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Transfer of Development Rights

What is a Transfer of Development Rights?

Transfer of development rights refers to a planning method for protecting land by transferring the "rights to develop" from one designated area of a jurisdiction and giving them to another. What is actually occurring is a consensus to place conservation easements on property in order to preserve or protect open space, natural resources, farmland, or urban areas of historical importance, while allowing for an increase in development densities or "bonuses" in other areas that are being developed. It is a fairly complex public intervention in the private land market.

TDR programs can be very complex and very difficult to administer. In order to be effective, a TDR program should be simple and easy for landowners and the public to understand. The county, municipality, or regional planning area must have a solid comprehensive plan and zoning ordinances in order to support a TDR program.

TDRs will not work in very rural areas where there is little or no development pressure on the area to be preserved. In predominantly rural areas, there is also likely to be an imbalance between sending and receiving areas. In these areas, a TDR program would be inappropriate but could be revisited in the future. A locality may also experience push-back in a receiving area that believes increased density is inappropriate for their community.

Purchase of Development Rights

TDRs are very similar to the more common purchase of development rights (PDR) programs. PDR programs require that a governmental agency or land trust purchase the development rights to a particular property. The development rights on the piece of property are then "retired" through deed restriction. The difference between a TDR and a PDR is that the TDR is done in more of a controlled, defined setting where areas are predetermined as "sending" or "receiving" areas. PDR rights, by contrast, are purchased but not transferred and are not typically in designated zones.

Voluntary vs. Mandatory Programs

The costs of purchasing the easements are recovered from the developers who receive the building bonus. The value of the development easement is the difference between the agricultural or open space value and the development value. Some planners believe that in order to succeed, TDR programs must be mandatory, rather than voluntary, for landowners in the sending area and for the higher-density building in the receiving areas. If the program is mandatory, it is essentially an upzoning of the entire receiving area for which a developer now has to pay a fee to develop.

Similarly, if the properties in the sending area are “required” to sell their development rights, this could be perceived as a taking. For these reasons, it is preferable to treat TDR programs as incentive programs, and they should always be voluntary.

Receiving Areas

In order for this program to be attractive to developers, the receiving zone properties will need to receive a density bonus that is worth the price of the fee. Developers who buy development rights are acquiring the capacity to build higher density in a receiving area, which can mean different types of the same use (apartments in addition to single family homes), higher densities of the same use (single family homes on ¼ acre lots instead of 1 acre), or different higher intensity uses (commercial or industrial use in addition to residential).

Sending Areas

In return for the purchase, landowners in the sending area place a deed restriction on their property. Restrictions limit the level of potential development, the type of development, or some combination of both. When credits are transferred the property owner maintains all remaining property rights.

Local Programs

The most common TDR program approach allows the landowner to sell the development rights to a developer, who then uses those development rights to increase the density of houses on another piece of property at another location within a single jurisdiction. A variation of that type of TDR would be a situation in which the developer transfers the development rights from one property to another property the developer owns.

A second method allows a local government to establish a TDR Bank to transfer development rights. In this method, developers who wish to develop at a higher density than current zoning allows would purchase development rights from the local government. The establishment of a TDR Bank can help keep a program active during slow economic times and provide a floor for TDR prices. In addition, developers may find it easier to purchase development rights from a governmental entity, rather than from individual landowners.

Interlocal TDR Programs

Interlocal programs, where development rights are transferred from one jurisdiction to another are more difficult to implement than local programs because of issues related to economic development and taxes. An interlocal program would work best where there is a predominantly rural county that wishes to remain rural but is experiencing development pressure, as seems to be the case with Highlands. That locality may find the agreement attractive if they can transfer some development rights to a growth county.

In order for this program to be successful, the regional entity must identify the sending and receiving areas on maps based on adequate supply and demand, and create formulas for calculating the allowable increase in density associated with each purchased TDR credit.

