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PRACTICE TDRs

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Zoning for Successful Transferable Development Rights Programs

By Tom Daniels

Good development design and the protection of large areas of farmland, open space, and natural areas are two primary goals of smart growth.

Yet achieving these goals in a common process is often elusive. Since the late 1960s, the transfer of development rights has held considerable promise for preserving rural landscapes by moving development potential from the countryside into designated growth areas. To date, thousands of TDR transactions have occurred, but not as many as some proponents might have hoped.

erty values. In areas designated for resource protection, rural landowners may resist suggested downzonings that may be used in conjunction with TDRs because they perceive a loss in property values.

There are several ways local governments can use the zoning ordinance to create effective TDR programs. But first it is important to understand how the TDR process works.

A local government creates a TDR program through four main steps. First, the local government identifies one or more sending areas from which TDR will be moved and gives landowners in the sending areas a certain number of TDRs. For instance, Montgomery County, Maryland, gave landowners in its sending area one TDR for every five acres owned. So a landowner who had 100 acres received 20 TDRs. This allocation formula, together with the size of the sending areas, determines the total potential number of TDRs available.

Next, the local government must identify one or more receiving areas that could accommodate higher density development than currently exists in the receiving area. Then the local government determines how many TDRs a developer must acquire from one or more landowners in the sending areas in order to receive approval for increased density. For instance, Montgomery County allowed one additional dwelling unit on an acre for each TDR a developer purchased and applied to a residential development project in the receiving area. The local government must set a maximum for the total potential number of TDRs that can be applied in the receiving areas, thus establishing the maximum amount of development those receiving areas can accommodate. Finally, the local government must set up a process for:

- confirming the use of TDRs by a developer;
- placing a conservation easement on lands in the sending area from which TDRs have been sold; and
- keeping track of how many TDRs landowners in the sending areas still have.

A developer will need to execute a deed of transferable development rights to show

HOW THE TRANSFER OF DEVELOPMENT RIGHTS WORKS

SENDING AREA (ZONED AGRICULTURE)

Farm Parcel A
sends TDRs
Farm is preserved through a conservation easement.

RECEIVING AREA (R-2, MEDIUM DENSITY RESIDENTIAL)

Housing Development Parcel B
purchased TDRs allow more housing units.

Developer buys TDRs on Farm Parcel A and transfers them to Parcel B. Developer can then build more housing units than zoning ordinance would normally allow. Parcel A can no longer be developed, except for farming.

Source: Adapted from Daniels and Bowers, 1997, p. 173.

A major obstacle to the creation of effective TDR programs has been local zoning. A local government's by-right zoning may allow ample development opportunities for developers who choose not to acquire TDRs, and local elected officials may choose to grant greater densities through bonus zoning without requiring that developers acquire and apply TDRs. Also, developers may be wary of encountering bureaucratic and procedural delays if they propose a development that uses TDRs, compared to a development that simply follows by-right zoning. Within designated growth areas, local residents may oppose increased densities that come with developments that use TDRs, for fear that the increased density will not be well designed, and will result in more congestion, and will reduce prop-

WHAT IS A TRANSFERABLE DEVELOPMENT RIGHT AND HOW DOES IT WORK?

A transferable development right is the right to create a residential building lot or to construct a dwelling unit or build additional square footage onto a commercial, industrial, or residential structure. A TDR is not one of the rights that come with property ownership. A TDR must be created through state enabling legislation and a local ordinance to allow a landowner to transfer a development right to another parcel owned by someone else. A local government creates a market in development rights between landowners in designated preservation areas (sellers) and developers (buyers) who can then use the TDRs to build at a higher density in the designated growth areas.

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About the Author

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that TDRs have been severed and purchased from a property in the sending area. A conservation easement is a legally binding contract between the landowner and the local government, stating the restrictions (for example, agricultural, forestry, or open space land uses) that apply to the property. The property is still privately owned, and there is usually no right of public access.

