TRANSFER OF DEVELOPMENT RIGHTS: A VIABLE RURAL PRESERVATION TOOL

By

SHARON RAE DOWNS

(Under the Direction of John C. Waters)

ABSTRACT

As one takes a look around at what used to be lush green pastures full of cows and old farmhouses, they are often appalled to find in their place walls of steel and glass and miles of endless pavement serving a multitude of automobiles. Our natural areas, farmlands, and open spaces are being destroyed daily in the name of progress for new monotonous development. Traditional land use control techniques such as zoning have proved to be rather ineffective growth management tools allowing the encroachment of development on agricultural lands. One preservation tool that can aid in preserving these threatened open spaces is the Transfer of Development Rights (TDR) program. This thesis examines the legitimacy and successfulness of the TDR program for the protection of farmlands, natural landscapes, and historic properties.

INDEX WORDS: Rural preservation, Transferable development rights, Conservation easements, Smart growth

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B.A., The University of the South, 2005

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment

of the Requirements for the Degree

MASTER OF HISTORIC PRESERVATION

ATHENS, GEORGIA

2007

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DEDICATION

I wish to dedicate this thesis to all of my family, especially Jason, Mom, Daddy, and Patricia, my granny, Virginia Sanders, and in loving memory of my grandmother, Marie Faulkner Watson. This work could not have been completed without the encouraging support of my husband, Jason Downs, who always assured me that I would make it through this as long as I "stayed focused and buckled-down!"

ACKNOWLEDGEMENTS

I would like to give a special acknowledgement for Professor John C. Waters, my major advisor. His guidance and encouragement has meant more to me than he will ever know, and I am very grateful for it. I would also like to gratefully acknowledge Rick Pruetz, author of *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, for permitting me to reprint sections of his book that were key to my study.

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CHAPTER 1

INTRODUCTION

Purpose of Study

This purpose of this thesis is to educate the general public on the subject of Transferable Development Rights (TDRs) as a viable preservation tool for farmlands, natural areas, and open spaces. The principal argument put forth in this study is that open space is worthy of preservation, and one technique that can effectively protect agricultural lands and open spaces from being encroached upon by development is the TDR program.

Methodology

Both primary and secondary source literature was analyzed to establish a foundation for the legitimacy of TDRs as an efficient preservation tool for rural lands. Although TDRs have an urban origin, they have been found to be a viable preservation tool for the preservation of rural farmlands and open space. Internet sources were additionally utilized as many TDR studies and reports have been made accessible on-line.

Organization

This study is organized into five chapters, all of which have distinct topics but are inter-related. Chapter 1 provides an introduction to the study and briefly details each chapter. Chapter 2 explains the importance of open space in our society and points out the pitfalls of current zoning that prevent the preservation of open space. Chapter 3 focuses on the development of TDR and makes a case for TDR being a viable preservation tool for open spaces. Chapter 4 briefly details two TDR success stories. Chapter 5 serves as the conclusion and makes future recommendations. Both Appendix A and B have been reprinted from the book, *Beyond Takings* *and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, with the author's permission. Appendix A contains 142 TDR Case Studies covering 134 communities nationwide. These case studies were selected based on their successfulness in generating a significant amount of transfers and also for their unique and diverse usage of TDRs. For further information on "takings" related to TDRs, see Appendix B, which contains State Takings Laws that were available as of June 2000.

CHAPTER 2

THE VALUE OF OPEN SPACE

Land is modern man's most precious natural resource and its wise use is imperative.

- Chavooshian, Norman, & Niewswand[1]

Our natural areas, farmlands, and open spaces are being destroyed daily in the name of progress for new monotonous development. On every "country road, every unpaved lane, every former cowpath, stands new houses, and each one is somebody's version of the American Dream. Most are simple raised ranches based on tried-and-true formulas – plans conceived originally in the 1950s, not rethought since then, and sold then thousand times over."[2] These mass produced homes could be located anywhere in the United States. Kunstler, author of *The Geography of Nowhere* says, "There is little sense of having arrived anywhere, because everyplace looks like no place in particular."[3] In order to preserve our countryside and restore a sense of place into people's hearts and minds, we, as a society, must implement sound policies to ensure a tomorrow that is not perceived as "just different versions of nowhere."[4]

The Loss of Farmland

The national decline in "both farmland acreage and the farming population during the past half-century, and particularly over the last several decades, is well documented. In the

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[1] Jerome G. Rose, ed., *The Transfer of Development Rights: A New Technique of Land Use Regulation* (New Brunswick: Center For Urban Policy Research - Rutgers - The State University of New Jersey, 1975), 167.
[2] James H. Kunstler, *The Geography of Nowhere: The Rise and Decline of America's Man-Made Landscape* (New York: Simon & Schuster, 1993), 166.
[3] Ibid., 131.
[4] Ibid., 166.

Northeast much of this land was literally abandoned and has gradually grown back into forest."[5] This has not remained true for other regions of the country. In many cases, large tracts of agricultural land have been bulldozed for suburban development.

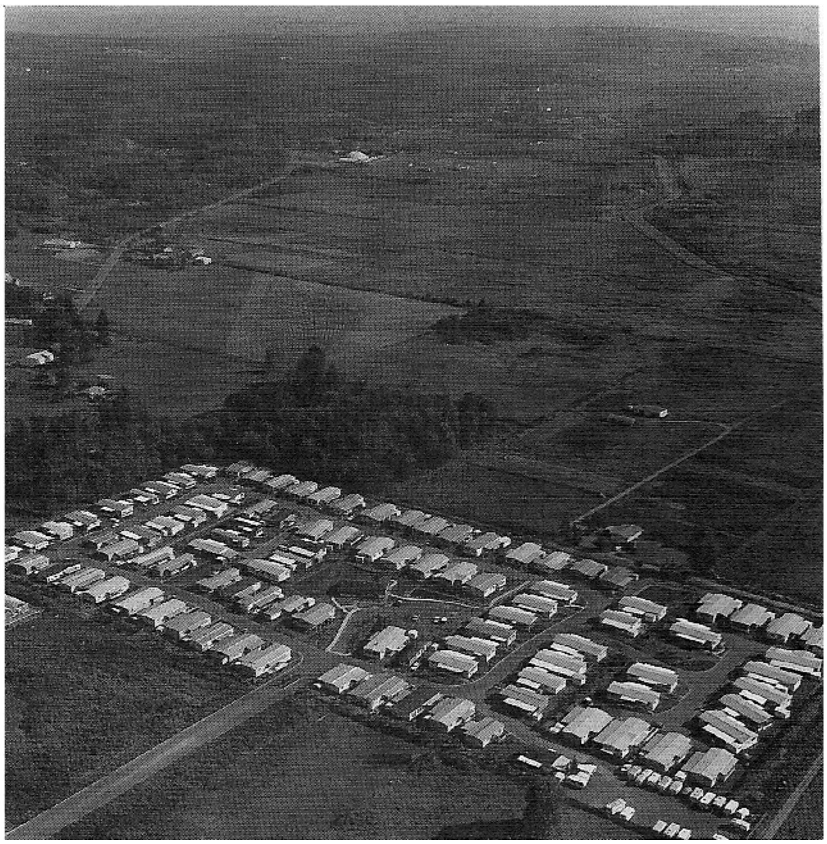

Figure 1. Development encroaching upon agricultural lands [6]

People have been able to move into these once rural areas primarily because of the construction of the interstate highway system. This network has made "it possible to drive much greater distances to urban jobs within tolerable commuting time (often as much as one hour in each direction). Superhighway extensions have frequently produced a 'can-opener effect' upon the rural hinterland of metropolitan job centers. Eventually employers relocate to more suburban

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[5] Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 289.
[6] Image credit - Samuel N. Stokes, A. Elizabeth Watson, Genevieve P. Keller, and J. Timothy Keller, *Saving America's Countryside: A Guide to Rural Conservation* (Baltimore: The John Hopkins University Press, 1989), 137.

locations, thereby further extending the 'commutershed' into adjacent rural counties." [7] This process has created a "post-interstate landscape," which has caused multiple problems for the indigenous farmers.

Land Rights

The question has been posed, "How can we protect critical natural areas, preserve open space, and ensure a high quality of life, yet at the same time accommodate the legitimate development demands of a growing society?"[8] One concept of land use controls that seems to achieve this objective is called the Transfer of Development Rights. The idea driving this concept is simple in nature, but at the same time, it is very different from the traditional laws that governed land development and ownership.

American attitudes toward "real property were inherited from the English land-tenure system and were strengthened during colonial times when there seemed to be unlimited land available. As expressed, for example, in the Northwest Ordinances of 1787, the central idea was ownership of land in 'fee simple,' which meant ownership that confers upon the owner the right to do anything he wants with his land except what is prohibited by local, state, and federal governments. In a sense land was treated as an unlimited commodity as abundant as air and water."[9] When an early settler purchased the title to a piece of land, he had a "free hand to farm it, mine it, build houses or stores on it, or simply hold it as an investment."[10] This freedom has been chipped away, and today we are even more aware of our limitations as current and potential

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[7] Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 289.
[8] Jerome G. Rose, ed., *The Transfer of Development Rights: A New Technique of Land Use Regulation* (New Brunswick: Center For Urban Policy Research - Rutgers - The State University of New Jersey, 1975), 166.
[9] Ibid.
[10] Ibid.

environmental problems are adding "other restrictions to the development process and are further narrowing that unlimited freedom to develop, once so closely associated with land ownership."[11]

As a developed society, we ought to "possess and enjoy an environment of the highest quality, but until very recently, land-use policies dictated by economic, political, and social (or perhaps anti-social) considerations have insensitively and irresponsibly squandered the land."[12] It is widely accepted that open space provides aesthetic and social values in the form of farmlands, historic sites, and scenic landscapes. It is ironic then that these are the areas that have rarely been protected and retained for their community value.

The Problems of Zoning

Traditional land use control techniques such as zoning, sliding scale zoning, open space zoning, and open space development are often viewed as ineffective growth management tools allowing the encroachment of development on agricultural lands. Under conventional zoning "land is considered a commodity programmed to be developed for some appropriate use, a notion entirely consistent with our frontier heritage."[13]

Zoning changes and variances have been granted often times in response to "political pressures that fail to adequately account for socioeconomic and environmental considerations. As a result, there is demand for new growth management techniques that recognize the need for an economic and environmental balance, the importance of private property rights, the power of market-based approaches, and states' particular legal and political structures." [14]

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[11] Ibid., 167.
[12] Ibid.
[13] Ibid.
[14] Michigan Agricultural Experiment Station - Michigan State University, "Managing Growth and Addressing Urban Sprawl: The Transfer of Development Rights," August 1999, <http://www.maes.msu.edu/publications/researchreports/RR/RR563.pdf> (15 June 2007).

Table 1. Key Definitions [15]

Comprehensive Planning - A process leading to adoption of a set of policies regarding land use, transportation, housing, public facilities, and economic and social issues. It may include a land use plan designating particular uses and a program for providing transportation, sewers, and other public facilities. In most states the plan in itself is not legally binding on governments or individuals, but a few states require that zoning and major public facility plans be consistent with comprehensive plans.

Agricultural Zoning - A legally binding designation of the uses to which land may be put, including the type, amount, and location of development. Agricultural zoning restricts uses to agriculture and related uses such as a farmstead. Often a large minimum lot size (20-160 acres) is stipulated in an agricultural zone.

Agricultural Districting - The designation of specific tracts of long-term agricultural uses, usually coupled with benefits and assurances which improve the conditions for farming. Generally no legally binding controls are imposed on land use.

Purchase of Development Rights - Purchase of the right to develop from owners of specific parcels, leaving the owner all other rights of ownership. The price of the rights is the diminution in the market value of the land as a result of the removal of the development rights. The remaining value of the land is the ''farm use'' value.

Purchase and Resale or Lease with Restrictions - Purchase of land, imposition of restrictions on use and development, and resale at market price. End result is equivalent to purchase of developing rights.

Transfer of Development Rights - Development rights on land in a designated preservation area may be purchased by a developer and transferred to a designated development area where the equivalent amount of additional development can be constructed.

Differential Assessment - Assessment for property tax purposes based on the farm use value of the land rather than on its market value. There are three major types of differential assessment: pure preferential assessment with full abatement, deferred taxation with partial or with no abatement, and restrictive agreement, under which a farmland owner contracts to maintain his land in farm uses in return for a lower assessment.

Development Permit System - Requirement that a special permit be obtained for development from designated state or regional agency. Permit is in addition to normal local zoning and building permits.

Right to Farm - Legislation stating that local ordinances cannot be enacted which restrict normal farming practices unless they endanger public health or safety, and providing farmers with some protection against private nuisance lawsuits.

New concepts were developed to overcome the shortcomings in zoning that prevent the preservation of open space. One concept that came out of this concern is the "greenbelt" concept, which is an adapted form of the European's "garden cities". Other techniques such as "clustering, density zoning, performance zoning, floor-area-ratio, and planned unit development (PUD) were prompted by the housing boom of the fifties and sixties which permitted

[15] Image credit- Robert E. Coughlin, John C. Keene, J. Dixon Esseks, William Toner, and Lisa Rosenberger, *The Protection of Farmland: A Reference Guidebook for State and Local Governments* (Amherst: Regional Science Research Institute, 1981), 17.

municipalities to explore and experiment with techniques to preserve some open space, rather than have entire tracts developed on a lot-by-lot basis."[16]

Existing Village | Conventional Development | Development with TDR

Figure 2. Development Images: Conventional vs. TDR [17]

All of these development techniques were enacted for the preservation of open space and to break up the monotonous sprawl often created by conventional zoning. Often times, these mechanisms result in noncontiguous tracts of preserved open space. While this result is not undesirable, these techniques do not allow for the protection of large tracts of open space.

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[16] Jerome G. Rose, ed., *The Transfer of Development Rights: A New Technique of Land Use Regulation* (New Brunswick: Center For Urban Policy Research - Rutgers - The State University of New Jersey, 1975), 168.
[17] Image credit - Massachusetts' Smart Growth Tool Kit, <http://www.mass.gov/envir/smart_
growth_toolkit/pages/glossary.html#sustainabledev> (15 June 2007).

Figure 3. Landscape prior to encroaching development [18]

[18] Image credit - Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 92.

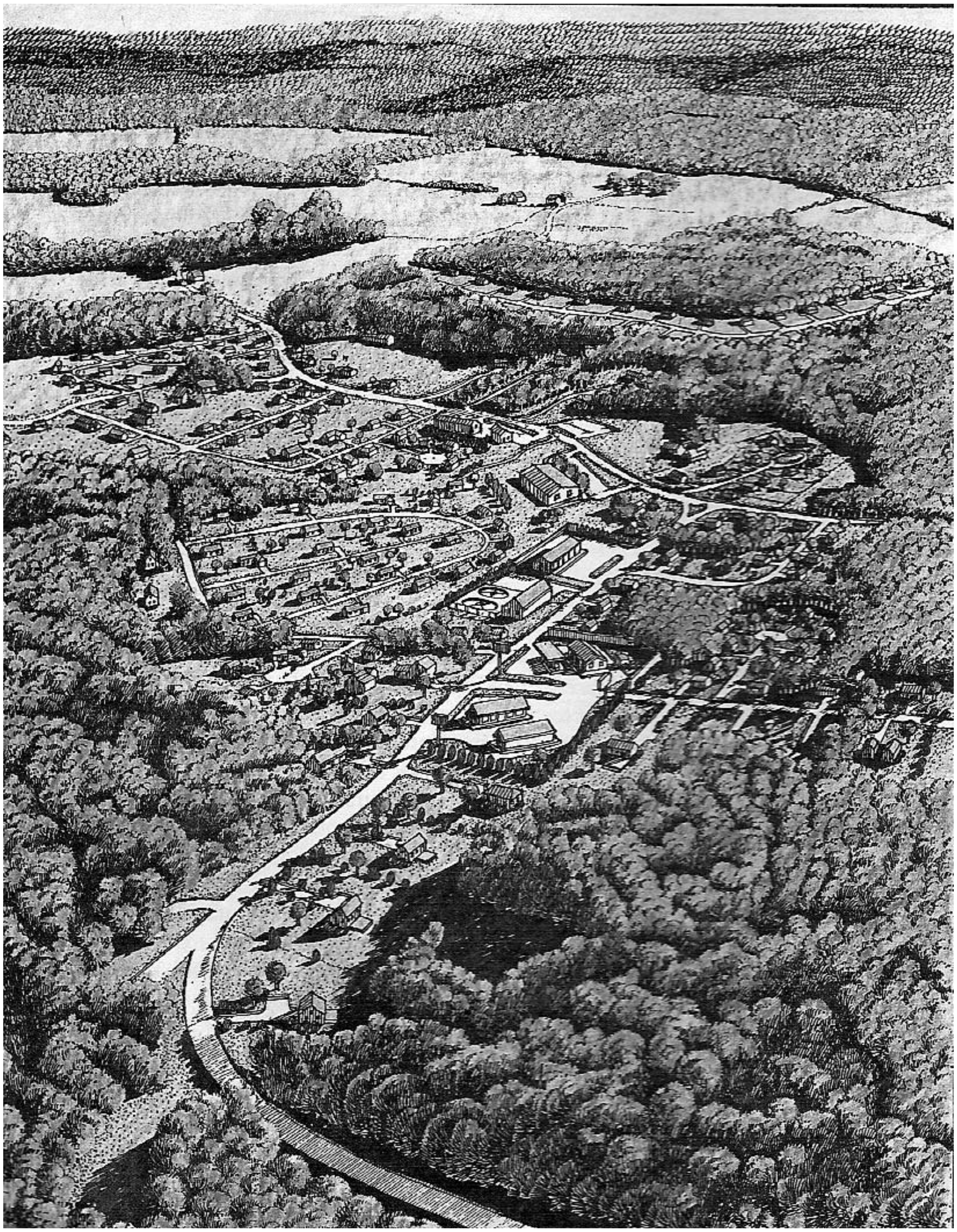

Figure 4. Landscape developed under current zoning regulations [19]

[19] Image credit - Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 94.

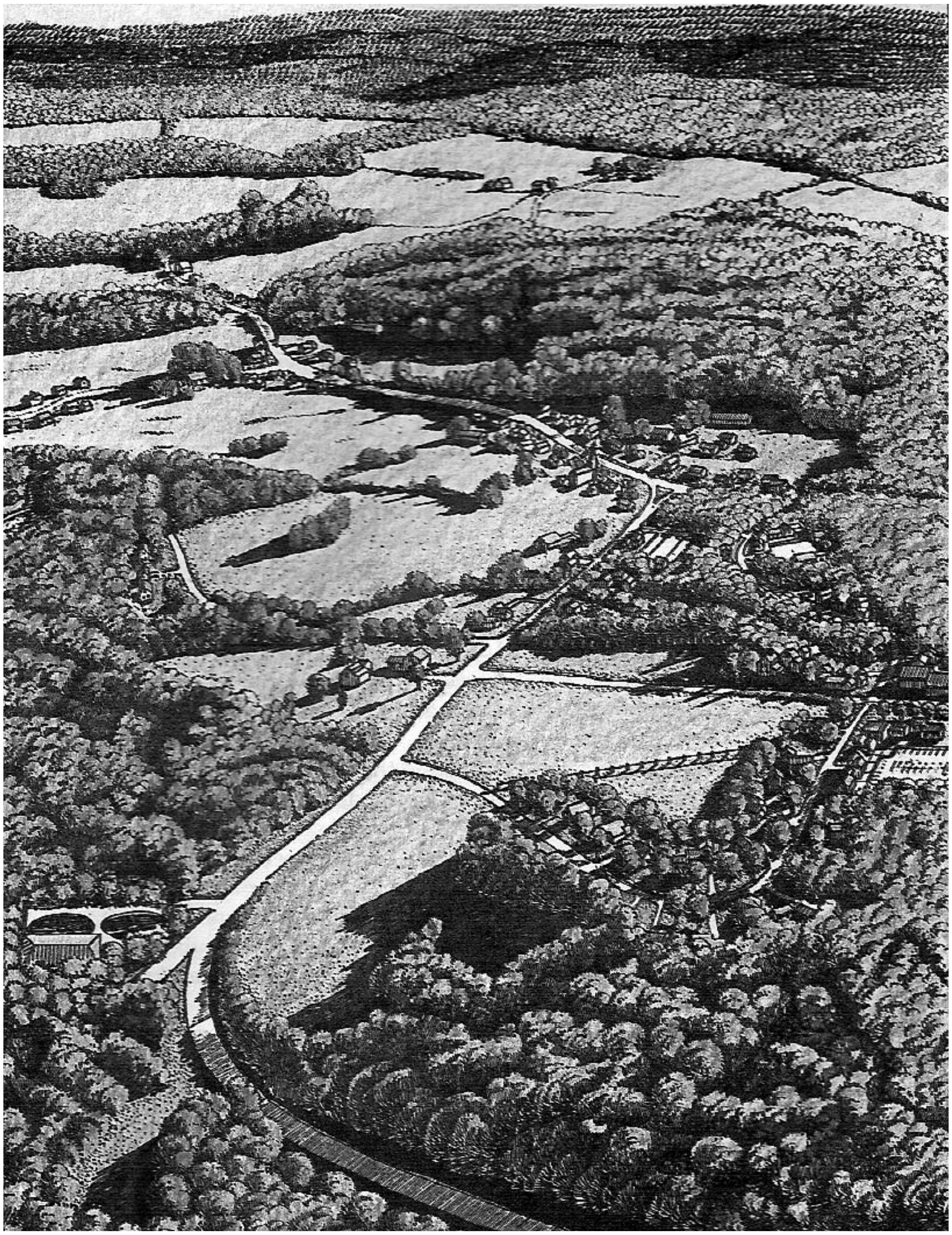

Figure 5. Landscape developed with use of TDRs [20]

Another concept that was developed to overcome the shortcomings of conventional zoning is the Transfer of Development Rights (TDR) program. This promising growth

[20] Image credit - Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 97.

management approach has often been associated with the new craze of "smart growth." TDR helps communities plan their growth in a way that preserves open spaces. The net effect is the "preservation of environmentally important areas with equitable compensation for the owners."[21] Besides the general question of due process and property rights, development raises "the plus of increased taxes for hard pressed municipalities against the minus of possibly making the community a less desirable place to live. The transfer of development rights is a new technique to help solve this fundamental dilemma without violating basic rights and due process as guaranteed under the Constitution. It combines planning with certain aspects of property law."[22] There is no cost to "the tax payers since no acquisition by government is involved, and at the same time, the housing needs of a growing population can continue to be met."[23] This program provides a foundation for growth control while protecting environmental and natural resources. Like all growth management techniques, TDR will not operate efficiently by itself. To be truly effective, TDR should work in conjunction with other growth control techniques such as zoning and agricultural districts.[24]

<u>The Need for Open Space</u>

The argument for the preservation of open space generally has been based on "an aesthetic notion that we must preserve our scenic areas. Certainly this is important, although not so critical as to justify very restrictive zoning regulations. However, we are now discovering that the wise, productive, and beneficial use of open space is essential in maintaining an ecological

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[21] Jerome G. Rose, ed., *The Transfer of Development Rights: A New Technique of Land Use Regulation* (New Brunswick: Center For Urban Policy Research - Rutgers - The State University of New Jersey, 1975), 169.
[22] Ibid., 168.
[23] Ibid., 169.
[24] Massachusetts' Smart Growth Tool Kit, <http://www.mass.gov/envir/smart_growth_toolkit/ pages/glossary.html#sustainabledev> (15 June 2007).

harmony, in improving the quality of air and water and in promoting the psychological well-being of the population."[25] The long-term effects of open space preservation go beyond mere aesthetics. According to a "1988 report of the Governors' Committee on the Environment (NPS, 1990), the governors of five New England states officially recognized open space as a key element in the quality of life that brought rapid economic growth and a multi-billion dollar tourism industry to the region."[26] Through studies of this nature, we can assess the tangible economic benefits associated with quality of life.

Before *After*

Figure 6. Open space devoured by development under conventional zoning regulations [27]

As early as the 1850s, Frederick Law Olmsted realized the economic benefits of preserving open space. Although Olmsted's Central Park example addresses the preservation of green space in an urban area, the principles remain the same for the preservation of rural lands. Olmsted began his study by "tracking the value of real estate adjacent to the park while it was

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[25] Jerome G. Rose, ed., *The Transfer of Development Rights: A New Technique of Land Use Regulation* (New Brunswick: Center For Urban Policy Research - Rutgers - The State University of New Jersey, 1975), 175.
[26] Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 283.
[27] Image credit - Massachusetts' Smart Growth Tool Kit, <http://www.mass.gov/envir/smart_growth_toolkit/pages/glossary.html#sustainabledev> (15 June 2007).

still under construction. He compared the higher tax revenues received from those adjacent properties with the interest the city was then paying for parkland acquisition and improvement. When it was only half complete, Central Park began to generate revenue. Olmsted documented a $55,880 net return in annual tax from the park in 1864 (Fox, 1990)."[28]

Olmsted's analysis of Central Park is still valid today and provides communities a compelling reason to preserve open space. Since one of a municipality's prime sources of "funds is the real estate property tax, and because protected open space increases the value of the surrounding land (while creating little new demand for costly governmental services), it is in the public's best interest to preserve open space."[29]

More recently, similar studies to Olmsted's yield growing evidence to show that open space in and around developments actually increases property values. For example, researchers evaluating "the impacts of a greenbelt on neighborhood property values in Boulder, Colorado, found that the aggregate property value for one neighborhood increased $5.4 million with proximity to the greenbelt. Resulting in $500,000 of additional annual property tax, the increase in property tax alone could recover the initial costs of the $1.5 million purchase price in just three years (Correll, Lillydahl, and Singell, 1978)."[30]

The Politics of Open Space Preservation

Politically, it has been difficult to enact regulations for the preservation of open space. As a result, many communities have adopted "large-lot zoning in an ill-guided effort to preserve open space. The result of those measures has been to increase sprawl and to lose any of the

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[28] Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 284.
[29] Ibid.
[30] Ibid.

economic or amenity advantages of preserved open space."[31] There are, however, two economically viable programs that are commonly used for open space preservation, which are open space acquisition and cluster ordinances.

Open Space Acquisition

Acquisition programs for the preservation of open space range from "land purchases (fee simple acquisition) to the purchase of certain specified rights in the land (through a variety of easements relating to different purposes, such as scenic protection, public foot-path access, and limitation or prohibition of future development)."[32] Purchase of Development Rights (PDR) is another technique for the preservation of farmland. PDRs allow for the permanent preservation of farmland but are extremely expensive and often do not preserve contiguous tracts of land. It is for these reasons that PDRs are often not the mechanism chosen for the preservation of open spaces.

At the local level, acquisition programs are generally thought to be too expensive for their worth. However, even without taking into consideration related benefits of open space, a community can usually acquire open space cheaper than to have it developed. One sample area that highlights this concept is Huntsville, Alabama. The Huntsville Land Trust compared "the public cost of development to the public cost of open space acquisition in its efforts to preserve acreage on Monte Sano, the city's scenic mountainous backdrop. Development of the area would cost $5 million in infrastructure costs and from $2,500 to $3,000 per acre annually for

[31] Ibid., 287.
[32] Ibid.

public services. Acquisition costs, on the other hand, would be $3.3 million, plus $75 per acre in annual maintenance costs for the open space (World Wildlife Fund, 1992)."[33]

This is not to say that all "housing developments should be prevented in a community, or that all vacant land should be bought and retained as open space. While open space acquisition may raise taxes, it will often times result in a smaller tax increase than that required by allowing the land to develop."[34]

Cluster Ordinances

Cluster development and TDR are not the same technique; however, they both "involve the shifting of development rights, but cluster development involves the reorganization of development yield *on the same property,* whereas TDR involves the transfer of rights *from one property to another*."[35] When considering cluster ordinances, many communities find it difficult to reach consensus on the determination of appropriate lot-size reductions and whether or not to offer density incentives.

Although size relationships will change with "local market conditions, there will be a threshold in every community where clustering will produce an equal or greater return to the developer than a conventional subdivision."[36] The nature of clustering lowers development costs as the length of roads has been shortened, therefore necessitating fewer utilities.

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[33] Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 287.
[34] Ibid.
[35] CRCOG Best Practices Manuel, "Transfer of Development Rights Fact Sheet," <http://www.crcog.org/publications/CommDevDocs/TCSP/Ch03_FactSheet_TDR.pdf> (15 June 2007).
[36] Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 287.

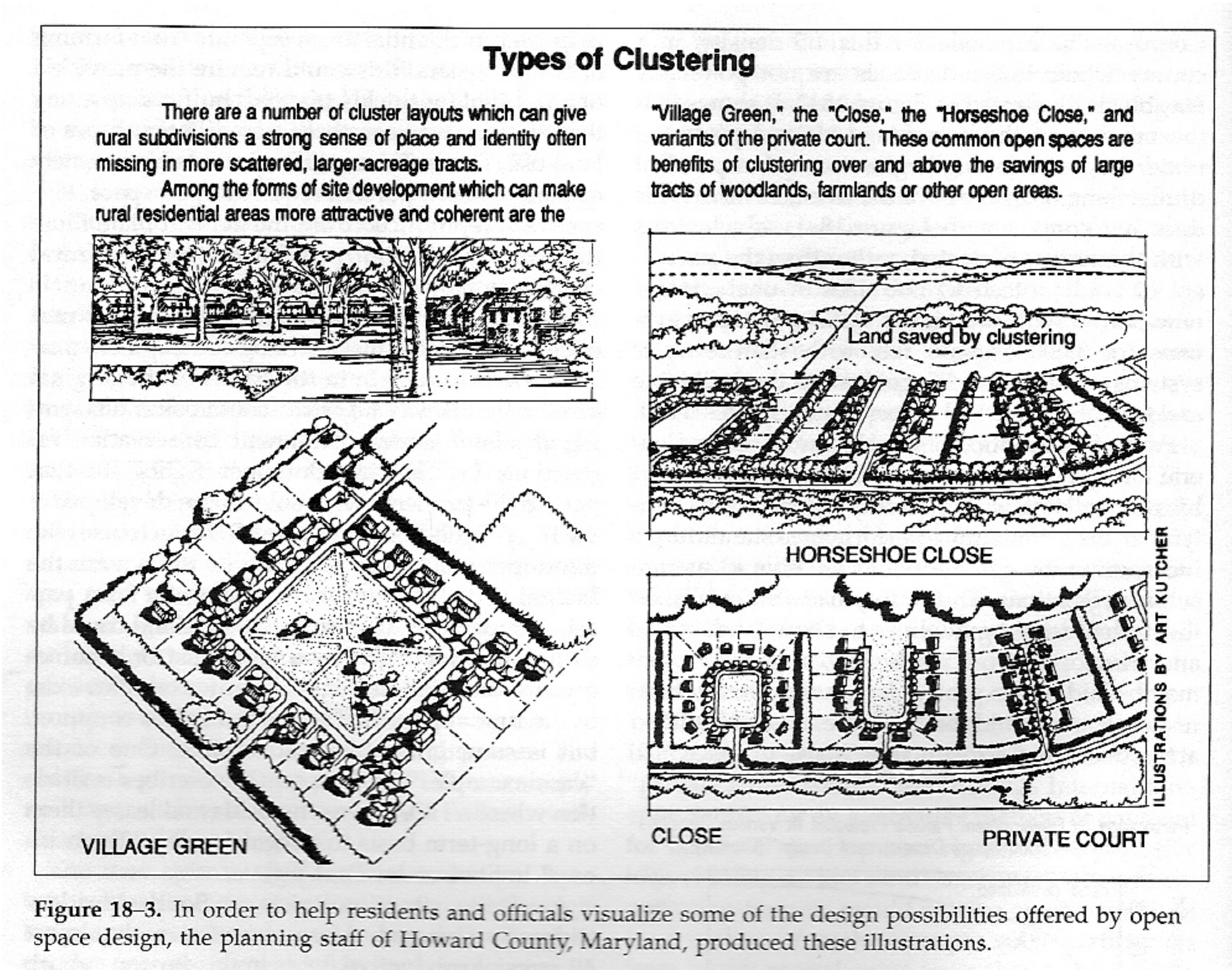

Figure 7. Forms of Clustering [37]

[37] Image credit - Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 302.

CHAPTER 3

TRANSFER OF DEVELOPMENT RIGHTS (TDR)

Who Coined TDR?

Since 1977, state and local governmental entities have "implemented transfer of development rights (TDR) and purchase of development rights or purchase of agricultural conservation easements (PDR/PACE) programs to permanently preserve farmland throughout the United States (AFT 2001a; AFT 2001b; AFT 2001c)."[38] One of the first, "if not *the* first, to suggest TDR as a technique to preserve open spaces was Gerald D. Lloyd. Perhaps because it was too new an idea and too different from traditional property ownership and development laws, Lloyd's suggestion was not seriously pursued or developed into a workable form."[39]

In 1968, seven years after Lloyd introduced the concept of TDR, New York City adopted the first TDR program in the United States as part of its Landmarks Preservation Law. This law prevented alterations or demolition of any historic landmark. It also allowed the landmark owners the option to transfer their development rights of the landmark to adjacent suitable properties. One example of this is the transfer of air rights over a historic landmark. Air rights could be transferred from "districts where strict height limitations are set (similar to open space areas that are to be kept open) to districts where new higher height limitations are permitted."[40] The developers' incentives to purchase these air rights were extremely high as property values in

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[38] Charles B. Moss and Andrew Schmitz, *Government Policy and Farmland Markets: The Maintenance of Farmer Wealth* (Iowa: Iowa State Press, 2003), 285.
[39] Jerome G. Rose, ed., *The Transfer of Development Rights: A New Technique of Land Use Regulation* (New Brunswick: Center For Urban Policy Research - Rutgers - The State University of New Jersey, 1975), 169.
[40] Ibid.

New York had sky-rocketed. The city of Chicago took a similar but "more comprehensive TDR approach to preserve historic buildings as proposed by Professor John J. Costonis of the University of Illinois Law School."[41]

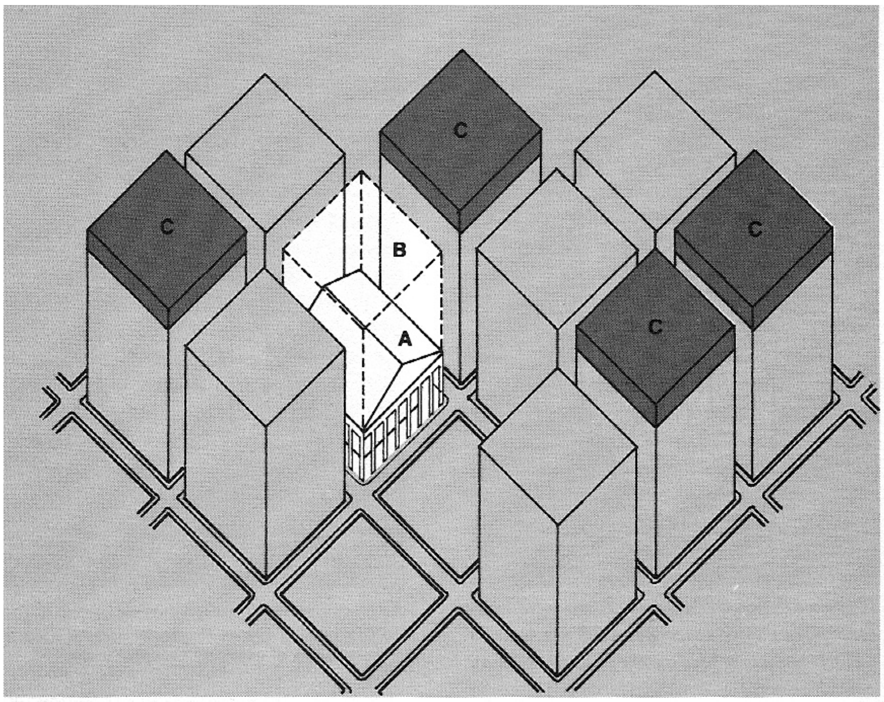


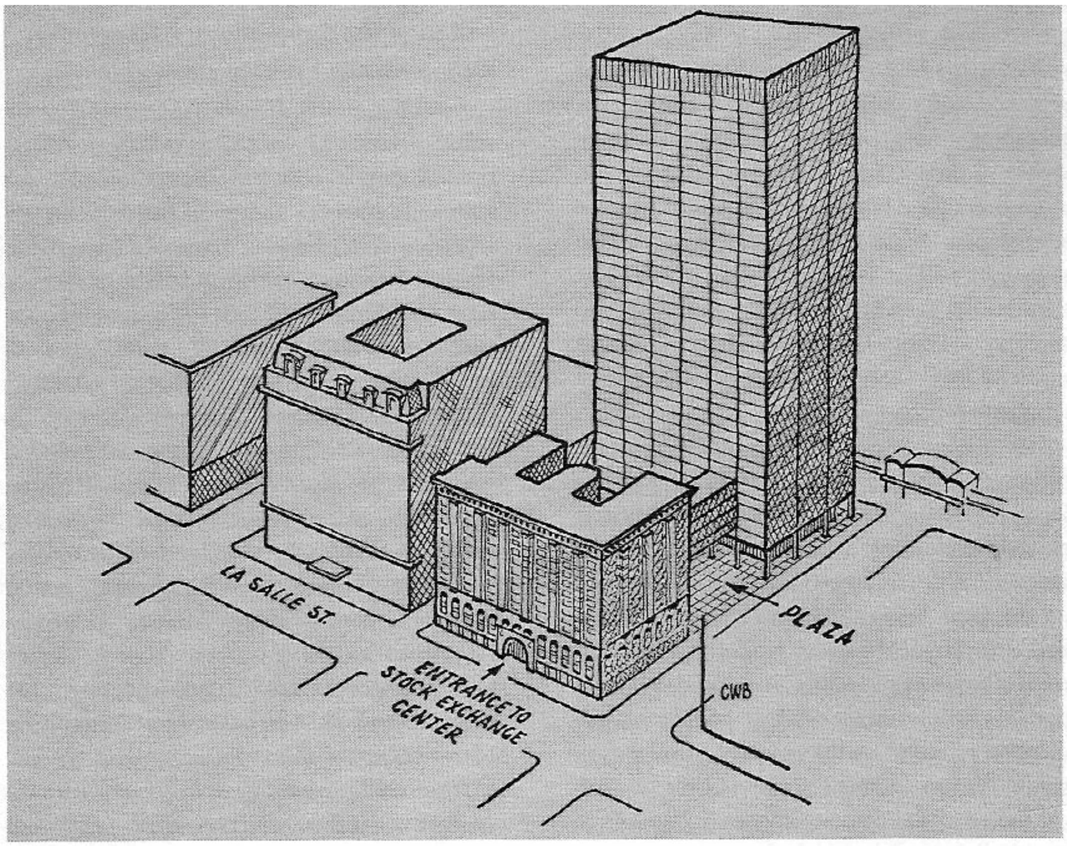
FIGURE 2. Development Rights Transfer
The landmark building (A) utilizes only a fraction of the development rights of the site, the remainder of which (B) are transferred to various other sites within a transfer district and appear as additional bulk (C) on neighboring buildings.