What Makes Transfer of Development Rights Work?¹

A 2009 study from the Journal of the American Planning Association, "What Makes Transfer of Development Rights Work," examined the factors that contribute to the success of TDR programs across the country. These factors include:

- Demand for Bonus Development – There must be a demand for the extra density developers can obtain through TDRs. Downzoning is one method of maintaining TDR demand, but it can be politically unpopular.
- Receiving Areas Customized to the Community – Communities must identify, through a comprehensive plan, a development area where the public supports higher density development and that has the roads, sewers, and other infrastructure to support that additional development.
- Strict Sending-Area Development Regulations – Communities with strict sending area regulations are more likely to succeed. Higher density levels increase the potential development value of land. If sending areas have high potential development values, landowners are not likely to sell their development rights. It is also highly unpopular to downzone these properties, so areas should be chosen that already have low density zoning.
- Few or No Alternatives to TDR for Additional Development – Many TDR programs succeed where landowners have few or no alternative methods for obtaining additional development rights.
- Transfer Ratios and Conversion Factors – TDR programs are more likely to succeed if the value of the TDRs in the receiving area exceeds their value in the sending area. For example, if the value of a TDR in a sending area equals one unit per acre, the program will likely be more successful if the TDR's value in the receiving area is greater than one unit per acre. In addition, some TDR programs use conversion factors that allow developers to convert residential development rights to other types of development rights at a receiving site, such as building height or lot coverage. These factors make TDRs more attractive to buyers and sellers.

Success (and failure) in Maryland²

Multiple counties in Maryland have enacted TDR programs. Some have seen success that changes the landscape of an entire county (Montgomery and Calvert), while others (St. Mary's, Charles and Queen Anne) are still struggling to get off the ground.

Montgomery County began its TDR program in 1980 and has since preserved over 16 percent of its total land area. Montgomery County downzoned the areas designated for preservation, reducing the permitted density from one unit per five acres to one unit per 25 acres. Montgomery allows landowners to use only one development right on the sending site and sell-off or transfer the others to receiving areas. It has periodically expanded the number of receiving

¹ Pruetz, Rick and Noah Standridge, *What Makes Transfer of Development Rights Work?* Journal of the American Planning Association, 2009.

http://www.qac.org/Docs/BuRP/What%20Makes%20Transfer%20of%20Development%20Rights%20Work_.pdf

²Pinho, Rute, *Maryland's Transfer of Development Rights Programs*. November 2010.

<http://www.cga.ct.gov/2010/rpt/2010-R-0464.htm>

areas to manage supply and demand in the TDR market. Its success is due mostly to the remarkable demand for real estate in the county.

Calvert County enacted the state's first TDR program in 1978. As of June 2007, TDRs have preserved 9.3 percent of the county's total land area. The program's success is linked to successive downzoning in rural areas, by 50 percent in 1999 and 2003. Under the program, landowners in preservation areas must buy TDRs from other landowners to restore the original density or obtain a higher density. But landowners using the TDRs in designated development areas receive a bonus density, making the development of land in the receiving areas more profitable. The county also used public funds to buy TDRs in strategic areas, thus precluding future development. These actions, coupled with the county's robust real estate market, increased the demand for TDRs.

St. Mary's County TDR program, enacted in 1990, has been less successful than those in Calvert and Montgomery counties, preserving about 1.3 percent of the county's total land area. Instead of allowing development rights to be used only in development areas, the county allows them to be used in the preservation area as well. This factor diminishes the program's potential to direct growth away from preservation areas.

Since enacting its TDR program in 1993, Charles County has preserved 1.6 percent of its total land area. Although the county has experienced development pressure over this time, the market has not demanded higher density development that would make it lucrative for developers to purchase and use TDRs.

Queen Anne's County TDR program has protected 1.1 percent of the total land area in the county. Since 1994, all of its TDR transfers have been to areas served by public water and sewers, conforming to the state's Comprehensive Plan of Development. But the market for TDRs has decreased since the county allowed developers to build at higher densities if they clustered buildings close together on a development and preserved the remaining land as open space. Recently, a lack of demand for high density developments in designated growth areas and citizen opposition to the pace and density of new residential development has further limited the program's effectiveness.

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