In sum, a local government creates a market for TDRs by assigning a certain number of TDRs to landowners in sending (or preservation) areas and requiring developers who want to build at higher than by-right densities in receiving (or growth) areas to purchase TDRs from landowners in the sending areas. The price of the TDRs is established through negotiations between a willing buyer and a willing seller, like an ordinary real estate transaction. A key feature of successful TDR programs is continued demand for TDRs from developers who see potential profits from purchasing TDRs and using them to develop projects in the receiving areas. One reason that TDR programs have not worked well in rural areas is that there is often insufficient development activity and little demand from developers for TDRs.

An overall rule of thumb is that at the start of a TDR program there should be twice as many receiving sites for TDRs as there are TDRs to send from the sending areas. This will help ensure that TDRs have a value. Another reason that TDR programs have a poor track record in rural areas is that there are usually many more TDRs in the sending areas than there are places to use them in the receiving area. This oversupply of TDRs drives down prices and discourages landowners in the sending areas from selling TDRs.

PUTTING THE TDR PROGRAM IN THE ZONING ORDINANCE

The local government can create a separate TDR ordinance, but a better approach is to include it as part of the local zoning code. Because a comprehensive plan sets the legal foundation for the zoning ordinance or TDR program, a local government should first amend its comprehensive plan to reflect the identified sending and receiving areas.

To add a TDR program to the zoning ordinance involves several changes. First, new definitions must be added to reflect the language of the TDR program, such as definitions for transferable development rights, sending area, receiving area, deed of transferable development rights, and deed of easement. Next, the TDR option must be added to the list of permitted uses in the zoning districts that are the designated sending areas, along with the minimum size parcel eligible for TDRs, the TDR allocation method, and the procedures for legally severing TDR and using a conservation easement to permanently preserve the sending area property. Then the TDR option must be added to the list of permitted uses, special exceptions, or conditional uses within the zoning districts that comprise the receiving areas.

Although developers may prefer by-right zoning for the use of TDRs, the conditional use process allows the governing body to impose conditions for approval to address development impacts that may affect the community. The conditional use process also allows the local government greater discretion than simply subjecting a TDR receiving area development to subdivision and land development standards. In short, the zoning ordinance can require a

A local government creates a market for TDRs by assigning a certain number of TDRs to landowners in sending areas and requiring developers in receiving areas to purchase TDRs from landowners in the sending areas.

conditional use process for new developments that use TDRs in the receiving areas, and describe the process for approval of a development that uses TDRs. For instance, once a conditional use permit has been granted, a local government could waive the preliminary land development plan and go straight to the final plan stage. This in effect grants the developer vested rights in the development, and final approval is mainly a formality.

- The zoning ordinance should include:
- a purpose clause, explaining the reason for establishing the TDR ordinance;
 - the authorization for the TDR ordinance in the state enabling legislation, and a basic explanation of the TDR program;
 - the procedure for sale of TDRs from a sending area, including a definition of the send-

Developers need to recognize that their use of TDRs will result in better financial returns than developments that meet only by-right zoning.

ing area, how TDRs are calculated, procedures for severing TDRs from land in the sending area, and the conservation easement that is applied to land from which TDRs have been severed;

- d. how TDRs can be used in a receiving area, including a definition of the receiving area, how the use of TDRs is calculated, design requirements and changes to base zoning standards (area and bulk standards), and the conditional use process and the land development and subdivision plan process for approval of a development that uses TDRs; and
- e. definition in the ordinance spelling out whether the TDR program is mandatory or voluntary. Most are voluntary, allowing a landowner the choice of selling off a certain number of building lots and selling a certain number of TDRs. (Under a mandatory program, such as at Lake Tahoe, Nevada, a landowner may not be allowed to build on the property, but can still sell TDRs.)

HOW CAN THE TDR PROGRAM AVOID ZONING OBSTACLES?