Figure 8. Transfer of air rights to surrounding buildings in an urban area [42]

The first state legislation to "create districts within which development rights would be transferred was introduced by Senator William Goodman in the Maryland Senate in January

[41] Ibid.
[42] Image credit - John J. Costonis, *Space Adrift: Landmark Preservation and the Marketplace* (Chicago: University of Illinois Press, 1974), 32.

1972."[43] The development rights must be "purchased by builders, since *no* building would be permitted unless sufficient rights had been obtained. This in turn would guarantee a specified amount of open space. The value of the development rights would be determined by market conditions, but local officials would set the open space requirement."[44]



Courtesy Charles William Brubaker

DEVELOPMENT RIGHTS TRANSFERS AND LANDMARK PRESERVATION

When the threat to Chicago's Old Stock Exchange building first became apparent in 1968-69, the Chicago Chapter Foundation of the American Institute of Architects urged that the building be protected through the transfer of its unused development rights to the lot at its rear for use in a modern office tower. Pursuant to this proposal, the tower is pictured as exceeding prevailing density limits by the amount of unused floor area at the Stock Exchange site.

Figure 9. The Chicago Plan - Transfer of air rights in an urban area [45]

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[43] Jerome G. Rose, ed., *The Transfer of Development Rights: A New Technique of Land Use Regulation* (New Brunswick: Center For Urban Policy Research - Rutgers - The State University of New Jersey, 1975), 170.
[44] Ibid.
[45] Image credit - John J. Costonis, *Space Adrift: Landmark Preservation and the Marketplace* (Chicago: University of Illinois Press, 1974), 33.

What is TDR?

The Transfer of Development Rights program, commonly known as TDR, is a not-for-profit organization designated by the IRS as a 501(c)(3). TDR has traditionally been associated with the preservation of historic landmarks, farmlands, and open spaces. Many communities, however, have been creative with the use of TDRs. For example, Carroll County, Maryland uses TDRs to protect underground stone deposits that are vital its economy. In the context of farmland protection, "TDR is used to shift development from agricultural areas to designated growth zones closer to municipal services."[46]

The TDR program is based on the concept that property owners have "a bundle of different rights, including the right to use land, lease, sell and bequeath it, borrow money using it as security, construct buildings on it and mine it, subject to reasonable local land use regulations. Some or all of these rights can be transferred or sold to another person."[47] When a landowner sells property, all the rights generally are transferred to the buyer. TDR programs allow landowners to separate and sell the right to develop land from their other property rights.

TDR can be thought of as "a way of encouraging the reduction or elimination of development in areas that a community wants to save and the increase of development in areas that a community wants to grow."[48] Traditionally, the areas that a community wants to preserve are called the "sending areas," while the areas that are to be developed are called the "receiving

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[46] American Farmland Trust – Farmland Information Center, "Fact Sheet: Transfer of Development Rights," <http://www.farmlandinfo.org/documents/27746/FS_TDR_1-01.pdf> (15 June 2007).
[47] Ibid.
[48] Rick Pruetz, "Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges," <http://<www.beyondtakingsandgivings.com/tdr.htm> (15 June 2007).

areas.” TDR programs are generally established by local zoning ordinances, which designate both “sending” and “receiving” areas.

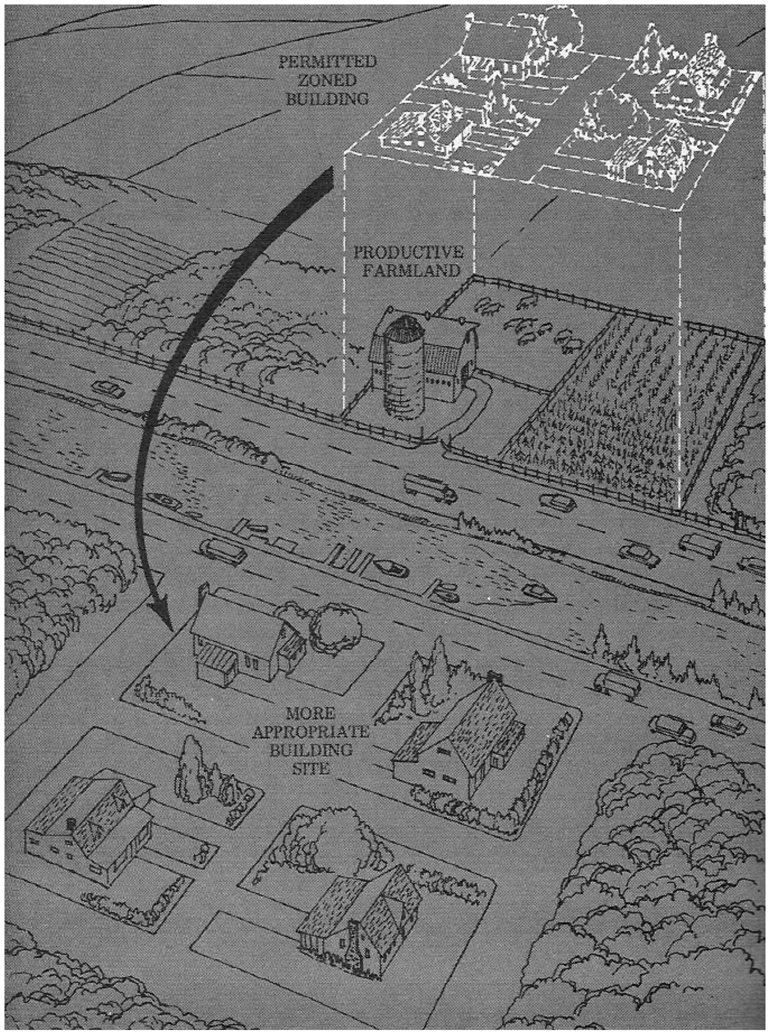

Figure 10. Development rights transferred from sending area to receiving area [49]

[49] Image credit - Peter Wolf, *Land in America: Its Value, Use, and Control* (New York: Pantheon Books, 1981), 176.

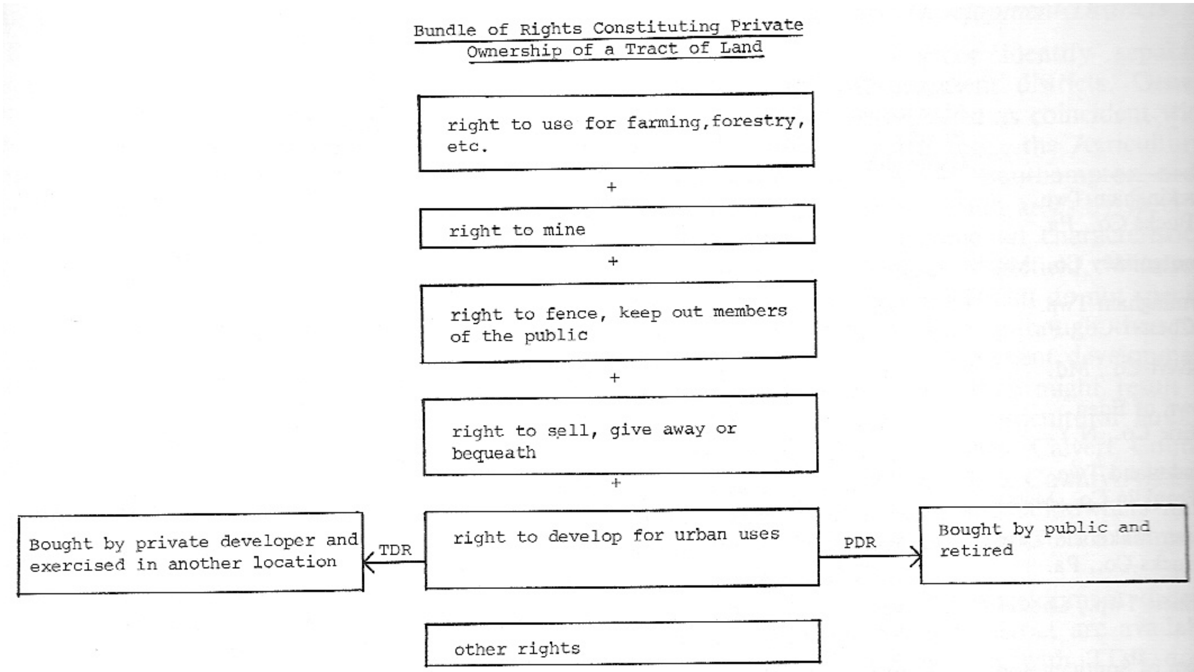

Figure 11. Flow chart of a landowner's bundle of rights [50]

Choosing a Sending Area

The sending areas can be natural areas, open spaces, agricultural lands, historic properties, or just any property that the community feels is important. The most suitable sending area is where large tracts of land remain in farm use. The more fragmented the agricultural land base, the more difficult it is to find a feasible sending area. The sending area properties must be "rezoned to a form of dual zoning that gives the property owners a choice. Given this choice, the owners can choose not to participate in the TDR program and instead use and develop their land as allowed under the baseline option."[51] Alternatively, the property owners can voluntarily elect

[50] Image credit - Robert E. Coughlin, John C. Keene, J. Dixon Esseks, William Toner, and Lisa Rosenberger, *The Protection of Farmland: A Reference Guidebook for State and Local Governments* (Amherst: Regional Science Research Institute, 1981), 175.
[51] Rick Pruetz, "Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges," <http://<www.beyondtakingsandgivings.com/tdr.htm> (15 June 2007).

to use the TDR option. Under the TDR option, the sending site owner "enters into a deed restriction that spells out the amount of future development and the types of land use activities that can occur on the property. When that deed-restriction is recorded, the sending site owner is able to sell a commodity created by the community's TDR ordinance called a transferable development right or a TDR."[52] Traditionally, the TDR ordinance specifies how many TDRs can be sold from one sending area after the deed-restrictions are filed. Pricing per TDR varies from case to case; however, if enough TDR sales are permitted, the proceeds from these sales can be an estimate of the development value of the sending area.[53]

Choosing a Receiving Area

Receiving areas are places where a community wants to see more growth. Jurisdictions must be able to "identify receiving areas that can accommodate the development to be transferred out of the farming area. The receiving areas must have the physical capacity to absorb new units."[54] Usually, receiving areas are closely located to a highly developed area causing said area to in turn have an even higher density. Residents of these areas must be willing to accept higher density development. Often, residents of a potential receiving area must be persuaded that "the benefits of protecting farmland outweigh the costs of living in a more compact neighborhood."[55]

The receiving areas, just as the sending area properties, have to be rezoned for dual zoning, which allows developers the freedom to choose whether or not they take part in the TDR program. If developers elect to not take part in the TDR program, they are limited to "a lower,

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52 Ibid.

53 Ibid.

54 American Farmland Trust – Farmland Information Center, "Fact Sheet: Transfer of Development Rights," <http://www.farmlandinfo.org/documents/27746/FS_TDR_1-01.pdf>(15 June 2007).

55 Ibid.

less-profitable level of development. Alternatively, under the TDR option, developers must buy and retire a specified number of TDRs in order to achieve a higher, more profitable level of development."[56] The price of TDRs is usually negotiable and discussed between any interested buyer and seller; however, the price can be influenced by the number of TDRs that the sending area has to sell.

TDRs a Success?

TDR programs have been both successful and unsuccessful. As long as TDRs remain affordable, developers will continue to buy them because they are able to attain higher profits through the extra development permitted under the TDR option, even with the additional price of the TDR. When TDR programs become unaffordable, developers will not buy them because "TDR costs will make the TDR option less profitable than the baseline option. Similarly, if the TDR ordinance does not allocate enough TDRs to sending areas, the property owners may decline to sell their TDRs. If a TDR program fails to generate transfers, there may be calls to remove it from a community's zoning code."[57]

On the other side of this process, there are some communities that are so committed to the preservation of historic landmarks, farmlands, and open spaces that they have gone as far as to willingly tax themselves in order to generate ongoing funds for easement or land purchases. These acts, while honorable, *are* reinforced with monetary incentives such as receiving a tax deduction. TDR programs, in general, are of a more regulated form than conservation easements and are distinct from purchase of agricultural conservation easements (PACE) programs because

[56] Rick Pruetz, "Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges," <http://<www.beyondtakingsandgivings.com/tdr.htm> (15 June 2007).
[57] Rick Pruetz, "Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges," <http://<www.beyondtakingsandgivings.com/tdr.htm> (15 June 2007).

they involve the private market. The TDR program effectively offers a solution to communities who lack enthusiastic public support by not relying upon taxpayer dollars or on grants. Before a community chooses TDR as a rural preservation tool, the following framework must be in place.

- Statewide enabling legislation that recognizes the benefits of TDR
- The adoption of a local TDR ordinance
- A competitive market for the sale of TDRs

<u>Who Uses TDRs?</u>

TDRs are predominately used by "counties, towns, and townships. In 1981, the National Agricultural Land Study reported that twelve jurisdictions had enacted TDR programs to protect farmland and open space, but very few of these programs had been implemented."[58] By the 1980s and 90s, many TDR ordinances had been adopted by local governments. In the spring of 2000, a survey identified fifty jurisdictions with TDR ordinances. Despite the widespread adoption of TDRs, "only fifteen programs have protected more than 100 acres of farmland and only eight programs have protected more than 1,000 acres of farmland. Twenty-two programs, or 44 percent, have not protected *any* agricultural land. Since the early 1980s, Montgomery County, Maryland, has protected 40,583 acres using TDRs, or 60 percent of the national total (67,707 acres)."[59]

In 2003, Rick Pruetz, author of *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer*

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58 American Farmland Trust – Farmland Information Center, "Fact Sheet: Transfer of Development Rights," <http://www.farmlandinfo.org/documents/27746/FS_TDR_1-01.pdf> (15 June 2007).
59 Ibid.

Charges, identified 134 communities nationwide with TDR programs. He gathered this information by reviewing planning publications and through a survey that he mailed to approximately 3,500 communities across the United States. While this collection of data is tremendous, there are undoubtedly many TDR programs that were not recorded in his book. He found that at least thirty-one states have "communities with TDR programs. However, the communities with TDR programs are not evenly distributed throughout those states."[60] Pruetz condensed his research findings on TDRs into several tables, which have been reprinted below.

Table 2. TDR Programs [61]

WHAT CAN TDR BE USED TO PRESERVE OR CREATE?

Type of Program	Jurisdiction/State
Environmental	Bernards, NJ Brunswick, ME Collier County, FL Everett, WA Greenville County, SC Largo, FL Portland, OR * St. Petersburg, FL San Bernardino County, CA San Marcos, TX Williston, VT
Environmental/Farmland	Berthoud, CO Blacksburg, VA Blue Earth County, MN Cape Elizabeth, ME Chanceford Twn., PA Douglas County, NV Eden, NY Fremont County, ID Groton, MA Hillsborough County, FL Hillsborough Twn., NJ Jericho Twn., VT King County, WA Larimer County, CO Lee, NH Lower Chanceford Twn., PA Mesa County, CO New Jersey Pinelands, NJ Palm Beach County, FL Payette County, ID Pittsford, NY Queen Anne's County, MD Redmond, WA South Burlington, VT Springfield Twn., PA Summit, WI Sunderland Twn., MA Talbot County, MD Townsend, MA Waukesha County, WI
Environmental/Historic	Charlotte County, FL
Environ./ Infrastructure	Malibu Coastal Zone, CA Summit County, CO
Environ./ Open Space	Douglas County, CO
Environmental/Rural	Alachua County, FL Island County, WA* Teton County, WY
Environment: Coastal	Brevard County, FL Clearwater, FL Hollywood, FL Oxnard, CA

* Indicates a community with more than one TDR program

60 Rick Pruetz, *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges* (Marina Del Rey: Arje Press, 2003), 49.

61 Reprinted, with permission of author, from *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, shown as Table III-1, 44-46.

Type of Program	Jurisdiction/State
Environ.: Groundwater	Long Island Pine Barrens, NY Southampton Twn., NY
Environment: Hillsides	Agoura Hills, CA Belmont, CA Brisbane, CA Claremont, CA Mapleton, UT Milpitas, CA Moraga, CA Morgan Hill, CA Pacifica, CA Pismo Beach, CA Scottsdale, AZ *
Environment: Minerals	Carroll County, MD
Env: Modern Subdivision	Sarasota County, FL
Environment: Scenic	Monterey County, CA Santa Fe County, NM
Environ.: Water Quality	Falmouth, MA Lake County, FL South Lake Tahoe, CA Tahoe Regional P.A., CA/NV Whatcom County, WA
Environment: Wetlands	Dade County, FL Indian River County, FL Lee County, FL Monroe County, FL Smithtown, NY West Valley City, UT
Env.: Wildlife Habitat	San Luis Obispo County, CA*
Farmland	Buckingham Twn., PA Calvert County, MD Caroline County, MD Charles County, MD Chesterfield Twn., NJ East Nantmeal Twn., PA Harford County, MD Howard County, MD Hopewell Twn., PA Island County, WA* London Grove Twn., PA Manheim Twn., PA Marin County, CA Montgomery County, MD Peach Bottom, PA St. Mary's County, MD San Mateo County, CA Shrewsbury Twn., PA Thurston County, WA Warrington Twn., PA Warwick, PA Washington Twn., PA Westchester-Clark County, KY
Flexibility	Oakland, CA Windsor, CT
Historic	Atlanta, GA Delray Beach, FL

* Indicates a community with more than one TDR program

Type of Program	Jurisdiction/State
Historic (continued)	New Orleans, LA New York, NY* San Diego, CA San Francisco, CA Scottsdale, AZ *
Historic/Cultural	New York, NY* Pittsburgh, PA
Historic: Pres. & Rehab	Dallas, TX Denver, CO Los Angeles, CA * West Hollywood, CA
Housing	Irvine, CA *
Infrastructure Capacity	Burbank, CA Cupertino, CA El Segundo, CA Irvine, CA *
Landfill Buffer	Northbrook, IL
Open Space	Northampton, MA Perinton, NY
Recreation	West Windsor, NJ
Redeveloped Areas	Traverse City, MI
Revitalized Downtowns	Los Angeles, CA * Portland, OR * Seattle, WA Washington, D.C.
Rural Character	Boulder County, CO Pitkin County/Aspen, CO
Rural/Farmland	Birmingham, PA Gallatin County, MT Lumberton Twn., NJ San Luis Obispo County, CA*
Urban Design	Los Angeles, CA * Pasadena, CA Santa Barbara, CA

* Indicates a community with more than one TDR program

Table 3. TDR Programs by State [62]

TDR PROGRAMS BY LOCATION

State	Jurisdiction	Type of Program
Arizona	Scottsdale	Environment: Hillsides; Historic
California	Agoura Hills	Environment: Hillsides
	Belmont	Environment: Hillsides
	Brisbane	Environment: Hillsides
	Burbank	Infrastructure Capacity
	Claremont	Environment: Hillsides
	Cupertino	Infrastructure Capacity
	El Segundo	Infrastructure Capacity
	Irvine	Housing; Infrastructure Capacity
	Los Angeles	Historic; Revitalized Downtowns; Urban Design
	Malibu Coastal Zone	Environmental/Infrastructure
	Marin County	Farmland
	Milpitas	Environment: Hillsides
	Monterey County	Environment: Scenic
	Moraga	Environment: Hillsides
	Morgan Hill	Environment: Hillsides
	Oakland	Flexibility
	Oxnard	Environment: Coastal
	Pacifica	Environment: Hillsides
	Pasadena	Urban Design
	Pismo Beach	Environment: Hillsides
	San Bernardino County	Environmental
	San Diego	Historic
	San Francisco	Historic
	San Luis Obispo County	Environment: Habitat; Rural/Farmland
	San Mateo	Farmland
	Santa Barbara	Urban Design
	South Lake Tahoe	Environment: Water Quality
	Tahoe Reg. Pln.Agcy.	Environment: Water Quality
	West Hollywood	Historic: Preservation and Rehab
Colorado	Berthoud	Environmental/Farmland
	Boulder County	Rural
	Denver	Historic: Preservation and Rehab
	Douglas County	Environmental/Open Space
	Larimer County	Environmental/Farmland
	Mesa County	Environmental/Farmland
	Pitkin County/Aspen	Rural
	Summit County	Environment: Infrastructure
Connecticu	Windsor	Flexibility
D. C.	Washington, D.C.	Revitalized Downtowns
Florida	Alachua County	Environmental/Rural
	Brevard County	Environment: Coastal
	Charlotte County	Environmental/Historic
	Clearwater	Environment: Coastal
	Collier County	Environmental

[62] Reprinted, with permission of author, from *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, shown as Table III-2, 47-49.

State	Jurisdiction	Type of Program
(Florida)	Dade County	Environment: Wetlands
	Delray Beach	Historic
	Hillsborough Co.	Environmental/Farmland
	Hollywood	Environment: Coastal
	Indian River County	Environment: Wetlands
	Lake County	Environment: Water Quality
	Largo	Environmental
	Lee County	Environment: Wetlands
	Monroe County	Environment: Wetlands
	Palm Beach County	Environmental/Farmland
	St. Petersburg	Environmental
	Sarasota County	Environment: Modern Subdivisions
Georgia	Atlanta	Historic
Idaho	Fremont County	Environmental/Farmland
	Payette County	Environmental/Farmland
Illinois	Northbrook	Landfill Buffer
Kentucky	Westchester-Clark Co.	Farmland
Louisiana	New Orleans	Historic
Maine	Brunswick	Environmental
	Cape Elizabeth	Environmental/Farmland
Maryland	Calvert County	Farmland
	Caroline County	Farmland
	Carroll County	Environment: Minerals
	Charles County	Farmland
	Harford County	Farmland
	Howard County	Farmland
	Montgomery County	Farmland
	St. Mary's County	Farmland
	Talbot County	Environmental/Farmland
	Queen Anne's County	Environmental/Farmland
Massachusetts	Falmouth	Environment: Water Quality
	Groton	Environmental/Farmland
	Northampton	Open Space
	Sunderland Township	Environmental/Farmland
	Townsend Township	Environmental/Farmland
Michigan	Traverse City	Redeveloped Areas
Minnesota	Blue Earth County	Environmental/Farmland
Montana	Gallatin County	Rural/Farmland
New Hampshire	Lee Township	Environmental/Farmland
Nevada	Douglas County	Environmental/Farmland
New Jersey	Bernards Township	Environmental
	Chesterfield Twn.	Farmland
	Hillsborough Twn.	Environmental/Farmland
	Lumberton Twn.	Rural/Farmland
	N.J. Pinelands	Environmental/Farmland
	West Windsor	Recreation
New Mexico	Santa Fe County	Environment: Scenic
New York	Eden	Environmental/Farmland
	Long Island	
	Pine Barrens	Environment: Groundwater

State	Jurisdiction	Type of Program
{New York)	New York City	Historic; Historic/Cultural
	Perinton	Open Space
	Pittsford	Environmental/Farmland
	Smithtown	Environment: Wetlands
	Southampton Township	Environment: Groundwater
Oregon	Portland	Environmental; Revitalized Downtowns
Pennsylvania	Birmingham Township	Rural/Farmland
	Buckingham Township	Farmland
	Chanceford Township	Environmental/Farmland
	East Nantmeal Township	Farmland
	Hopewell Township	Farmland
	London Grove Township	Farmland
	Lower Chanceford Twn.	Environmental/Farmland
	Manheim Township	Farmland
	Peach Bottom Township	Farmland
	Pittsburgh	Historic/Cultural
	Shrewsbury Township	Farmland
	Springfield Township	Environmental/Farmland
	Warrington Township	Farmland
	Warwick Township	Farmland
	Washington Township	Farmland
South Carolina	Greenville County	Environmental
Texas	Dallas	Historic: Preservation and Rehab
	San Marcos	Environmental
Utah	Mapleton	Environment: Hillsides
	West Valley City	Environment: Wetlands
Vermont	Jericho Township	Environmental/Farmland
	South Burlington	Environmental/Farmland
	Williston	Environmental
Virginia	Blacksburg	Environmental/Farmland
Washington	Everett	Environmental
	Island County	Environmental/Rural; Farmland
	King County	Environmental/Farmland
	Redmond	Environmental/Farmland
	Seattle	Revitalized Downtowns
	Thurston County	Farmland
	Whatcom County	Environment: Water Quality
Wisconsin	Summit Township	Environment/Farmland
	Waukesha County	Environment/Farmland
Wyoming	Teton County	Environmental/Open Space

Table 4. States Ranked by TDR Programs [63]

States Ranked By
Number Of Communities With TDR Programs

State		Number Of TDR Programs
1	California	29
2	Florida	17
3	Pennsylvania	15
4	Maryland	10
5	Colorado	8
6	New York	7
6	Washington	7
7	New Jersey	6
8	Massachusetts	5
9	Vermont	3
10	Idaho	2
10	Maine	2
10	Texas	2
10	Utah	2
10	Wisconsin	2
11	Arizona	1
11	Connecticut	1
11	District of Columbia	1
11	Georgia	1
11	Illinois	1
11	Kentucky	1
11	Louisiana	1
11	Michigan	1
11	Minnesota	1
11	Montana	1
11	Nevada	1
11	New Hampshire	1
11	New Mexico	1
11	Oregon	1
11	South Carolina	1
11	Virginia	1
11	Wyoming	1
Total		**134**

[63] Reprinted, with permission of author, from *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, shown as Table III-3, 51.

Table 5. TDR Programs listed by Region [64]

Communities With TDR Programs By Region

Region	States	Communities With TDR
Mid Atlantic	Pennsylvania (15)	
	Maryland (10)	
	New York (7)	
	New Jersey (6)	
	Connecticut (1)	
	Washington DC (1)	40
Pacific West	California (29)	
	Washington (7)	
	Oregon (1)	37
South	Florida (17)	
	Georgia (1)	
	Louisiana (1)	
	South Carolina (1)	
	Virginia (1)	21
Mountain West	Colorado (8)	
	Idaho (2)	
	Utah (2)	
	Arizona (1)	
	Montana (1)	
	Nevada (1)	
	New Mexico (1)	
	Wyoming (1)	17
New England	Massachusetts (5)	
	Vermont (3)	
	Maine (2)	
	New Hampshire (1)	11
Plains/Midwest	Texas (2)	
	Wisconsin (2)	
	Illinois (1)	
	Kentucky (1)	
	Michigan (1)	
	Minnesota (1)	8
Total	**32**	**134**

Advantages and Disadvantages of TDRs

While the success of places like Montgomery County, Maryland is undeniable, we must address *both* the advantages and disadvantages of the TDR program. One of the advantages is

[64] Reprinted, with permission of author, from *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, shown as Table III-4, 52.

that the sending site owner is able to make a total profit off of the sheer potential of development that could have taken place on his/her property, while still profiting from their farming. The developers in the receiving areas also have an advantage. They are able to increase their profit through “the extra development allowed under the TDR option despite the additional cost of the TDRs.”[65] For some communities, another advantage of the program is that it does not rely upon tax dollars but rather the private sector so that areas without a strong public support can still preserve natural areas, farmland, and historic landmarks by using market incentives.

Some disadvantages of the program are most felt by the people who live close to receiving areas. This is because residents who live close to where the additional new homes are to be built are likely to object to this added density in their neighborhood. TDR programs can also be considered difficult to understand for many people and from a technical standpoint “can be difficult to establish because they require a reasonable match of supply to demand in what is by definition a very limited market to establish a legitimate price and careful rezoning to create the necessary financial incentives.”[66]

TDRs vs. Conservation Easements

While there have been many efforts to save rural America’s historic resources, one recent movement in our law system could make all of the difference. Many communities often times confuse conservation easements with transferable development rights, as they both preserve agricultural farmlands. A conservation easement is a “way for a landowner to permanently protect the environmental value of his or her land while continuing to own it. It is a legal

[65] Rick Pruetz, “Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges,” <http://<www.beyondtakingsandgivings.com/tdr.htm> (15 June 2007).
[66] Deborah Bowers & The Patuxent Tidewater Land Trust, “Transferable Development Rights,” 2003, <http://www.patuxent tidewater.org/TDRs.html> (15 June 2007).

agreement between a landowner and a government agency or nonprofit organization that permanently limits development of the land. Even if an owner sells the land or passes it to his or her heirs, the conservation easement remains in effect. By donating a conservation easement, a landowner may qualify for a variety of tax incentives. These include reduced property and estate taxes, as well as having the easement classified as a charitable gift for income tax purposes."[67] The recent tax law signed by President George W. Bush Jr. gives rural landowners more incentives to place conservation easements on their property. These easements are defined as "donations of all of a portion of a landowner's development rights to protect specific natural, scenic, or historic resources such as working farms or wildlife habitat."[68]

This tax law is only effective for donations given in 2006 and 2007 unless it is later made permanent. While the enhanced tax benefits are in effect, it is assumed that many rural property owners will take advantage of this program. Property owners who give their development rights away in a conservation easement now can deduct "up to 50 percent of their adjusted gross income in any year instead of 30 percent and if most of their income is from farming, ranching or forestry, they can deduct all of their income."[69] Another perk is that property owners can now carry over their deductions for their contribution for up to fifteen years, whereas under the old law the limit was five years.

Once property owners place a conservation easement on their land, they are still able to manage and farm their land. The easement simply is a donation of the property owner's

[67] Andy Porter, "Tax law holds promise for rural lands." *Walla Walla Union Bulletin*, 14 September 2006, <http://www.unionbulletin.com/articles/2006/09/14/local_news/local04.txt> (15 June 2007).
[68] Ibid.
[69] Ibid.

development rights so as to protect the land from being developed. Property owners who participate in this program are still required to pay local taxes on their land.

In the past, conservation easements have not been as widely used by farmers as transferable development rights. In the absence of documentation, one can speculate that this is because under the TDR program the landowner gets *paid* for his/her development rights along with being able to maintain and farm his/her land. This new law will make conservation easements a stronger competitor, as it gives enhanced tax incentives to the property owner for his/her donation of development rights to the land while still being able to manage and farm the land.

Legal Issues of TDRs

Under the Fifth Amendment of the Constitution, "made applicable to the states under the Fourteenth Amendment, the government is prohibited from taking private property for public use without 'just compensation,' and from depriving individuals of their private property without 'due process of law.'"[70] TDR, in many instances, avoids the "takings issue" as the sending site owners have the choice whether or not to participate in the TDR program. If the landowners do not wish to sell their development rights, then they are only allowed to develop their property under the current zoning regulations. For more information on "takings" related to TDRs, see Appendix B, which contains a summary of State Takings Laws that were available as of July 2000.

There is little question that the *Penn Central*[71] case was a "watershed decision not only in takings jurisprudence but also in establishing the legal context for using TDR to abate impacts

[70] Rick Pruetz, *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges* (Marina Del Rey: Arje Press, 2003), 101.
[71] *Penn Central Transportation Co. v. City of New York*, 438 U. S. 104 (1978).

from potentially invasive regulations."[72] In this particular legal case, the Landmarks Preservation Commission denied "permission for the Penn Central Transportation Company to build an office tower on top of Grand Central Station, a designated landmark. Penn Central sued the City, claiming that the Landmarks Preservation Law had taken its property. The U.S. Supreme Court ultimately heard this case and decided that he City had not taken Penn Central's property. Furthermore the Court gave TDR some legitimacy by adding that if a taking *had* occurred, the TDRs 'undoubtedly mitigate whatever financial burdens the law has imposed on appellants, and, for that reason, are to be taken into account in considering the impact of the regulation.'"[73]

[72] Rick Pruetz, *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges* (Marina Del Rey: Arje Press, 2003), 104.
[73] Ibid., 34-35.

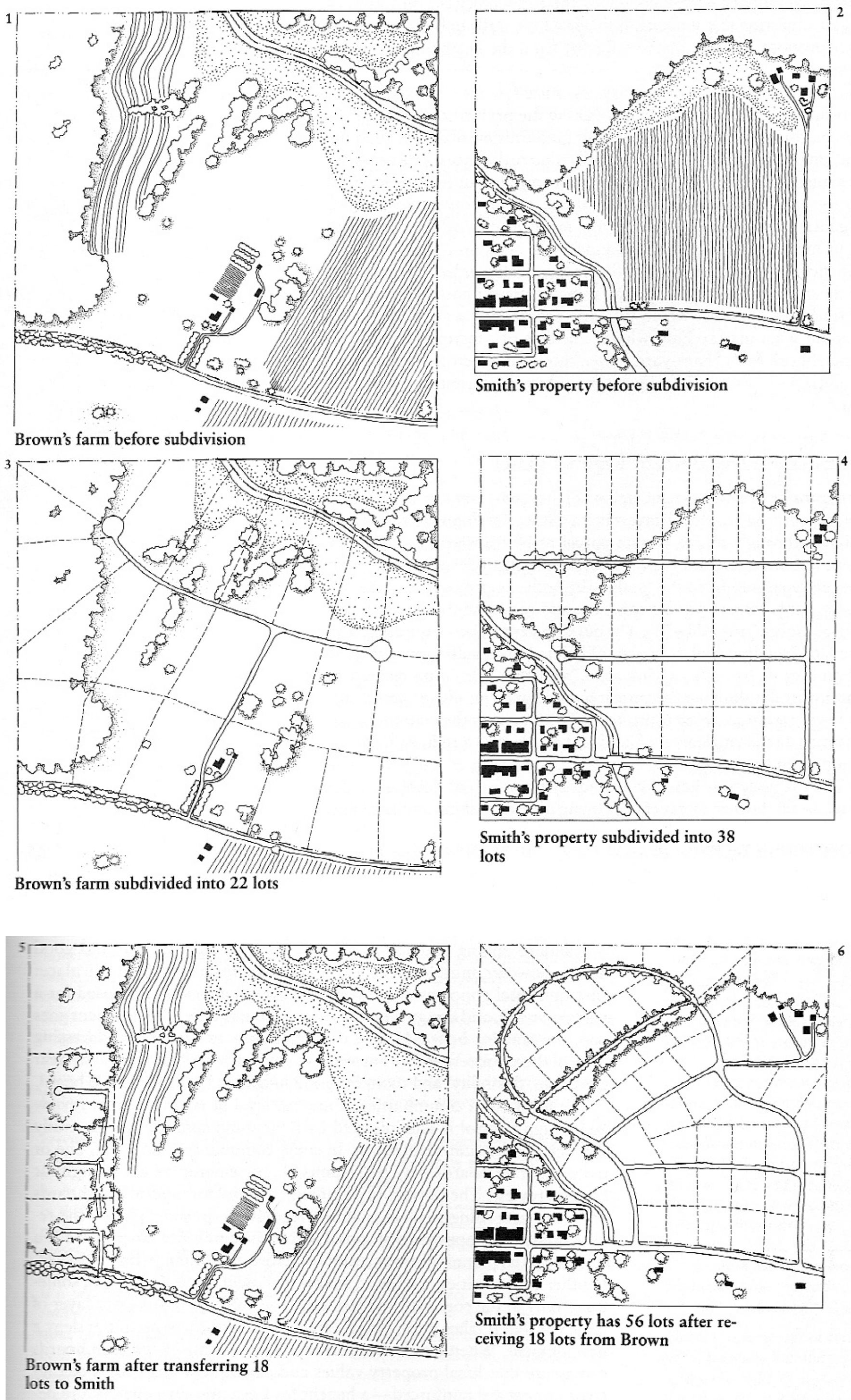

Figure 12. TDR Scenario [74]

[74] Image credit - Randall Arendt, Elizabeth A. Brabec, Harry L. Dodson, Christine Reid, and Robert D. Yaro, *Rural By Design* (Chicago: Planners Press – American Planning Association, 1994), 152-153.

CHAPTER 4

TDR SUCCESSES

Montgomery County, Maryland

With Montgomery County, Maryland producing over half of the total protected land in the United States through the use of the TDR program, it is obvious that this case is one of the most successful TDR stories. Montgomery's population "more than doubled between 1950 and 1960 from 164,000 to 340,000, making it the fastest growing county in the state. After witnessing the loss of productive farmland during the 1950s and 1960s in the southeastern part of the county, elected officials decided to protect the remaining farmland in the northwestern section."[75]

Montgomery County adopted several plans throughout the 1960s and 70s that promoted the protection of agricultural land and open space such as *On Wedges and Corridors* and also the adoption of the Rural Zone. In 1981, Montgomery County established the TDR program as part of the functional *Master Plan for Preservation of Agricultural and Rural Open Space*. Maryland's enacted legislation for the TDR program can be found in Article 66B, Section 11.01. It states that "a local legislative body that exercises authority granted by this article may establish a program for the transfer of development rights to: (1) Encourage the preservation of natural

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[75] American Farmland Trust, "Purchase of Development Rights and Transfer of Development Rights Case Studies," Prepared for Boone County Planning Commission, 4 May 2001, <http://www.ctahr.hawaii.edu/awg/downloads/rp_AFT_TDRstudies_Boone.doc> (15 June 2007).

resources; and (2) Facilitate orderly growth and development in the State."[76] This framework gives any county or municipal corporation in Maryland the power to establish a TDR program.

Montgomery County, Maryland turned to TDR because it wanted to offer compensation for the preservation of farmland without reliance on tax revenues

Figure 13. Preserved open space in Montgomery County, Maryland [77]

When a task force determined that it would be too costly for the county to purchase agricultural easements, they turned to the TDR program. Through the TDR program in Montgomery County, "approximately 93,000 acres of county land has been designated as the Agricultural Reserve (the sending area) and has Rural Density Transfer zoning. The Rural Density Transfer Zone gives strong preferences to agriculture, forestry, and other open space uses, as well as allowing a variety of agriculturally related commercial and industrial uses. Housing density in the Agricultural Reserve limits the development to one house per twenty-five

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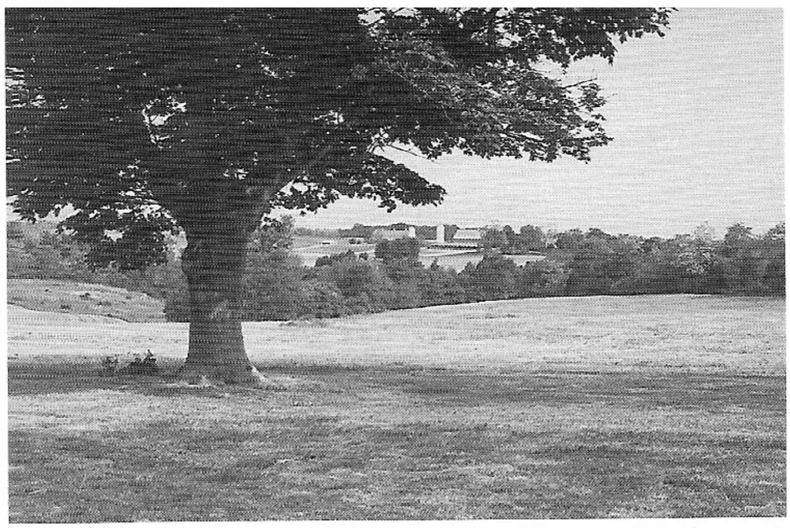
[76] Maryland Code, Article 66B - Land Use: Transfer of Development Rights, <http://michie.lexisnexis.com/maryland/ lpext.dll?f=templates&fn=main-h.htm&cp=> (15 June 2007).

