

Transfer of Development Rights

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Transfer of Development Rights (TDR) are programs designed to mitigate the harshness and political consequences of zoning for protective purposes where a community might attempt to preserve historic sites, groundwater, or agricultural areas. The concept of TDRs is in line with the fact that property rights are comprised of more than one specific claim to the rights of the property. A commonly used example is that property rights are a “bundle of sticks” and the right to develop the land is a “stick” within that “bundle”. By transferring the development right, the landowner retains all of the other property rights over the land. The individual or entity that purchases the right to develop is allowed in the TDR system to develop where there otherwise may not have been the same right without restriction. TDRs also provide flexibility with zoning programs by allowing redistribution based on individual decisions and free market principals. TDR programs can balance the pressures on administrative bodies to create plans that are beneficial to all aspects of the community.¹

They can be adapted to the purposes of the locale. However, TDR programs are not a substitute for zoning. TDRs can require more complex systems at times and more

¹ Theodore A. Feitshans. PDRs and TDRs: *Land Preservation Tools in a Universe of Voluntary and Compulsory Land Used Planning Tools* 7 Drake J. Agric. L 305 (2002)

comprehensive plans for the community. Zoning and Planning Boards must look ahead to create areas for future preservation and high density development. They must create and sustain a market for the rights. TDRs have been mentioned by the U.S. Supreme Court when looking at constitutional issues of just compensation for the taking of property. They were used as proof that the entire value wasn't taken even though there were severe restrictions on the development of the property. Although the constitutional issues surrounding TDRs have not been directly addressed by the court, there have been analyses by various justices warning that TDRs should not be used to substitute for just compensation in a real takings situation.

Different Approaches for Different Purposes

Motivations for the use of TDR's differ depending on the development needs of a community. One of the earliest and well publicized mentions of TDR use was related to New York City's Grand Central Station. After the U.S. Supreme Court found that the zoning laws restricting some development rights, including height restrictions, were not considered a "taking" (which would violate the Constitutional "Takings Clause"), Justice Brennan mentioned TDRs as a way to mitigate the harsh consequences, *Penn Central Transportation Company v. New York City*. Communities use TDRs to solve problems and avoid situations where they might have previously needed to intervene with eminent domain.

Height and History: TDRs were used in New York when dealing with Grand Central Station and South Street Seaport. In cities with historic buildings like New York where development and height restrictions often collide, TDRs serve to preserve historic structures by allowing height development rights to transfer to other properties and decrease

the canyon effect by promoting diverse building heights throughout the city. In the late 60's Penn Central wanted to construct a fifty-three story addition over Grand Central Station, a protected landmark, but the city barred this development and allowed the development rights to be transferred to adjacent properties

Low Income Housing: Seattle, Washington has used TDRs to lessen development pressures that exist on landowners that retain low-income housing; they also use the same TDR's to protect landmarks. The system was designed to decrease motivation for the sale of low-income housing for development by making the development rights marketable at a high value. Other attempts were made before establishing TDRs but they were always invalidated because they were found to be in violation of substantive due process. In 1988 the TDR system was set into motion and worked very well. Those who wanted to sell their low-income housing were free to do so but many areas providing the low- income housing were preserved. A slow down in development downtown threatened the system's effectiveness and the city then switched to a TDR bank system to keep the preservation system working during the late 80's and early 90's when the demand was lower. The city's TDR bank has saved 377 low-income housing units and two landmark theatres. The funding from the TDR bank has also gone toward city projects such as a symphony hall.²

Farmland Preservation and Overdevelopment: Montgomery County, MD has adopted a plan for the preservation of agriculture and rural open space by "down zoning" 91,591 acres in an agricultural reserve area. "Down Zoning" takes place when areas that used to be available for dense development are rezoned to accommodate less development. They increased the minimum lot size to twenty five acres. The county has designated

² Jennifer Frankel. *Notes & Comments: Past, Present, and Future Constitutional Challenges to Transferable Development Rights* 74 Wash. L. Rev. 825-833

receiving sites for transferred development rights in specified communities. Those receiving sites have two maximum densities, one for and one without TDRs.