A TDR program blends financial incentives with planning and zoning. For a TDR program to be effective, developers need to recognize that their use of TDRs will result in better financial returns than developments that meet only by-right zoning. Local officials are often eager to encourage development in designated growth areas and may grant developers bonus density in return for certain design features or infrastructure. For TDR programs to work, local officials cannot “give away” density in designated receiving areas. Any increase in density through a rezoning in a receiving area must require the developer to acquire and apply development rights. This requirement can be spelled out in the zoning ordinance.

Local governments may find that there is some trial and error involved in setting by-right zoning in the sending and receiving areas and as bonus densities in the receiv-

ing areas. Don’t be afraid to make changes. Over time the TDR program may require occasional adjustments to the zoning ordinance to respond to changing conditions in the real estate market, changes in the comprehensive plan, or density or land-use provisions that did not produce the intended outcomes.

Community districts to one house per 20 acres, allowing only one house per four acres with the purchase of TDRs (see McConnell *et al.*, 2007).

A TDR program can incorporate bonus zoning through the use of multipliers. Multipliers are bonus TDRs that reward developers for building desirable developments in the receiving areas. For example, St. Lucie County, Florida, gave one TDR per acre to landowners in its sending area because the underlying zoning is one dwelling unit per acre. A developer who buys a TDR can obtain a TDR bonus of 1.5 additional TDRs for each TDR purchased by building workforce housing (based on 80 to 120 percent of the median area



Source: Treasure Coast Regional Planning Council, 2006a

➡ Rendering of what a new town or village, created with the use of Transferable Development Rights, would look like in St. Lucie County, Florida.

Calvert County, Maryland, began the nation’s first county-level TDR program to preserve open space in 1978. Part of the program has featured a single-zone TDR in which the sending area and the receiving area are the same. Calvert County started with an existing zoning density standard that allowed one house per five acres and allowed one house per 2.5 acres in its Rural Community districts with the purchase of TDRs. In 1999 the county attempted to slow development by downzoning its Rural Community districts to one house per 10 acres, but allowed up to one house per two acres with the purchase of TDRs. Then, in 2003, in the face of continued growth pressures, the county again downzoned the Rural

household income), building higher education facilities, building a research and development park, or attracting a “targeted industry,” such as an electronics manufacturer.

Developers want as much certainty as possible in the development process. Thus, expedited rezoning and subdivision and land development reviews are important to encourage developers to use TDRs. West Lampeter Township in Lancaster County, Pennsylvania, requires a developer to apply for a conditional use permit when proposing a development that uses TDRs. The conditional use process means that the elected officials will have to vote on the project. Once the project receives conditional use approval,

the township will waive the preliminary plan review and go straight to final plan review. This waiver in effect grants a developer vested rights in the project.

One way to keep property owners in receiving areas mollified is to use a form-based code. Ultimately, a form-based code is easier to do if the receiving area is a green-field site. St. Lucie County has incorporated form-based code elements into its land development regulations, which relate to the TDR ordinance. The ordinance won an Award of Excellence from the Florida Chapter of the American Planning Association in 2006 and an award from the Form-Based Codes Institute in 2007.

The county's land development regulations include, for example:

- The development shall incorporate principles of Traditional Neighborhood Design, including a mix of land uses, a mix of building types, a mix of housing for different income levels, a pedestrian-friendly block and street network, and a significant amount of public open space.
- Neighborhood size shall be scaled upon a five-minute walk radius (approximately 0.25 mile) or a total area of 125 acres, as measured from the Neighborhood Center.
- Each neighborhood shall have well-defined edges, and range from 80 to 150 acres in size. The shape or form of the neighborhood is flexible, provided that the 0.25-mile radius benchmark for scale is maintained.
- A neighborhood shall provide a variety of dwelling unit types and prices that support a broad range of family sizes and incomes.
- A neighborhood shall contain at least one civic building, such as a school, social center, fire or police station.
- A neighborhood shall contain at least one local store.
- Blocks shall be scaled to accommodate a variety of building types.
- A neighborhood shall have an interconnected network of public streets designed to balance the needs of all users, including pedestrians, bicyclists, and motor vehicle operators (Treasure Coast Regional Planning Council, 2006b).