[77] Reprinted, with permission of author, from *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, p. 33.

acres with a minimum one-acre lot size."[78] Furthermore, the agricultural zoning changed so that properties in the Agricultural Reserve have TDRs at the rate of one unit per five acres instead of the prior one unit per two acres. Despite the downzoning, the county still lost eighteen percent of its agricultural land to development in the 1970s." [79] Under the Montgomery County TDR program, sending site owners can "continue farming and receive some revenue from the development potential of their land through the sale of development rights. To date, farmers have sold TDRs from more than 40,000 acres, permanently preserving this farmland."[80]



Montgomery County, Maryland downzoned its sending area from one unit per five acres to one unit per 25 acres but allows transfers at the rate of one TDR per five acres

Figure 14. Scenic view of Montgomery County, Maryland [81]

[78] The Department of Economic Development and the Agricultural Preservation Advisory Board, "Farmland Preservation Programs in Montgomery County," 2002 Revised Edition, <http://www.dnr.state.md.us/education/envirothon/currentissue2003/farmlandpreservationbrochure.doc> (15 June 2007).
[79] Rick Pruetz, "Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges," <http://<www.beyondtakingsandgivings.com/tdr.htm> (15 June 2007).
[80] Ibid.
[81] Reprinted, with permission of author, from *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, p. 66

A lawsuit was filed by a group of property owners from the Agricultural Reserve in the early 1980s claiming that they had “suffered a loss in property value because receiving sites had not been designated prior to the downzoning. A circuit court judge ruled that the downzoning was valid on its own merits and did not depend on the TDR program.”[82]

Fulton County, Georgia

Georgia, much later than Maryland, established a TDR program in 1998. The Georgia Assembly passed legislation, which authorized local governments to implement TDR programs. The Official Code of Georgia Section 36-66A-1 and 2 generally states that “the legislation enables municipalities and county governments to protect public heath, safety, and the state’s general welfare by adopting ordinances that provide for the transfer of development rights.”[83] These programs have been used successfully “in other jurisdictions to preserve important agricultural and ecologically sensitive lands and historic landmarks, stimulate economic growth, and to manage urban development.”[84]

On April 22, 2003, the “State Legislature passed an amendment to the Transfer of Development Rights legislation (Senate Bill 86), making TDRs available to any county that adopts enabling TDR ordinances. Fulton County had already passed the enabling ordinance on April 2, 2003, making Fulton County’s Chattahoochee Hill Country the first area eligible for

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[82] American Farmland Trust, “Purchase of Development Rights and Transfer of Development Rights Case Studies,” Prepared for Boone County Planning Commission, 4 May 2001, <http://www.ctahr.hawaii.edu/awg/downloads/rp_AFT_TDRstudies_Boone.doc> (15 June 2007).
[83] State Environmental Resource Center, “Transfer of Development Rights: State Activity Page,” Updated 4 February 2005, <http://www.serconline.org/tdr/stateactivity.html> (15 June 2007).
[84] University of Georgia Institute of Ecology’s Office of Public Service and Outreach, “Final Report of the Joint ‘Future of Forestry’ Study Committee,” Prepared by the Senate Research Office, 2005, <http://www.warnell.uga.edu/h/news/archive/forestryreport/forestryreport.pdf> (15 June 2007).

TDR transactions, not only in Georgia, but in the entire southeastern United States."[85] The Chattahoochee Hill Country, "located 45 minutes south of downtown Atlanta, stretches across 40,000 acres of undeveloped land bordering the Chattahoochee River on the west, Cascade Palmetto/ Hwy. 154 on the east, and Coweta County on the South. A master plan has been created to accommodate growth while preserving open space."[86] The community and landowners along with the Chattahoochee Hill Country Alliance decided that the best way to protect their valuable greenspace and meet their preservation goals was to establish a voluntary TDR program, making it the first TDR program in Georgia.

The Fulton County TDR ordinance makes the transfer of development rights available to Chattahoochee Hill Country landowners with "one acre or more of undeveloped property, excluding the county mandated 75-foot streamside buffer. The landowners will be allowed 1 TDR per 1 acre of property without a residential structure."[87] The TDR program provides an effective way to permanently preserve the natural resources of the Chattahoochee Hill Country while still allowing growth in specific designated areas.

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[85] Chattahoochee Hill Country - Fulton County, <http://www.chatthillcountry.org> (15 June 2007).
[86] Ibid.
[87] Ibid.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

Recommendations

TDR has been a difficult concept to implement, as it breaks the traditional link between a site and the location of its potential development. While there are approximately 134 communities in at least thirty-one states that have a TDR program, only "fifteen programs have protected more than 100 acres of farmland and only eight programs have protected more than 1,000 acres of farmland. Twenty-two programs, or 44 percent, have not protected *any* agricultural land."[88] There is a growing need for communities with TDR ordinances to more vigorously participate in generating the transfer of development rights for the preservation of farmlands and open space. Additionally, the nineteen states without TDR enabling legislation should be encouraged to take the appropriate steps in passing statewide legislation so that each individual municipality will have the power to enact a TDR ordinance so that they may also begin to generate transfers for open space preservation.

To create momentum in the understanding, adoption, and utilization of TDR ordinances across the nation, the following steps should be taken:

Step 1. *Seek an organization which will provide leadership in developing a program of education regarding the use and benefits of TDRs.* There are a number of organizations whose interests are compatible with this concern. Perhaps the National Trust for Historic Preservation

[88] American Farmland Trust – Farmland Information Center, "Fact Sheet: Transfer of Development Rights," <http://www.farmlandinfo.org/documents/27746/FS_TDR_1-01.pdf> (15 June 2007).

would be appropriate, especially because of its regional offices and field services which could utilize statewide nonprofit preservation organizations to secure legislative approval in states where needed.

Step 2. *Identify those states which do and do not have enabling legislation.* Table 5 (See p. 36) lists those states -within each region- that have TDR capability and Table 6 (See p. 48) lists those states -within each region- that do not have TDR capability.

Step 3. *Organize a regional association interested in the proliferation of TDRs, utilizing the statewide nonprofits as initial members, where they exist, or other identified interest groups.*

Step 4. *Target states without enabling legislation and identify those groups and individuals within these states who would support enabling legislation.*

Step 5. *Working with those in each respective state, determine the nature of legislation needed for TDRs, seek legislative sponsorship, and develop programs to educate citizens regarding the needs and opportunities that TDRs can meet.*

Step 6. *Ask the leadership organization to create a TDR newsletter/ website which can serve as a data bank and communications "vehicle" that will monitor TDR successes and challenges for the benefit of subscribers.*

Table 6. States Without TDR Legislation

Region	**States**
East North Central	Indiana
	Ohio
East South Central	Alabama
	Mississippi
	Tennessee
Mid Atlantic	Delaware
New England	Rhode Island
Pacific West	Alaska
	Hawaii
South Atlantic	North Carolina
	West Virginia
West North Central	Iowa
	Kansas
	Missouri
	Nebraska
	North Dakota
	South Dakota
West South Central	Arkansas
	Oklahoma

Conclusion

In order to preserve our countryside, farmlands, and open spaces from the fate of becoming "just different versions of nowhere,"[89] we must stop relying solely upon zoning protection. Zoning is temporary and is often ineffectual, as it can be changed from one election to the next. We must go a step further to implement the TDR program because the overall good that can be achieved through its installment far outweighs any disadvantages of the program.

[89] James H. Kunstler, *The Geography of Nowhere: The Rise and Decline of America's Man-Made Landscape* (New York: Simon & Schuster, 1993), 166.

With that said, TDRs may not always be the best implementation tool for rural land preservation. The best tool or combination of tools will vary from community to community. In some communities, "public support for preservation is so strong that voters agree to tax themselves to generate substantial, ongoing funds for land and/or easement purchases. This taxpayer financed preservation avoids the controversies associated with development, an inherent feature of TDR."[90] Many communities, however, do not yet have this level of public support for preservation. As more rural areas become developed, communities will begin to appreciate the places that they once took for granted. Public support for preservation will gradually grow out of this recognition.

When TDR ordinances work, they provide "a solution with multiple benefits. The developers achieve greater profits from the higher level of development. The sending site owners are able to liquidate the development potential of their properties while still using these properties from non-development and, in some cases, income-producing activities. Finally, the community itself is able to implement its preservation goals without relying exclusively on tax revenues and other traditional funding sources."[91] With the aid of a TDR program, the countryside that Kunstler refers to as a "wasteland" will be rejuvenated and a sense of place restored.

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[90] Rick Pruetz, *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges* (Marina Del Rey: Arje Press, 2003), Preface.

[91] Rick Pruetz, "Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges," <http://<www.beyondtakingsandgivings.com/tdr.htm> (15 June 2007).

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APPENDIX A. CASE STUDIES

Reprinted, with permission of author, from *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges,* shown as VI Selected Case Studies, p. 169-242

VI SELECTED CASE STUDIES

This chapter contains the case studies of TDR programs in 20 communities from throughout the United States. These programs were selected partly for their ability to illustrate various goals, including the preservation of farmland, environmental areas, historic landmarks and the capacity of infrastructure systems. In addition, these 20 case studies also demonstrate sending site restrictions, receiving site incentives, TDR banks and other transfer techniques. Finally, most of these programs have been successful in terms of the number of transfers accomplished and the community assets permanently preserved as a result. These 20 programs are listed below.

- BOULDER COUNTY, COLORADO - This rural preservation program was the first to allow transfers between municipalities based on inter-jurisdictional agreements rather than state or federal legislation.
- CALVERT COUNTY, MARYLAND - This farmland preservation program has saved 8,900 acres of land despite the fact that it operates at relatively low densities.
- COLLIER COUNTY, FLORIDA - This program, adopted in 1974, was one of the first environmental protection TDR ordinances.
- CUPERTINO, CALIFORNIA - This program, adopted in 1973, was the first and most successful TDR program designed to provide flexibility in the location of development while keeping overall growth within the capacity of the infrastructure system.
- DADE COUNTY, FLORIDA - With assistance from federal land purchase programs, this TDR program is preserving large portions of the Florida Everglades west of Miami.
- DENVER, COLORADO - Unlike some historic preservation programs, the Denver TDR ordinance allows transfers between properties anywhere within the downtown.
- KING COUNTY, WASHINGTON – This program promotes inter jurisdictional transfers from rural county areas by funding public amenities for receiving areas within a downtown Seattle neighborhood.
- LARIMER COUNTY, COLORADO – This pilot program has achieved 100-percent participation using an inter jurisdictional process in which the City of Fort Collins delays annexation of projects approved by the County in compliance with City development standards.
- LONG ISLAND PINE BARRENS, NEW YORK – The State of New York facilitated a TDR program in which development rights can be transferred between three townships in Suffolk County in order to protect the environmentally significant Pine Barrens.
- LOS ANGELES, CALIFORNIA - Three different TDR mechanisms are available to promote this city's downtown revitalization goals including historic preservation and the provision of affordable housing, open space, public transportation and cultural facilities.
- MALIBU COASTAL ZONE, CALIFORNIA - This program, designed to deal with antiquated subdivisions, requires deed restrictions on undeveloped, substandard lots in the coastal mountains in return for each new lot created in the receiving area.
- MONTGOMERY COUNTY, MARYLAND - This program has combined attractive incentives with strong growth demand to preserve over 40,000 acres of farmland to date.
- MORGAN HILL, CALIFORNIA - This city of 24,000 people uses three different transfer techniques to save open space in general and, in particular, a mountain which is part of the community's identity.
- NEW JERSEY PINELANDS, NEW JERSEY - In the most ambitious TDR program adopted to date, the State of New Jersey created an environmental/ farmland protection program which allows transfers between communities within a one-million-acre planning area.
- NEW YORK, NEW YORK - Adopted in 1968, New York's historic preservation TDR program is famous for the Penn Central case which was ultimately decided by the U.S. Supreme Court.
- SAN FRANCISCO, CALIFORNIA – This program has been successful because TDR is practically a requirement for building large office buildings, which are in high demand periodically in downtown San Francisco.
- SAN LUIS OBISPO COUNTY, CALIFORNIA - To deal with antiquated subdivisions and sensitive environmental areas, this TDR program encouraged transfers by limiting the size of structures which can be built on individual, substandard lots.

- SEATTLE, WASHINGTON - The 1985 downtown plan uses TDR to preserve historic landmarks, provide affordable housing and promote the performing arts.
- TAHOE REGIONAL PLANNING AGENCY, CALIFORNIA/NEVADA - In an effort to preserve the clarity of Lake Tahoe, TRPA provides four different transfer programs including land coverage transfers and transfers of existing development rights which result in the restoration of previously developed stream environments.
- WASHINGTON, D.C. - In an effort to create a livable downtown, Washington, D.C. allows transferable bonus density to buildings that provide housing, retail shopping, art space and historic preservation.

BOULDER COUNTY, COLORADO[1]

BACKGROUND

Boulder County, Colorado, population 291,288 (2000), begins 15 miles northwest of downtown Denver. The eastern third of the County lies within the Great Plains. The western two-thirds consists of mountainous terrain, primarily within the Roosevelt National Forest, Rocky Mountain National Park and other parks, preserves and wilderness areas.

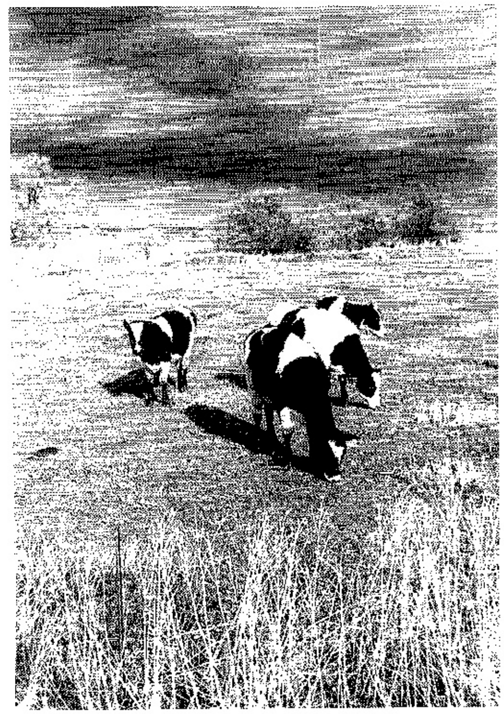
In 1981, Boulder County adopted a clustering technique known as a non-urban planned unit development, or NUPUD. This technique allows a density bonus for on-site development when at least 75 percent of a parcel is permanently preserved by a conservation easement. In 1989, the program was expanded to allow the density bonus gained by NUPUD to be transferred to a non-contiguous parcel; this process, known as non-contiguous non-urban planned unit development, or NCNUPUD, provided additional bonus density for transferring, as explained below. The NCNUPUD process was not extensively used in the early 1990s because receiving sites were not pre-designated; developers were reluctant to go through the discretionary approval process and face public hearing testimony from the owners of property adjacent to the receiving sites.

Elected officials and staff recognized that the County's original TDR program was limited in only being able to transfer development into unincorporated portions of the County. They saw a need to transfer development rights from the unincorporated parts of the County to the cities, where concentrated development is more appropriate. In 1994, Boulder County and the City of Boulder jointly prepared and adopted a draft framework for the Boulder Valley Transfer of Development Rights Program. The planning area for this program included the unincorporated portion of the County adjacent to the City of Boulder, known as Boulder Valley, as well as the City of Boulder, population 95,000, located 20 miles northwest of Denver.

The Boulder Valley TDR program marks a significant step forward from the NCNUPUD process because it identifies sending sites, spells out the criteria for receiving sites both within and outside the city limits and defines the number of TDRs that can be transferred.

The Boulder Valley TDR Program is implemented through an inter-governmental agreement between the City of Boulder and Boulder County adopted in 1995. Between 1995 and 1997, agreements were signed with two other cities and one unincorporated community, as listed below.

- The City of Longmont, population 71,093 (2000), is located 12 miles northeast of Boulder.
- The City of Lafayette, population 23,197 (2000), is located nine miles east of Boulder.



Boulder County, Colorado has entered into inter jurisdictional agreements allowing transfers to receiving sites in or near the City of Boulder and seven other communities from sending sites under County jurisdiction, like this dairy farm outside the City of Longmont

- Niwot, population 3,700 (2000), is an unincorporated community located six miles northeast of Boulder.

Since 1997, IGAs have been entered into with three other cities and two unincorporated towns, as listed below.

- The City of Louisville, population 18,973 (2000), is located six miles east of Boulder.
- The City of Broomfield, population 38,272 (2000), is located seven miles southeast of Boulder.
- Erie, population 6,291 (2000), is an incorporated town located 12 miles east of Boulder.
- Lyons, population 1,585 (2000), is an incorporated town located 14 miles north of Boulder.
- Superior, population 9,011 (2000) is located four miles southeast of Boulder.

As described below, a planning area is created around each community participating in the TDR program. In this way, each community can maximize the benefits of open space preservation by requiring that a minimum percent of transferred development rights come from the rural areas immediately surrounding them. In some communities, the planning area is further divided into subareas and the transfers are required to occur between sending and receiving sites within that subarea. With this technique, the neighborhoods accepting the extra receiving site development also are closest to the open space which that extra density made possible.

Before describing the TDR process, it should be noted that TDR is one of several preservation techniques used by Boulder County. For example, the County has an open space sales tax that preserved over 50,000 acres of land as of 1997 through fee simple purchase, purchase of development rights and conservation easements. As of 1998, Boulder County had spent about $68 million on open space acquisitions and the voters had approved bonding authority expected to generate another $38 million. In addition, Boulder County has joined with four other counties in the Front Range Mountain Backdrop Planning Project designed to save the visual and ecological integrity of the Front Range mountains from the Wyoming border to south of Colorado Springs. This project is sponsored by proceeds from the Colorado state lottery, Great Outdoors Colorado, with matching funds and in-kind services supplied by the participating counties.

PROCESS

Since 1981, Boulder County has encouraged open space preservation via a clustering option known as a non-urban planned unit development, or NUPUD. With this process, base density can be doubled, from one unit per 35 acres to two units per 35 acres. The process also allows an extra unit per each additional 17.5 acre increment, if the property owner concentrates all development on 25 percent or less of the property and preserves the remaining 75 percent or more with a conservation easement. By 1995, over 10,000 acres had been permanently protected using this technique.

In 1989, the County introduced transfers of development rights through a process called non-contiguous non-urban planned unit development, or NCNUPUD. The County relied on the PUD process because Colorado state law did not explicitly authorize the use of TDR. The NCNUPUD process allows a single PUD to encompass two or more non-contiguous sites and, furthermore, allows development rights to be transferred between these non-contiguous properties.

By using NCNUPUD, receiving sites can achieve a density of up to three times that permitted under the older NUPUD process. For example, a 35-acre site would be allowed one unit by right, two units through NUPUD and six units by NCNUPUD. Sending and receiving sites are not pre-designated but the County controls the direction of the transfer. Specifically, development rights can be transferred from mountain parcels to plains parcels and from one plains parcel to another plains parcel. However, development rights cannot be transferred from a plains parcel to a mountain parcel.

The NCNUPUD process has not as yet been as popular as the NUPUD process. Since the receiving sites are not pre-designated, the applicant must prove that the proposed parcels meet the criteria for receiving sites. The owners of property near the proposed receiving sites are likely to contest the transfer at the required public hearings and this creates an uncertainty about whether or not each individual application will be approved.

As discussed above, the County has recently started programs to transfer development rights from county land to incorporated cities. Despite this new development, the NCNUPUD process is still available in most parts of the County; however, as mentioned below, the inter-governmental agreement (IGA) between the County and the City of Boulder prohibits NCNUPUDs in the part of Boulder County that is within the boundaries of that IGA. This prohibition was a response to the City's concern that NCNUPUDs would occur in areas designed for preservation under the IGA.

The Boulder County TDR program made a significant step forward upon the adoption of the Boulder Valley TDR Program and its implementation through an IGA between the County and the City of Boulder. Under the new program, owners of sending sites can develop these sites at a density of one unit per 35 acres or transfer development at a rate of two units per 35 acres, a transfer ratio of two-to-one. If deliverable agricultural water is attached to the sending site and an interest in that water is granted to the County, the ratio can be increased to three units per 35 acres.

The process starts when an owner submits a conservation easement for a sending site in order to obtain a Development Rights Certificate. These certificates can be used to increase the density of PUDs at designated receiving sites as long as the proposed development is compatible with the surrounding neighborhood and mitigates potential infrastructure and environmental impacts. Each individual community determines the maximum amount of additional density which will be allowed on the receiving site by TDR.

While these and other procedures remain constant, the Boulder County program is actually several separate TDR programs regulated by separate IGAs between Boulder County and each individual city. The most detailed IGA, adopted in April 1995 as the "Boulder Valley TDR Comprehensive Development Plan", is between Boulder County and the City of Boulder.

In general, this IGA combines the City of Boulder's commitment to accept transferred development rights from the County and the County's commitment to preserve rural character. More specifically, the County agrees not to approve NCNUPUDs within the Plan

Area or NUPUDs within the Planning Reserve Area unless they are jointly approved by both the City and County. Correspondingly, the City agrees not to annex unincorporated land or otherwise allow development that is contrary to the jointly-adopted Boulder Valley Comprehensive Plan.

The TDR Plan identifies four categories of sending sites: 1) the Rural Preservation Area; 2) the Accelerated Open Space Acquisition Area; 3) the Northern Tier Lands; and 4) Private Land Enclaves lying between the Boulder Mountain Parks and the Arapaho-Roosevelt National Forest west of the City. Receiving sites can include land within the boundaries of the City of Boulder's community service area, areas being annexed to the City in accordance with the provisions of the Boulder Valley Comprehensive Plan (BVCP) or lands within a rural planning area that have been approved under the provisions of the BVCP. Another area, Planning Reserve Area, is suitable for urban development in the long-term future; but in the near term it is planned to remain rural and cannot be used as a receiving site.

Under the IGA, the City of Boulder agrees to accept up to 250 development rights. Certificates of Development Rights are issued only after a conservation easement, precluding further development and granted jointly to the County and City, is recorded for the sending site. The IGA further requires the City and County to establish a joint committee to monitor the progress of the TDR program. The Agreement also prevents the County from making any changes to its NUPUD or NCNUPUD regulations without the City's consent. Finally, the IGA between Boulder City and Boulder County terminates five years after its effective date.

The IGA between the County and the City of Lafayette became effective in December of 1995. This IGA is actually the latest in a series of agreements, beginning in 1984, in which these two jurisdictions agree to cooperate to protect rural lands. This agreement is similar to the IGA with the City of Boulder. However this IGA does not limit the number of development rights which can be transferred to Lafayette. In addition, this TDR plan clearly limits the sending sites to designated areas within a 27-square-mile Plan Area that extends from one to four miles in each direction from the Lafayette City Limits.

The IGA with the City of Longmont became effective in January of 1996. This IGA designates the Longmont TDR Planning Area Boundary which incorporates approximately 80 square miles surrounding the City of Longmont. About 50 square miles at the periphery of this TDR Planning Area constitutes the sending area. Designated receiving sites are located closer to Longmont's City Limits, within the Longmont Planning Area Boundary. This IGA also specifies that the County or Longmont may sell the development rights that they acquire. This IGA expires in ten years.

In 1996, Boulder County also amended its land use code to create a TDR program specifically for the unincorporated settlement of Niwot, which is located between the cities of Boulder and Longmont. Because the area is entirely within the County, an IGA was not needed. Nevertheless, the code amendment designates a Niwot TDR Plan Boundary. Potential sending sites are any properties on the County-wide map of sending sites and the sending sites identified in individual IGAs with other communities as well as the properties depicted on the Niwot Sending and Receiving Area Map. Owners continue to be able to develop on these sending sites at a density of one dwelling unit per 35 acres. However, owners are now able to transfer development rights from the sending site at a rate of two units per 35 acres, a two-to-one transfer ratio.

The potential receiving sites are identified on the Niwot map. To qualify, a developer has to demonstrate that a proposed receiving site is not located on prime farmland, designated open space, environmentally-sensitive lands or critical wildlife habitat and that the proposed receiving site can be provided with adequate facilities and services. The baseline density on the receiving sites is two units per 35 acres. Receiving site projects can be approved, through the PUD process, only after 15 requirements have been met.

Finally, the ordinance allows only a maximum of 93 units to be transferred into the Niwot receiving areas. Furthermore, the code creates eight subareas. Each has a fixed percentage of the available development rights that can be transferred to designated receiving areas adjacent to Niwot. The percentage is based in large measure on the importance of the particular subarea to the Niwot community for open-space buffer land functions. Remaining rights in the sending subareas can be transferred to sites outside of the Niwot planning area.

In addition, the County-wide process can be used to transfer development rights in those parts of the County which are not located within any of the TDR planning areas designated through the intergovernmental agreements.

PROGRAM STATUS

The County's clustering technique, NUPUD, has preserved over 10,000 acres of land so far. But the original transferring mechanism, NCNUPUD, has been used only five times since 1989. Peter Fogg, Manager of the County's Long-Range Planning Division, reports that demand for rural lots continued through the recession of the early 1990s. Nevertheless, builders preferred to use the NUPUD process even through the NCNUPUD process could yield three times the density.

According to Mr Fogg, the development community was leery of NCNUPUD because it was considered to be complex and time-consuming. Developers were particularly concerned by the uncertainty inherent in a decision made by a planning commission and county

BOULDER COUNTY

The County's original TDR program allows receiving sites to achieve six times the baseline density

The inter jurisdictional TDR program allows TDRs to be transferred from sending sites in the County to receiving areas in or near the City of Boulder and seven other incorporated communities

The inter jurisdictional program was created through voluntary agreements rather than through state or federal mandates

The original TDR program resulted in five transfers and the inter jurisdictional program has produced 15 transfers to date, preserving between 3,200 and 4,700 acres of land

commissioners via a public hearing process. NCNUPUD hearings are likely to be contentious because the receiving sites are not pre-determined; communities have not even discussed, much less accepted, the concept of increased receiving site densities, leaving these issues to be argued for the first time at the NCNUPUD hearing.

Despite these drawbacks, the NCNUPUD process may see increased use in the future. It is still available everywhere in Boulder County except the Boulder Valley IGA area surrounding the City of Boulder. Developers should be attracted by the ability to achieve six times the baseline density limit by using NCNUPUD. This bonus ratio is significantly higher than the two-to-one ratio offered by the County's new inter-jurisdictional TDR program.

Boulder County's new TDR program, implemented through inter-governmental agreements has many impressive features. By transferring development rights from unincorporated County land to incorporated cities, the program clearly addresses the goal of preserving rural land and concentrating development where it can be efficiently served. In fact, with some exceptions like Morgan Hill, California and King County, Washington, there are few programs so far which have been able to gain the inter-jurisdictional cooperation needed for a program that allows transfers between separate municipalities.

The inter jurisdictional TDR program was used on 15 transfers as of the end of the year 2,000. These TDR PUDs range in size from four units to over 50 units and represent 265 units on approximately 470 acres of land. The average lot sizes in the receiving site projects range from 0.5 acres to 1.9 acres. The average TDR price was $50,000. These transfers will result in the permanent preservation of between 3,200 and 4,700 acres depending on whether or not the sending areas retain their water rights.

In April 2001, Mr. Fogg reported that the Boulder Valley program had been dormant. Sending site owners have not been interested in selling TDRs and the City of Boulder has emphasized affordable housing contributions rather than open space preservation in return for annexation. Developers seeking annexations prefer the affordable housing option over the TDR alternative because it is more convenient, less time consuming and probably less costly for most annexations. To improve the Boulder Valley program, the County eliminated the receiving sites originally designated and replaced them with criteria-based designation standards defined in the County's Land Use Code. Receiving sites can be approved within the Boulder city limits or within the Boulder Valley Planning Area as is the case with all cities that entered into inter jurisdictional agreements with the County.

As explained above, the City of Broomfield currently has an inter jurisdictional agreement with Boulder County. Broomfield is actually within four separate counties. To implement approval of a voter initiative in 1998, Broomfield will become a city/county in November of 2001. (Currently Denver is the only city-county in Colorado.) Boulder County is not yet sure how this new status might affect the IGA.

Boulder County is looking for even more ways to expand the use of TDR. Currently, informal discussions are underway between the County planning staff and the US Forest Service. These discussions focus on the feasibility of using TDR in the Forest Service's boundary adjustment effort. This is a process in which the Forest Service pursues parcel trades, sales and acquisitions in an effort to consolidate public/private land intermixes for more efficient land use management and to reduce the number of private inholdings within the Forest boundary. This program is likely to take some time to materialize since TDRs complicate the Forest Service's land appraisal requirements.

In a 1998 update, Mr. Fogg offered seven reasons why the Bolder County TDR program was succeeding.

1) Intergovernmental agreements with several municipalities increase TDR's credibility with developers and the general public.
2) Refinements of the eligibility criteria under the Non-Urban Planned Unit Development program has made the TDR PUD the preferred option for rural development above the individual building permit level.
3) Despite the high cost, there continues to be a market for TDR receiving-site developments.
4) The public may be becoming more comfortable with TDR as a growth management and preservation tool, resulting in somewhat reduced opposition to TDR receiving site proposals.
5) The County Commissioners and Planning Commissioners promote the use of TDR in their official actions, speaking engagements, media interviews and other venues.
6) The receiving site criteria allow developers significant latitude in site design and density.
7) TDR is increasingly being looked at in Colorado as a legitimate and acceptable way to address growth issues.

CALVERT COUNTY, MARYLAND[2]

BACKGROUND

Calvert County, population 74,563 (2000), is located 25 miles southeast of Washington, D.C., on the western shores of the Chesapeake Bay in Maryland. The County's 1974 Comprehensive Plan called for the preservation of prime agricultural and forestry lands. To implement that plan, the County adopted a TDR program in 1978. The program is one of the most successful in the nation with over 8,900 acres permanently preserved through TDR as of January 2001.

In the Calvert County program, sending sites are properties in the Agricultural Preservation District. In this District, on-site development can occur at a maximum density of one dwelling per 25 acres and transfers can be made at the rate of one dwelling per five acres. Consequently, at an initial glance, the Calvert County program appears to be similar to the program in Montgomery County, Maryland. However, there is a major difference. In Calvert County, land can only be placed in the Agricultural Preservation District at the request of the owner. Without the request for the Agricultural Preservation District zoning, the sending site owner is limited to building on site at a density of one dwelling per ten acres. (On site permitted density was changed from one unit per five acres to one unit per ten acres in the late 1990s according to a January 2001 update from Gregory Bowen, Deputy Planning Director.)

PROCESS

Land in Calvert County is about equally divided into two basic land use categories. Land in the Farm Communities/Resource Protection District generally lies around the perimeter of the County. The Rural Community District is located in the center of the County. The Farm Community/Resource Protection District allows an average of one dwelling unit per ten acres; property owners in this District may apply for an Agricultural Preservation District through a process described below. Property owners in an Agricultural Preservation District may sell development rights for use in the Rural Community District.

Land in the Rural Community District is allowed an average of one dwelling unit per ten acres. However, through approved transfers, the density in this district is allowed to increase to an average of one dwelling unit per two acres; in areas close to Town Centers, density is allowed to go even higher via TDR.

The rules and regulations that guide the agricultural preservation process in Calvert County explicitly state that the program is designed to use the free market system to finance agricultural and forestry preservation. To assist this process, the County uses an Agricultural Preservation Advisory Board appointed by the County Commissioners. The Advisory Board makes decisions on the creation of Designated Agricultural Areas and Agricultural Preservation Districts. The Board makes the final decision on Designated Agricultural Areas and Agricultural Preservation Districts; any aggrieved parties may appeal the decision to the County Circuit Court.

In one of its primary duties, the Advisory Board forms Designated Agricultural Areas, land in the County having the greatest potential for maintaining a viable agricultural or forestry production. In making this decision, the Board considers various guidelines including soil classifications and whether or not the size of the proposed area is adequate to permanently function as an agricultural unit. Transfers cannot be located in a Designated Agricultural Area. The Advisory Board also approves or rejects all applications from property owners to place land in Agricultural Preservation Districts.

Owners of prime agricultural or forest land voluntarily ask the Advisory Board to consider designating their land as Agricultural Preservation Districts. The program guidelines contain several requirements for Agricultural Preservation Districts. They must be within Designated Agricultural Areas or contain at least 50 contiguous acres. At least 75 percent of the proposed District must be suitable for cropland or managed forest land. Also and the land must meet one of five soil classification criteria.

The owners of land enrolled in Agricultural Preservation Districts may withdraw their land after five years if development rights have not been transferred from the land during that time. Land within an Agricultural Preservation District may not be subdivided. However, if no development rights have been transferred, parcels with at least 25 acres are allowed to be developed at a density of one unit per 25 acres, with a maximum of three lots on parcels 75 acres or more in size. Once all development rights have been transferred from a parcel, the parcel must retain the Agricultural Preservation District designation and the density of that parcel cannot exceed one dwelling per 25 acres up to a maximum of four lots per parcel regardless of size. No commercial or industrial activities are allowed in Agricultural Preservation Districts with certain exceptions for mining.

Landowners in Agricultural Preservation Districts may transfer development rights. The transfer rate is one dwelling per five acres of land within the Agricultural Preservation District; the rate is even higher for land in a special classification. Prior to the late 1990s, the program offered a transfer ratio of one-to-one because the on-site development limit was also one unit per five acres. As reported in January 2001, the on-site density limit has been changed to one unit per ten acres, creating a two-to-one transfer ratio. In addition, the Calvert County program is thriving for two reasons.

- There is a strong demand for TDRs because buying development rights is a profitable alternative to buying land.
- There is an ample supply of TDRs because many sending site owners want to continue farming.

Calvert County's agricultural preservation program is also designed to provide further protection to agricultural land by permanently removing TDRs from the market before they can be used to allow development. This goal is accomplished through the Purchase and Retirement (PAR) Fund. On an annual basis, the Advisory Board ranks applications for TDR purchase by the PAR Fund using ranking criteria which consider land use, location, parcel size and soil classifications.

To this point, the discussion has dealt with sending sites. The Calvert County program is equally concerned with receiving sites. Receiving sites may only be located in overlay zones with a designation of Transfer Zone District or TZD. These TZDs include Town Centers and Rural Communities that were comprehensively designated.

The designation of a new TZD requires a recommendation from the County Planning Commission. After consideration of that recommendation and holding a public hearing, the County Commissioners may designate a TZD. There are several criteria for designating TZDs.

- TZDs cannot be located in Designated Agricultural Areas, Designated Farm Communities, Resource Preservation Districts or Critical Natural Areas.
- If a TZD is proposed to be located within a major subdivision, all property owners in that subdivision must sign the TZD application.
- At least 50 percent of the site of the proposed development must be designated as open space.

One additional dwelling unit in excess of zoning density may be built in a TZD for each five development rights transferred from an Agricultural Preservation District. With TDRs, density can increase from an average of one unit per five acres to one unit per two acres, a density bonus of 150 percent. With TDR, densities can go even higher in areas near the Town Centers where the Town Center ordinances take precedence.

CALVERT COUNTY

Sending site owners must request re designation to the Agricultural Preservation District overlay zone

Many farmers in Calvert County favor farmland preservation and look at TDR as a means of gaining extra income by continuing an activity they would probably continue with or without TDR

In the late 1990s, the program changed to a two-to-one transfer ratio, increasing the incentive to use TDR

Over 8,900 acres of farmland have been preserved as of January 2001, almost one quarter of the County's goal of 40,000 acres.

In Calvert County, Maryland, sending sites are created when the owners of farms, like the one seen above, request a rezoning to the Agricultural Preservation District

PROGRAM STATUS

According to Gregory Bowen, Deputy Director of the Calvert County Department of Planning and Zoning, the success of the program is primarily due to strong demand for additional density in the potential receiving sites. On the sending sites, property owners can build at an average density of one dwelling per ten acres or sell the right to build one dwelling for each five acres of land. On the potential receiving sites, TDR allows the average density to go from one dwelling per five acres to one dwelling per two acres or greater.

In some communities, that differential might not be sufficient to motivate transfers. But in Calvert County, that difference is significant because TDRs are valued at $2,600 per acre while raw land values are roughly twice that amount. As a purely hypothetical example, if a developer wants to build a five-unit complex, he could buy 50 acres of land at $5,000 per acre and spend $250,000. Or he could buy 20 acres of land and 15 TDRs (five TDRs are needed for each additional unit) and spend $139,000 to achieve the same density. This is a substantial cost savings considering the fact that Calvert County developers charge roughly the same amount for a house regardless of whether it is on a 5-acre or a 2-acre lot. Due to this economic incentive, most Calvert County developers want to use TDR.

The value of TDRs depends, of course, on demand. In the early 1980s, TDRs in Calvert County cost from $600 to $800 each. By the late 1980s, demand for TDRs exceeded supply and the value rose to $2,200. Due to the slow economy, the demand for TDRs, as well as new development, leveled off in the early 1990s. As reported by Gregory Bowen, Deputy Planning Director, TDRs were selling for $2,600 in January 2001. However, as long as raw land values are substantially higher than TDR prices, these economic forces should continue to drive Calvert County's TDR program.

In addition to economic forces, there is another important success factor related to the sending site owners in Calvert County. According to Gregory Bowen, the sending sites are typically developable; the sites are not usually burdened by extraordinary site-improvement costs and, despite environmental regulations, the owners can typically achieve the maximum density allowed by zoning. However, these sending site owners are often genuinely interested in preserving their land in farming and other rural uses. For example, the first transfer approved in the County involved a parcel of land that had already been subdivided but not yet developed; the owner simply decided to preserve the land rather than build.

Given this preference to retain rural character, many sending site owners view TDR as just a way of obtaining additional funds to purchase agricultural equipment or build their retirement accounts. To many of these sending site owners, the imposition of an Agricultural Preservation District designation on their property merely requires the continuation of an activity that they intended to continue anyway.

In a January 2001 update, Bowen reported that Calvert County had instituted an installment purchase program for TDRs and increased the preservation goal from 20,000 to 40,000 acres. As mentioned above, the incentive to use TDRs has been increased by reducing on-site density limits from one unit per five acres to one unit per ten acres. Due to these strong success factors, the Calvert County TDR program has permanently preserved over 8,900 acres of agricultural and forestry lands as of January 2001, making this program one of the most successful in the United States.

COLLIER COUNTY, FLORIDA[3]

BACKGROUND

Collier County, population 251,377 (2000), includes the City of Naples as well as part of The Everglades and the Gulf of Mexico shoreline at the southwestern tip of Florida. In 1974, Collier County adopted a new zoning ordinance designed to control growth and preserve coastal islands, marshes and other ecologically sensitive areas. As part of this code change, more than 80 percent of the land area in the County was placed in a new zoning classification called the Special Treatment overlay. The Special Treatment overlay imposes environmental regulations and requires a special permit for all new development. To encourage the protection of sensitive environmental resources in the Special Treatment overlay, the County's original TDR ordinance allowed for the transfer of development rights exclusively out of this zone. At first, transfers were only allowed to contiguous properties. However, a 1979 amendment permitted transfers to non-contiguous land and also streamlined the approval process.