Pineland Development Credits (PDC) were created in New Jersey as a TDR solution for over development. There is a New Jersey Pineland's Development Credit Bank that buys up the rights or credits as a last resort and has been active in holding the PDCs. The bank only sells the rights if there is sufficient demand to justify the sale and if the sale will not interfere with private PDR sales. The Pineland's program also designated areas to receive the transferred credits. The program has been successful and has been updated and modified to make transfers easier and to create funding for sewer in high density areas.

Lancaster, Pennsylvania has used a variety of techniques to preserve farmland such as easement payments, lower taxes through state programs, and through the establishment of Agricultural Security Areas. In Pennsylvania where municipalities are more powerful than in other states, townships can adopt TDR programs that coincide with the county or region's vision for planning.³ Counties can not create TDR programs that are mandatory on municipalities within its borders. Manheim Township, a suburb of Lancaster, created a TDR program in 1991. They first "down zoned" a portion of the land to require twenty-five acres per dwelling. The landowners in the area were given TDRs at a ratio of one TDR per 1.25 acres and the TDR purchases allowed developers in the "receiving area" to build at a higher density than zoning would normally allow.⁴ The township also established a TDR bank and has successfully preserved more than two hundred acres. Because the TDR program was implemented in the early nineties and the development pressures were present decades before, it is difficult to measure the effectiveness of the program alone. In 1982 the first

³ Act 247 of 1968, P.L. 805, 53 P.S. 10101.

⁴ Tom Daniels. *Purchase of Development rights, Agricultural Preservation and other Land Use Policy Tools – The Pennsylvania Experience.* (1998) www.cnsunix.albany.edu

conservation easement was established in the Lancaster area. TDRs are an added tool to be used by the region in fighting sprawl over farmland. Collectively easement purchase, establishment of agriculture security areas, good zoning, and TDR use are saving agriculture and limiting sprawl in the area. Before 1992 municipalities were forced to keep the transfer rights within their municipalities, but with the revised Municipal Planning Code, encouraging municipalities to work together, there can be joint TDR programs in Pennsylvania.

TDR Systems

TDR Banks – These allow immediate monetary compensation by selling rights to the bank regardless of what the current demand is. In some areas TDR banks are only available to purchase rights if there are no private buyers available. The bank allows more control and continuing power over the development rights by keeping up demand during low points in development demand. The money from these banks is usually derived from the sale of development right of publicly owned landmarks. The idea of the TDR bank was designed for but never used in Chicago in 1972 by John Costonis, a professor of urban planning law at the University of Illinois.⁵

Multiple motivations – It is important to recognize that a good system for use of TDRs can serve more than one purpose for the local government. Seattle's use of TDRs is proof of this. Low-income housing preservation and landmark preservation were both done there with TDRs. With good zoning and planning, a variety of uses can take place in one area utilizing one pool of resources.

Considerations for Developing TDR Programs

⁵ Jennifer Frankel. *Notes & Comments: Past, Present, and Future Constitutional Challenges to Transferable Development Rights* 74 Wash. L. Rev. 825 at 832

TDR programs can be more complex to administer and require more zoning changes when compared to traditional zoning. There must be a strong comprehensive plan in place to account for “sending” and “receiving” areas for these development rights.

There is also often a need for public or community education about the TDRs and the way they work.⁶ Residents in areas designated for higher density might not desire further development. Farmers may fear the inability to sell their rights at a good price and then being left with worthless rights and no development options.

Because the reasons behind TDRs include preservation and compensation the market value of the development rights, even if assisted by TDR banks, can decrease leaving farmers or “sending” areas without as attractive of an option as when the program began. The “receiving” area demand must be present for the TDR system to be effective. These areas must be built up properly to maintain the worth of the TDRs.

A municipality or county must weigh the cost and benefits of starting a TDR program. It may be successful in preserving or maintaining historical landmarks or farmland, but there will be upfront costs for the administering party and if a bank is used, funds must be in place to purchase and later sell the rights.

The final concern is the growth and change of needs within an area over time. TDR sending and receiving zones must be designated with the consideration of future needs and changes of the community.

** The Center does not provide legal advice, nor is its work intended to be a substitute for such advice and counsel.*

⁶ <http://government.cce.cornell.edu> Jason Hanly-Forde, George Homsy, Katherine Lieberknecht, Remington Stone; *Transfer of Development Rights Programs: Using the Market for Compensation and Preservation.*