Warwick Township in Lancaster County, Pennsylvania, created a dual-zone TDR program to preserve farmland in the sending areas but tied it to the expansion of commercial and industrial space in its receiving area. The increased development in the

receiving area thus expands the local property tax base without adding school-age children. This produces a net revenue gain for the township. The Campus Industrial Zone receiving area is 167 acres. The township zoning allows only 10 percent maximum lot coverage by-right. For each TDR that a landowner/developer acquires, another 4,000 square feet of lot coverage is allowed, up to a maximum of 70 percent coverage. The township has preserved nearly 1,000 acres of farmland through its TDR program, which got a major boost when a regional hospital decided to locate in the Campus Industrial Zone and needed to purchase more than 100 TDRs.

Downzoning in sending areas has been a major obstacle to creating effective TDR programs. One way that local governments have attempted to minimize the effects of downzoning is to create single zones that serve as both the sending and receiving areas. In a single-zone TDR, the transfer of development rights rearranges development, often to cluster the development and maintain some open space. This is primarily a rural residential strategy. The by-right zoning in a single-zone TDR program generally uses a density standard, so that one house lot may be developed for every certain number of acres. For instance, if the density standard is one house per five acres and a landowner has 20 acres, then the landowner could create four building lots by right. The landowner could purchase a TDR from another property and create an additional lot, for a total of five lots on the 20 acres, but some of the open land, such as 50 percent or 10 acres, would be placed under a conservation easement restricting future development. Farmland protection zoning of one house per 20 acres (or more) is rarely used in a single-zone TDR.

The single-zone TDR is not a recommended method for several reasons. First, it encourages more people to move out to the countryside and live in automobile-dependent developments. In other words, this new development adds to sprawl, though perhaps in a more attractive setting. Second, the additional development is likely to lead to increased conflicts with nearby farm operations. And third, it encourages greater use of on-site septic systems, which contribute to groundwater pollution. In Maryland, for example, there are 14 county TDR programs, of

THE LEGALITY OF TDRs

The concept of transferable development rights came into practice in 1968 when New York City adopted a TDR program in the form of transferable air rights to protect historic landmarks (Preutz 1997). In 1978, the U.S. Supreme Court upheld New York City's transferable air rights program and found that the owners of Grand Central Station could earn a reasonable profit by transferring development potential above the station to another site in the city. That is, the owners of Grand Central could build higher than the zoning height limit would normally allow on another site (see *Penn Central Transp. v. New York City*, 438 U.S. 104 (1978)).

TDRs have drawn the interest of elected local officials because of the potential to avoid the Fifth Amendment takings issue that has plagued proposals to downzone property as a way to manage growth. Thus far, the courts have not given definitive direction on the legality of using TDRs as just compensation. In *Suitum v. Tahoe Regional Planning Agency*, 96 U.S. 243 (1997), the U.S. Supreme Court ruled that the plaintiff, Mrs. Suitum, did not have a "ripe" situation because she had not tried to sell her TDRs and had not determined what they were worth.

In *Williamstown County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court ruled that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause [of the Fifth Amendment] until it has used the procedure and been denied just compensation." In short, the role of TDRs as "just compensation" has not been fully resolved by the courts.

One way that local governments have attempted to minimize the effects of downzoning is to create single zones that serve as both the sending and receiving areas.

which only Montgomery County uses a dual zone that clearly separates sending and receiving areas. Montgomery County downzoned its rural area from one house per five acres to one per 25 and then gave each landowner in the sending area one TDR per five acres.

St. Lucie County adopted a single-zone TDR program, but requires that a landowner or two or more landowners have a minimum of 500 acres and develop their land in a new urbanist town or village. In return, the county agrees to provide central sewer and water service, even to new towns or villages outside the county's urban service boundary.