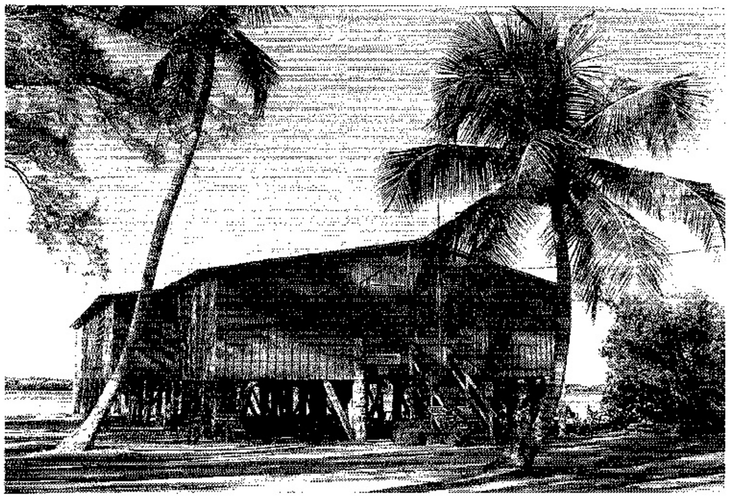
In a December 1999 update, Ronald Nino, Current Planning Manager reported that several changes had been made to the ordinance as summarized in Saved By Development.

- The original ordinance only allowed transfers from the ST zone. The current program requires sending and receiving sites to be within the areas designated as urban on the Future Land Use Map. Consequently, sending sites may or may not be designated ST.
- The original program specified that 0.5 TDRs per acre could be transferred from ST sending sites. Now, the number of units that can be transferred from a sending site is the on-site density allowed to sending sites by the underlying zoning.
- The original ordinance offered either a ten or twenty percent density bonus to receiving site projects using TDR. The current program has reduced those bonuses to five and ten percent.

PROCESS

As discussed above, the current TDR program allows sending and receiving sites to be located within any areas designated as urban on the Future Land Use Map. The preserved sending site may be used for recreation, education, open space, critical habitat or any other public purpose specified in the ordinance adopted by county commissioners approving the proposed deed restriction.

In a change from the original ordinance, the sending sites no longer have to be zoned Special Treatment (ST).



In Collier County, Florida, TDR is used to preserve historic sites as well as areas of ecological significance

However, sending sites may have the ST designation. The ST District is designed to protect and preserve areas of ecological value including mangrove and freshwater swamps, barrier islands, hardwood hammocks, xeric scrubs, coastal beaches, estuaries, cypress domes, natural drainage ways, aquifer recharge areas and lands of historical and archaeological significance. To promote protection, the Special Treatment (ST) regulations encourage preservation but allow certain types of development found acceptable by the Collier County Board of Commissioners following a public hearing. Collier County imposed the ST overlay in areas where it was determined that the base zoning did not adequately protect these resources.

Any development of land within the ST Overlay requires submittal of a site alteration plan. If the site involved is 20 acres or less, the site alteration plan can be approved administratively if the Zoning Administrator determines that the project would not involve significant environmental changes. If the site is more than 20 acres in size, the Collier County Environmental Advisory Board and Planning Commission must review the plan in a public meeting and the Board of County Commissioners must approve, approve with modifications or deny the plan. In addition to this approval process, owners of ST land are further constrained by additional development requirements imposed in a 1982 zoning code amendment.

The approval of a proposed transfer must be made by a super majority of the board of county commissioners. Upon that approval, the sending site owner must dedicate the land in fee simple to a public agency or a private, not-for-profit conservation organization approved by the county commissioners.

Preservation of a sending site allows the owner to transfer the maximum number of residential units allowed on that site by the underlying zoning.

Receiving sites must also be within areas designated as urban on the Future Land Use Map. Receiving site developments must comply with all requirements of the underlying zoning district. However, residential density can increase by one residential unit for each unit transferred from a sending site. The maximum density bonus that can be achieved varies depending on the underlying zoning of the receiving site. A ten percent maximum increase in density is allowed in the single-family residential districts as well as the RMF-6 and RMF-12 districts. The density bonus is limited to five percent in the RMF-16, RT and PUD districts.

COLLIER COUNTY

Over 80 percent of the land in Collier County requires a special permit for all new development

Transfers are approved administratively

Development rights can be severed from sending sites independently from their use at receiving sites

Developers are often satisfied with baseline densities, particularly because of the ability to cluster

The County has transferred 526 TDRs and preserved 325 acres of environmentally sensitive land

PROGRAM STATUS

The Collier County TDR program has several strengths. It is procedurally simple to sell development rights; transfers are approved administratively and rights can be severed from sending sites independently from their use on receiving sites. Furthermore, the environmental restrictions placed on ST Overlay Districts provide substantial motivation to find different development sites.

However, the motivation to use TDR is reduced by the fact that Collier County permits limited development within ST zones. The County also allows clustering of development within a single site; in this method, developers are able to preserve those portions of their site with the ST overlay and increase density on non-constrained portions of their land. Similarly, the owners of potential receiving sites often do not build to the densities allowed by the base zoning and, consequently, are not interested in buying development rights to increase the density of their projects.

Despite these drawbacks, the Collier County program has resulted in the transfer of 526 development rights and the preservation of 325 acres of environmentally sensitive land. A single transaction accounted for 350 of these transferred development rights.

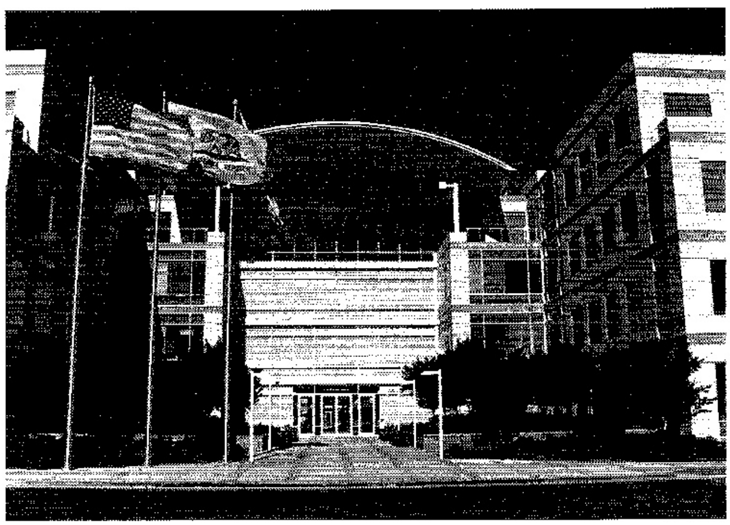
In December 1999, Ronald Nino, Current Planning Manager, reported that the County had changed the code to limit TDR transactions to areas designated as urban on the County's Future Land Use Map. The code changes also changed the minimum size of a parcel eligible to receive TDRs and reduced the maximum density allowed in some receiving zones from 20 percent to 10 percent of the maximum baseline density.

CUPERTINO, CALIFORNIA[4]

BACKGROUND

The City of Cupertino, population 50,546 (2000), is located five miles west of downtown San Jose, California. In 1973, Cupertino calculated that vehicle trips would have to be limited in order to maintain acceptable levels of service on its two major streets, DeAnza Boulevard and Stevens Creek Boulevard. Specifically, the City calculated that development within the DeAnza/Stevens Creek commercial corridor should not exceed 16 one-way, peak-hour trips per acre of commercial land. To allow more traffic in this corridor would require more than four travel lanes in each direction. Roadways wider than four lanes in each direction were considered infeasible in terms of cost and the inter-governmental cooperation that would be required.

Cupertino recognized that some land uses would not need the maximum number of trips allowed while other uses with high, peak-hour trip-generation characteristics would not be able to locate within the corridor without some form of relief. To provide developers with flexibility in locating a mix of land uses and intensities within the corridor, Cupertino included a transfer of trip rights provision in its Traffic Intensity Performance Standard (TIPS) regulation. Using the transfer provision, developers are able to buy and sell trips without ex-



By allowing the transfer of rights from three separate sending sites, Cupertino, California was able to approve a large office park for Apple Computer on this receiving site without overburdening the transportation system ceeding the corridor average of 16 one-way, peak-hour trips per acre.

In 1983, Cupertino adopted a general plan amendment establishing floor area ratios (FAR) for the industrial and commercial zones that are not within the DeAnza/Stevens Creek corridor. One year later, the general plan was amended to allow transfers of FAR within these zones.

PROCESS

To implement the TIPS program, Cupertino published a Development Intensity Manual which explains the trip limitation concept and demonstrates how to use the transfer mechanism. The manual contains trip generation rates for residential, industrial, office, commercial, restaurant, retail and other uses. These trip generation rates are expressed as peak-hour, one-way trips per 1,000 square feet of floor area for all non-residential uses. Residential uses have a trip generation rate of.75 peak-hour, one-way trips per dwelling unit. The trip-generation rates for uses not listed in the manual can be determined either on the basis of existing transportation research or a separate analysis prepared by a traffic engineer. For certain desirable uses, such as affordable housing, trip generation rates can be waived or reduced by action of the City Council.

A property within the DeAnza/Stevens Creek corridor is a potential sending site if it does not use the entire allocation of 16 peak-hour, one-way trips per acre. To transfer trips, the sending site owner must apply for a Use Permit. In approving a Use Permit, the Planning Commission and City Council must find that the trip rights proposed to be transferred have not already been transferred and that the proposed transfer will not severely reduce future development options for the sending site. When a Use Permit is approved, the sending site owner must record a covenant on the property stating the number of trips available to the subject property and the number of trips transferred to a receiving site.

As mentioned above, in 1983, Cupertino established floor area ratio limitations on all land zoned for commercial or industrial uses that are not in the DeAnza/ Stevens Creek TIPS area. In 1984, a transfer provision was instituted which allows flexibility in the location of development within these zones. This transfer program is similar to TIPS: the proposed sending and receiving sites must be approved by a use permit hearing; transfers must be recorded on the deeds of both properties; and a reasonable amount of development potential must remain on the sending site to ensure that the property maintains its viability.

CUPERTINO

Adopted in 1973, the Cupertino program was first to use TDR to allow flexibility in the location of development while maintaining overall growth within limits that can be accommodated by infrastructure

Developers purchased TDRs early in the program, knowing their value would increase over time

After 30 or more transfers, the development capacity of the project area has been reached

PROGRAM STATUS

The Cupertino program has most of the features of a successful TDR program. The owners of potential receiving sites are motivated to buy trips or development rights because there are few other mechanisms available for getting the extra density they want. The sending site owners are encouraged to sell because the demand for trip rights and development rights creates an attractive selling price. As reported by Robert Cowan, Cupertino's Community Development Director, at one point in the program the estimated value was $50,000 per trip right. In fact, some developers acquired trip rights early in the program, realizing that their value would increase over time. The Cupertino program is also assisted by supporting informational materials and a development community that understands the transfer concept and how to use it.

To date, 30 to 40 transfers have occurred under the TIPS program. In fact, the trip capacity of the DeAnza/ Stevens Creek corridor has essentially been filled with the transfers allowed since the start of the program in 1973. Most recently, a 785,000 square foot research and development office park was built in the corridor using 322 trip rights purchased from three separate sending sites. In this transaction, Cupertino was able to allow its major employer, Apple Computer, to expand without overwhelming the capacity of the City's street system.

DADE COUNTY, FLORIDA[5]

BACKGROUND

Dade County, population 1.9 million, occupies the southeastern corner of the Florida peninsula. Containing the Miami metropolitan area, Dade County is the most populated county in the state. Yet over half of the County's land area is in the Everglades.

The Everglades originally consisted of a gently sloping wetland flowing in a 40-mile-wide path from Lake Okeechobee 100 miles south to the mangrove and coastal glades of Florida Bay. This huge wetland flushes and recharges the coastal aquifers and reduces salt-water intrusion near the coast.

For decades, there has been a recognition that man-made alterations are reducing the ability of The Everglades to replenish the groundwater and perform various other environmental functions. In 1980, a proposed management plan was prepared for the East Everglades area, the 242-square mile portion of The Everglades that covers the western half of Dade County. The plan recognized that protection of the Everglades is critical to supplying freshwater to metropolitan Dade County, the Florida Keys and Everglades National Park. The plan also described how preservation of The Everglades was needed for flood control, commercial fisheries, recreation, wildlife habitat and the efficient provision of utilities and public services.

In 1981, the Dade County Board of County Commissioners adopted the East Everglades Ordinance. This ordinance exhaustively describes the environmental characteristics of the area from the standpoint of geology, groundwater, physiography and topography. It then declares that the East Everglades is an Area of Critical Environmental Concern because it recharges the Biscayne Aquifer, provides a surface water supply to Everglades National Park, creates flood storage capacity, maintains water quality, protects the economic vitality of Dade County and contains numerous natural features including 30 endangered or threatened species. Finally, the ordinance implements its goals and policies through land use regulations and procedures, including the ability to transfer development rights.

PROCESS

In 1981, Dade County adopted a severable use rights (SUR) ordinance which became effective in 1982. Potential sending sites are parcels in the East Everglades and eligible receiving areas are unincorporated lands within the urban boundary line designated in the County's Comprehensive Development Master Plan.

The amount of SURs available to sending sites varies depending on the management area of the East Everglades in which the sending site is located. The ratio varies from one SUR per five acres to one SUR per 40 acres. The expectation of being able to develop is usually highest in Management Area 1 because land in this subarea is generally closest to urban areas and contains altered wetlands and agricultural lands with some existing residences. Some of this management area is allocated one SUR per five acres. However, even within Management Area 1, the expectation of being able to develop depends on whether or not the land in question is protected from floodwaters.

As a matter of right, the owners of parcels in Management Area 1 may build homes on these parcels at a density of one unit per 40 acres. Since SURs can be generated at the rate of one SUR per five acres, the land in this management area can carry a substantial transfer ratio of eight to one.

Management Area 3B contains agricultural lands that are further removed from urbanized areas; in this management area, one SUR is allocated per 12 acres. In Management Area 3C, considered a transitional area, one SUR per 40 acres is allowed. The remaining management areas have water at or above the surface for at least three months per year. The County determined that this land has no realistic development value and no SURs are available in these areas. Any potential sending parcels which are smaller than these minimum lot sizes but were legally entitled to develop one dwelling unit prior to 1981 can be allocated one SUR if the property owner registered within one year of the adoption of the severable use rights ordinance.

In addition to density limits, the East Everglades Ordinance imposes strict environmental regulations within the sending areas. For example, new roads are not allowed in some management areas and, where roads are allowed, they must be designed to allow the natural sheet flow of water. Similarly, no excavation is allowed in the East Everglades except for agriculture. As a result, regardless of the nominal density permitted by the code, property owners can find it difficult and expensive to develop in many parts of the East Everglades, providing a further incentive to transfer severable use rights rather than build on sending sites.

The SURs transferred from the sending sites can be used to deviate from density, lot area, frontage and other development requirements on residential and commercial receiving sites in the unincorporated portions of Dade County which are designated for urban development. In fact, only the environmental, open space, agricultural and recreation zones are ineligible to receive SURs.

The density increases which can be attained through transfers vary between the 18 different zoning districts which can receive SURs. For example, in the RU-TH Townhouse zoning district, a project using SURs can be granted a 10 percent reduction in the minimum lot size, a one-third reduction in the required front setback and an 18 percent increase in density, from 8.5 to 10 dwelling units per acre. In the commercial and office park zoning districts, SURs are converted to floor area ratio or FAR. For each SUR transferred, a receiving site in a commercial zone is granted an additional.015 FAR per acre as long as all other development and zoning code requirements are met. In the office park zone, an SUR allows an additional floor area of.010 FAR per acre.

To be granted an SUR density bonus, developers of receiving sites must demonstrate that they own the SURs, that these SURs have not already been used, that the SURs are recorded in the chain of title of the sending parcel and that the sending site has been restricted to residential uses. The Dade County program does not require a rezoning or any other discretionary approval of the receiving site. The use of SURs at a receiving site is a matter of right. However, in 1997, the County adopted an ordinance requiring that a special exception for site plan approval be part of residential rezoning applications for sites that are three acres or more in size. The applicant is then required to disclose the intention to obtain a density bonus via SUR and the number of SURs to be used. Again, once the rezoning is secured, the use of SURs is a matter of right. Administrative approval of TDRs may be appealed by an applicant or any aggrieved party who alleges a misinterpretation of the code.

PROGRAM STATUS

The Dade County program has many factors found in successful TDR programs. The Comprehensive Development Master Plan provisions encourage the use of SURs. Property owners are discouraged from developing on sending sites by environmental regulations and, in some areas, restrictive density limits. In some management areas, transfer ratios are as high as eight to one, providing a significant incentive to transfer SURs. The ordinance has eighteen different zoning districts which can receive SURs and the code clearly spells out the density bonus available to those who use SUR. Also, the use of TDR is a matter of right once receiving site zoning has been secured. This provides a level of speed and certainty that makes the use of SURs attractive to developers. However, since 1997, developers who intend to use SURs on a site three acres or larger in size must disclose that fact and apply for a special exception in conjunction with a rezoning application.

There is substantial demand for additional development in Dade County. In the past, developers found that it was often cheaper to acquire SURs than buy the additional land needed to accommodate more dwelling units. SURs can cost about $2,500 each when purchased directly from major SUR holders.

When purchased through an intermediary, SUR prices can range from $3,000 to $5,000. However, under the right circumstances, landowners can still benefit from purchasing these SURs at "retail" prices. For example, in some zoning districts, real estate agents can look for people who own less than two acres of land in a receiving area that is zoned at one unit per acre. By purchasing one SUR, these owners can create a second buildable lot from their properties using an administrative process that does not require a public hearing as long as all zoning codes are met.

As a result, SURs have been used for a wide range of residential projects from single-family lot splits to high-rise developments. However, to date, SURs have not been used for commercial projects. As reported in 1995 by Tom Spehar, Dade County Principal Planner, commercial and office buildings are typically surrounding by ample surface parking, creating a density that is usually lower than the density allowed by the zoning as a matter of right.

In addition to tough environmental regulations, significant SUR supplies are created as a byproduct of the land acquisition programs of the U.S. Army Corps of Engineers and the U.S. Department of the Interior. These federal agencies, pursuing watershed protection and environmental preservation missions, often acquire properties in The Everglades through condemnation. The SURs from these condemned properties remain in the possession of the former landowners.

There has been a debate about whether SURs are personal property or real property. The federal agencies consider SURs to be personal property that cannot be acquired via condemnation. This policy leaves the former owners of the condemned land with SURs to sell. While SURs can be transferred and held indefinitely, the sheer number of available SURs has kept the SURs affordably priced.

DADE COUNTY

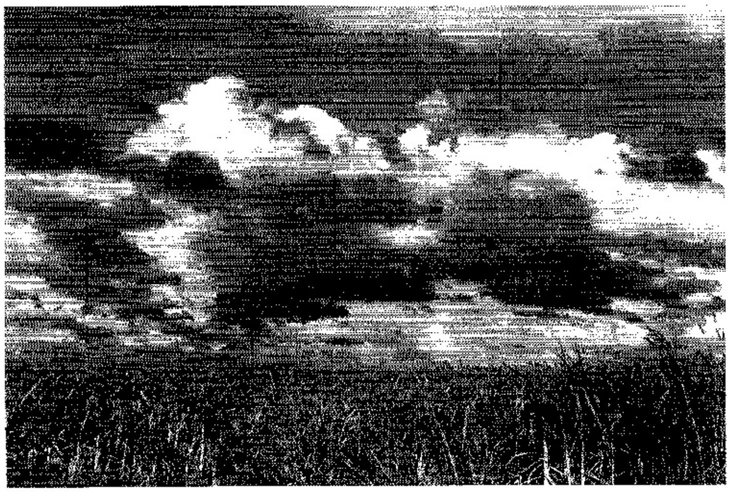
Owners of environmentally sensitive sending sites in the East Everglades are encouraged to sell their "severable use rights" (SURs) by strict environmental regulations and transfer ratios as high as eight to one

Use of SURs on receiving sites is approved administratively

As of 2001, 829 SURs had been used out of an estimated total of from 4500 to 4700

SUR use is hampered by requirements to disclose intent to use SURs during rezonings, new zones that allow higher density without SURs and reductions in potential receiving areas through incorporation

Land acquisition in the Everglades by federal agencies creates a steady supply of SURs which should keep SUR prices reasonable



Dade County, Florida uses TDR to preserve a 242-square mile portion of the Everglades, which occupies approximately half of the land area in the County.

These factors combined to make the Dade County program one of the most successful TDR programs in the country when it began. Within one year of the adoption of the East Everglades Ordinance, about 400 owners of land parcels that do not meet the minimum requirements for whole SURs registered, as required by the code, to convert these fractional SURs to whole SURs. The County is not able to track the number of SURs severed from sending sites. However, in a September 2001 update, Diane O'Quinn Williams, Director of Planning and Zoning, reported that approximately 829 of the estimated 4500 to 4700 SURs had been used through the platting process for residential purposes. In addition, at that time, the use of another 50 to 75 SURs was anticipated within the next year. However, SURs had not yet been used on any commercial projects.

However, in the September 2001 update, O'Quinn cites four factors that may hamper the effectiveness of the SUR program in the future.

1. Originally, a developer could get a property of any size rezoned and thereafter apply for administrative approval to use SURs. Now, if a developer ultimately intends to use SURs on a parcel greater than three acres in size, the developer must disclose that fact during the rezoning process and include a special exception as part of the rezoning applications.
2. Similarly, final plats for approval using SURs are required to state that the lot sizes shown on the plats have been approved via SURs.
3. Originally, developers were motivated to use SURs in the RU-1 zone to change frontage from 75 to 60 feet, lot coverage from 35 to 40 percent and lot area from 7500 to 6000 square feet. However in 1995, the County created two new single-family residential zones with frontages of 50 or 60 feet, lot areas of 5000 or 6000 square feet and lot coverage of 40 percent. Consequently, developers now have the option of requesting zone changes to these two zoning districts. As a result, they can achieve a density that was previously only possible with SUR purchases without having to acquire SURs. This has reduced the need to use SURs.
4. Finally, the amount of land in the unincorporated portion of the County has declined as new cities incorporate. As of the September 2001 update, incorporation proposals were pending in five other areas of the County. This means that a significant portion of the County may request to incorporate. To date, incorporated cities in Dade County do not accept SURs. Consequently, incorporations are likely to further reduce the potential SUR receiving areas.

DENVER, COLORADO[6]

BACKGROUND

In the late 1970s, discussions were underway to create a historic district in downtown Denver. However, the committee working on this proposal, composed of historic preservation advocates, downtown property owners and members of the business community, did not want to impose preservation restrictions on historic properties without owner consent. Consequently, the committee ultimately proposed an ordinance that uses TDR as an incentive for property owners to volunteer their buildings for landmark designation.

After that ordinance was adopted in 1982, another committee, also composed of representatives from both the business and historic preservation communities, proposed that the TDR technique be used to encourage preservation in a historic warehouse district just west of downtown. As a result, the use of TDR was extended from the Denver's 40-block downtown B-5 district into the B-7 zone district.

In 1994, the code for the downtown B-5 zone district was amended. Under the new code, the B-5 zone offers density bonuses to encourage many desired uses such as housing, childcare centers, pedestrian-active facilities, public art, underground parking and transit-supporting facilities as well as historic preservation. All but one of these density bonuses must be used on site; but with historic properties, the density bonus must be transferred to a receiving site.

In a January 2001 update, Ellen Ittelson, Citywide Planning Manager, reported that the City Council approved a Downtown Historic District in December 2000. This district includes 43 historic buildings that are all eligible to transfer TDRs.

PROCESS

The TDR section of Denver's zoning code allows for the transfer of unused development rights from properties designated as landmarks by the Denver Landmark Preservation Commission. Transfers can only occur between lots in the B-5 district and between lots in the B-7 district. Until the 1994 amendment of the B-5 zone district, the amount of undeveloped floor area that could be transferred from the sending sites was the difference between the existing floor area of the designated landmark and the maximum floor area allowed by the zoning code.

With the 1994 amendment, downtown properties are now granted density bonuses beyond the basic maximum of ten square feet of floor area for each square foot of land area (FAR 10) for implementing certain goals, including historic preservation. Owners who rehabilitate structures designated for historic preservation can receive four bonus square feet of transferable floor area for each square foot of floor area in the designated landmark as long as the rehabilitation complies with the historic preservation standards of either the U.S. Secretary of the Interior or the Denver Landmark Preservation Commission. These bonus provisions can greatly increase the undeveloped floor area available for transfer from a historic property.

Denver's new B-5 zoning code allows the transfer of two types of undeveloped floor area from historic structures. The first type of undeveloped floor area pertains to properties without density bonuses gained through rehabilitation; in this instance, the undeveloped floor area available for transfer is the area of the lot occupied by the historic structure plus the difference between the maximum floor area permitted on that lot by zoning and the floor area of the existing historic structure.

The second type of transferable floor area is the bonus floor area gained by rehabilitating a designated

In Denver, Colorado, the owners of the Navarre Building sold its development rights to the developers of the Republic Building and used the proceeds to rehabilitate this historic landmark.

landmark as described above. The code allows a bonus to be claimed even if the rehabilitation occurred prior to adoption of the new bonus provisions. If historic property owners were issued certificates of undeveloped floor area prior to the 1994 code change, they have the option of either using these certificates under the old provisions or exchanging the old certificates for new certificates calculated under the new code. If a structure was designated for preservation prior to 1994 but a certificate of undeveloped floor area was not issued, the owner has the option of obtaining a certificate using the provision of the old code as long as an application is filed within one year of the adoption of the new code.

Property owners apply for certificates of undeveloped floor area by submitting an application which includes all calculations, a copy of the ordinance designating the structure for historic preservation and, if applicable, evidence that the rehabilitation was completed to historic preservation standards. Once the application is deemed complete, the Zoning Administrator must promptly issue and record the certificate. The certificate can be used immediately, held for future use or transferred from one owner to another.

The Zoning Administrator also approves the use of undeveloped floor area at a receiving site after verifying that the certificate has not already been used at another receiving site. Eligible receiving sites are parcels in four downtown B-5 zone districts. A project using transferred undeveloped floor area cannot increase the size of that project more than six times the land area of the receiving parcel. In addition, within a designated 50-block area, a maximum floor area ratio of 17:1 is imposed even with TDR unless over half of the structure is residential. In the rest of the downtown, the maximum density is 12:1, or 17:1 if more than half of the structure is residential.

DENVER, COLORADO

Density bonus of four times the floor area of rehabilitated historic landmark can be transferred throughout 40-block downtown

Alternatively, landmark owners can chose to transfer the area of the lot occupied by the landmark plus the difference between the floor area of the landmark and the maximum floor area allowed by zoning

Transferred floor area can increase receiving site projects by six times the lot size of the receiving site.

Denver does not require that a preservation easement be recorded on the landmark

Use of TDR is approved administratively

Sluggish market for office space has reduced demand for TDR

Three buildings preserved to date

In 1984, Denver expanded its TDR program to include a warehouse district west of the downtown. Unlike the downtown B-5 zoning code, the B-7 code has not been amended to include bonus density and the transfer of that density. Consequently, the TDR program in the B-7 zone remains similar to the way the B-5 zone TDR program was prior to 1994:

- Designated, rehabilitated landmarks are the sending sites;
- The density available for transfer from these sending sites is the difference between the floor area of the landmark and the maximum development allowed the sending parcel by zoning; and
- Receiving sites must be within the same zoning district as sending sites.

In the B-7 zone, however, a sending site owner can also transfer an additional square foot of floor area for each square foot of residential floor area within the landmark. Receiving sites in the B-7 zone are limited to 25 percent more than the maximum density allowed by the base zoning. However in the B-7 zone, transferred floor area can increase the density of the receiving site up to 50 percent higher than code maximum as long as the property does not exceed a floor area ratio (FAR) 6.0, meaning six square feet of floor area for every square foot of lot area.

According to a study done in the early 1980s, the B-5 zone contains 2.7 million square feet of transferable density from existing landmarks and another 13 million square feet of transferable density from potential landmarks. The B-7 zone is estimated to have 1.6 million in transferable density from existing and potential landmarks.

Unlike many TDR programs, the Denver program does not require the recording of a preservation easement; the committee that drafted the ordinance was concerned that an easement requirement might jeopardize the possible tax benefits to landmark owners wanting to donate landmark easements.

A building permit cannot be issued to use the transferred floor area at the receiving site until the designated landmark at the sending site has been restored as required by the Denver Code. If the landmark is destroyed, any new structure on the sending site cannot exceed the floor area of the landmark unless the site receives floor area through TDR from another site.

PROGRAM STATUS

The Denver TDR program has several promising features. Unlike historic-landmark TDR programs in many other large cities, the Denver code does not restrict transfers to adjacent lots. In Denver's B-5 zone, transfers can occur anywhere within the 40-block downtown area; and in the B-7 zone, there is a 23-block trading area available. This flexibility for the owners of sending and receiving sites should promote greater use of transfers during upswings in the Denver office market. Furthermore, whether or not transfers actually occur, the ability to use TDR in the future has been a sufficient incentive for some owners to consent to landmark designations for their properties.

Secondly, most historic-preservation TDR programs have a 1:1 transfer ratio. The Denver program allows a sending site to transfer four times the floor area of the existing landmark; for certain buildings, this bonus would result in a transfer ratio greater than 1:1, providing an increased incentive for transfers and landmark designation. In addition, the use of TDR is approved administratively, reducing developer concerns about unknown costs, time delays and approvals.

Finally, the 1994 amendment to the B-5 zoning district should generate considerable interest in TDR on the part of historic property owners. The owners of larger landmarks will generally have much more undeveloped floor area to transfer based on the new calculation of four square feet of floor area for each square foot of landmark floor area. Likewise, if they secured their certificates by October of 1995, the owners of smaller landmarks will still be able to use the old formula in which undeveloped floor area is the difference between the maximum density allowed by zoning and the actual size of the landmark.

While the supply of transferable rights is relatively high, the demand for added density has been reduced by cyclical slumps in Denver's office market. In addition, as reported by Ittelson in a 1998 update, many developers continue to prefer to build new, free-standing retail space in the downtown, reducing the demand for existing space in historic landmarks as well as the demand for transferable density available in historic properties. Nevertheless, Denver's TDR program has been used three times to date.

- The City had the Navarre Building in mind when the ordinance was originally adopted. In 1982, the owners of the Navarre Building severed the development rights and used them as collateral on a loan to rehabilitate the building. The rights were subsequently transferred to the Republic Building.
- The owners of the Denver Athletic Club sold 60,000 square feet of development rights in 1984 which were transferred to the Empire Savings site.
- The owners of the Odd Fellows Hall severed 58,700 square feet of development rights and used the TDR value as collateral on a construction loan; the TDRs were eventually used at the Empire Savings site,

In addition to these three transfers, Denver's historic Masonic Building was rehabilitated and its owners expect to sever and sell the development rights at some point.

King County, Washington[7]

BACKGROUND

King County, population 1,737,034 (2000), includes the Seattle metropolitan area on the west and the Cascade Mountains and Wenatchee National Forest on the east. The County has a tradition of strong support for open space preservation. In 1979, it approved a $50 million bond used to buy development rights from over 12,000 acres of land. In 1989, it passed a $117-million open space bond. And in 1993, the County approved a $60 million bond that preserved 11,000 acres and 70 miles of trails.

Interest in TDC began with passage of Washington's Growth Management Act in 1990. This Act led to adoption of an Urban Growth Boundary in King County that encompasses 460 square miles of land. Beyond the UGB is a Rural Land Area containing 350 square miles and a Resource Zone with 1,290 square miles of forests and other lands needed for water quality protection.

The County's original TDR program, adopted in 1993, allowed receiving sites exclusively on land under County jurisdiction. In the mid 1990s, the County considered various ways to implement this TDC program culminating in a 1997 report that recommended amendments to both the Comprehensive Plan and the TDC section of the County's zoning code. In 1998, concern over natural resource preservation was increased when the Federal government listed the Chinook Salmon as an endangered species.

In 1998, King County adopted a second TDC ordinance referred to as the "TDC Pilot Project Program". For a three-year trial period, this new ordinance allowed transfers from rural portions of King County to incorporated cities within the County. This program offered cities incentives to participate in the form of amenities for receiving area neighborhoods funded by the County. These amenities included transit enhancements, pocket parks and pedestrian/transit-friendly streets.

In 1999, the County budget included $1.5 million for the purchase of TDCs and another $500,000 for receiving area amenities to offset the impacts of increased densities in receiving areas within incorporated cities that enter into interlocal agreements with the County to accept development credits from unincorporated County land. The County also pledged another $250,000 in transportation capital improvement program money to smart-growth amenities under the TDC program. However, this money could not be spent until the adoption of policies to manage the TDC program. In March of 2000, King County adopted an ordinance that created a TDC bank and established transaction procedures.

In 2000, the City of Seattle and King County entered into an interlocal agreement that put the County's

TDC Pilot Program into effect. Under this agreement, the designated receiving area in the City of Seattle received $100,000 from the County for amenities plus a pledge for another $400,000 in improvements once credits from rural County land were actually transferred to the City.

Based on progress with the City of Seattle and a significant transfer to another incorporated city, King County made the provisions of the TDC Pilot Program a permanent fixture of the County Code in 2001.

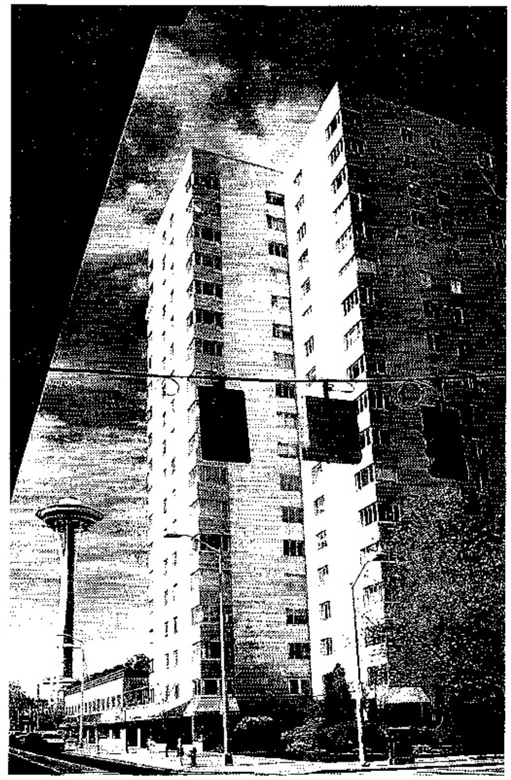
PROCESS

Under the original 1993 ordinance, sending sites contained open space, wildlife habitat, woodlands, shoreline access, community separators, regional trail linkages, historic landmarks, agricultural land and/or park sites. Receiving sites were urban unincorporated areas. These receiving areas had to be located in any of six zoning classifications and designated as appropriate to receive TDCs in the community plan. The density bonus achievable through TDC varied depending on the zoning of the receiving area. For example, TDC allowed a density bonus of 50 percent in the Neighborhood Business zone and 33 percent in the Community Business, Regional Business and Office zones. The transfer itself did not require a separate public hearing when the receiving site project required some other approval that also requires a public hearing. However, when the receiving site project did not otherwise require a public hearing, the transfer was subject to the procedures required for a conditional use permit.

In 1998, King County adopted a three-year TDC Pilot Program modeled after programs in the New Jersey Pinelands, Boulder County, Colorado and Montgomery County, Maryland. When the three-year Pilot Program was about to expire in 2001, the County made the provisions of the Pilot Program a permanent component of the County Code. That code section, as it existed in 2001, is described later.

In 1999, the King County Council appropriated $1.5 million to fund a TDC Bank. At the same time, the County also appropriated $500,000 for amenities in neighborhoods that receive additional development as a result of the TDC Program. Statements from the County Executive indicate that the County may appropriate $1 million per year for cities that agree to accept additional density through the TDR program.

In 2000, King County adopted a TDC Bank Ordinance that created the TDC bank and established bank operating procedures, site selection criteria and the use of amenity funds. The TDC bank must buy and sell TDCs at fair market value. The bank can also facilitate transfers by maintaining web sites, marketing TDC receiving sites, procuring title reports and obtaining appraisals. Credits cannot be sold for use within incorporated cities unless the County and city have entered into an inter-local agreement and the city has adopted an implementing ordinance for the receiving area. The inter-local agreement establishes whether the city is to receive any amenity funds and whether a priority will be given to sending sites in specified geographical areas. TDC amenities can include public art, community facilities, parks, open space, trails, roads, parking, landscaping, sidewalks, transit-related improvements or other programs that facilitate increased densities.



To promote inter jurisdictional transfers from rural areas to the Denny Triangle receiving area, adjacent Seattle's Space Needle, King County has pledged funding for neighborhood amenities

The City of Seattle believed that inter jurisdictional transfers would be appropriate for its Denny Triangle neighborhood, an area consisting of about 25 blocks located just north of downtown Seattle. The area currently contains numerous surface parking lots and underutilized commercial/industrial buildings. In addition to seeing the need to revitalize this neighborhood, Seattle also recognized the importance of protecting rural County land in general and drinking water supplies in particular. Projections call for housing in this neighborhood to increase from 900 to 5,000 units in the next dozen years with the work force doubling to 45,000 workers. The City adopted a neighborhood plan for this neighborhood and approved amendments to its Land Use Code permitting the use of development credits from County areas.

In April 2000, the County and City of Seattle approved an interlocal agreement establishing the Denny Triangle Urban Village as a receiving area. The agreement specified that this receiving area would only accept credits transferred from rural and agricultural production districts in the unincorporated areas of the County. The agreement refers to the credits as "rural development credits" and allows the City and County to establish priority sending areas. Future development in the Denny Triangle Urban Village can be granted a 30 percent bonus in building height to allow residential units when developers buy rural development credits and pay an Urban Amenity Payment to be used for Green Streets and similar public improvements. In considering this bonus, Seattle planners demonstrated that the additional height would not obstruct scenic views any more than the buildings allowed under the baseline zoning. Approval of the bonus option was also greatly helped by the fact that half the public benefit comes in the form of neighborhood amenities.

The agreement requires the County to provide up to $500,000 for public amenities to the Denny Triangle area. The agreement specifies that the County funds can be used for the following list of amenities.

1) planning and development of Green Streets;
2) sidewalk widening, pedestrian and street improvements;
3) transit facilities, incentives to use transit, and improved transit service for residents;
4) parks, open space acquisition or improvements, gardens, gateways, and recreation and community facilities;
5) drainage improvements; and
6) public art and street furniture.

