solar orientation, accommodation of pedestrian desire lines, placement of plantings, movable seats and other amenities, integration with the host building, and relationship to other nearby spaces.

### B. Classification System

Based upon empirical observation, user interviews, and analysis of actual and potential uses, Kayden divides the 503 subject spaces into five categories. Destination space is the highest quality public space, which attracts users from outside its immediate neighborhood. Neighborhood space is high-quality space that draws users from its immediate neighborhood, defined as the host building and other buildings within a three-block radius.<sup>9</sup> Hiatus space is space which “accommodates the passing user for a brief stop, but never attracts neighborhood or destination space use.”<sup>10</sup> Circulation space is space which “materially improves the pedestrian’s experience of moving through the city” either by shortening the distance between points or making a path of travel more comfortable by providing weather protection.<sup>11</sup> Finally, marginal space is defined as space which the public rarely uses for any purpose.<sup>12</sup>

There are value judgments inherent in these classifications, although they are not simply gradations from highest to lowest. For instance, while destination space is clearly the most valuable and marginal space the least valuable, neighborhood space, hiatus space and circulation space can all serve valuable functions. Individual spaces within each category can also vary widely in quality.

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<sup>9</sup> *Id.* at 49.

<sup>10</sup> *Id.* at 50.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 51.

### C. *Individual Space Evaluation*

Since each space is unique, Kayden provides a portrait of each space in the second part of his book. Each portrait includes a descriptive evaluation of each space and a precis of its legal requirements, accompanied by a photograph and a scaled schematic site plan. For instance, the former IBM Building at 590 Madison Avenue, designed by Edward Larabee Barnes and completed in 1982, contains four separate bonus spaces—an urban plaza, an arcade, a through-block arcade, and a covered pedestrian space with an adjoining seating area—a total of over 20,000 square feet of public space, meriting almost two pages of description. The interconnected covered pedestrian space, seating area and through-block arcade are classified as destination space—the highest ranking. Kayden calls the main atrium “an aesthetically dramatic, yet peaceful room” and notes that the seating area, with ample movable chairs, granite-topped tables and a food kiosk “continues to rank high on visibility.”<sup>13</sup> This entry also includes an even-handed account of the controversial changes made to the public space by a subsequent building owner.

At the other end of Midtown, the 18,000-square-foot plaza surrounding Madison Square Garden, designed by Charles Luckman and completed in 1967, is rated marginal. According to Kayden, “the bulk of the plaza is empty space” except for small strips of additional plaza on side streets, with ledges and steps suitable for seating. Access to one of these strips along 33rd Street is banned by locked gates apparently installed without city approval.<sup>14</sup>

Two residential plazas show a similar contrast. The entry for 150 East 34th Street, completed in 1987, praises the juxtaposition of landscaping and public art, as well as the plentiful seating, including a bench thoughtfully positioned for a view of the spire of the Chrysler Building.<sup>15</sup> In contrast, the residential plaza at 200 East 24th Street, completed in 1972 before the 1975–1977 zoning reforms, has spiked railings on its planter ledges to prevent sitting, and unauthorized gates separating the purportedly public space from the sidewalk.<sup>16</sup>

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<sup>13</sup> *Id.* at 173.

<sup>14</sup> *Id.* at 122.

<sup>15</sup> *Id.* at 195.

<sup>16</sup> *Id.* at 191.

#### D. Trends

Several general trends emerge from this evaluation exercise. First, early as-of-right plazas and arcades tend to be less satisfactory than later spaces, particularly those subject to certification or discretionary review. Of the city's 167 plazas, the author finds only one percent to be destination places and sixty-three percent to be marginal. Many of the early as-of-right plazas are "environmentally and aesthetically hostile to public use . . . barren, desolate, depressing and sterile . . . shaped and located indifferently and surfaced in inexpensive materials . . . their micro-climates are cold . . . [and they] lack such basic functional amenities as seating."<sup>17</sup> In addition, many as-of-right plazas are not identified with plaques or signs as public spaces and are often randomly situated without regard to their surrounding context. Similarly, of the city's eighty-eight arcades, almost three quarters are deemed to be marginal.

Urban and residential plazas produced after the zoning reforms of 1975 and 1977, on the other hand, rate considerably better. They tend to be more sensitive to their context, more thoughtfully designed, more amenity-laden and hence more heavily used. The usability of spaces other than plazas is not as easily determined, however, by the date of their creation. Partially or fully enclosed spaces tend to fare better; by definition, most are integrated with their host buildings and are thus better maintained. Most have also been subject to discretionary review. Through-block arcades and covered pedestrian spaces, both creatures of later amendments to the ordinance, are more likely to be destination, hiatus or circulation spaces; none of them are rated "marginal."

#### E. Legal Compliance

The book also evaluates the compliance of each space with the legal requirements governing it, concluding that almost half of the 320 buildings with public spaces are out of compliance. Most often these violations relate to denial of public access to areas, encroachment of private uses onto legally mandated public spaces, or a reduction in required amenities. For instance, in many cases, spaces are inaccessible due to locked gates or other obstructions. Signs identifying rights of public access were never provided or have been removed or obscured. Sidewalk cafes, newsstands or other private uses have en-

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<sup>17</sup> *Id.* at 52-53.

croached into space required to remain public. Finally, amenities such as seating and trees or other landscaping have been removed or not properly maintained. Ironically, more recent spaces are more likely to be in violation, both because they are likely to be subject to more detailed requirements, creating the potential for more violations, and because they are likely to be more heavily used by the public, ironically creating a stronger disincentive for the property owner to comply.