Take the case of an owner of a 500-acre parcel outside the USB who proposes to build a new village development:

- The landowner must set aside at least 75 percent of the site as open space.
- The minimum density is five dwelling units per acre, so the 125 acres of development land must support at least 625 dwelling units, of which 50 units (eight percent) must be Workforce Housing units.
- Transferable development rights moved from the open space for use as Workforce Housing receive a multiplier of 2.5. The remaining land set aside for open space receives a multiplier of 1.25.
- The landowner can receive additional TDR multipliers (bonuses) by attracting a target industry, institution of higher learning, or a research facility.

TDRS: THE NEXT GENERATION

The next generation of TDRs will feature the transfer of development rights across political jurisdictions and landscape-scale preservation. TDR programs may provide a way to encourage greater regional cooperation, especially in the Northeast, where townships control planning and zoning.

In 2000, the State of Pennsylvania authorized the use of TDRs across municipal boundaries if the municipalities have a written intergovernmental agreement or have adopted a multimunicipal plan. Even though

dozens of multimunicipal plans have been completed, to date, no TDRs have moved from one municipality to another. An obvious problem: Why would one municipality want to provide space for another's development?

➊ Density map of St. Lucie County's single-zone TDR: "The Transferable Development Value Map reflects the underlying densities and intensities established by the pre-existing Future Land Use Map. Properties shall not have the underlying potential densities or intensities limited by the TVC Element."
—From the St. Lucie County Comprehensive Plan, TVC Element, May 15, 2006.
Note: Dotted line indicates urban service boundary.



Treasure Coast Regional Planning Council (2006a)

In 2004, the State of New Jersey passed legislation allowing the transfer of development rights not only across municipal boundaries but from a sending area anywhere in the state to a receiving area anywhere in the state. New Jersey is proposing to use transfer of development rights as a key tool in preserving the New Jersey Highlands in the northeast corner of the state.

King County, Washington, has preserved more than 92,000 acres since 1999, mainly through a single transaction that enabled it to put many TDRs in its bank. In 2004, the county paid \$22 million for TDRs from a 90,000-acre tract owned by Hancock Timber Resource Group. Development rights can be transferred to inside Seattle's urban growth boundary to allow taller buildings in down-

town Seattle, or for a 50 percent increase in the number of homes allowed in some unincorporated parts of the county. For instance, in 2006, R.C. Hedreen Co. paid \$930,000 to King County's TDR Bank for 31 rural development rights. In exchange, the company was allowed to add 62,000 square feet of residential space and increase the height of a building it owned above 300 feet.

CONCLUSION

The transfer of development rights technique is nearly 40 years old. Local governments have used TDRs to protect historic sites, wetlands,

and scenic areas in addition to farmland and forestland. A TDR program can be addressed in the local comprehensive plan and added to the local zoning ordinance. The zoning in both the sending areas and receiving areas should match the outcomes the local government is trying to achieve. And the procedures for operating the TDR program should be spelled out in the zoning ordinance.

A common mistake local governments make is giving away density for free in the rezoning process rather than requiring a developer to acquire TDRs to help preserve land in the community and thus maintain a balance between open space and development. Also, most TDR programs place a heavy emphasis on preserving open space and not enough attention to the appearance, density,

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and function of development that can be built in the receiving areas.

Intergovernmental cooperation, landscape-scale preservation, and form-based zoning codes for major developments will be needed to make transfer of development rights programs effective over the next few decades. Between now and 2050, the United States is projected to add more than 100 million people. TDRs can be a helpful tool to accommodate growth and preserve important natural and cultural resources, but getting the zoning and comprehensive plan right are important first steps.

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Glenn Bell, Tallahassee Democrat

The White Carlin farm in Boyds, Maryland (Montgomery County), features a recently restored barn that housed German POWs during World War II. The farm is protected by a TDR easement and a PDR (Purchase of Development Rights) easement. Photo by Agata Newlacil.



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TRANSFERRED ANY
GOOD DEVELOPMENT
RIGHTS LATELY?

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