The agreement required the County to provide $100,000 immediately to design and begin construction on Green Street projects for two roadways. The agreement requires the County to provide the remaining $400,000 to complete the two Green Street projects when the City has approved the use of at least ten rural development credits in the Denny Triangle. Once 25 credits have been accepted for use in the Denny Triangle, the agreement calls on the City and the County to negotiate additional funding from the County. The agreement will be in effect until 2005 and can be extended an additional three years.

In Fall 2001, King County permanently adopted the provisions of the TDC Pilot Program. The King County TDC Code Section, as of 2001, states that the County's program is designed to permanently preserve rural resources and urban separators while encouraging increased density within cities, where it can best be accommodated by urban services.

Sending sites must meet one of the following site criteria.

1) Land planned or zoned for agriculture.
2) Land planned or zoned for forest.
3) Forested parcels at least 15 acres in size planned for rural forest and zoned RA.
4) Land designated or meeting standards for proposed rural or resource area regional trails or rural or resource area open space site.
5) Habitat of any federally listed endangered or threatened species.
6) Land planned as Urban Separator and zoned R-1.

Sending site owners submit an application for sending site certification that includes a legal description, title report, a description of the resources that qualify the site and, when applicable, a forest stewardship plan. An interagency committee reviews these applications within 60 days. If the property meets sending site criteria, the committee issues a TDR certification letter agreeing to issue a TDR certificate in exchange for recording a conservation easement on the sending site.

The King County Code has specific requirements for the conservation easements recorded on sending sites. These requirements vary depending on the type of sending site. For example, a conservation easement on a rural forest focal area sending site must contain a Forest Stewardship Plan describing the site's forest resources and the long term management objectives of the owner.

To calculate the number of TDRs that can be transferred, the gross area of the sending site is reduced by the land area of any existing easements, the minimum lot size requirement for any existing or planned residences, code required setbacks and all submerged land. The following base densities apply to the resulting net area of these sending sites.

- Sending sites planned Urban Separator and zoned R-1 have a base density of four units per acre.
- Sites zoned RA within rural forest focus areas have a base density of one unit per five acres for transfer purposes.
- Sites zoned A-10 and A-35 have a base density of one unit per five acres for transfer purposes.
- Sites zoned F within the forest production district have a base density of one unit per 80 acres or one unit per each lot between 15 and 80 acres in size for transfer purposes.

A sending site zoned RA, A or F can send twice the base density allowed for transfer purposes to a receiving site within unincorporated County land planned for urban development. Alternatively, one development right can be transferred for each legal lot if the resulting number of TDRs is greater than that produced by the factors cited above. Finally, conversion ratios are established jointly by King County and incorporated cities when transfers occur from unincorporated county land to a receiving site within an incorporated city. The program identifies three categories of receiving sites.

1) Urban sites within unincorporated King County zoned R-4 through R-48, NB, CB, RB or O.
2) Cities where the Growth Management Act encourages new growth and where urban services are planned or already exist.
3) Rural receiving areas zoned RA-2.5 and RA-5 may receive TDCs from rural forest focus areas and be developed at a maximum density of one unit per 2.5 acres if all of the following criteria are met.
   a) The site has public water service.
   b) The site is within one-quarter mile of an area with existing lots smaller than five acres in size.
   c) The receiving site project would not adversely affect locally-significant resource areas or environmentally sensitive areas
   d) The proposed development would not require the extension of public services or encourage a new pattern of smaller lots
   e) The proposed site is not within a rural forest focus area.
   f) The proposed site is not on Vashon or Maury Islands.

In addition to density increases, TDR receiving projects can use the dimensional standards of the zone with a base density most closely comparable to the total approved density of the TDR receiving site development.

When applying for a receiving site project, a developer must own either a TDR certificate or letter of intent or an option to purchase a certificate or letter of intent. TDR is considered under whatever hearing or other procedural requirements are needed for the development proposal.

The TDR bank is only allowed to purchase development rights from sending sites in the rural area or in an agricultural or forest production district. The TDR bank can only sell TDR s for use in receiving site projects located in cities or in the urban unincorporated area. The TDR bank can purchase development rights for not more than fair market value and sell development rights for not less than fair market value. The TDR bank can select TDR buyers based on the price offered as well as number of TDRs offered to be purchased and the potential for the sale to achieve the goals of the program.

Before the TDR bank can sell TDRs for use at receiving sites in incorporated cities, an interlocal agreement must be in place and the city must have legislation regulating transfers to receiving sites. The agreement must identify the receiving area and the conversion ratio. The agreement can also identify the location of sending areas that the incorporated city is particularly interested in preserving.

If the city is seeking funding from King County for receiving area amenities, the agreement must state the funding amount and the amenities to be provided. Qualifying amenities include public art, cultural/community facilities, parks, open space, trails, roads, parking, landscaping, sidewalks, other streetscape improvements, transit-related improvements or other improvements that facilitate increased density. The County Code specifies that public transportation amenities may include passenger shelters and security for passenger and layover facilities. The County could also fund receiving area road projects in cities with receiving areas including streets, traffic signals, sidewalks, landscaping, bike lanes and pedestrian overpasses. King County funding of amenities cannot exceed the appropriations adopted by council or the amount stated in the interlocal agreement, whichever is less. A TDR executive board, consisting of the directors of County departments, selects sending sites to be purchased by the TDR bank and makes recommendations on interlocal agreements and funding of receiving site amenities.

PROGRAM STATUS

One transfer occurred under the original 1993 TDC ordinance. In this transfer, a single-family residential development was allowed to expand from 43 to 49 lots in return for preserving a 1.25-acre sending site as a trail corridor.

In 1999, King County funded it's TDC bank with $1.5 million and used almost the entire amount to preserve 285 acres on Sugarloaf Mountain. This put 56 TDCs in the King County bank valued at approximately $26,000 each. Sugarloaf Mountain is located in rural King County and provides views of Mount Rainier, Tacoma and downtown Seattle.

According to Mark Sollitto, King County TDR Program Manager, the first transfer under King County's 1998 TDC Pilot Program also occurred in 1999. The sending site is 313 acres of forested land. This area is referred to as the McCormack Forest or the Mitchell Hill Connector. A developer paid the owner of this 313-acre property $3.75 million for the development rights allowing the transfer of 62 rural residential credits. The credits were converted at the rate of 8,065 square feet of commercial floor area per rural residential credit. These credits were used to allow 500,000 square feet of additional floor area in an office complex to be occupied by Microsoft. The office developer was motivated to buy credits because the TDC option was estimated to cost 20 percent less than the market rate cost of providing office space at that time. The receiving site is located in the incorporated City of Issaquah, making this the first inter jurisdictional transfer in the Pacific Northwest. As part of this transfer, the developers also contributed an additional $1 million toward transportation improvements in Issaquah. The County used $250,000 of public funds to acquire title and timber rights from the sending site. This sending area is important because it links 1,700 acres of open space to the west with 1,000 acres of state land, providing a regional corridor for both wildlife and hikers. In additional, this area includes several key salmon spawning streams.

As of April 2002, no transfers had occurred under the Denny Triangle interlocal agreement between Seattle and King County. Developers have shown considerable interest in the program, but transfers may not actually occur until 2003 due to the market slump experienced in Seattle at the start of the decade. One development is expected to use TDCs as soon as the market improves. This is a proposal for almost 385,000 square feet of office space, 6,000 square feet of retail, 13,000 square feet of childcare center and 166 dwelling units on a 30,000 square feet site. Seattle's baseline zoning allows FAR 4, which would yield 120,000 square feet of floor area. To obtain the remaining square feet of non-residential space, the developer will use three incentive mechanisms in the Seattle code. These mechanisms allow extra intensity to projects that provide on-site amenities such as day care, affordable housing and TDRs from Seattle's intramural TDR program designed to create/protect performing art centers, historic properties and affordable housing. The 166 dwelling units will be made possible though an inter-jurisdictional transfer of rural residential credits from rural King County at one credit per 2,000 square feet of residential floor area. The developer plans to buy 35 credits from the King County TDC Bank at a cost of $26,500 each or $927,500. (The developer could buy TDCs directly from landowners at an estimated $18,000 each but this process would be much more time consuming since negotiations would probably be needed with several property owners.) In addition to the TDC purchases, the developer will pay $10 per square foot as an Urban Amenity Payment to be used for neighborhood public improvements such as Green Streets. Since the 35 TDCs will result in an additional 70,000 square feet of residential floor area, the Urban Amenity Payment will produce $700,000 for neighborhood improvements. A representative of this developer reports that the neighborhood has supported the proposed project partly because the neighborhood recognizes the importance of preserving rural land. In addition, residents of Denny Triangle have also been supportive of plans for neighborhood revitalization and see the benefit of public improvements, like Green Streets, that will result from TDC receiving area developments.

As of early 2002, planners in Seattle were considering the possible creation of a second receiving area for inter-jurisdictional transfers in the South Lake Union neighborhood. At that time, Mr. Sollitto reported that TDC had preserved 1200 acres of land in rural King County and that transfers under development at that time were capable of preserving an additional 1200 acres. Approximately 80 percent of this land is in the areas where attractive transfer ratios were created when the 1998 Pilot Program became a permanent TDC program. For example, in some sending areas, landowners can build to an on-site density of one unit per 35 acres but may transfer at the rate of one TDC per five acres. Mr. Sollitto refers to this as a "virtual density bonus" of seven-to-one.

In July 2002, Mr. Sollitto announced that the County had used $2.8 million to buy 88 TDRs from Ames Lake Forest, a private, 443-acre working forest. In addition to woodland preservation, this transaction will protect Patterson Creek, a Coho salmon spawning stream, and join with adjacent Tolt MacDonald Park to create a 1000-acre "green wall". The TDRs will be held in the County's TDR Bank for resale to landowners within Seattle's Denny Triangle neighborhood.

King County's original TDC program was intra jurisdictional and experienced only one transfer

In 2001, the County permanently adopted the provisions of a three-year Pilot Program adopted in 1998

Receiving areas can include incorporated cities identified through interlocal agreements

King County will fund $500,000 in improvements within a receiving area in the City of Seattle

An inter jurisdictional transfer with the City of Issaquah preserved a 313-acre open space connector

In 2002, King County bought TDRs from a 443-acre forest and will hold them in its bank for future sale

LARIMER COUNTY, COLORADO[8]

BACKGROUND

Larimer County, population 251,494 (2000), lies 50 miles north of Denver, bordering Wyoming. In the mid 1990s, the County estimated that its zoning allowed 60,000 additional dwellings in rural portions of the County east of the foothills and south of Wellington. The County rejected the idea of down zoning these areas believing it would be unfair to property owners who purchased land in expectation of a higher development potential. Instead, the County considered the possibility of transferring development rights from these rural areas to the Growth Management Areas of municipalities where urban densities are desired.

As a policy matter, the County decided that receiving areas should be close enough to sending areas so that those in the receiving areas would enjoy the benefit of the lower densities or open space created in the sending area. The County also concluded that TDR should be adopted in the context of an adopted area plan. In early 1998, the County identified the Fossil Creek Reservoir Planning Area as an appropriate place for testing the feasibility of a TDR program. As a way to test this approach, the County adopted a resolution in September 1998 creating a "transfer of density units" program for the Fossil Creek Reservoir Area Plan.

PROCESS

The transferable density unit (TDU) program for the Fossil Creek Reservoir Area is generally intended to guide growth and implement land use plans. More specifically, it is designed to protect areas that are important to the community including environmental areas, community buffers, corridors for wildlife migration or hiking, agriculture, park sites, historic landmarks and important scenic views.

The resolution creating this TDU program maps potential sending areas but clarifies that these sending areas are not subject to any overlay zoning but instead are subject to pre-resolution development regulations. Owners of sending area properties may request a determination of the number of TDUs available for transfer. The baseline determination is 114.5 percent of the density allowed by the existing zoning. However this baseline determination can be changed as follows. 1) The baseline TDU determination can be increased for sending sites that include significant natural resources, community buffers, corridors for wildlife migration or hiking, agriculture, park sites, historic landmarks or important scenic views. 2) The baseline TDU determination can be decreased based on parcel sizes of forty acres or less, diminished development potential, property location and existing development on the property. The TDU Administrator uses guidelines to make these adjustments. Once the number of TDUs eligible for transfer has been determined, the property owner receives a certificate stating that number. The certificate remains in effect for two years.

After issuance of a certificate, a sending parcel owner can sell either all or a portion of the TDUs. Upon sale, the TDUs are assigned to a specific Receiving Parcel. Simultaneously with the sale of TDUs, the sending parcel owner executes and records a use covenant with Larimer County that controls all future development of the sending parcel.

Receiving areas in the Larimer County TDU program are in an area of the County with strong demand for growth. It is expected that these areas will be annexed to the City of Fort Collins after they have been developed under the TDU program in the County. The TDU resolution assigns these receiving areas an overlay zoning of "Fossil Creek TDU Zone" in addition to their underlying zoning which imposes required densities ranging from 0.5 to 5 dwelling units per acre. Two sub-areas lie within this overlay: the Estate Residential Area and the Mixed-Use Neighborhood Zone.

The Fossil Creek Program originally contained a feature designed to jumpstart the transfer process. For the first two years of the program, 1.5 dwelling units could be built on a receiving site for each TDU transferred from a sending area. The original ordinance called for this ratio to be reduced to one additional dwelling unit per TDU after September 2000. However, as that date approached, the development community argued that transfers would not be profitable unless the 1.5-to-1 ratio was maintained. The County Board was also persuaded by the argument that all receiving site projects should be treated the same. Consequently the 1.5-to-1 ratio was retained after the original September 2000 sunset date.

Developers interested in using TDUs must submit a plan for the proposed receiving site. The number of units shown in this plan must be within the range of units allowed by the adopted area plan for the subject site. The Board of County Commissioners determines the actual number of units allowed on the receiving site, and allowed to be transferred, through the approval of development review and the preliminary plat.

The most significant aspect of this program involves the cooperation between Larimer County and Fort Collins as memorialized by inter-jurisdictional agreement, or IGA. In some programs, such as Boulder County, Colorado, incorporated cities voluntarily agree to transfer development from rural county areas into receiving sites within their city limits. This option requires city residents to understand that their quality of life can benefit from the preservation of land in another jurisdiction. This level of understanding can be difficult to achieve. Consequently, city officials are often reluctant to designate TDR receiving sites that allow increased density within their jurisdictions in return for decreased density in another jurisdiction. The Larimer County-Fort Collins agreements do not require Fort Collins to designate TDU receiving sites within the city limits. Instead, the IGA states that Fort Collins will not annex a TDR receiving site until Larimer County has approved the development for that site (and required the TDUs that represent the preservation of sending areas.) In return, the IGA requires receiving site projects to comply with the City's development standards. The City is also a referral agency on development projects in the receiving areas. As a result, the City conducts its own review process on projects proposed for the receiving areas.

Instead of actually obtaining TDUs, receiving site developers can elect to pay an in lieu fee if they meet the following three conditions. 1) The receiving site must be 25 acres or less or the proposed project must need ten or less TDUs. 2) The developer must be able to demonstrate a good-faith effort to obtain TDUs. 3) The developer and the County Board must agree on a reasonable fee. Payments under this in lieu fee option are only to be used to acquire open space in the sending areas. The fee was originally calculated by taking the per-acre amount paid by the County for a comparable easement and multiplying it by 2.29 and multiplying that amount again by the number of TDUs to be represented by this in lieu payment. (The density allowed in the sending areas is one dwelling unit per 2.29 acres.) This formula tended to make the in-lieu fee option much more expensive than private sector transactions. In May 2001, TDR Administrator Steve Ryder reported that the ordinance had been modified to reduce that discrepancy.

LARIMER COUNTY, COLORADO

- Sending areas include environmental lands, community buffers, corridors for wildlife migration or hiking, agriculture, park sites, historic landmarks and important scenic views
- The program originally allowed more receiving site development per TDU for the first two years
- Under certain conditions, developers can pay in lieu fees rather than obtain TDUs
- The City of Fort Collins agrees not to annex receiving sites until Larimer County has approved development, securing the preservation of sending site land
- As of January 2001, three transfers had been approved, preserving 380 acres
- Every development approved in the receiving area as of 2002 had used the TDU option

PROGRAM STATUS

As of January 2001, the Fossil Creek TDU program had preserved three sending areas with a combined area of over 380 acres. As a result, 281 TDUs were transferred. At that time, two additional transfers were pending which will cause 233 TDUs to be transferred and an additional 37 acres to be protected from development.

Approximately 60 percent of the receiving area was either under development or had development plans in the review process according to a January 2001 update provided by Larry Timm, Director of the Larimer County Planning Division. TDU Administrator Steve Ryder reported in May 2001 that every development approved in the receiving area since the adoption of the TDU program had taken advantage of the TDU option.

According to Steve Ryder, TDUs sell for about $3,000 each. However sending site owners are sometimes able to supplement the revenue from TDU sales in other ways. For example, an owner might sell only some of the TDUs available on a property and retain the ability to develop one or two prime home sites that are adjacent to deed-restricted

The Larimer County Transferable Density Unit Program preserved this open space site next to the Fossil Creek Reservoir land following the TDU sales. Likewise, the owner may be able to sell trail easements on land previously deed restricted in conjunction with TDU sales.

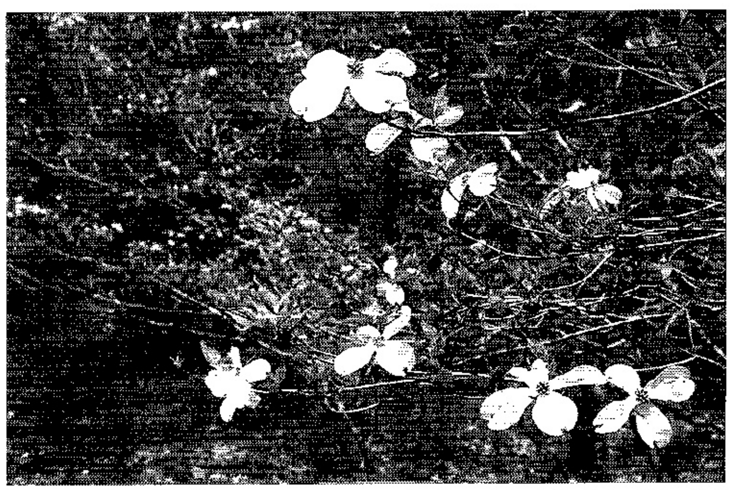
The County is proceeding with efforts to expand the TDU program to other areas in order to achieve the master plan's goals of community separation, preservation of farmland and protection of natural resources. For example, in May 2001, the City of Fort Collins was considering the possibility of a second TDU receiving area in conjunction with a multi-jurisdictional study of growth along the Interstate-25 Corridor. The potential receiving areas might be at a location known as the Northeast Study Area, east of Interstate Highway 25. This potential receiving area would be smaller geographically than the receiving area for the Fossil Creek program. However the TDU demand in the Northeast Study Area might be similar to the Fossil Creek program demand since the Northeast Study Area might be capable of supporting higher densities. The sending areas for this program might be located near the community of Wellington, ten miles northeast of Fort Collins and west of I-25. In 2001, Larimer County was involved in preparing plans for this potential sending area.

LONG ISLAND PINE BARRENS, NEW YORK[9]

BACKGROUND

Suffolk County, population 1,321,339 (2000), includes the entire eastern end of Long Island in the State of New York. In the center of Suffolk County lies the Long Island Pine Barrens, the largest single undeveloped area on Long Island. The Pine Barrens contain pitch pine and pine-oak forests, coastal plain ponds, marshes and streams which provide numerous recreational opportunities as well as open space. The area contains the largest concentration of endangered, threatened and special concern plant and animal species in the State, including dwarf pines. In addition, the Pine Barrens constitute the deep recharge area for one of the largest sources of groundwater in New York State, an aquifer that provides drinking water for much of Long Island.

Originally 250,000 acres in size, the Pine Barrens has been reduced by development to a 100,000-acre area shared by the townships of Brookhaven, Riverhead and Southampton. The Town of Southampton has had an individual TDR program since 1972, which is discussed in a separate case study. In addition, the Town of Brookhaven also had a TDR program which was designed to accomplish the same goals as the Pine Barrens program; the Brookhaven program was used on two or three occasions but was eliminated in 1994



To protect the aquifer that provides water to much of Long Island, the State of New York and Suffolk County facilitated the Central Pine Barrens TDR program that operates within three adjacent towns in anticipation that the Pine Barrens program would be adopted.

In 1989, environmental groups over sued the three towns and Suffolk County over whether or not more than 200 building projects should be allowed to proceed. In 1992, the New York State Court of Appeals agreed with the environmental groups that a protection plan for the area was needed. The New York State Legislature responded with the Long Island Pine Barrens Protection Act of 1993. This legislation created the Central Pine Barrens Joint Planning and Policy Commission consisting of representatives from each of the three townships, Suffolk County and the State of New York. The Commission was charged with developing a plan for the protection of the Pine Barrens. The State legislation referred to transfer of development rights as an optional means of implementation, but it did not require that TDR be incorporated in the plan.

In June of 1995, each of these jurisdictions adopted the Central Pine Barrens Comprehensive Land Use Plan. This plan divided the Pine Barrens into two areas: the 52,500-acre Core Preservation Area and the 48,500-acre Compatible Growth Area. The Core Area is designed for agriculture, recreation and other open space uses; new development is prohibited in the Core Area with some exceptions, as discussed below. The Compatible Growth Area permits appropriate patterns of growth, including some development redirected from the Core.

To implement these goals, the Plan seeks to purchase 75 percent of the remaining privately-owned vacant land in the Core; since approximately 14,000 acres within the Core are undeveloped and privately held, the Plan seeks to preserve about 10,000 acres through acquisition. At one time the State of New York and Suffolk County pledged to spend $70 million to buy land in the Pine Barrens. Owners of land in the Core can also use a transfer of development rights program called the Pine Barrens Credit Program as described below.

PROCESS

Sending sites in the Pine Barrens Credit Program include land within the Core area. In this area, owners can use their property for certain recreational uses and agricultural activities that do not require substantial alteration of native plants. Most residential development is prohibited except for the expansion of existing homes and development approved before June 1, 1993. In addition, property owners can apply to build on site using the extraordinary hardship provisions of the Pine Barrens Protection Act.

While new development is basically prohibited, one single family residence can be built on existing lots at least ten acres in size if the lots front on existing streets and are within areas that are already partly developed. This exception reflects the belief that a limited number of homes in the core area could serve a stewardship function by deterring illegal dumping and other activities that damage the environment. In addition, the exception recognizes the fact that lots on existing streets have greater value than lots that have no access; this higher value would have to be matched by a higher level of compensation if development is prohibited on these lots.

As an alternative to building on these sending sites, the owners of Core Area land may sell their property to public agencies, such as Suffolk County and the State of New York. Private developers may also buy these sending site properties in order to acquire the transferable development rights associated with this land. Alternatively, these owners can retain fee title to the sending sites but sell the development rights, referred to as Pine Barren Credits, or PBCs.

To determine the PBCs allocated to each sending site, the acreage eligible for PBCs must first be calculated by deducting areas already precluded from development by conservation easements and other deed restrictions. Then a development yield factor is multiplied by the number of dwelling units per acre allowed on the site under the zoning regulations in existence in June 1995, when the Plan was adopted. In general, this underlying density is either one dwelling per five acres or one dwelling per two acres. There are eight different yield factors; these factors result in the award of fewer PBCs to a site than the number of dwelling units allowed under the old zoning. For example, if the zoning allows four units per acre, the sending site is entitled to 2.7 PBCs per acre. Similarly, if the zoning allows one unit per acre, the sending site is granted 0.08 PBCs per acre. In addition, one PBC must be deducted for each existing dwelling.

Although these transfer ratios are negative, unlike most TDR transfer ratios, sending site owners should nevertheless be motivated to create and transfer PBCs. As discussed above, no development can occur in the core unless property owners are granted hardship exemptions or legislative amendments allowing one dwelling on an existing ten-acre lot along certain roads.

Furthermore, these sending sites are often smaller land holdings consisting of substandard, 40-by-100-foot lots created in the early 1900s. It would not be economical to develop many of these lots due to site constraints and the high cost of providing roads and other public services. As explained by Tim Hopkins, an attorney with the Suffolk County Water Authority assigned to the Commission, the owners often have an inflated opinion of the value of these lots based partly on the amount of tax payments made on these properties over decades. But the Commission estimates that the value of these lots is actually very low and that the ability to transfer development rights off of these properties at the rate set by the underlying zoning is more valuable than the questionable ability to develop the lots themselves.

This near-prohibition on sending site development is often categorized as a mandatory TDR program because the property owners must transfer in order to receive economic gain from the development potential of their property. As discussed in the chapter on legal issues in this book, mandatory programs have a greater obligation to ensure that the compensation mechanism is fast and fair. As shown below, the Pine Barrens program has features which address the compensation issue, including a bank authorized and funded to buy PBCs and receiving sites zoned to accept PBCs as a matter of right.

Pine Barren Credits are severed from sending sites in the process of obtaining Pine Barren Credit Certificates. To facilitate this process, the Commission has prepared a "Pine Barrens Credit Program Handbook: A User's Guide to the Central Pine Barrens Transferable Development Rights Program". This handbook provides applications, sample documents and a user-friendly guide to the three steps needed to obtain Pine Barrens Credit Certificates.

In the first step of the process, a property owner submits an application to the Clearinghouse and the Clearinghouse issues a Letter of Interpretation identifying the number of PBCs available to the applicant's parcel. If applicants disagree with the number of credits identified, they can follow a specified appeal procedure. It is possible to negotiate for the sale of PBCs, without actually receiving a PBC Certificate, using just this Letter of Interpretation. The Letter of Interpretation is valid for one year.

In the second step, the sending site owner must submit an application for a Pine Barrens Credit Certificate to the Clearinghouse along with the Letter of Interpretation, a title search to ensure marketable title, a survey and a copy of the proposed conservation easement. If an applicant uses the pre-approved conservation easement provided by the Clearinghouse, the easement does not have to be reviewed by the Commission. Alternatively, applicants may draft their own easements as long as they restrict the sending sites in a way that achieves the Plan's conservation goals. The Commission approves these proposed easements at this step to avoid the extra cost and time delay which can occur when a recorded easement has to be removed or modified because it does not meet the Commission's standards.

In the third step, the conservation easement is recorded and a certified copy is sent to the Clearinghouse. The Clearinghouse verifies that the recorded easement is identical to the one approved by the Commission. Following an updated title search, the Clearinghouse issues a PBC Certificate. The owner of PBC Certificates may sell them, hold them for future use or redeem them to receive additional density at a receiving site. Whenever PBCs are sold, the Clearinghouse issues new PBC Certificates to the new owners. The Clearinghouse also maintains a Pine Barrens Credit Registry indicating the names and addresses of all people who have created, bought or sold PBCs.

Owners wishing to sell PBCs may consult lists of potential buyers provided by the Clearinghouse or may list their PBCs with a real estate broker. Alternatively, PBCs may be sold directly to the Clearinghouse. The State Natural Resources Damages Account contributed $5 million to the Clearinghouse to establish a revolving fund for this purpose. (This seed money was transmitted in the form of an interest-free loan that would have to be repaid only if the Clearinghouse is terminated.) However the Commission's goal is to develop a private-sector market for PBCs. The Clearinghouse purchases PBCs at a price established by its Board of Advisors.

PBCs are redeemed when they are used to increase residential density or non-residential intensity at a receiving site. Unless the town grants special permission, PBCs can only be used at receiving sites in the same town as the sending sites which generated the PBCs; in Southampton, the sending and receiving sites must be within the same school district also.

The Plan requires each of the three towns to identify receiving sites capable of accommodating 2.5 times the number of PBCs which could be created at the sending sites in that town. Furthermore, each town is required to establish "as of right" receiving areas where PBCs will be accepted without the need to obtain a special permit. These "as of right" receiving areas must be capable of accepting at least as many PBCs as the sending sites in that town are capable of generating.

In Brookhaven, the receiving sites include lands covered by a residential overlay which are not within specified environmental protection areas. By Planned Development, PBCs can also be used in Brookhaven to increase the intensity of Planned Retirement Communities as well as commercial and industrial projects.

LONG ISLAND PINE BARRENS, NEW YORK

New York State Court of Appeals ruled that a plan was needed to protect unique ecology and the aquifer that supplies water to much of Long Island

State legislation created the Central Pine Barrens Commission consisting of representatives from Suffolk County, three townships and the State of New York

Sending sites have little development potential

State provided $5 million to start a Clearinghouse to buy and sell Pine Barrens Credits (PBCs)

PBCs must be accepted as a matter of right in receiving areas

As of 2001, 335 parcels had been permanently protected by easements, representing 315 acres of land.

In Riverhead, PBCs generated by residential development are allowed to increase intensity within non-residential receiving areas. The extra density is expressed as 300 gallons per day per acre of additional sewage flow.

In Southampton, as-of-right receiving sites are located in residential overlay zones. When the underlying zoning allows one unit per five acres, the use of PBCs would allow the density to increase to one unit per acre. In some cases, the density could increase to one unit per 0.5 acres; this 900-percent increase is one of the highest bonuses of the TDR programs included in this book. In areas zoned for one unit per acre, Southampton would allow transfer projects to achieve a density of one unit per 0.5 acres. To fully redeem PBCs in some school districts, Southampton would have to allow densities even higher than one unit per 0.5 acre; this would require a sewage treatment plant to be installed. Southampton also allows PBCs to be transferred to Planned Development Districts to facilitate tourism facilities, senior housing, medical centers and commercial uses.

PROGRAM STATUS

The Pine Barrens program has many promising features. Sending site owners should be motivated to sell their development rights since they are prohibited, with some exceptions, from building on sending sites within the Core. Likewise, developers should be interested in buying PBCs since PBCs can be used to increase receiving site density by as much as ten times the baseline levels. The program has a Clearinghouse, which distributes information to the public and buys PBCs when necessary. The Commission also has a staff of five people and can draw on support from the staff of the three townships, the County and the State. In addition, each Town has identified receiving areas where PBCs are permitted as of right; this certainty should make more developers interested in the program. Finally, unlike larger multi-jurisdictional TDR programs, like the New Jersey Pinelands, (with a planning area of one million acres), the Pine Barrens program has a smaller scale and a more manageable goal of preserving 52,500 acres.

As of August 1, 2001, PBC Certificates had been issued to a total of 335 parcels of land representing 315 acres under permanent conservation easement. Most of the preservation at that time had occurred in the Town of Brookhaven. The easements created 230 Pine Barren Credits. Of this total, 110 credits had been redeemed, or used on receiving site projects. The remaining 120 credits had not been redeemed. The Pine Barrens Credit Clearinghouse also keeps lists of potential sellers and purchasers of credits. As of August 2001, the Clearinghouse reported 33 potential purchasers of credits. The list of potential sellers indicated that there were 35 potential sellers of 103 Pine Barrens Credits that had been issued but not yet redeemed. The Clearinghouse itself was the owner of 35 of these credits, or roughly 35 percent of the immediate supply at that time. Also, Letters of Interpretation had been issued to roughly 300 other property owners who had expressed an interest in selling their credits. These Letters of Interpretation represented a potential supply of another 200 Pine Barren Credits.

In a February 2000 update, Commission Executive Director Raymond P. Corwin reported that Pine Barren Credits were selling for roughly $50,000 each. In Riverhead, credits were sometimes purchased not for extra development but to convert to new land uses with higher sewage treatment demand ratings, such as restaurants. Mr. Corwin also reported in a 1999 update that the $5 million in seed money provided by the State was important to the success of the program.

LOS ANGELES, CALIFORNIA[10]

BACKGROUND

The City of Los Angeles, population 3,694,820 (2000), uses three different mechanisms to achieve a wide range of objectives: preserve historic landmarks, promote affordable housing, create public open space, provide public transportation and create public/cultural facilities as well as offer flexibility in the concentration of development without overwhelming the overall capacity of the public service and infrastructure system.

One technique, known as "Floor Area Ratio Averaging", has been available for several years in commercial and industrial zones throughout the City; this mechanism is limited to transfers between contiguous parcels which result in unified developments, or projects that are linked both functionally and architecturally.

When the redevelopment plan for Los Angeles' central business district was adopted in 1975, it contained provisions for allowing additional density to development projects which incorporate development rights transferred from sending sites within the Central Business District. Specifically, the baseline density allowed by zoning, which is typically either FAR 3:1 or FAR 6:1 can be more than doubled, to FAR 13:1 for projects involving transfers. However, transfers are limited to properties located in certain downtown subareas. In addition, receiving sites must be within 1500 feet of sending sites.

In 1985, the City adopted a "Designated Building Site" ordinance as a way of preserving historic downtown buildings in general and the City's Central Library in particular. Historic and non-historic properties can be included within the boundaries of a "Designated Building Site". In the downtown TDR mechanism mentioned above, the FAR-13 density limit is multiplied by the land area of only the receiving site to determine the maximum size of a receiving-site project using TDR. In the Designated Building Site mechanism, the parcel size of the entire Designated Building Site, (the acreage of the historic property as well as the development site), is multiplied by FAR 13 to determine the total development capacity of the Designated Building Site. This total development capacity can then be allocated to all parcels in the Designated Building Site as long as the City Council approves of the plan for development of the receiving sites and preservation/restoration of the landmark on the sending property. As a result, the density on the development parcels within the designated building site can greatly exceed FAR 13:1.

In 1988, the City adopted an ordinance that essentially created a permutation of the transfer process started in 1975 with the central business district redevelopment plan. The 1988 ordinance retained the previously-discussed mechanism created by the 1975 redevelopment plan for the central business district for transfers of 50,000 square feet or less of floor area. However this 1988 ordinance changed the rules whenever downtown projects incorporate more than 50,000 square feet of transferred floor area. This change was prompted by the observation that the value added by transferred rights to receiving sites was often much greater than the amount of money which some sending site owners were willing to accept for these development rights. Through this 1988 ordinance, Los Angeles's Community Redevelopment Agency (CRA) charges a Public Benefits Payment of $35 per square foot of transferred floor area to be used for affordable housing, open space, historic preservation, public transportation and public/cultural facilities.

PROCESS

Each of Los Angeles's three TDR processes is discussed separately below: Floor Area Ratio Averaging, Designated Building Site and Transfer of Development Rights - Central Business District Redevelopment Project Area.

Floor Area Ratio Averaging

Under the floor area ratio averaging code section, sending sites can be any properties in the commercial or manufacturing zones throughout the City; additionally, qualifying parcels can be located in the Residential R5 zone within the Central Business District Redevelopment Area or the Bunker Hill Urban Renewal Project Area at the north end of downtown Los Angeles. The receiving sites must also be within these zones. The sending and receiving sites must be two or more contiguous parcels or lots of record separated only by a street or alley.

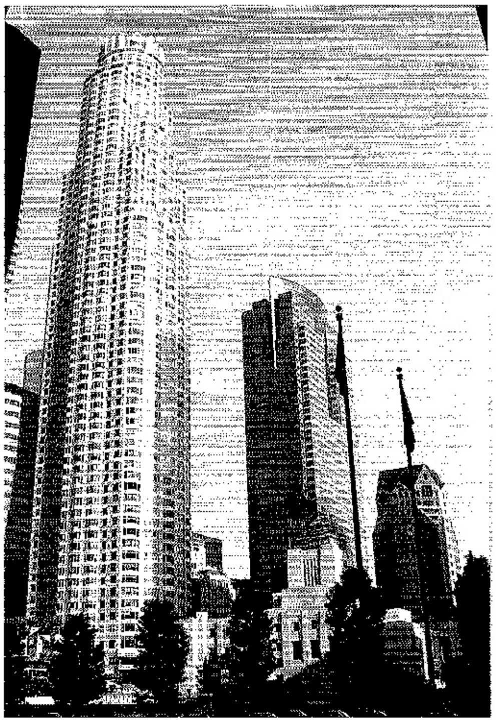
This process offers a one-to-one transfer ratio. Through the conditional use permit process, the Planning Commission can permit development on the receiving site to exceed the permitted floor area ratio as long as the floor area ratio for both the sending and receiving sites as a whole does not exceed the density limit specified by the zoning code.

Floor area ratio averaging is only available to unified developments. In addition to being located on contiguous parcels, proposed projects must meet three other criteria to qualify as unified developments: separate buildings within the development must have functional connections, such as pedestrian or vehicular linkages; the design elements of a unified development must have common architectural and landscaping features; and the development must appear to be a consolidated whole when viewed from adjoining streets.

A title search must be submitted to ensure that the application has been signed by everyone with either ownership or mortgage interests in all parcels within the proposed unified development. Following approval, the applicants must file a covenant that satisfies four requirements: guarantees that the parcels will be maintained as a unified development; indicates the floor area assigned to each parcel; assures continued maintenance of the unifying design elements; and assigns responsibility for this ongoing maintenance.

Designated Building Site Ordinance

In 1985, Los Angeles adopted a Designated Building Site ordinance for the purpose of preserving City-owned and operated historic structures in general and the City's Central Library in particular. Designated Building Sites must be located within the Central Business District Redevelopment Project Area and/or the Bunker Hill Urban Renewal Project Area. Multiple properties do not have to be under the same ownership; but they must be contiguous or separated only by streets or other rights of way.



The Los Angeles Central Library, in the foreground, and the One Bunker Hill Building behind it, were restored and expanded through transfers to the two largest high-rise office towers at the rear of the photo.

The Planning Commission holds a hearing on the Designated Building Site application and transmits its recommendation to the City Council. Before approving the application, the City Council must find that the Designated Building Site designation is needed to preserve and restore a structure which is a designated as historic by the Cultural Heritage Commission as well as City owned and operated. Following approval, an agreement must be recorded which establishes the total permitted floor area for each parcel.

Approval as a Designated Building Site establishes a maximum floor area ratio of 13:1 for the entire land area within the Designated Building Site, not just the receiving site. This development potential must be distributed to preserve the historic landmark while allowing buildings on the receiving site portions of the Designated Building Site to greatly exceed 13:1. As described below, this ordinance was used to preserve and restore Los Angeles's Central Library and another older structure while allowing the construction of two major office towers.

Transfer Of Development Rights - Central Business District Redevelopment Project Area

The Los Angeles Central Business District Redevelopment Project Area encompasses approximately 2.5 square miles of land, incorporating underutilized industrial areas as well as high-rise office complexes. The project area is composed of five subareas: Civic Center, Central Commercial Core, Central City East, South Park and Eastside Industrial Park.

A mechanism for transferring development rights within the Central Business District was first created in 1975 with the adoption of the Redevelopment Plan for the Central Business District. This 1975 ordinance still regulates projects which use 50,000 square feet or less of transferred floor area.

Under the 1975 ordinance, transfers must meet the following five criteria:

- The higher density of development proposed for the receiving site must be accessible to the transportation system, compatible with surrounding development and consistent with the Redevelopment Plan.
- Sending and receiving sites must be within 1500 feet of each other.
- Floor area can only be transferred from and to parcels in the Civic Center, Central Commercial Core and South Park subareas and a portion of the Central City East subarea.
- The floor area ratio cannot exceed the maximum allowed by the City Zoning ordinance.
- Particular encouragement is given to transfers in projects with direct access to public transportation facilities.