Enforcement has been hampered up until now by the lack of a comprehensive data base identifying spaces and their legal requirements. The book itself and the research project of which it is an outgrowth, partly directed toward remedying this situation, have already begun to have a salutary effect. The book's findings, that a high proportion of spaces are "marginal" and that nearly half are in violation of their legal requirements, have been heavily reported, particularly in New York, including on the front page of the *New York Times*.<sup>18</sup> This publicity has led to enforcement actions by the Giuliani administration against the most egregious violators.<sup>19</sup>

#### CONCLUSIONS AND IMPLICATIONS

Many press accounts have misread this book as an indictment of incentive zoning or as a polemic against privatization. In fact, Kayden takes pains to avoid unsupportable generalizations and to examine each space in an even-handed, non-ideological way. The book's conclusions with regard to the New York City experience also have broader resonance. For instance, the need for well-thought-out design and locational standards and for periodic re-examination and fine-tuning of these standards based on experience are equally applicable to similar spaces in other cities. Likewise, the benefits of discretionary review and the need for ongoing enforcement of legal requirements can be applied to a wide variety of land use regulation, regardless of

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<sup>18</sup> See, e.g., David W. Dunlap, *A Public Realm on Private Property*, N. Y. TIMES, Oct. 15, 2000, § 11, at 1; David W. Dunlap, *In City Canyons, Slivers Of Public Space Erode*, N.Y. TIMES, Sept. 28, 2000, at A1 [hereinafter *In City Canyons*]; James Gardner, *Public Plazas: the Disappointing Legacy of the Do-Gooders of 1961*, N. Y. OBSERVER, Dec. 18, 2000, at 45; Mac Griswold, *Developers to Public: Drop Dead*, WALL ST. J., Oct. 11, 2000, at A1; Anthony Flint, Book Review, *Public Space, Private Greed*, BOSTON GLOBE, Nov. 15, 2000, at G3; Verlyn Klinkenborg, Editorial, *A Field Guide to Public Spaces*, N. Y. TIMES, , Nov. 19, 2000, § 4, at 14; *Book Reveals State of City's Privately Owned Spaces*, REAL ESTATE WEEKLY, November 15, 2000, at 17; *Privately Owned Public Spaces in New York City* (All Things Considered radio broadcast, Dec. 29, 2000).

<sup>19</sup> See *In City Canyons*, *supra* note 18, at A1.

whether based on incentives, mandates, or conditions on development approvals.

The book's value flows in part from its marriage of painstaking research into legal requirements governing the design and operation of spaces, on the one hand, and close empirical observation of how the spaces are actually used by the public, on the other hand. This approach reveals the often obscure process by which land use regulation shapes the built environment and provides an analytical model for how to shape land use regulation to achieve its desired purposes. As evidence of how rapidly the book has entered the discourse about public space, the Massachusetts Environmental Secretary's decision approving the South Boston Municipal Harbor Plan—a planning document with regulatory significance for the development of a large section of Boston's waterfront bordering the downtown core—focused in detail on the public amenities required to be provided by private landowners in exchange for the right to build large-scale development projects on the waterfront.<sup>20</sup> Issued within a matter of weeks after the book was published, the decision clearly reflects a familiarity with the book's methodology and conclusions.

New York City's experience with incentive zoning also raises provocative questions about the effects of privatizing responsibility for creating and maintaining pieces of the public realm. Clearly, the private developers who are the creators and stewards of these spaces have far different objectives than the public. While property owners may perceive a value in adding amenities for the users of their own buildings, they will only rarely have an independent commitment to providing benefits to the broader public which do not translate into increased rental income or market appeal.<sup>21</sup> These competing incentives highlight the need both for clearly articulated design standards and for enforcement of legal obligations. Are we willing to bear the administrative burden of making sure these public amenities are appropriately designed and maintained? Does the promise of attractive public benefits distort the public approval process by making it difficult for public officials to deny approvals to otherwise objection-

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<sup>20</sup> See Mass. Executive Office of Env'tl. Affairs, Decision on the City of Boston's South Boston Waterfront District Municipal Harbor Plan (Dec. 6, 2000).

<sup>21</sup> See KAYDEN, *supra* note 2, at 173. In fact, left to themselves, developers may actively avoid creating destination spaces which attract a broad constituency of users, lest they suffer the fate of the purchasers of the IBM Building, whose attempts to reconfigure the building's popular atrium attracted public alarm and close planning board scrutiny. See *id.*

able projects? Is it good public policy to burden private actors with responsibility for creating and maintaining public amenities?

The difficulty of answering these questions highlights the comforting clarity of the classical paradigm of city building, where private actors are expected only to pursue their own economic self-interest and the public sector is charged with using the resulting tax revenues to provide public amenities. One wonders whether Jane Jacobs would agree.