The receiving site developer must submit an application for approval of transfer of floor area ratios. The Planning Commission holds a noticed public hearing after which it may deny, approve or conditionally approve a TDR application if it can make the five findings listed above and if the Commission also determines that the transfer would benefit the public welfare and would be consistent with the City's General Plan. The decision of the Planning Commission is final unless appealed to the City Council.

In 1988, Los Angeles added a permutation to this TDR process by adopting an ordinance entitled "Transfer of Development Rights - Central Business District Redevelopment Project Area" designed to increase the public benefits resulting from larger TDR projects in the downtown. The ordinance specifies five purposes:

- Establish standards and procedures for transferring more than 50,000 square feet of development rights.
- Maximize coordination between the City's Community Redevelopment Agency and the City Planning Commission.
- Record the available development rights within the Central Business District.
- Keep an account of public benefits resulting from transfers.
- Facilitate transfers which generate public benefits such as housing, open space, historic preservation, cultural/community facilities and public transportation improvements.

Sending sites can be any parcels within the Central Business District Redevelopment Project Area. Receiving sites can be any parcel within this project area. The baseline density allowed to parcels in the project area is either floor area ratio (FAR) 3:1 or 6:1 depending on the subarea in which the site is located.

The ordinance requires the applicant to consult with the City Planning Department prior to entering into agreements with the Community Redevelopment Agency. This requires an Early Consultation Session designed to identify important issues related to the proposed project including transportation, parking and public benefits.

An application for approval of a transfer plan is submitted to the Redevelopment Agency. When the Agency Board has approved the request, the applicant and the Agency jointly submit an application for the transfer plan to the Planning Commission.

The Planning Commission holds a public hearing on the proposed transfer plan. In order to recommend approval of the transfer plan to the City Council, the Planning Commission must find that the proposed development meets eight requirements:

- Compatibility with adjacent development and supporting infrastructure, particularly the transportation system.
- Consistency with the Redevelopment Plan.
- Within the development limits of the receiving site subarea.
- Consistency with the Community Plan.
- Consistency with other Commission/City Council policies.
- Consistent with the Joint Resolution between the Agency Board and the Planning Commission regarding public benefits to be provided pursuant to the transfer plan.

The City Council considers the recommendation of the Planning Commission. In order to approve the transfer plan, the Council must make the same findings required of the Planning Commission. When the final Owner Participation Agreements or Disposition and Development Agreements are approved by the Agency, the Director of Planning must determine whether or not these final agreements are consistent with the City Council's approval.

The ordinance requires the Agency to maintain records of existing development rights, transferred development rights and public benefits resulting from transfers. In addition, transferors and transferees must sign and record documents which set forth the amount of floor area transferred and the floor area remaining on the sending site.

Developers are required to pay a public benefit payment on transfers in order to fund public open space, affordable housing, cultural/public facilities, historic preservation and public transportation improvements. Payment can be deferred until the project is ready to begin construction. In the building boom of the late 1980s, this public benefit payment was set at $35 per square foot of floor area transferred. Fee requirements are also found in the TDR programs in Burbank and Irvine, California.

PROGRAM STATUS

The first transfer mechanism, floor area ratio averaging, is not a frequently used process. On occasion, two property owners may seek CUP approval for a parking lot on one parcel and a building which exceeds the zoning code's density limits on a contiguous parcel. But, according to Bob Sutton, Assistant Planning Director, a relatively small percentage of project sites are likely to meet the requirements for using this procedure.

At least one major project in downtown Los Angeles was approved using the 1985 Designated Building Site ordinance. As mentioned above, the ordinance was adopted in an effort to save historic downtown buildings. Of particular concern was the Central Library, which was built in 1926, designated as an historic monument of the city in 1967 and added to the National Register of Historic Places in 1970.

In 1985, the Community Redevelopment Agency and Maguire/Thomas Partners Development, Ltd. jointed applied for designated building site status for five properties in downtown Los Angeles: the historic Central Library, the Library Plaza, One Bunker Hill (another older property), Library Tower (later renamed the First Interstate Building) and Grand Place Tower (ultimately renamed the Gas Company Tower). The entire Designated Building Site has a land area of 382,422 square feet. Under the baseline zoning limits, the by-right development on these five parcels would have been limited to a total of 2.5 million square feet of floor area; (this by-right floor area is slightly higher than FAR 6:1 because one existing building, One Bunker Hill, was larger than FAR 6:1 and because the Central Library and Library Plaza sites qualified for a 25-percent rehabilitation bonus.

In the application for Designated Building Site status, the following development was proposed for the five sites.

- Central Library: restoration of the original 161,000 square foot building plus a 200,000 square foot expansion.
- Library Plaza: construction of a 600-space subterranean parking garage topped by a landscaped public plaza and a 6,000-square foot above-grade retail/restaurant structure.
- One Bunker Hill: Restoration of this 14-story, 220,000-square foot office building plus a 20,000 square foot addition.
- Library Tower: Construction of a new, office tower with approximately 73 floors and 1.3 million square feet of floor area; an FAR of 18.77.
- Grand Place Tower: Construction of a new office tower with approximately 70 stories and 1.2 million square feet of floor area; an FAR of 19.82.

The total proposed floor area, 3,107,000 square feet, represented a density of FAR 8.12 for the 382,422 square foot designated building site; this proposal was well within the maximum FAR 13:1 allowable under the Designated Building Site ordinance.

The original proposal described above was approved after major modifications. Nevertheless, construction on all five parcels in the designated building site has been completed. Despite damage from an earthquake and two arson fires, (which almost doubled the original cost estimates), the Central Library has been preserved, restored and enlarged with a public plaza built over a subterranean parking garage. It is estimated that, in return for the increased density allowed on the development parcels, the City received an estimated $65-million worth of public benefits from this approval.

LOS ANGELES, CALIFORNIA

Three different mechanisms are used

Floor Area Ratio Averaging is designed to achieve urban design goals by allowing contiguous properties to be treated as one property for the purpose of computing maximum density

The Designated Building Site ordinance is designed to protect downtown historic buildings. In fact, Los Angeles' historic Central Library was rehabilitated and preserved as part of a project that incorporated five buildings with over three million square feet of floor area

A TDR mechanism also allows transferred floor area to more than double the size of receiving site projects if the overall project promotes the goals of the downtown redevelopment plan; the city charges a fee of $35 per square foot when more than 50,000 square feet are transferred. This technique was used in the approval of 3.5 million square feet of receiving site projects

As discussed above, the transfer of development rights process originally instituted for the downtown as part of the 1975 community plan was changed in 1988 for projects incorporating more than 50,000 square feet of transferred floor area. Following the 1988 code changes, three additional projects were approved with a total build-out of 3.5 million square feet of office, hotel and retail floor area; of this total, one million square feet of floor area were transferred from downtown sending sites. Another three projects were in discussion when the recession of the early 1990s drastically cut the demand for office space in downtown Los Angeles.

Charles Loveman and Larry Kosmont, of the consulting firm of Kosmont & Associates Inc. in Los Angeles, have examined the public benefit payment. They credit the CRA with inventing an important new mechanism for funding public improvements using TDR. But they also question the price tag of $35 per transferred square foot of floor area. In Loveman and Kosmont's opinion, at $35 per square foot, the receiving site developer can only afford to buy TDRs from sending sites in the most undesirable parts of the Central Business District; the owners of historic landmarks with a higher value for unused TDRs will be unlikely to get a fair price for these development rights and, consequently, will have less incentive to deed restrict their properties unless the CRA uses some or all of the value of the public benefit payment on their landmarks. Faced with this uncertainty, Loveman and Kosmont believe that developers are encouraged to buy TDRs from the CRA reserves rather than on the private market, putting CRA in control of the price of TDRs as well as the public benefit payment.

Supporters of the public benefit payment respond by pointing out that the public benefit payment is simply one of the costs of building projects at substantially higher densities than those permitted by right; specifically densities can be more than doubled to 13:1. These proponents estimate that the public benefit payment represented approximately one-third of the value of floor area associated with prime office sites in downtown Los Angeles in the late 1980s and early 1990s. During these years, the payment was not considered an impediment to development and actually provided a level of certainty since the payment amount was fixed and was not required to be paid until construction began.

In addition, supporters of the payment point out that CRA's reserve floor area made some transfers possible by providing an alternative to purchasing development rights on the open market. This level of certainty is critical to securing financing for major construction projects which could take five years to go from conception to completion.

Finally, the supporters of the $35-per square foot benefit payment point to the fact that approximately one million square feet of floor area was approved for transfer after imposition of the public benefit payment requirements; these transfers resulted in approvals for 3.5 million square feet of total development. David Riccitiello, Project Manager at CRA, also adds that three more projects using TDR were at the discussion stage when the recession reversed the Los Angeles office market. In fact, the low demand for downtown office space in the 1990s makes it difficult to assess what impacts the 1988 ordinance and the $35 per-square-foot payment have had on Los Angeles's TDR program.

The Planning Department staff is currently completing a specific plan for the City's Alameda District, an area east of the central business district which includes the regional transportation center. This specific plan includes a procedure for the transfer of development rights.

MALIBU COASTAL ZONE, CALIFORNIA[11]

BACKGROUND

The Malibu Coastal zone stretches along 27 miles of Pacific Ocean shoreline from the City of Los Angeles to the border of Ventura County. It also extends five miles inland to encompass the coastal terrace and a portion of the Santa Monica Mountains. Until 1991, the entire coastal zone was in unincorporated portions of Los Angeles County. However, the newly-incorporated City of Malibu now constitutes about one fifth of the coastal zone.

The extremely rare Mediterranean ecosystem found in the Santa Monica Mountains provides for exceptional biological diversity, with more than 900 species of plants, over half of the bird species found in the entire United States and habitat for mountain lions, bobcats and golden eagles. To protect a portion of this important natural resource, the Santa Monica Mountains National Recreation Area was created by the U. S. Congress in 1978.

In addition to natural resources, the Malibu Coastal Zone is known for natural disasters. Wildfires are a common occurrence. These fires burn the vegetation from steep and highly-erosive slopes making them vulnerable to landslides during the winter rainy season. The steep canyons are also highly susceptible to flooding.

This area is also extremely hard to provide with infrastructure. For example, access to the Malibu beaches is often difficult due to traffic congestion; yet the rugged coastal topography does not easily lend itself to new roadways or even the expansion of existing roads.

The mountains are also laced with thousands of small lots created prior to the advent of modern subdivision regulations. These lots were originally designed as sites for weekend cabins. Some of these lots, which are generally between 4,000 and 7,000 square feet each, are suitable for development. However, many are not.

Where these substandard lots have been developed, roadways are often inadequate, making access difficult, particularly if residents need to evacuate in advance of a wildfire. In addition, septic systems installed on small, steep lots can fail, causing raw sewage to enter nearby streams. In the late 1970s, coliform contamination exceeded standards in two Santa Monica Mountain creeks. These creeks enter the Pacific Ocean at some of the most popular beaches in Southern California.

Almost 5,000 of these substandard lots remained undeveloped in the late 1970s. Many of them are steep, inaccessible, not suitable for septic systems and difficult to serve with public utilities. Nevertheless, unless there are health or safety concerns, the County of Los Angeles considers every legally-created lot as having a vested right for the development of one single-family home. If all of the lots in these antiquated subdivisions were to be developed, there would be even more environmental damage and significantly more households exposed to wildfire, landslides, floods and traffic congestion.

Despite the well-publicized hazards and inconveniences of living in the Santa Monica Mountains, people continue to build new homes there. In fact, due to its natural beauty and proximity to Los Angeles, land in the Malibu area is highly desirable and extremely expensive.

The California Coastal Act of 1976 created the California Coastal Commission to safeguard coastal resources and ensure public access to the coast. The Coastal Act also requires all municipalities to adopt a Local Coastal Plan (LCP) to regulate development in a manner that protects the coastal zone. Until an LCP is certified, the Coastal Commission has the authority to approve or deny development applications in a jurisdiction. Since a certified LCP has not yet been adopted, the Coastal Commission has been regulating development in the Malibu Coastal Zone from 1977 to the present.

The Coastal Act states that new subdivisions can only be permitted where 50 percent of the existing lots are already developed. In 1978, 64 percent of the 13,475 lots of record in the Malibu Coastal Zone were vacant. Unless a solution was found, the Commission would have to allow the development of hundreds of substandard lots in antiquated subdivisions while denying new subdivisions which complied with modern environmental standards and which were located in areas suitable for development.

In 1978, a study was performed by the Santa Monica Mountains Comprehensive Planning Commission which recommended that future subdivisions not be permitted in the Malibu Coastal Zone which would increase the total number of lots. It suggested that development potential be transferred from existing substandard lots to specific areas capable of accommodating growth. A second study concluded that only one of the small lot subdivisions existing in the Malibu Coastal Zone met modern environmental standards. The report added that many of the lots were too steep to provide a good building site or allow for a septic tank leach field; many had no public water service or paved road access.

Prior to establishing a policy or preparing guidelines, the Coastal Commission began facilitating transfers in order to allow individual subdivisions. During one of these early transactions, a private broker asked that the Commission create rules and regulations to institutionalize the program.

Consequently, in 1979, the California Coastal Commission adopted guidelines for the location of new subdivisions and the mitigation of their impacts. These guidelines require that one existing lot be retired from development for each lot created through new subdivisions. As described in detail in the following section, these guidelines established a process for subdividers to buy TDCs from the owners of undeveloped substandard lots in order to be granted new subdivisions in the extremely desirable Malibu coastal area. The sending site owners receive compensation for the development potential of their substandard lots even though these lots are deed restricted from future development.

Through this TDC program, the Commission has allowed new subdivisions without increasing the overall development capacity of the area. In addition, the Commission can shift development from inappropriate areas without spending public funds to acquire substandard lots.

Elizabeth Wiechec, now a consultant, was Executive Director of the Mountains Restoration Trust from 1982 to 1992 and has written an excellent analysis of the Malibu program for the Santa Monica Mountains Conservancy. Most of the information in this case study

The Malibu Coastal Zone program has preserved over 800 acres of environmentally-sensitive land including the Cold Creek Preserve pictured here comes from that 81-page publication entitled "Transfer of Development in the Malibu Coastal Zone". This highly-readable study not only provides insights into the Malibu program but also describes the more universal issues that have to be grappled with in any TDR program such as political acceptance, market forces and the need to adapt to changing circumstances.

PROCESS

The Malibu program is considered voluntary because sending site owners are not prohibited from developing their existing lots nor are they required to sell development rights for their substandard lots. The owners of receiving sites, on the other hand, must buy TDCs in order to create new lots. However, they can always develop one home on an existing, legal lot. Consequently, the program is not considered mandatory for the receiving site owner although the value of home sites in Malibu makes the purchase of TDCs and the subdivision of land economically attractive.

TDCs are only needed to create the additional lots, not to build on the original lot which existed prior to the subdivision. For example, the owner of a large legal lot would have to buy three TDCs in order to be granted a subdivision separating the original lot into four smaller lots.

Developers are highly motivated to buy TDCs because of the huge increases in land value that can be gained by subdividing land. According to Elizabeth Wiechec, the size of the lot is not as important as the size of building site. Consequently, splitting a 10-acre lot into four, 2.5-acre lots can produce a 300- to 400-percent increase in value.

The Malibu TDC program is not as yet included in an adopted Local Coastal Plan or zoning code. Instead, the program follows the process found in the guidelines adopted by the California Coastal Commission and will continue to be regulated by these guidelines until the certified Local Coastal Plan is adopted.

Originally, the guidelines confined potential sending sites to existing substandard lots in small lot subdivisions. Larger lots and undivided acreage were not at first allowed to be sending sites. However, the 1981 amendments to the guidelines allowed TDCs to be transferred from land parcels of any size within Significant Ecological Areas. The guidelines do not designate receiving sites other than to describe them as areas that are currently developed and capable of accommodating growth.

The guidelines also establish criteria for determining the number of TDCs available at a sending site within a small lot subdivision. One credit is assigned for any combination of small lots which total one acre or more regardless of whether these lots can actually be developed. Alternatively, one credit can be assigned for one or more small lots, regardless of size, which meet two criteria: they must be buildable, meaning they are served by an existing road and not located in a landslide or geologic-hazard area; they must be eligible to support a house consisting of at least 1,500 square feet of floor area according to a slope-intensity formula. As a third alternative, an owner may claim one TDC for three existing lots of at least 4,000 square feet each regardless of the floor area allowed under the slope-density formula. Finally, the Commission can allow increased credit value on a case-by-case basis, to land that offers exceptional public access opportunities.

When TDCs are severed from a sending site, the lot is retired from development through a scenic easement. The easement runs with the land in perpetuity and precludes residential development. The easement protects the site for light, air, view and scenic qualities. If stated in the easement, the property may be used for private recreational uses. However, these easements do not give the public any rights for use or entry. The easements are recorded free of any encumbrances, with any loans subordinated to the easement to provide protection from foreclosure.

To prevent abandonment, deed-restricted lots must be joined with adjacent lots. Los Angeles County does not allow the merger of contiguous lots in common ownership. To avoid the expense of removing the original lot lines by a process called reversion to acreage, the sending site owner records a Declaration of Restrictions. This agreement ensures that the lots are treated as a single parcel of land which cannot be divided or sold separately.

The TDC is approved for transfer from the sending site after the Coastal Commission has accepted the scenic easement and authorized the recordation of all documents.

As described in the preceding section, the Malibu Coastal Zone TDC program began with individual transfers facilitated, at first, by the Coastal Commission staff and, later, by private sector brokers. In addition to the time consumed in negotiating these purchases, developers were concerned about the high cost of the early TDCs ($25,000 to $40,000) caused by short supply. Developers needing a large number of TDCs were particularly concerned that the TDC market was unstable.

To provide stability and consistency, the State Coastal Conservancy took a proactive role in creating and selling TDCs. The Coastal Conservancy is a division of the State Resources Agency authorized to protect coastal resources through a wide range of planning, acquisition and development techniques including the awarding of grants to governments and non-profit organizations.

The Coastal Conservancy is particularly interested in correcting problematic subdivisions through the implementation of restoration plans which guide the use of land acquisition funds. In the early 1980s, the Conservancy prepared and implemented a restoration program in the Malibu Coastal Zone. The Conservancy ensured a dependable supply of TDCs by creating and purchasing 213 TDCs using $2.6 million. This money was actually a revolving fund, with the proceeds of the TDC sales repaying the Conservancy. The 213 TDCs were purchased in four separate project areas: El Nido, Malibu Lake, Cold Creek and Las Flores Heights.

The El Nido subdivision was created in the 1920s with narrow winding roads and 347 lots on 70 acres of land. By 1980, only 40 lots were developed. Los Angeles County had inherited 153 lots due to property tax default and it was offering them for sale to the public whether or not they were buildable. Approximately 25 of the lots were in or near the bed of a creek that drains into a canyon which is now a public park. Through the Conservancy, the 153 lots owned by Los Angeles County and 30 other lots were permanently retired.

The Conservancy's second restoration project was the Malibu Lake small lot subdivision, which is now surrounded on three sides by Malibu Creek State Park. This tract was created in the 1920s and 1930s to provide cabin sites adjacent to a private hunting camp. Within the Coastal Zone, only 16 of the 158 lots were developed in 1981. Many of the lots were not suited to septic systems and further development of these lots could threaten the quality of the water in Malibu Creek. The Conservancy purchased 125 lots here for $773,000.

The third Conservancy project was the Cold Creek Watershed, a 5,000-acre area containing exceptional wildlife habitat supported by one of the few perennial streams in the Santa Monica Mountains. The Coastal Commission originally required that TDCs used on receiving sites within the Cold Creek watershed had to come from sending sites within the Cold Creek watershed. The only small-lot subdivision within the Cold Creek project area is the Monte Nido subdivision, a 1926 tract with 416 lots on 40 acres. Although the lots average only 4,000 square feet, each lot relies on individual septic systems, including the lots immediately adjacent to the two blue-line streams that cross the subdivision.

However, the Monte Nido subdivision was considered by some to have too few potential sending sites to create an adequate supply of reasonably-priced TDCs. The TDCs from Monte Nido were priced much higher than the TDCs in other parts of the Malibu Coastal Zone. In addition, there were concerns that the owners of the potential sending sites could cooperate to drive up TDC prices even more or perhaps block a proposed development. One developer stated that this requirement was essentially a denial of his project, claiming that it would be difficult or impossible to buy enough TDCs from within the watershed to mitigate a proposed subdivision. In response, the Coastal Commission allowed a tract outside of the Cold Creek watershed, the Fernwood small lot subdivision, to serve as a reserve source of TDCs for receiving sites within the Cold Creek watershed. Fernwood is the largest of the small lot subdivisions, with 1497 lots, 1154 of which were undeveloped in 1979.

In addition, the Conservancy started a program allowing developers to pay fees in lieu of actually purchasing TDCs. The Conservancy would then use the funds generated by the fees to purchase TDCs. The Coastal Commission also reduced the formula for creating TDCs within the watershed to one TDC for two contiguous lots or five non-contiguous lots. And finally, the Mountains Restoration Trust, a non-profit satellite organization of the Conservancy was created to purchase TDCs at below market rates using creative techniques that are not always available to a governmental agency.

The Conservancy started the Mountains Restoration Trust with a $300,000 grant for the purchase of TDCs. Five percent of the in lieu fee was to be reimbursed to the Conservancy until the grant was fully repaid. However, the demand for Cold Creek TDCs declined. Instead of buying TDCs, the Trust found itself accepting TDCs as donations from homeowners wanting charitable-donation tax benefits in exchange for scenic easements. Typically, these donations were made by homeowners who owned five contiguous lots but only used two or three of these lots as a building site. By donating scenic easements on the two or three undeveloped lots, these property owners were able to continue to use these lots as private open space yet they received tax benefits as high as $150,000. Using this process, the Trust accepted easements from over 46 lots, representing 24 TDCs. Because these TDCs were acquired for little or no money, the Trust was able to sell TDCs for $15,000 to $18,000, a fraction of the price originally assumed.

The Trust to date has retired the development rights on 260 acres of land within the Cold Creek watershed, representing 22 TDCs. In addition, the Trust has collected in lieu fees equivalent to 39 additional TDCs but the fee money has not yet been used to record easements on sending sites.

The fourth Coastal Conservancy project is the Las Flores Heights Restoration Program. In 1918, the Las Flores Heights subdivision was created with 102 lots on 160 acres. The lots in Las Flores Heights range from one-half acre to an acre in size, but they tend to be steep and many are not served by a paved road. This area is particularly susceptible to natural disaster. In the 1930s, 20 homes existed in this subdivision; however, by 1982, all but six of the homes had been eliminated by fires and floods. The fires of 1993 have reduced that number even more. The Conservancy granted the Trust $886,000 to acquire a major interest in a landholding which included 60 percent of the Las Flores Heights subdivision plus a 160-acre site to the north of the tract.

As explained above, in addition to lots in small-lot subdivisions, sending sites could also be land within Significant Environmental Areas, or SEAs. Seven canyons in the Santa Monica Mountains were designated as SEAs. The majority of natural resource protection has been the result of the National Park Service acquisition of 21,000 acres to date for the Santa Monica Mountains National Recreation Area and the State of California's acquisition of three large park sites totaling 38,000 acres.

However, 52 TDCs have been created using resource lands as sending sites. In most instances, the sale of these TDCs only partly compensated for the acquisition costs since large resource parcels are typically worth much more than their TDC value. This occurs because the Coastal Commission guidelines only allow one TDC to be generated per parcel up to 20 acres in size. Under these guidelines, a large building site might be worth $200,000 while the TDC that can be severed from that site is valued at about $20,000.

In "Transfer of Development in the Malibu Coastal Zone", Elizabeth Wiechec discusses significant changes in Malibu Coastal Zone TDC program resulting from three sources: the regulatory framework, the incorporation of the City of Malibu and shifting market forces.

As discussed above, the Coastal Commission regulates land use within the Coastal Zone until a Local Coastal Plan is certified. The ordinances needed to implement the Coastal Land Use Plan were never prepared by Los Angeles County and the Coastal Commission continues to regulate development in this Zone. The first component of a Local Coastal Plan, the Land Use Plan, was first submitted to the Coastal Commission in 1982 but rejected. In 1984, the Land Use Plan was adopted by the Coastal Commission based on suggested modifications offered by Los Angeles County.

The Land Use Plan was modified to reduce the ability to grant TDCs for the retirement of lots which were actually unbuildable due to geologic hazards, septic system limitations and flood hazards. In response, the Coastal Commission staff now refers to geologic and floodplain maps, and field checks where necessary, to ensure that TDCs are not granted to lots which are actually unbuildable.

In another modification, the Coastal Commission refined its maps of Environmentally Sensitive Habitat Areas (ESHAs) to protect only the riparian area flanking streams. As a result, many properties which were previously considered unbuildable became viable home sites with commensurate increases in value. This greatly decreased the likelihood that they would become TDC sending sites.

The second major change in the Malibu Coastal Zone TDC program is now underway as a result of the incorporation of the City of Malibu in 1991. The City, which represents about 20 percent of the land area of the Malibu Coastal Zone, has still not adopted a general plan. The area which is now the City of Malibu has been the primary location of the receiving sites under the Malibu Coastal Zone TDC program. Some Malibu residents are concerned that the City is accepting more development than would otherwise be the case due to having TDC receiving areas within the City limits. Malibu's interim zoning ordinance does not focus future growth within the coastal terrace, the location of the receiving sites. The City has discussed a TDC program which would have both sending and receiving sites within the City limits. This concept of a self-contained TDC program within the City is at odds with the historical approach of treating the entire Malibu Coastal Zone as the appropriate area for a TDC program. If the City of Malibu ultimately proposes a plan which does not accept TDCs from outside the City, the Coastal Commission would be asked to accept a City of Malibu plan which would require fundamental changes in the larger Malibu Coastal Zone TDC program.

As a third element, Wiechec cites changes in the TDC program which resulted from political and market forces. From 1982 to 1986, developers were reluctant to buy TDCs because the Land Use Plan for the Malibu Coastal zone was still in flux. When the Land Use Plan was adopted in 1987 with the TDC concept intact, the program stabilized. At the same time, the Malibu real estate market was very active, with new building sites selling for as much as $1 million. The Trust and the Conservancy tried to keep the price of TDCs low to ensure an adequate supply in order to reduce developer discontent with having to buy TDCs to create a new lot. With TDC prices at about $20,000 each, most developers accepted the concept and treated the purchase of TDCs as simply a normal procedure of developing in Malibu.

MALIBU COASTAL ZONE

The Malibu Coastal Zone contains thousands of undeveloped lots in antiquated subdivisions; development of these substandard lots would further impact water quality, wildlife habitat and infrastructure systems as well as expose more people to the potential for wildfire, flood and landslide hazards

Receiving site developers have a strong motivation to buy TDCs because a new lot cannot be created unless an existing lot is permanently deed restricted

Sending site owners are motivated to sell the TDCs from substandard lots currently used as yards

Using seed money from the Coastal Conservancy, sensitive environmental areas have been purchased; proceeds from the sales of TDCs from these areas is placed in a revolving fund to repay the Conservancy

Due to favorable supply and demand forces, this program has retired 924 substandard lots

Even though the voters approved cityhood for Malibu in June of 1990, incorporation did not occur until March of 1991. During this nine-month gap, developers scrambled to get subdivisions approved while Malibu was still in the County of Los Angeles. In the year prior to incorporation, approximately 150 TDCs were exchanged. During this period, one quarter of all the credits transferred since the beginning of the program were bought and sold.

It looked likely that the Trust would not be able to meet the demand for more TDCs in 1990, and developers complained to the Coastal Commission that the TDC requirement would become a de facto taking of their properties. In response, TDC prices were increased to $35,000 each and the Trust was able to buy all the easements needed to meet the rising demand for TDCs. This ability to meet the demand was critical to keeping the program in place since the subdivisions probably would have been approved without TDCs if TDCs had not been available for developers to buy.

The demand for TDCs ended abruptly in 1991. The moratorium imposed on new development stopped activity within the City of Malibu while the recession slowed growth in the rest of the Malibu Coastal Zone. Since 1991, only five TDC sales have occurred. Developers and the City of Malibu are now disputing whether or not three large subdivisions approved before 1991 can proceed. If these three subdivisions are allowed to proceed, 132 TDCs would be needed. Since the Trust does not currently have a supply of 132 credits, another period of intense activity could ensue.

PROGRAM STATUS

To date, 505 density transfers have occurred under the Malibu program. As a result 924 substandard lots have been retired in antiquated subdivisions or roughly 20 percent of the undeveloped, substandard lots originally inventoried in the late 1970s. The 924 retired lots include roughly 800 acres of land that are now permanently preserved. In addition, the in lieu fee program has accepted the equivalent of 39 more TDCs, bringing the total to 544 transfers. This makes the Malibu program one of the most active TDR programs in the country. In fact, in terms of transfers per acre of land within the program boundaries, the Malibu program is second only to the Montgomery County program, with eight transfers per 1,000 acres.

In "Transfer of Development in the Malibu Coastal Zone", Elizabeth Wiechec identifies several important changes in the regulatory environment which affected the future of the Malibu Coastal Zone TDC program.

- As discussed above, the new City of Malibu appears to be unwilling to accept transfers of development from outside its boundaries.
- Unlike the 1970s, governments in the 1990s are reluctant to deny development permits on existing lots, regardless of the potential environmental impacts, unless health and safety issues are at stake.
- Parkland acquisition funds are dwindling and the voters of California recently rejected a bond measure which would have allowed parkland acquisition to continue.
- There has been talk of the National Park Service selling some or all of its 21,000 acres in the Santa Monica Mountains National Recreation Area.

In the "Recommendations" section of "Transfer of Development in the Malibu Coastal Zone", Elizabeth Wiechec offers four suggestions for the future of the TDC program: Place greater emphasis on resource and parkland protection; ensure an adequate supply of TDCs to mitigate large subdivisions; encourage private brokers to participate in the process; and make incremental refinements to the program rather than fundamental changes. To implement these suggestions, Wiechec calls for five program refinements: a mitigation bank, bankable TDCs, the completion of the Cold Creek Restoration Program, the abolition of transfer zones and an improved TDC registry.

In the mitigation bank concept proposed by Weichec, public agencies would deed restrict existing parkland and deposit the TDCs which result into a mitigation bank. When the mitigation bank sells these TDCs, the proceeds would be used to purchase additional land to be transferred to the agencies which originally deposited the TDCs. The concept responds to the need to create TDCs in advance of the demand created by large subdivisions. It also offers a source of capital at a time when the likelihood of raising public funding to seed TDC programs seems remote. The California Resources Agency, which oversees the State Department of Recreation as well as the Coastal Conservancy, the Santa Monica Mountains Conservancy and all other state conservancies, has already gone on record as supporting the use of existing parkland to create TDC reserves.

As a second option, Weichec suggests that developers be allowed to pay in lieu fees to the mitigation bank. Alternatively, developers could purchase land targeted by a public agency and present it to the mitigation bank as mitigation for a proposed subdivision. Finally, the Santa Monica Mountains Conservancy could institute a program allowing an acquisition to mitigate a proposed subdivision even if it does not meet the mitigation guidelines through a Condition of Special Circumstances process which recognizes that greater mitigation weight should be granted to the deed-restricting of critical parcels such as land at the headwaters of a watershed or lots which provide public access to a beach.

In Wiechec's second proposal, the Malibu Coastal Zone program would allow TDCs to be banked. At the start of the program, the Coastal Commission prohibited TDCs from being severed from sending sites until they could be simultaneously transferred to receiving sites. This requirement for simultaneity was considered necessary to prevent speculation. But it also means that an entity, such as the Coastal Conservancy or the Mountains Restoration Trust, has to have land in its control to use for TDC creation as the need arises. In the current era of reduced public funding of land acquisition, the supply of mitigation land is likely to decrease. In fact, current supplies are estimated to be capable of producing only ten TDCs. Consequently, Wiechec sees a need for TDCs to become more like a commodity which can be bought, sold or held for later sale as market forces dictate. Wiechec also suggests that private brokers be encouraged to participate since they have expertise in the real estate market. Finally, she proposes that the Malibu Coastal Zone process follow the model of the Montgomery County, Maryland, TDR program which allows the separate recordation of a TDR easement, deed of TDR and TDR Extinguishment.

As a third refinement, Weichec recommends that the Cold Creek Restoration Program be completed. As described above, the Coastal Conservancy initiated four restoration projects in the Santa Monica Mountains. Three of these programs has been closed: Malibu Lake, Las Flores Heights and El Nido. The goal in the fourth Conservancy project, Cold Creek, was to retire 100 building sites. So far, easements have been recorded on over 73 sites and in lieu fees have been collected which would be capable of retiring another 39 sites. However, the Trust has not as yet recorded easements which would deed-restrict these 39 sites. Consequently, the Coastal Commission has restricted further use of the in lieu fee program.

In a fourth change, Wiechec calls for abolition of the rule restricting receiving sites in the Cold Creek Project area to TDCs only from sending sites in the Cold Creek area. The demand for TDCs within the Cold Creek watershed has not materialized as expected and Weichec recommends that TDCs from any of the three zones in the Malibu Coastal Zone project be used interchangeably.

Finally, Wiechec recommends that deed-restricted properties be recorded in a Geographic Information System (GIS) format to avoid the possibility of a sending site being deed-restricted more than once.

In conclusion, the Malibu Coastal Zone program has had all the right ingredients for a successful TDR program. The demand for new lots in Malibu is so great, and the economic benefits of subdividing land are so obvious, that developers have been willing to pay for the retirement of substandard lots as long as TDCs are available at a reasonable price. Even though the sending lot owners are not obligated to sell TDCs, the program has been flexible enough to respond to market forces to ensure that TDCs are always available to meet the demand. In addition, the program was assisted by the California Coastal Act and the California Coastal Commission, which ensured that new lots would only be allowed by transfers. And finally, this program was greatly helped by the Coastal Conservancy, which provided seed money for restoration programs and established the Mountains Restoration Trust, with a staff that had the ability to adapt and allow the program to survive through severe economic and political challenges.

In 2002, the future of the Malibu Coastal Program appeared to be reaffirmed. Through the 1990s, the City of Malibu was unable to adopt a local coastal plan acceptable to the State. Consequently, at the direction of the State legislature, the California Coastal Commission prepared the plan and adopted it on September 13, 2002. This plan, the City of Malibu LCP Land Use Plan, includes a TDC program that requires that the impacts of creating of new lots be mitigated through the retirement of an equal number of development credits from existing lots that qualify for the program. Qualifying lots may contain environmentally sensitive habitat, be located in small lot subdivisions or adjacent to parklands. Qualifying sending areas may be located within the City of Malibu or portions of Los Angeles County inside the Malibu Coastal Zone. The plan therefore maintains the requirement for the City of Malibu to accept TDCs from sending sites in another jurisdiction, Los Angeles County.

MONTGOMERY COUNTY, MARYLAND[12]

BACKGROUND

Montgomery County, population 873,341 (2000), is a 323,000-acre county lying between the Potomac and the Patuxent rivers immediately northwest of Washington, D.C. The southern portion of the County contains the cities of Bethesda, Silver Spring, Wheaton, Rockville and various other suburbs within the greater Washington D.C. metropolitan area. But the northern portion of the County is a productive agricultural area.

Maryland was one of the first states to recognize the need to preserve farmland. In 1956, the state adopted a preferential tax that assessed agricultural land at its value as farmland rather than for its development potential. Nevertheless, throughout the 1960s, Montgomery County experienced a significant loss of farmland to development. In 1969, the County adopted a "Wedges and Corridors" land use plan that concentrates development along a spine through the center of the County; rural densities flank this corridor and protect the rivers which form the County's north and south boundaries.

Five years after adoption of the "Wedges and Corridors Plan", the County changed the one- and two-acre residential zoning in the rural wedges to a Rural Zone density of one dwelling unit per five acres. However, farmland conversions continued despite the new restrictions and the County lost 18 percent of its agricultural land in the 1970s.

This led to the appointment of a task force to develop methods to stem the loss of agricultural land. The task force considered three options: purchase of agricultural rights, downzoning and transfer of development rights. The task force concluded that purchase of development rights would be too expensive. Downzoning alone might not be politically feasible and could have the unintended effect of satisfying the demand for exurban development using 25-acre estate lots. In addition, there was a concern that downzoning without some form of compensation could make it difficult for farmers to get loans due to reduced land values. Consequently, the task force recommended a combination of downzoning and TDR.

In 1980, the Montgomery County Council adopted a functional master plan entitled: "Preservation of Agriculture and Rural Open Space". The study area for this plan encompassed 163,000 acres in the northern half of the County farthest from Washington, D.C. The plan designated 26,000 acres as Rural Open Space where existing subdivisions had already precluded large-scale agriculture but where small farms and other rural uses could be maintained through the clustering of future development. In addition, the plan created an Agricultural Reserve containing 110,000 acres, more than one third of the land area of the County, where farmland and farming was to be preserved.

To implement the Plan, sectional map amendments rezoned 91,591 acres of land in the Agricultural Reserve from a density of one unit per five acres to a Rural Density Transfer Zone which allows on site development of one dwelling per 25 acres. The 25-acre minimum was based on an economic study showing that this was the minimum size for a farm in Montgomery County to function on a cash crop basis. In addition to the reduced density, the Rural Density Transfer (RDT) also promoted agricultural preservation through land use restrictions and the ability to cluster development on a small portion of a land parcel in order to keep the majority of the parcel intact for farming purposes.

While on-site development in the RDT zone was limited to one dwelling per 25 acres, the RDT zone allowed development rights to be transferred to designated receiving areas at the rate of one TDR for every five acres of land at the sending site. This constitutes a transfer ratio of five-to-one; in other words, the County's plan allowed five times as much development if the development rights were transferred to a receiving site rather than used at the sending site.

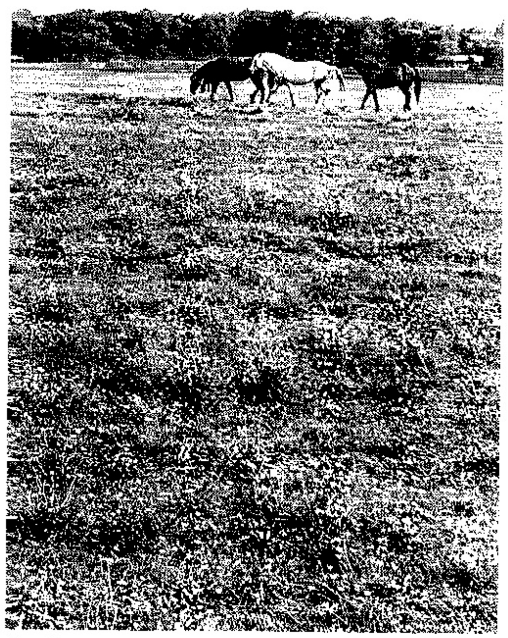
In 1980, the ratio of one TDR per five acres of land to the 91,591 acres in the RDT zone created a total of 18,319 TDRs theoretically available for transfer in this program. However, as of 1992, only 12,297 TDRs were actually in existence. Over 6,000 theoretical TDRs were, in reality, not available for transfer due to existing development, public ownership of land and easements placed on land by other programs. (The Program Status section below updates these figures.)

In 1980, the County created its first receiving area by adopting the Olney Master Plan. The master plan for this community differed from those which were to follow because transfers here operated within a closed system, with sending and receiving sites entirely within the Olney Master Plan Area. However, from 1981 through 1990, the County amended the master plans for eight other communities to create additional receiving areas capable of accepting TDRs from sending areas anywhere within the County. In 1990, the Olney Master Plan was also amended to merge with the County-wide TDR program. In the 1990s, the County created potential receiving sites in five more master plan areas bring the total number of receiving areas to 14 as of 1997.

In these receiving-area communities, the County adopted an array of zoning districts which feature baseline density limits for projects without TDR and higher density limits for projects with TDR. These rezonings created a theoretical capacity estimated, in 1992, to accommodate the transfer of 11,650 TDRs. In reality, the capacity of these receiving areas was actually lower than the theoretical capacity because not all receiving site developments use TDR or at least don't use the maximum amount of TDR that the zoning code allows. (This figure is updated in the Program Status section below.)

When the Rural Density Transfer Zone was adopted, some property owners sued the County claiming that they had suffered a loss in property value because receiving sites had not been designated prior to the downzoning. A circuit court judge ruled that the downzoning was valid on its own merits and was not a "taking" with or without the transfer mechanism. Furthermore, the judge stated that the availability of TDR would support the position that a taking had not occurred if a taking was at issue.

However, in 1987, the Maryland Court of Appeals ruled that the designation of TDR receiving sites should appear in the zoning code rather than just through the master plans adopted for the receiving site communities. In response, the County adopted a comprehensive zoning ordinance in 1987 which established TDR receiving zones in those communities with TDR receiving areas in their master plans.



The Montgomery County TDR program has preserved over 40,000 acres as of 2000, making it the most successful TDR program in the country

On receiving sites, the zone code established two maximum densities: a lower base limit when transfers are not involved and a higher density to accommodate transfers from sending sites. In setting these two limits, the County wanted to ensure that the base limit was reasonable and that the bonus limit was high enough to justify the purchase of development rights but not so high that the additional development might overwhelm the infrastructure system.

To support the TDR program, Montgomery County's capital improvements program ensures that sewer, water, transportation and other public services are extended into receiving areas rather than sending areas where they could subvert the goal of farmland preservation.

In addition, the County created a TDR fund as a last-resort buyer of development rights in the event that sending site owners are unable to sell their rights when they want. In establishing the TDR Fund, the farming community wanted a guaranteed market for TDRs but also wanted to ensure that the County would not hold a large percentage of transferred rights and therefore control the TDR market. To counter the possible impression of control, the County intentionally used the term "fund" rather than "bank" and provided that the fund would sunset after five years in operation. As explained below, the fund was never used and was finally eliminated in 1990.

PROCESS

The transfer process in Montgomery County can be summarized in six steps. 1) The sending site owner sells development rights, or development right options, to a receiving site developer or any other individual interested in owning the rights. 2) The developer files a preliminary subdivision plan for the receiving site according to the requirements detailed below. 3) After the preliminary subdivision plan is approved, the developer submits a site plan for the proposed development on the receiving site. 4) Following site plan approval, the developer submits a record plat to the County Planning Board along with two documents: a deed of transfer conveying ownership of the TDRs to the developer and an easement limiting development on the sending site and conveying the easement to the County as the Grantee. 5) After the deed of transfer and easement are recorded, the record plat is approved by the Planning Board and recorded in the land records. 6) Following recordation of the record plat, the transfer is completed by the recording of an extinguishment document which certifies that a TDR has been transferred to a specific property and is no longer available for transfer.

Sending Sites

In the Montgomery County program, potential sending sites are lands zoned Rural Density Transfer (RDT). RDT land has an on-site density limit of one unit per 25 acres with the following two exceptions for lots that are at least 25 acres in size. First, tenant houses and mobile homes associated with farming activities are not included within the one-unit-per-25-acre density limit. Second, the density can exceed one dwelling unit per 25 acres to allow lots for the offspring of those who owned sending sites prior to the RDT zoning. However, regardless of whether the units were built before or after the RDT rezoning, a development right must be reserved for every permanent dwelling on the sending site. Reserved rights remain with the sending sites and cannot be transferred to receiving sites.

Lots smaller than 25 acres which were recorded prior to creation of the RDT zone are allowed to follow the development regulations of the prior zoning. However, a TDR must be reserved for each dwelling on a lot greater than 10 acres in size recorded prior to the creation of the RDT zone. After the construction of one home, further development on these pre-RDT lots must comply with RDT requirements.

When TDRs are transferred, an easement is recorded on the sending property identifying the limitations on the number of dwelling units that can be built on that site. When no dwellings exist on the sending site, the number of transferable TDRs can be as high as the total number of development rights allowed by the zoning. Conversely, the County also allows TDRs to be severed from sending sites individually and at different times. However, once TDRs are transferred, they cannot be returned to the sending site; transferred TDRs are permanently removed from the sending site as described in the preservation easement.

To track the transfer process, each TDR is given a serial number. The serial number is assigned by the County Attorney's Office as part of the process of approving the TDR easement document. This serial number appears on the record plat to specify exactly which TDRs are being used to increase density on the receiving site.

Receiving Sites

As explained in the Background section of this case study, Montgomery County has identified receiving areas in nine communities. At first the receiving areas were only designated by the master plans for these communities. However, since a comprehensive zoning code amendment adopted in 1987, all receiving sites are zoned for receipt of transferred development.

In these receiving areas, various zoning districts contain two separate density limits: a baseline limit sets the density maximum for projects in which developers chose not to use TDRs; a higher limit controls the density for projects which use TDRs. For example, an R-60 TDR Zone allows a density of as much as five units per gross acre as a baseline limit but the density can be much higher. The allowed additional density bonuses in the designated receiving area properties vary considerably and are determined through the master plan process. However, the developer is not guaranteed to achieve the maximum density identified either by baseline zoning limits or with-TDR limits; the Planning Board can find that the actual density must be less than the maximum due to various site constraints and environmental limitations.

Other than through TDR, the only way a developer can exceed the base density of a receiving site is by providing moderately-priced dwelling units, or MPDUs. Montgomery County allows increases in master plan density designations to any project in which at least 12.5 percent of the total number of units are MPDUs. With MPDUs, the density on the receiving site can be increased an additional 20 percent beyond the density allowed under the TDR-only option.

In addition to maximum density, there is a minimum density increase that must be met for TDR to be used at a receiving site. This was imposed because the County was concerned that receiving sites would need to be too large if they had to accommodate all the sending site TDRs at reduced densities. Consequently, Montgomery County requires the density increase granted by transfers to be at least two-thirds of the maximum possible increase. For example, a 20-acre receiving site could be granted two extra dwelling units per acre, or a total of 40 extra units using TDR; the developer of that receiving site would have to propose a project that used at least two-thirds of that 40-unit maximum, or 27 extra units. However, the County Planning Board may waive this minimum transfer requirement for compatibility or environmental considerations.

The development standards applicable to a receiving site project are established based on the TDR density of the proposed project. For projects with TDR densities of six or more per acre, lot sizes and other development standards may be determined through the preliminary subdivision plan and site plan approval process in accordance with the County's planned development code provisions. To use these provisions, the Planning Board must find that the creation of site-specific standards would result in a receiving site project which has fewer environmental effects or which would be more compatible with adjacent properties.

As mentioned above, Montgomery County requires site plan approval of receiving site projects prior to final plat approval. The site plan approval requirement was imposed to provide greater assurances that the transferred density would not overwhelm the receiving site or cause problems for adjacent properties. Since the number of TDRs needed for a receiving site project is not certain until the site plan is approved, TDRs in Montgomery County are typically secured under option contracts. If the site plan approval process determines that some or all of the optioned TDRs are not needed, these excess TDRs can be returned to the original seller.

Incentives

Montgomery County uses speed of approval as an incentive to transfer. Since the transfer process does not involve rezonings, the processing time is comparable to that required for any land subdivision, with or without TDR. In addition, the County has priority categories for providing sewer and water service. If a development using TDRs passes the Adequate Public Facilities test and receives site plan approval from the Planning Board, it is automatically advanced to a higher priority category.

To facilitate the approval process, the County adopted ten administrative practices which clearly spell out the procedural requirements for transfers. For example, these Administrative Practices provide the Planning Board-approved forms that must be used for TDR easements, deeds of TDR transfer and TDR extinguishments.

The County has devoted considerable effort to promoting TDRs to both buyers and sellers. However, the cost of managing the program is reported to be minimal since the TDR approval process is incorporated within the subdivision review and approval process.

The County also established a County Development Rights Fund in 1982. One purpose of the Fund was to provide loan guarantees to farmers who wanted to use the value of TDRs as collateral on farm loans. However, the Fund was primarily intended to buy TDRs if interested sellers could not find buyers in the private market. The Fund was designed to bank any TDRs it acquired and resell them at auction to the highest bidder. Without assistance from the Fund, sending site owners were able to find developers willing to buy their TDRs at prices established through private market transactions. Consequently, after going unused for eight years, the Development Rights Fund was terminated.

PROGRAM STATUS

Montgomery County has all of the key factors needed for a successful TDR program. The program was based on a comprehensive land use plan supported by economic analysis. While sending site owners are allowed to build on site at a density of one unit per 25 acres, the ability to sell TDRs at the rate of one TDR per five acres provides enough incentive for these sellers to create an adequate supply of TDRs for sale.

Similarly, the developers of receiving sites find that it is more profitable to buy TDRs than acquire the additional land they would need to build the same number of units. Montgomery County has also been careful to make TDR the only means, with the exception of moderately-priced housing, of exceeding the base zoning of a receiving site. Furthermore, there is significant demand for additional housing in Montgomery County since even the northernmost agricultural areas are only 25 miles from Washington, D.C. This demand propels the TDR process, leading the County to create additional receiving areas and ensure that these are served by infrastructure and public service systems.

> **MONTGOMERY COUNTY**
>
> In 1980, the County adopted a TDR program that changed the zoning of agricultural property from one unit per five acres to one unit per 25 acres
>
> However, sending site owners were given the opportunity to sell their development rights at the previous on-site development limitation of one unit per five acres; this represents a transfer ratio of five-to-one
>
> The Montgomery County TDR program has preserved over 40,000 acres as of 2000 making it the most successful in the country

In addition, the County has encouraged landowners and developers to use TDR by keeping the program straightforward, predictable and easy to use. Even though it involves over 100,000 acres of land, the County's TDR concept is simple enough to be easily understood by the general public. The County also minimizes confusion by providing administrative guidelines and forms for the necessary legal documents. Finally, TDR projects use the same processing steps required of non-TDR projects, avoiding the disincentives of uncertainty and long approval times.

On the negative side, some have observed that the approval process can still take up to two years despite the attempts to make the process as easy and fast as possible. Other critics point out that the sending area densities were established in a blanket fashion rather than in recognition of differences in land value, thereby creating inequities in compensation. And finally, it should be noted that the incorporated municipalities have not participated in the program resulting in receiving area densities that are lower than would likely be the case if transfers were made to cities.

Despite these criticisms, Montgomery County is often regarded as having the most successful TDR program in the nation. As 0f 2000, Montgomery County had saved 40,583 acres using TDR alone. That represents almost one half of the 92,000 acres rezoned as RDT in response to the County's 1980 master plan. In addition, the County had saved an additional 11,897 acres using four other county or state programs. The Maryland

Agricultural Preservation Foundation preserved 2,074 acres. The County's Agricultural Easement Program, a purchase of development rights program, saved 5,644 acres. Another 1,959 acres was preserved through the Maryland Environmental Trust. And the state's Rural Legacy Program had protected another 2,220 acres. In total, TDR and the four other programs had saved 52,480 acres as of 2000.

In a February 2001 update, Montgomery County's Judy Daniel provided the following current statistics on TDR supply and demand as of 1998.

Sending Areas	
Original Maximum TDRs	19,297
Less public land, land in easements	6, 889
	12,408 TDRs
Less 20 percent TDRs to be used for	
For development in RDT	2,481
Zone at 1/25 density	9,927
Less TDRs severed and transferred	5,972
	3,955 TDRs
Less TDRs severed, not transferred	657
	3,298 TDRs
Receiving Areas	
Theoretical Maximum	14,427
Capacity in master plans	
Less TDR capacity used	9,560
Remaining theoretical capacity	4,867 TDRs
Current overage receiving to sending areas	1,569 TDRs

As mentioned above, Montgomery County created potential receiving sites in the master plans of five additional communities between 1990 and 1997, increasing the total to 14 master plan areas with potential receiving sites. In February 2001, Daniels reported that the County continued to need additional receiving areas. Daniels also reported that the County now allows multiple-family residential receiving areas; however, as of February 2001, this option had not been used.

In February 2001, the County was considering additional changes to receiving mechanisms. A task force was scheduled to present recommendations to the Planning Board and the County Council by the end of 2001.

MORGAN HILL, CALIFORNIA[13]

BACKGROUND

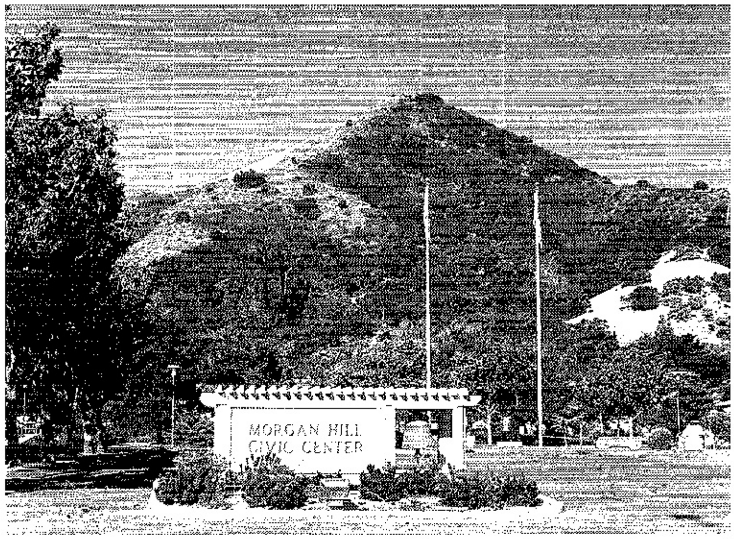
Morgan Hill, population 33,556 (2000), lies 20 miles southeast of San Jose, California. The City wants to preserve its most prominent natural landmark, El Toro Mountain, as well as other open space. Specifically, Morgan Hill's general plan calls for the preservation of open space above the 500 foot elevation line on El Toro Mountain. To implement this goal, the City has adopted a Hillside Combining District which allows the development rights from higher elevations to be clustered on lower elevations of the same parcel. In 1981, the City also adopted an ordinance which allows the development rights, or credits as they are called in this program, to be transferred from one parcel to another. In addition to traditional transfers, Morgan Hill uses other techniques to preserve El Toro Mountain.

PROCESS

In the Morgan Hill program, sending sites are land parcels located at the higher elevations of El Toro Mountain as well as other land with a grade steeper than 20 percent. On El Toro Mountain alone, 850 acres lie above the 500-foot elevation contour; 250 acres are within the city limits and the remainder is located in the County. Regardless of whether these steep lots are located within the City or the County, Morgan Hill allows TDCs from these lots to be transferred to receiving sites within the City.

Of the 250 acres in the City, 150 acres remain undeveloped and could accommodate roughly 25 homes if Morgan Hill allowed development in this area. However, Morgan Hill effectively prohibits development on slopes over 20 percent. Owners of property with a slope greater than 20 percent can cluster development in portions of their property with less steep grades. However, if these owners still cannot achieve the density allowed by zoning, they must transfer their development credits in order to maximize the economic potential of their property.

The development potential of sending sites is established either by the provisions of the Hillside Combining District or the underlying zoning, whichever allows less development. The amount of development allowed on the potential sending sites is calculated using slope-density regulations; the greater the slope, the more lot area is needed to allow one dwelling. An environmental study must be performed to determine whether any portion of a proposed sending site is unbuildable due to environmental constraints; if so, the development rights available for transfer must be reduced accordingly. Once the City has agreed on the number of units which could be built on site, the number of units available for transfer



Morgan Hill, California uses three variations of TDR to preserve its most prominent natural landmark, El Toro Mountain

is calculated at twice that amount. That represents a 2:1 transfer ratio.

Prior to transfer, either fee title or dedication of an open space easement must be transmitted to the City. The easement prohibits cultivation as well as all residential, commercial or industrial uses. In the early 1990s, TDCs typically sold for $25,000 to $40,000 each when the purchase price was negotiated between buyers and sellers.

Eligible receiving sites must be at least one acre in size and have a slope of ten percent or less. A TDC transaction cannot increase the density of a receiving site more than ten percent greater than the density allowed under base zoning. The planning commission must approve a detailed site plan for the receiving site and the transfer itself must be approved by both the planning commission and the city council. Once approved, a record of the transfer must be recorded as well as the transfer of fee title or dedication of an open space easement.

As described above, one incentive to purchase TDCs is to achieve up to a ten percent increase in density on a receiving site. As an additional incentive, Morgan Hill recognizes the use of TDCs in its Residential Development Control System (RDCS) process. Under RDCS, a limited number of residential building permits are issued each year based on the City's population goals. Typically, 250 allocations are issued each year. Developers must compete for these limited permits by gaining points for providing schools, parks, affordable housing and other benefits including open space. Developers can maximize the number of points available in the open space category of RDCS by incorporating TDCs in their proposed projects.

Specifically, larger projects are awarded three points for acquisition of TDCs at the rate of one per 24 units. Projects of 24 units or less as well as projects with higher densities receive six points by purchasing double TDCs. Alternatively, smaller developments and affordable housing projects can receive four points for payment of an open space fee or six points for double the open space fee. In 2002, this open space in lieu fee was $15,000 per TDC. The fee can be adjusted annually based on the percentage change in median single-family home prices.

In addition to the straightforward TDC approach described above, Morgan Hill uses two other programs involving transfers. One alternative program was developed when Morgan Hill had limited sewer capacity. A sewer allocation is needed to obtain a permit to build a new dwelling unit. To encourage hillside preservation, a certain number of sewer allocations were set aside to be used with TDCs transferred from El Toro Mountain. Under this option, a developer was encouraged to acquire a TDC as a way of obtaining a sewer allocation. However, there no longer is an incentive to use this option since a new sewage treatment plant was built in 1995 and sewer allocations are now plentiful.

In a second permutation, Morgan Hill itself purchased a 43-acre property on El Toro Mountain and, as a result, obtained control over 17 TDCs. Morgan Hill has made projects which use these 17 TDCs completely exempt from competition in the City's Residential Development Control System (RDCS). The City has set the price for these TDCs at $75,000 each. In 1991, the City considered reducing the price to $50,000 or $60,000 per TDC in response to market conditions; but, ultimately, Morgan Hill decided to maintain the original price. The City intends to use revenues from the sale of these TDCs to purchase other open space land.

PROGRAM STATUS

Morgan Hill is achieving its primary goal of preserving the top of El Toro Mountain simply by effectively prohibiting development in this area. In addition, the City is experiencing a relatively high rate of transfer

MORGAN HILL

Morgan Hill uses three TDC mechanisms to preserve the upper elevations of El Toro Mountain, the City's signature feature

The City allows TDCs from county land to be transferred into the City

Sending site owners are strongly encouraged to sell their TDRs by site constraints, slope-density restrictions, environmental regulations and a transfer ratio of two-to-one

Receiving site projects can achieve a ten percent density bonus with TDC and a higher ranking in the annual permit quota system

Alternatively, TDCs can be used to obtain sewer allocations

Developers who buy TDCs directly from the City, at $75,000 each, can be exempt from the permit quota system entirely

As of 1991, 46 TDCs had been transferred preserving almost 100 acres

activity. In the traditional TDC program, 46 TDCs had been transferred as of 1991. These transfers permanently preserved 92.5 acres on El Toro Mountain and 46 acres in other areas. As described above, the City also obtained 17 TDCs by purchasing a 43-acre property on El Toro Mountain. Finally, a property owner deed-restricted a 30-acre hillside property in 1995 and will be selling the TDCs in the private market. Consequently, the City has preserved a total of 211.5 acres of open space. In addition, another 28 acres of steep land have been permanently preserved via clustering of development at the lower elevations of single land parcels.

Despite the price tag of $75,000 each, developers have also purchased four of the City-owned TDCs in order to exempt their developments from having to compete in the RDCS permit-allocation process. However, even when sewer allocations were scarce, no one took advantage of the option in which TDCs could be purchased to obtain sewer allocations.

Terry Linder, Associate Planner, reports that the pace of TDC acquisitions slowed during the early 1990s. Every year, all 250 building allocations were issued. However, multi-home projects are not required to buy TDCs until several homes in the project are built. Since the demand for new homes has declined, it takes longer to reach the threshold at which the TDCs must be purchased. Nevertheless, the land preservation activity has provided an adequate supply of TDCs. As mentioned above, the TDCs from a newly-covenanted, 30-acre parcel are available for purchase when the developers are required to buy them.

The Morgan Hill program is a success for many reasons. The effective prohibition of development on steep sending sites strongly encourages the owners of these properties to sell their development credits. The City has also created a strong incentive for receiving site owners to buy development credits by giving TDCs a point value in the competitive process used to allocate a limited number of residential building permits each year. In addition, the City supports its program with information for affected property owners and regular status reports on the TDC program. And finally, the City monitors its program and makes adjustments when needed. For example, Morgan Hill realized that the price which receiving site owners could afford to pay for a TDC was less than the price which sending site owners wanted. As a result, the City made a mid-course correction and created the two-to-one transfer ratio.

In an October 1999 update, Lindner reported that the City made slight revisions in the TDR provisions in 1992, 1993, 1995 and 1998. The components of the program remained unchanged but certain procedural requirements were modified. For example, applications for TDC must now include a title report and any other documentation disclosing all existing interests or obligations against a sending site property to be affected by the open space easement. If other interests exist, a subordination agreement acknowledging the reservation of the City of Morgan Hill's open space easement claim must be submitted with the title report.

NEW JERSEY PINELANDS, NEW JERSEY[14]

BACKGROUND

The New Jersey Pinelands is a one-million-acre area occupying roughly the south-eastern quarter of the State of New Jersey. The area features pine and oak forests, cedar and hardwood swamps, pitch pine lowlands, bogs and marshes. The Pinelands also includes over 12,000 acres of "pygmy forest", (stands of dwarf pine and oak), 850 species of plants and over 350 species of birds, reptiles, mammals and amphibians, including the Pine Barrens tree frog.

In addition, the Pinelands account for about one quarter of New Jersey's agricultural income with specialization in cranberries and blueberries. It also contains one of the largest and least polluted aquifers in the north-eastern United States and provides numerous recreational opportunities, particularly for residents in New York City and Philadelphia, which are within a one- to three-hour drive from the Pinelands.

During the 1970s, the Pinelands experienced increased growth due to the development of casinos in nearby Atlantic City and due to the general spread of vacation and retirement homes. In 1978, the U.S. Congress designated the Pinelands as the country's first National Reserve; the federal legislation also authorized the creation of a regional planning agency and charged it to adopt a reserve plan within 18 months.

In response, the governor of New Jersey established the Pinelands Commission, a regional agency which incorporates seven counties and 53 local jurisdictions. The 15-member Commission consists of seven representatives appointed by the seven Pineland counties, seven members appointed by the Governor of New Jersey and one member designated by the U.S. Secretary of the Interior.

In 1979, the New Jersey state legislature passed the Pinelands Protection Act, designed to protect the environment, safeguard water quality, promote appropriate agricultural/recreational uses and encourage compatible development within the Pinelands. This Act endorsed the Pinelands Commission and the preparation of the Pinelands Comprehensive Plan.

In 1980, the Pinelands Commission adopted the Pinelands Comprehensive Management Plan. This Plan includes a massive land use analysis which divides the planning area into two parts. The inner Preservation Area consists of approximately 368,000 acres of land which is particularly environmentally sensitive. The peripheral Protection Area includes about 566,000 acres of land which had already experienced some development at the time the Plan was being prepared. The Plan further divides the planning area into nine management areas.

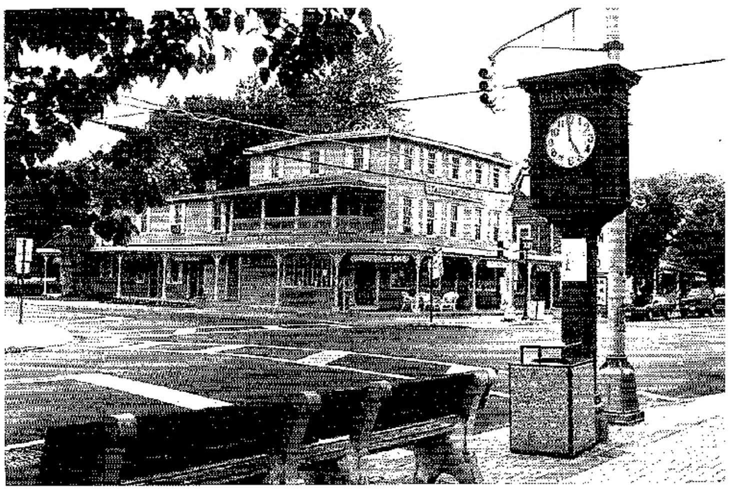
- Preservation Area District: Uses include cranberry/blueberry agriculture, forestry, recreation and fish/wildlife management.
- Forest Areas: Uses include low-density development, agriculture, forestry and recreation.
- Agricultural Production Areas: Restricted to agriculture and agriculture-related uses.
- Special Agricultural Production Areas: Limited to cranberry and blueberry farming.
- Rural Development Areas: Semi-developed areas allowed additional development limited to 200 units per square mile.
- Regional Growth Areas: Lands adjacent to developed areas which can be zoned to achieve assigned average growth densities.
- Pinelands Towns: Traditional communities outside regional growth areas.
- Military and federal Installation Areas: Uses as needed by the federal government.
- Pinelands Villages: Communities with cultural or historic ties to the Pinelands which can accommodate compatible development.

The Plan calls for public acquisition of 100,000 acres using $23 million from the National Parks and Recreation Act supplemented by funds from the federal Land and Water Conservation Fund and New Jersey's Green Acres Program. However, the Plan's preservation goals are largely implemented through land use regulations.

Within those management areas identified for at least some development, such as Pinelands Towns, Villages and Regional Growth Areas, a wide range of activities is allowed. But development is closely controlled in the Preservation Area District, Agricultural Production Area and Special Agricultural Production Area. In addition, residential development is not allowed as a matter of right in these three areas but, rather, must be approved by the local jurisdiction through a conditional use permit.

To provide some compensation to the owners of property in the Preservation Area District, Agricultural Production Area and Special Agricultural Production Area, the Plan encourages these owners to preserve their land through conservation easements. Once these easements are in place, development rights, known as Pinelands Development Credits (PDCs), are severed and can be sold. These PDCs are purchased by developers of land in the Regional Growth Areas in order to increase the density above the limits allowed as a matter of right by the zoning. PDCs cannot be transferred from or to land in the other five management districts: Forest Areas, Rural Development Areas, Villages, Towns and Military and Federal Installations.

The New Jersey state legislature required all local jurisdictions within the planning area to amend their land



The New Jersey Pinelands program allows transfers between 60 separate municipalities including the receiving sites within Medford, New Jersey, shown above

use plans and zoning to implement the Comprehensive Plan. These amendments were to be completed within one year. However, several communities were unable to meet this timetable and the deadlines were extended. As of the end of 1994, 51 of the 53 municipalities and all seven counties in the Pinelands had brought their plans and codes into conformance with the Pinelands Comprehensive Plan.

PROCESS

The Pinelands Comprehensive Management Plan (CMP) created the Pinelands Development Credit Program, which encourages transfers from sending sites in preservation areas to receiving sites in Regional Growth Areas.

Sending Areas

In the Pinelands TDR program, sending sites are parcels within the Preservation Area District, Agricultural Production Area and Special Agricultural Production Area. To implement the Comprehensive Plan, municipalities had to establish land use restrictions capable of promoting preservation in these three areas. Additionally, these jurisdictions were required to have clustering provisions designed to maximize the amount of land left in open space. Finally, in regulated areas, residential development is only allowed by conditional use permit rather than as a matter of right.

The Plan allows the owners of land in the sending areas to build on site, by conditional use permit, at low density. But to encourage these owners to transfer development rights rather than build on site, the Plan allows four dwelling units to be built in growth areas for every development credit transferred from a preservation area. In other words, the Plan offers four development rights at the receiving site for every Pinelands Development Credit (PDC) transferred from a sending site. Since 5,625 PDCs are assigned to the preservation areas, a complete transfer of these credits would result in 22,500 additional homes in the Regional Growth Areas.

Development potential and environmental sensitivity determines the number of PDCs allocated to a sending site. In the Preservation Area District, one PDC per 39 acres of land is granted to uplands; 0.2 PDCs per 39 acres are allocated to wetlands; two PDCs per 39 acres are allocated to land approved for mining but not yet disturbed; and no credits are allocated to land mined as a result of a resource extraction permit. In the Agricultural Production Areas and Special Agricultural Production Areas, two credits per 39 acres are allocated for uplands, lands in active berry agriculture, wetlands in active field agriculture as of 1979 and uplands approved for mining but not yet disturbed; 0.2 PDCs per 39 acres are allocated for other wetlands; and no credits are allocated to uplands mined as a result of a resource extraction permit.

A credit can also be made to land which meets the above criteria which was partially developed as of 1981 as long as the unused portion of the property is at least ten acres in size. The credits available to land in the Agricultural Production Area are reduced by the number of dwelling units located on the sending site. In addition, one quarter PDC can be allocated to someone who has owned a vacant parcel at least one tenth of an acre in size since 1979 which does not adjoin another parcel owned by the same person as of 1979. Owners can also receive fractional PDCs according to the formulas described above. The resulting fractions are always rounded to the nearest quarter of a credit since each quarter credit can be used to build an additional home in a Regional Growth Area.

To receive a PDC allocation, a property owner must apply to the Pinelands Commission for a Letter of Interpretation. The allocations have value because they represent the development potential of the property and should be included in appraisals of the property.

However, Letters of Interpretation do not mean that the property owners commit to deed restrict their property or sever the PDCs from the land; property owners may decide to keep the PDCs with the land rather than sever and sell them.

To actually sever the PDC from the sending site, the owners must have a 60-year title search performed on their property. The title search is critical because the owner must have clear title to the property in order to be able to place an easement on the property. If even the mineral rights are owned by someone else, the property owner would not be able to deed restrict the property for PDCs unless he or she regained control of those mineral rights.

If the title search indicates that the title is marketable, the owners can deed restrict their land with an easement which meets the requirements of the PDC Bank. The restriction must limit future uses of the land in accordance with the Pinelands Comprehensive Management Plan. In addition, the deed restriction must be granted in favor of a public agency or a non-profit, incorporated conservation organization. Finally, the restriction must be enforceable by the Pinelands Commission. An attorney is not an absolute necessity if the landowner chooses to use one of the three sample deed restrictions provided by the PDC Bank.

Landowners are encouraged to submit draft deed restrictions along with applications for PDC Certificates; that way the PDC Bank can assist in resolving potential problems before the deed restriction is actually executed and recorded. Landowners receive PDC Certificates from the PDC Bank after the Bank verifies the accuracy of the PDC allocation and ensures that the land has been properly deed restricted. If a Burlington County property owner wishes to sell PDCs to the Burlington County PDC Exchange, application for a PDC Certificate must be made to the Exchange since the deed restriction must be made in favor of Burlington County; the Exchange takes care of obtaining the PDC Certificate from the PDC Bank for the property owner as well as other procedures such as making arrangements for the title search and filing the deed restriction.

Sending site owners have numerous options for marketing their PDCs:

- List PDCs with a real estate salesperson;
- Obtain PDC Certificates and, consequently, get listed in the PDC Registry;
- Locate PDC buyers from the list kept by the PDC Bank;
- Sell the credits to the PDC Bank or, in the case of Burlington County landowners, to the Burlington County Exchange;
- Advertise the PDCs for sale; or
- Sell the PDCs along with the property.

Each Certificate records the PDC owner, the number of credits and the land from which the PDCs were severed. When PDC owners sell their PDCs, the transaction is recorded on the Certificate and the PDC Bank issues a new PDC Certificate in the name of the new owners. PDC Certificates can be encumbered as collateral for a loan. The PDC Bank records all transactions in its PDC Registry. PDC Certificates are not needed for PDC sales which occurred prior to the establishment of the PDC Bank in 1988; however, if pre-1988 PDCs are bought and sold, these transactions must be reported to the PDC Bank.

After PDCs are severed, the property owners continue to hold title to the land and may use it for prescribed purposes as listed in the deed restriction. In the Preservation Area District, the land may be used for berry production, native plant horticulture, beekeeping, fish and wildlife management, passive recreation and housing for migrant farm workers. In the Special Agricultural Production Area, the deed restrictions can allow berry production, horticulture of native plants, forestry, beekeeping, fish and wildlife management and migrant farm worker housing. And in Agricultural Production Areas, the easements can permit agriculture, migrant farm worker housing, forestry, passive recreation, smaller agricultural processing and sales establishments, fish and wildlife management and, under limited circumstances, agriculture-related airports and heliports.

If the PDC allocation is adjusted accordingly, the right to build other farm-related housing can also be retained. For example, if sending site owners wish to reserve the right to build agricultural-related dwelling units on the sending property in the future, they can subdivide the property and deed restrict only the resulting parcel slated for preservation. Alternatively, the right to build on the site in the future can be noted on the Letter of Interpretation and the available PDCs adjusted accordingly.

PDC Banks

A TDR bank was originally approved by the New Jersey legislature but vetoed by the governor. However, in 1981, the Burlington County Conservation Easement and Pinelands Development Credit Exchange was established by Burlington County, one of the seven counties within the Pinelands. The Exchange was funded by the issuance of a $1.5-million county bond. The Exchange is a buyer of last resort for PDCs severed from land in Burlington County; however, PDCs purchased by the Exchange can be sold for use on receiving sites anywhere in the Pinelands.

The Exchange is allowed to buy PDCs from property with environmental resources, such as agricultural land, wetlands or property contiguous to property already in public ownership. The program also requires that the seller demonstrate financial hardship; however, this requirement can be waived at the seller's request.

The Exchange bought and sold PDCs at $10,000 each plus costs. The price was based on the estimated value to a receiving site project of one additional dwelling unit. The Exchange's purchase price had the effect of establishing the price of PDCs in private transactions; for example, Roddewig and Inghram reported in 1987 that although PDC prices ranged from $8,000 to $20,000 in the early 1980s, most PDCs sold for $10,000. During the early years of the Pinelands program, the Exchange also found itself marketing PDCs since New Jersey real estate brokers did not see much opportunity in this market.

In 1982, the legality of the Exchange was challenged. At issue was whether or not the Burlington County voters, in approving the bond measure, had authorized the County to purchase PDCs as well as easements. In addition, there were arguments about whether the PDCs were securities, and, consequently, regulated by federal securities law. The courts upheld the legality of the Exchange. From 1981 to 1987, the Exchange purchased 91.75 PDCs, which represents a preservation of 2,400 acres of land. The Exchange has now sold all of the PDCs it acquired.

In 1987, the State of New Jersey established the New Jersey Pinelands Development Credit Bank and capitalized it with $5 million from the state general fund. The Bank acts as a "buyer of last resort", ensuring that there will always be a market for PDCs should a PDC seller be unable or unwilling to find a buyer. The Bank was originally required to pay at least $10,000 per PDC. The Bank may periodically increase its purchase price, as reported in the Program Status section below. However, the Bank's purchase price may not impair private transactions of PDCs; in fact, the state legislation prohibits the Bank from buying PDCs for a price greater than 80 percent of market value. The Bank must be re-authorized to purchase PDCs every two years.

The Bank can purchase PDCs if it would further the objectives of the Pinelands Protection Act and the Pinelands Comprehensive Management Plan. To assist in understanding that goal, the Bank developed five specific examples:

- When purchase of the PDCs would deed restrict a property of ecological or agricultural significance.
- When the property abuts or protects public conservation land.
- When the PDCs will be used on a residential project which is important because it includes environmentally-sensitive design and/or affordable housing.
- When the purchase would result in a positive example of the Pinelands program.
- When the landowner intends to use the proceeds from the PDC sale for activities that further promote the goals of the Pinelands Plan, such as a nature center or wildlife refuge.

The Bank can also buy PDCs to alleviate a hardship, for which the Bank has three examples:

- When an owner's land investment represents a substantial portion of the owner's net worth.
- When the owner has applied for and been denied a waiver from the development restrictions of the Pinelands Plan.
- When an owner is experiencing an extraordinary financial hardship such as unemployment or illness.

The Bank can sell the PDCs that it owns only if there is sufficient demand for PDCs to warrant a sale and only if the sale would not substantially impair the private sale of PDCs. The Bank sells PDCs through auctions. A minimum bid price is established. Originally, the minimum bid had to be $2,500 per right (or $10,000 per PDC); however, the Bank can set a higher minimum bid in order to avoid a substantial impairment of private PDC sales. In fact, during the Bank's first sale of PDCs in 1990, the high bid was $5,560 per development right. The State of New Jersey can increase the minimum bid as needed.

Following a two-thirds vote of the Bank Board, the Bank can also convey PDCs at no cost to projects which serve a compelling public purpose. In approving such no-cost conveyances, the Bank Board must find that the project could not proceed without the conveyance and that the conveyance will not substantially impair private-market sales of PDCs.

Most transactions occur in the private market where sales prices are determined by negotiation between buyers and sellers. For example, in 1993 and 1994, the PDC Bank purchased only one development right while 156 development rights were purchased in private sector transactions. Similarly, the Bank sells relatively few development rights; from 1990 through 1994, the Bank sold only five development rights, compared with 328 development rights sold by private parties to private parties. Private-transaction sales prices are influenced both by general supply and demand for development rights and by the additional profit which a receiving site developer is able to obtain by purchasing development rights.

In addition to buying and selling development rights and providing credit guarantees, the Pinelands Development Credit Bank:

- Guarantees loans secured by PDCs as collateral;
- Facilitates all PDC transactions;
- Issues PDC Certificates;
- Reissues PDC Certificates when ownership changes;

- Maintains the Registry of all PDC transactions;
- Uses the Registry to help PDC buyers find PDC sellers;
- Maintains a list of developers who want to buy PDCs; and
- Prepares an annual report of all PDC transactions.

Receiving Sites

Receiving sites are lands in the Regional Growth Area subcategory of the Protection Area. Land in Regional Growth Areas is capable of accommodating additional development and is recognized as having a high demand for development. Land designated as Regional Growth Area is located in 23 Pineland municipalities. To ensure that there would be enough land to receive transferred credits, the Plan designated receiving areas capable of accommodating up to 46,200 transferred units; this is more than double the number of units, 22,500 units, which would be generated by the severing of all credits allocated to the sending areas.

PDCs can be used to increase the density of receiving site projects. The extra density allowed by PDCs varies between the 23 communities involved; the zoning code for each municipality spells out the bonus density available by transferring development rights. However, in each community, the bonus density is awarded as a matter of right, not as a result of a discretionary approval process. PDCs can be used for any type of single-family or multiple-family residential development.

Some of the 23 local municipalities with receiving sites were accustomed to granting extra density in response to developer applications for planned unit developments or other rezonings. The Pinelands Commission required these communities to discontinue this practice since developers would have little incentive to buy PDCs when they could get the density they want for free. Similarly, the Pinelands Plan requires the use of PDC whenever a municipality approves a zoning variance which increases residential densities or allows residential uses in areas zoned for non-residential uses. In addition, the Pinelands Commission watches for stringent development standards for higher density development which could discourage developers from buying development rights.

Most applications for subdivisions and site plan approvals are submitted first to the Pinelands Commission. The Commission certifies the number of PDCs required for the proposed project, as well as compliance with other Pinelands regulations, in a Certificate of Filing. The application then goes to the applicable municipality for review and approval. The project can receive preliminary approval conditioned on delivery of the necessary PDCs prior to final approval. For multi-phase projects, the approval can specify the number of PDCs to be provided prior to proceeding to the next phase.

Prior to final local approval of a project, developers must redeem the PDCs. Developers redeem PDCs by exchanging them for the right to build additional dwelling units on the receiving site. The municipality sends the "redeemed" PDC Certificates to the PDC Bank, which records these PDCs in the Registry as "retired". The developer also submits proof of local project approval and PDC redemption to the Pinelands Commission. The Commission must review the project approval and verify redemption of the PDCs prior to issuing a letter concurring with the local government approval.

The Pinelands program is supported by a substantial public outreach effort. The Pinelands Commission has prepared a color brochure describing the Comprehensive Management Plan. The New Jersey Pinelands Development Credit Bank distributes guidelines, entitled "Selling and Buying Pinelands Development Credits", which outline the forms and procedures used in the transfer process. The Bank has also prepared a handbook, entitled "Benefits of the Pinelands Development Credit Program", which explains why landowners and developers should take advantage of the program. In addition, the Bank regularly sends letters to landowners reminding them of the benefits of the program.

PROGRAM STATUS

In the first two years of the Pinelands program, severances rose from 686 acres in 1982 to 1,021 acres in 1983. But for the next five years, the acreage of protected land each year steadily declined to a low of less than one

NEW JERSEY PINELANDS

The State of New Jersey formed a Pinelands Commission to plan and manage a one-million acre area composed of 60 different jurisdictions

The plan uses TDR to encourage the preservation of a 368,000-acre inner Preservation Area consisting of forests, lowlands and swamps which serve as habitat for 1,200 species of plants and animals

Sending site owners are encouraged to sell their development credits by environmental regulations and a four-to-one transfer ratio

The Pinelands Development Credit Bank serves as a "buyer of last resort" and administers much of the program

The Pinelands Infrastructure Trust Bond Act helped fund sewer improvements that made it possible for receiving areas to accept the additional density provided by TDR

As of August 2001, the Pinelands TDR program has preserved 31,465 acres of agricultural and environmentally sensitive land acre protected in 1988. Similarly, the use of development rights on receiving sites had a dramatic start, with 638 development rights transferred to receiving sites in 1985 and 1986. This was followed by declining use of transfers on receiving sites between 1986 and 1989.

Fortunately, the Pinelands program has been routinely analyzed and adjusted. In 1983 and 1984, Peter J. Pizor conducted interviews with landowners, facilitators and developers affected by the Pinelands program; the results were reported in a Spring 1986 Journal of the American Planning Association article entitled "Making TDR Work". Pizor concluded that the Pinelands program expanded the options for landowners by allowing them to continue farming while selling their development rights, sometimes using the proceeds to expand the land area of their farms. Prior to the establishment of the Pinelands Development Credit Bank, there was relatively little formal facilitation; consequently, Pizor found that developers were reluctant to use the new program. Finally, Pizor reported that, in the early 1980s, the Pinelands program was hampered by three disincentives. 1) The transferred density could not be used on land served only by septic systems. 2) Communities with strong "no-growth" sentiments resisted transfers. 3) Transactions were delayed by overlapping regulations and disputes between local governments and the Pinelands Commission.

In 1987, the Pinelands Commission hired a real estate consultant to interview property owners, developers and public officials about the program. The consultant recommended that the Commission increase its public outreach effort after discovering that few of those interviewed were familiar with the details or even the goals of the program. The consultant also reported that the Pinelands Program was hindered by opposition to increased density in the growth centers. The local governments had the ability to approve or deny receiving site projects using PDCs. These proposals were sometimes denied or at least discouraged by local zoning codes which imposed height, setback and other development requirements which effectively made higher-density projects impossible.

In addition, the consultant found that environmental constraints within the growth areas often preclude the use of PDCs. As reported by Pizor, the absence of sewers in many of the growth areas prohibited higher density development. Finally, land owners and developers who had not used PDCs believed that the program was so complex and time-consuming that they would rather build at a lower density than go through the process. However, the consultant found that those who used PDCs were typically interested in using them again.

In 1988, 34 potential changes in the Pinelands program were recommended. Some minor adjustments were made immediately, including improved marketing, increased public education and streamlining of the approval process. In 1990, the Commission followed up with comprehensive program amendments which improved the calculation procedure, simplified requirements and adjusted density limits in specific areas to account for special circumstances.

Most importantly, in 1988, the Pinelands Development Credit Bank was established and began a marketing program that created an increased level of activity. Between January 1, 1989 and June 30, 1991, 240 allocations occurred; this was more than 60 percent of the total number of allocations that had occurred to that date.

The Pinelands TDR program was also greatly assisted by the adoption of the Pinelands Infrastructure Trust Bond Act. This legislation has helped to fund about $50 million worth of sewer improvements in Regional Growth Areas, thereby making it possible for developers to use development rights to increase the density of receiving site projects.

In the 1990s, the Pinelands program continues to be analyzed and improved. In 1994, the Pinelands Commission adopted new rules to the Comprehensive Management Plan designed to provide flexibility in municipal growth management, streamline the development review process and change regulations for mining in the Pinelands. The Commission had previously allowed single-family residential development to be reviewed by a local review officer in two municipalities; based on that experience, the Commission hopes to expand local review to other jurisdictions. In addition, the Commission increasingly enters into memoranda of agreement which identify categories of minor projects which can be approved locally rather than being delayed by Commission review.

In 1999, the Pinelands Commission adopted further amendments to the Comprehensive Management Plan to allow a supplemental purchase of PDCs. Specifically, the State of New Jersey provided $3 million in 2000 to buy PDCs for $22,500 each. (Each PDC allows the development of four residential units.) In 2000, another component was added in which cranberry farmers are allowed to expand into freshwater wetlands if they contribute Pinelands Development Credits to the New Jersey Department of Environmental Protection. The Department will sell these credits to the to the Pinelands Development Credit Bank and use the proceeds to finance a program to restore the Atlantic White Cedars.

In fiscal year 2000, New Jersey instituted a Special Development Credit Purchase Program financed by a $3-million state appropriation. Under this program the Development Credit Bank was authorized to buy up to 100 rights (25 PDCs) from any single property owner for $5,562.50 per right. However, these rights are to be extinguished rather than resold for receiving site developments. Another $20 million was appropriated in the state's FY 2001 budget for this program.

Due to the comprehensive nature of the Pinelands Plan and the willingness of the State of New Jersey and the Pinelands Commission to make necessary adjustments, the Pinelands has all of the ingredients needed for a successful program. First, the transfer program was imposed on every municipality in the one-million-acre planning area and the Comprehensive Plan was carefully designed to be implemented by TDR. On sending sites, the four-to-one transfer ratio provides a substantial motivation for property owners to sell development rights rather than build on site. And on the other end of the transfer, the Plan designates growth centers that are capable of accommodating the transferred development. Furthermore, the Pinelands Commission has prevented local governments from increasing density, through rezonings or planned unit developments, unless PDCs are used. Finally, as mentioned above, the program is supported by a public outreach program and assistance from the Pinelands Development Credit Bank.

In the ten-year period of 1990 through 1999, PDCs had been used in 442 receiving site projects, or an average of 44 projects per year. In the year 2000, private transactions and sales from the Pinelands Development Credit Bank generally ranged from $5,000 to $9,000 per development right. According to a progress report updated on August 17, 2001 950 PDCs or 3,800 development rights had been severed as of that date. Of that total 2406 rights had been sold to developers, leaving 110 rights in the NJ Pinelands Development Credit Bank, 284 in private ownership and 394 rights not yet sold. The severance of these rights resulted in the preservation of 31,465 acres including 13,777 acres of Preservation Area, 7,152 acres of Agricultural Production Area and 10,532 acres of Special Agricultural Production Area. Only the Montgomery County, Maryland TDR program surpasses the New Jersey Pinelands program in terms of total acreage preserved.

NEW YORK, NEW YORK[15]

BACKGROUND

In 1961, New York City began providing some flexibility in its density limits through a technique called a zoning-lot merger. Using this technique, multiple owners of contiguous properties within a single city block can declare single zoning-lot status. All of the properties, or tax lots, in this merged zoning lot are thereafter treated as one lot for the purpose of meeting zoning requirements. If one of the properties in the merged zoning lot contains a building with less floor area than the development potential allowed under the density limits of the zoning code, this so-called unused development right can be transferred and used on one of the other properties in the merged zoning lot.

Consequently, as a matter of right, some properties in the merged zoning lot can exceed the density which would otherwise apply to individual properties which are not within a merged zoning lot. This zoning-lot merger technique can be used to avoid the demolition of historic landmarks. However, a merged zoning lot does not have to contain a historic property; the process is available to any contiguous properties within a single city block.

In 1968, New York City adopted new zoning code provisions allowing unused density from designated historic landmarks to be transferred to adjacent zoning lots, including zoning lots across streets and zoning lots relatively far removed as long as they are part of a contiguous chain of properties under the same ownership.

One year later, the City denied Penn Central's request to build a 59-story office tower on top of the Grand Central Terminal, a designated historic landmark. The lawsuit that arose was ultimately heard by the U.S. Supreme Court. In addition to affirming that the City could impose restrictions on the alteration of historic properties, the Court also ruled that transfer of development rights could be used to mitigate the impacts of development restrictions. However, as explained in much greater detail in Chapter IV on legal issues, this ruling did not resolve whether or not TDR could be used as just compensation for a taking of private property for public purposes.

PROCESS

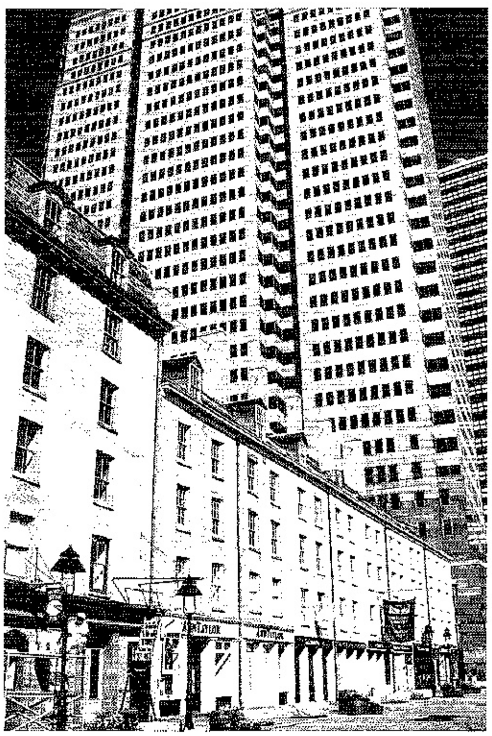
New York City allows unused development rights from historic landmark properties to be transferred to adjacent zoning lots. An adjacent zoning lot can be any of the following:

- A lot which is contiguous to the landmark property;
- A lot across a street and opposite from the landmark;
- In the case of a corner lot, a lot which fronts on the same street intersection as the landmark; or
- In certain zoning districts, lots which are part

of a chain of contiguous lots under the same ownership.

Transfers of development rights are approved through the special permit process, which requires the review of the City Planning Commission. When filing an application for this special permit, the property owner must submit a program outlining the maintenance of the landmark, a report from the Landmarks Preservation Commission and plans for the development of the receiving site. In addition to exceptions to density limitations on the receiving site, the City Planning Commission may grant receiving site projects deviations from setback, open space and building height requirements as well as minor variations to plaza, arcade and yard regulations.

The floor area available for transfer from the sending site is the difference between the floor area of the landmark building and the maximum floor area allowed by the applicable zone without any additional density allowed for arcades, plazas or other amenities. When a transfer is approved, the sending site density restrictions must be recorded with the county.



In the South Street Seaport TDR program, New York City preserved the landmark buildings in the foreground by allowing the development rights to be used in office towers outside the historic district

The program offers a one-to-one transfer ratio; the amount of floor area precluded from being used at sending sites is the same amount of floor area which can be transferred to receiving sites. Originally, there was no limit on the amount of density that could be transferred to a receiving site by special permit. However, zoning changes for Lower Manhattan now limit transfers in the FAR 15 districts to 21.6 FAR. For receiving sites throughout the city in zoning districts with lower FARs, the base intensity may be increased by a maximum of 20 percent through TDR.

In approving a transfer, the Planning Commission must make three findings. First, the additional development allowed on the receiving site cannot create unacceptable impacts on adjacent properties; if impacts on the properties are anticipated, the disadvantages to these surrounding properties must be more than outweighed by the advantage to the community of the preservation of the landmark. Second, the program providing for the maintenance of the landmark must result in the preservation of that landmark. And, finally, if the landmark is in public ownership, pedestrian and/or transportation improvements should be created in conjunction with the transfer.

Generally, New York's TDR program does not apply to historic districts. However, the City made an exception through a special zoning amendment for the South Street Seaport District. In this amendment, a preservation area was created and development rights from this area were allowed to be transferred to an adjacent area designated for redevelopment. Financial institutions agreed to write off delinquent loans on buildings in the preservation area in return for development rights; these rights were held in a TDR bank and eventually used to promote the construction of several major office buildings in the redevelopment area. In turn, the owners of property in the preservation area were able to qualify for loans to rehabilitate their historic structures. The restoration of these properties led to the evolution of the South Street Seaport area into an important tourist attraction for the City.

Other special regulations for the transfer of rights from landmark sites were adopted in 1992 for the Grand Central Subdistrict. For this subdistrict alone, the code creates the term "granting lot", which is a zoning lot which contains a landmark and which is at least 50 percent inside the subdistrict boundaries. Similarly, receiving lots are defined as zoning lots which receive transferred rights that are at least 50 percent within the subdistrict boundaries provided these lots occupy frontage on specified streets if they are located in a particular

NEW YORK

New York adopted the first TDR ordinance in the U.S. in 1968

This ordinance, like many other historic-preservation TDR ordinances, calculates the transferable density as the difference between the size of the landmark and the maximum size of a building which the zoning code will allow on that site

The receiving site must be adjacent lots including lots across streets or lots that are farther removed but part of a contiguous chain of properties under the same ownership

As of 2001, the City's landmarks transfers had preserved twelve historic structures

The Seaport Subdistrict TDR program has transferred 660,000 square feet of development rights

Four projects have transferred 448,000 square feet of development rights within the Grand Central Station Subdistrict

In 1998, the City adopted a Theater Subdistrict ordinance which allows receiving site projects to receive development rights transferred from Broadway theaters that are deed restricted to operate for live performances

part of the subdistrict. In other words, for the Grand Central Subdistrict, the City relaxed the lot adjacency requirements in effect elsewhere.

While relaxing adjacency requirements, the City imposed restrictions on the amount of density which can be transferred to a receiving site which only apply to the Grand Central Subdistrict. In this subdistrict, transfers can be approved either by certification or special use permit. Using the certification option, the City Planning Commission can allow a transfer to increase the receiving lot density one FAR higher than the density permitted as a matter of right on that site.

The special permit option can only be used in a portion of the Grand Central Subdistrict known as the Core Area. Under the special permit option, the density of a receiving site project cannot exceed an FAR 21.6 as a result of TDR. However, the special permit process can also be used to allow exceptions to other development requirements on the receiving site.

PROGRAM STATUS

In New York City, there is a strong demand for more density than the underlying zoning will allow. Consequently, there is considerable transfer activity despite the ability to obtain density bonuses in return for incorporating plazas, arcades and other on-site amenities into new developments. However, most of the transfer activity occurs through the zoning-lot merger process rather than the discretionary process which allows transfers to properties in different city blocks. For example, a merged zoning lot allowed the preservation of the historic Racquet and Tennis Club at Park Avenue and Fifty-second street in conjunction with the development of a major office tower.

The zoning lot merger technique has been used extensively. As described above, any contiguous properties in a single city block can be granted merged zoning-lot status which allows transfers between properties as a matter of right; consequently, property owners and developers consider the zoning-lot merger process to be relatively fast and predictable. Furthermore, there is no limit on the density increase which can be allowed on the receiving site through this technique. Some zoning-lot mergers result in a receiving site density which is twice the amount which would be allowed by the zoning code without the use of this process.

On the other hand, only a dozen transfers have occurred under the non-zoning-lot merger TDR process since its introduction in 1968. Unlike the zoning-lot merger technique, this process requires Planning Commission review. Sending and receiving sites must be "adjacent" properties, including lots that are across a street, fronting on the same intersection or part of a chain of contiguous properties under the same ownership. However, this technique may see greater use in the future as developers become increasingly creative in assembling parcels to meet the definition of adjacency.

In "Downtown Growth Control Through Development Rights Transfer", David Alan Richards listed twelve transfers resulting in the preservation of New York landmarks.

- Amster Yard: a nineteenth century courtyard residential complex;
- A Greek revival residence;
- Three transfers from the development rights bank created by the preservation of buildings in the South Street Seaport were used in the headquarters of Continental Insurance as well as office towers at 175 Water Street and 199 Water Street;
- Grand Central Station, (75,000 square feet of development rights transferred to the southwest corner of Park Avenue and 42nd Street);
- Villard Houses, which were incorporated into the Helmsley Palace on Madison Avenue at 51st Street;
- The Federal Reserve Bank and John Street First Methodist Church, (which transferred rights to a new Federal Reserve Annex);
- The India House on Hanover Square;
- The Old Slip Police Station;
- The Citibank Building;
- 55 Wall Street;

- The City Center Theater; and
- Saks Fifth Avenue.

In an April 2000 update, Richard Barth, Director of the New York City Planning Department's Manhattan Office, reported that there had not been any additional transfers under the City's general transfer program. In addition, there had been no further transfers in the Seaport District although a 350,000 square foot transfer had been proposed. (As of 2001, 540,000 square feet of the original 1.2 million square feet remained in the Seaport District.)

However, Barth reported three transfers within the Grand Central Station Subdistrict in the late 1990s. In 1998, 286,000 square feet of development rights were transferred to the one million square foot headquarters of Bear Sterns at Madison Avenue and 47th Street, increasing that building from FAR 15 to FAR 21.6. In addition to contributing to the preservation and maintenance of the Grand Central landmark, the receiving site development provided direct access to commuter rail facilities as well as other pedestrian improvements. In 2000, two other transfers from Grand Central were approved resulting in an increase of one FAR, or roughly 87,000 square feet at two receiving sites on Madison Avenue. As listed above, 75,000 square feet of development rights were transferred to the Philip Morris Building on Park Avenue under the landmarks program in 1979. These four transfers yield a total of 448,000 square feet transferred as of 2001, leaving from 1.3 to 1.5 million square feet of development rights still to be transferred.

In 1998, the City adopted a Theater District zone that allows listed Broadway theaters within the Theater Subdistrict (part of the Special Midtown District) to transfer excess development rights to receiving sites anywhere within the subdistrict. Receiving site projects can increase their FAR by 20 percent through the transfer of theater development rights. The transfers are approved ministerially by a City Planning Commission certification process. The theater at the sending site must comply with the following requirements.

- The theater must enter into a restrictive covenant limiting the theater to be used only as a legitimate theater.
- An operation and maintenance plan must be established for the theater.
- For each square foot of air rights transferred, a $10 payment must be made to a Theater Subdistrict Fund to cover the cost of inspections, monitoring and other activities to advance the purposes of the theater subdistrict.
- The theater must be brought up to a condition of physical and operational soundness.

SAN FRANCISCO, CALIFORNIA[16]

BACKGROUND

San Francisco, population 776,733 (2000), has a wealth of historical and architecturally-significant buildings. For decades, the City has encouraged the preservation of historic structures. In the 1960s, San Francisco began using TDR to allow the unused development capacity from a landmark to be transferred to a downtown receiving site.

The use of TDR dramatically increased in 1985 with the adoption of a new downtown plan which designated 253 properties in the downtown as architecturally significant and 183 other properties as contributory buildings. Concurrently, the new plan lowered density limits in the downtown, creating a greater incentive for developers to acquire TDR in order to achieve the density desired for high-rise offices.

PROCESS

In the San Francisco program, a preservation lot is a parcel of land containing a structure that meets at least one of three criteria: a designated significant or contributing historic building; a designated landmark; or a building which otherwise complies with TDR eligibility requirements. It is very difficult to alter or demolish a significant historic structure in San Francisco. Historic structures which are designated as contributing rather than significant are not automatically protected; however, once development rights are transferred from these structures, they are treated as significant historic structures and are protected from alteration and demolition.

SAN FRANCISCO

In 1985, San Francisco adopted a downtown plan which designated 253 buildings in the downtown as architecturally significant

It is very difficult to alter or destroy a historically-significant building; this gives the owners of landmarks an incentive to transfer their development rights

In addition, the 1985 plan reduced the amount of density that new buildings can achieve as a matter of right under the zoning code; this lower by-right density motivates developers to buy TDRs because there are no mechanisms, other than TDR, for exceeding these limits

Unlike many historic TDR programs, the San Francisco program allows development rights to be transferred between any lots in the same zoning district

The approval process is ministerial and developers have come to regard it as a routine real-estate transaction

A transfer lot is a preservation lot in San Francisco's C-3 zoning district from which development rights may be transferred. The receiving sites are referred to as development lots. The amount of TDR available for transfer from a transfer lot is the difference between the floor area allowed by zoning and the actual floor area of the existing building. The transfer ratio is one-to-one; the amount of development available for transfer equals the amount of development precluded by deed-restricting the sending site.

Transfers can only occur between lots in the same zoning district or between two combinations of transfer lots and development lots as specified in the code. Development rights may not be transferred to development sites with significant or contributing structures unless the added development is needed for the historic building to meet the earthquake standards of the building code. The approval of a transfer of development rights only exempts the development lot project from floor area ratio limitations; approval of the transfer, in itself, does not entitle the development lot project to exceed other limitations, such as height, bulk, and setback. However, projects incorporating additional density gained through TDR can typically be accommodated within the height limits specified in the code.

The owner of a transfer lot may apply for a Statement of Eligibility to determine the amount of TDR available for transfer. This statement is recorded and remains in effect unless it is revoked due to alteration or demolition of the historic building on the preservation lot. TDR may be transferred directly from the original owner or from someone who acquires TDRs for future transfer. TDRs are conveyed from one owner to another through a Certificate of Transfer prepared and recorded by the Zoning Administrator.

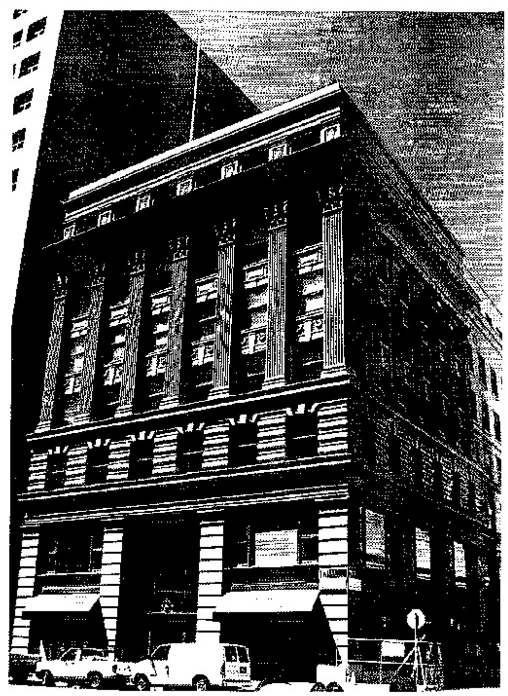
When TDR are needed to allow a project on a development lot, the Zoning Administrator must certify that the owner of the development lot owns the required TDR. When the project is approved, the Zoning Administrator also prepares and records a Notice of Use of TDR which states that the TDR have been used and may not be further transferred.

PROGRAM STATUS

The San Francisco TDR program has several elements needed for success. The owners of potential sending sites are motivated to sell their development rights because it is very difficult to get permission to alter or demolish a significant historic building in San Francisco. At the other end of the transfer, developers are interested in acquiring development rights because the demand for new office space in downtown San Francisco can be very high during economic upswings. Furthermore, the 9:1 downtown density limit cannot be circumvented by bonus densities awarded for design or site amenities; TDR is the only available means of exceeding the density allowed by base zoning. Consequently, there is a significant demand for TDR.

According to Planner-Urban Designer Lawrence B. Badiner, the San Francisco TDR program has been in effect for so long that downtown developers have learned to use it as a routine tool for making projects work. Also, because of the track record established, developers can rely on TDR as a predictable, ministerial process that is not likely to subject projects to disapproval or delays. In fact, the City found that San Francisco developers did not need help in finding TDR buyers and sellers or negotiating TDR transactions. Consequently, the City consciously decided not to create a TDR bank so that market forces could control transfers without interference.

In 1995, Badiner estimated that about ten historic landmarks had been preserved by the San Francisco



It is difficult to alter or demolish any of the 253 properties in downtown San Francisco designated as architecturally significant. These restrictions help make the San Francisco TDR program one of the most successful in the country

TDR program. In April 2001, Dan DiBartolo, who now runs the TDR program for the City Planning Department, provided an inventory of recent activity. From November 1999 to March 2001, Statements of Eligibility were approved allowing almost 400,000 square feet of development rights to be transferred from 15 landmarks including theaters, banks, commercial buildings, a fire station and a church. In addition, applications for Statements of Eligibility on over 200,000 more square feet of floor area were pending but not yet approved. Between May 2000 and March 2001, the City received applications to use 565,000 square feet of transferred development rights from 14 different sending sites in ten receiving site projects. As of April 2001, seven of the ten applications had been approved allowing the use of over 500,000 square feet of development rights in these receiving site developments. This level of transfer activity makes the San Francisco TDR program one of the most successful in the United States.

SAN LUIS OBISPO COUNTY, CALIFORNIA[17]

BACKGROUND

San Luis Obispo County, population 246,681 (2000), lies midway between San Francisco and Los Angeles on California's Pacific Coast. There are two TDR programs in San Luis Obispo County at this time; a community-based program developed for the community of Cambria in the 1980s and a countywide program adopted in 1996.

Cambria TDR Program - Cambria, with a permanent population of 5,000, is a seaside community in the northern portion of the County. Cambria's coastal hills provide one of the few habitats for Monterey Pine and Cambria Pine. Thanks to its natural setting, Cambria has an active real estate market, particularly for vacation and retirement homes. In the late 1800s, prior to the adoption of modern development standards, 9,000 very small lots were created in the Lodge Hill subdivision of Cambria, often on steep and highly erodible slopes. Many of these lots remain undeveloped.

The Cambria transfer of development credits (TDC) program grew out of a collaboration of the California Coastal Commission, the California Coastal Conservancy, San Luis Obispo County and the Land Conservancy of San Luis Obispo County. These organizations were particularly concerned about the destruction of the Cambria Pine habitat as well as the hazards of building on the steep, substandard lots of the antiquated Lodge Hill subdivision in Cambria. The goal in Cambria was to save the Cambria Pine habitat by reducing the size of the homes that could be built on small lots and retiring these lots wherever possible.

Before the certification of San Luis Obispo County's Local Coastal Program, the Coastal Commission regulated development in the coastal zone. During this period, the Coastal Commission required developers to retire one small, steep lot in the Lodge Hill subdivision in return for approving a permit to build a home on another lot. This process became increasingly formalized from 1980 to 1988 with the development of the County's Local Coastal Program (LCP). The LCP ultimately targeted a canyon filled with Monterey Pine, known as Fern Canyon, and a hillside visible from Highway 1 as two areas in which development should be minimized.

To maximize public input, questionnaires were sent to every property owner in the affected areas. The results of these questionnaires helped to formulate the program as well as identify potential buyers and sellers of development credits.

In the mid 1980s, the Land Conservancy of San Luis Obispo County proposed a restoration plan for Lodge Hill. In 1986, the Coastal Conservancy and the

Land Conservancy entered into a ten-year contract to implement the restoration plan using $275,000 from the Coastal Conservancy as a revolving fund. The fund is used to buy environmentally sensitive lots and is replenished through the sale of development credits from these lots. At the end of the ten-year contract, the money remaining in the revolving fund is to be returned to the Coastal Conservancy.

When the Local Coastal Program was adopted in 1988, the County took over the authority to issue building permits in the coastal zone in accordance with the LCP. The County reduces the potential impact of building on the substandard Lodge Hill lots by restricting the size of any dwelling unit constructed on a small lot. However, some parts of the Lodge Hill subdivision have been designated as appropriate to accommodate larger dwellings. The owners of property in these receiving areas can increase the size of their homes by buying development credits from the Land Conservancy to build additional floor area on these receiving lots. The Land Conservancy uses the proceeds from these credit sales to buy more environmentally sensitive land in the special project areas.

Countywide Program - A second countywide TDR program, adopted in October 1996, evolved from the work of a Growth Management Advisory Committee appointed in 1989. Following a Committee Recommendation, the County prepared a three-phase study called the "Rural Settlement Pattern Strategy". Phase I of this study revealed that there are already 23,000 undeveloped lots in the unincorporated portions of San Luis Obispo County of which 12,000 lots are in rural areas. Approximately 2,000 of these lots are in antiquated subdivisions. In addition, the County's general plan would allow the creation of another 8,000 new lots in rural areas. In the 1980s, development in the County shifted away from the edges of urbanized areas and into these rural areas. The report concluded that this pattern of development had serious consequences for agriculture, the environment and the provision of infrastructure and public services.

In 1991, the Phase II Report recommended four major policies.

- Concentrated development in urban areas.
- Locate new development close to existing urban areas.
- Avoid fragmentation in transition areas.
- Protect agricultural and rural character by retaining existing uses and lot sizes in outlying areas.

In Phase III, a Transfer of Development Rights Technical Advisory Committee was formed which identified areas with TDR potential and demonstrated how TDR could work in specific instances.

Seven years of work paved the way for adoption of the countywide TDR ordinance in October 1996. The ordinance is designed to preserve agricultural land and natural resources as well as retire the thousands of legal lots scattered throughout the rural portion of the County. The ordinance was first amended in 1998 to reconstitute the TDC Review Committee. It was amended a second time in 1999 and again in 2000. In 2001, the County Board directed staff to develop additional amendments for further consideration including an amendment that would limit allocation to one TDC for each existing lot in a proposed sending site.

The countywide ordinance allowed for the development of additional community-based programs similar to the Cambria program discussed above. As of July 2001, additional community-based programs had been discussed but were not yet adopted for the unincorporated communities of Nipomo and Los Osos.

The original TDR program in San Luis Obispo County is designed to reduce the number and size of homes built in an antiquated subdivision in an effort to protect one of the few habitats of the Cambria Pine

PROCESS

Cambria TDR Program - The Local Coastal Program (LCP) contains a land use element and implementing ordinances for the North Coast Planning Area, which includes Cambria. The land use element classifies the Monterey Pine Forest as a Sensitive Resource Area, identifies specific needs in the Lodge Hill area and describes the transfer of development credits process.

- In the San Luis Obispo County TDC program for Cambria, sending sites are lots in the Lodge Hill subdivision designated as special project areas. The LCP specifies that these special project areas, or SPAs, contain the most environmentally-sensitive land including steeper slopes, heavier tree cover, areas visible from Highway 1 and wildlife corridors. As described above, two SPAs have been identified to date: SPA #1, Fern Canyon and SPA #2, a scenic hillside visible from Highway 1 when approaching Cambria from the south.
- Different development standards apply depending on whether a parcel is in SPA #1 or #2, whether the slope is greater or less than 25 percent, and whether the parcel is in a single-, double- or triple-lot configuration. For example, a single lot, 25 feet wide and 1,750 square feet in area in SPA #1 could have a house footprint of 500 square feet and a total floor area of 900 square feet if the lot has a slope of 25 percent or less. If the slope exceeds 25 percent, the maximum footprint would be 400 square feet and the total floor area would be limited to 600 square feet. Consequently, to build a home with more than 1,000 square feet of floor area, a property owner must either acquire an adjacent property or buy transferred development credits for additional floor area.

The ordinance section of the LCP specifies lots which are eligible to receive transferred development credits. Lodge Hill subdivision lots which are not within SPA #1 or #2 can receive floor area transferred from lots within these two SPAs. Lots within SPA #1 or #2 cannot receive development credits from lots outside of these special project areas. However, the floor area of a dwelling unit inside a special project area can be increased through transfers of floor area from lots in the same special project area.

The San Luis Obispo County LCP requires the participation of a public agency or non-profit organization in the TDC process to provide public information, record easements and, most importantly, buy and sell development credits. To date, the Land Conservancy of San Luis Obispo County is the only non-profit organization to seek and be granted authority to implement the program. The Land Conservancy, after approval from the Coastal Conservancy, buys lots from willing sellers in SPA #1 using the revolving fund started with the $275,000 grant from the Coastal Conservancy. The Land Conservancy records a conservation easement on these lots and, in turn, offers the development credits from these retired lots to receiving site owners who want to build a larger house than the slope-density requirements of the code would normally allow. The proceeds from these sales are returned to the revolving fund and used to buy more sending sites.

A Minor Use Permit is needed from the County to allow the additional floor area on the receiving lot. In approving the permit, three findings must be made: that the easements on the sending site permanently preserve that site as open space; that the proposed receiving site can accommodate the additional floor area without the need for variances; and that the proposed transfer implements the purpose of the program. A Minor Use Permit is granted administratively but the staff decision can be appealed to the County Planning Commission.

Receiving site owners must demonstrate to the County that they have at least reserved the TDCs needed for the additional floor area. The Land Conservancy originally allowed receiving site owners to reserve TDCs indefinitely with a ten- percent deposit. To avoid the problem of unused reservations, the Land Conservancy now allows TDCs to be reserved at no cost for the first six months; however, the Land Conservancy requires a 50 percent deposit after the first six months and a 100 percent deposit after one year.

The Cambria program offers a one-to-one transfer ratio. The floor area purchased by the receiving site owner represents the same amount of floor area which cannot be built in a sending area because it has been purchased and deed-restricted by the Land Conservancy. However, the LCP limits the amount of floor area that can be transferred to receiving sites; even using transferred floor area, the maximum footprint cannot exceed 45 percent of the receiving lot area and the total floor area cannot exceed 90 percent of the receiving lot area. In actuality, most receiving site applicants do not need the maximum allowed footprint or floor area; for lots receiving TDCs from 1987 through 1990, building footprints averaged 31 percent of the lot area and floor area averaged 55 percent of the lot area.

The program does provide one extra incentive. In addition to the transferable floor area, the sending site may have water or sewer credits that are available for transfer if the lot is retired. These sewer and water credits are not needed at the site receiving the floor area if the transferred floor area is being used to increase the size of an existing home that already has a water meter. However, these water and sewer connection rights can be transferred to other properties within the Cambria Community Services District that are not served with sewer or water.

The code further specifies that two potential receiving site owners can jointly finance the retirement of a sending lot. In this option, the owner of a Lodge Hill receiving site gets the transferred floor area and the owner of a lot outside of Lodge Hill, but within the Community Services District, receives the water and sewer connection rights.

The Land Conservancy of San Luis Obispo County is the only purchaser that buys land in Lodge Hill strictly for the purpose of transferring development credits. Since it has this dominant position in the market, the Land Conservancy has had to carefully consider its pricing strategy. As a benchmark, the Land Conservancy considers the sales price for TDCs and estimates a fair lot purchase price based on the transferable floor area that each lot will yield. However, rather than maintain an inflexible purchase formula that could lead to disgruntled sellers, the Land Conservancy will negotiate a reasonable purchase price. The Land Conservancy has acquired sending sites at an average price of $10 per square foot and has sold TDCs at an average price of $20 per square foot.

After the Land Conservancy acquires a lot and records a conservation easement, it applies to the County for certification of the floor area that can be transferred from that sending site. The County Planning Department reviews a form completed by the Land Conservancy for accuracy. After confirming all the information, the form is signed by the County as a certification that the Land Conservancy can sell the TDCs from the lot.

Countywide Program – The County's Land Use Element states that the countywide TDC program is designed to relocate development from environmentally sensitive land, agricultural land and antiquated subdivisions to more suitable areas. The Element stresses that the program is voluntary, incentive-based and market-driven. Landowners are not obligated to use this technique to request an amendment to the general plan or to develop their land as allowed by existing regulations.

The Land Use Element also promotes the concept of "Community-Based TDC Programs". These are designed to allow a community to develop a TDC program tailored to an individual community's specific goals. Community-based TDC programs can be initiated through an area plan update, a request from area property owners or a proposal from the area's community advisory group.

The Element's land use designation of TDC Sending Site only applies after the sending site owner has entered into a conservation easement. The TDC Receiving Site designation only applies after a tentative map requiring the use of TDCs has been approved and recorded.

The TDC components of the County's Land Use Ordinance explain the process by which owners can apply for sending site designation for their properties. The County decided not to map sending areas due to the information the County would need to accurately pre-designate sending sites throughout the County. In addition, the County was responding to the concerns of property owners that mapped sending sites might create a "green cloud" that could decrease the value of designated properties.

Applications for sending site approval must include a preliminary title report, information supporting the determination of the development value of the property, (as described below), and an explanation of how the property qualifies as a sending site under the following specific and general criteria. The Review Authority would generally approve a site that meets the Specific Criteria unless the proposed site has technical problems or special circumstances that run counter to the purpose of the program. In contrast, the Review Authority may or may not approve a proposed sending site that meets the General Criteria.

Agricultural – Specific Criteria: a) At least 50 percent of the site must be Class I or II soil and the site must be at least 40 acres in size. b) Grazing land must have been used for grazing for more than ten years, be at least 320 acres in size with at least 100 acres moderately suited for range land as described by the Natural Resources Conservation Service. General Criteria allow the approval of sites which would a) continue demonstrated productive capacity, b) preserve micro-climates that support specific crops, c) retire development potential in areas with limited groundwater resources and d) reduce soil erosion.

Natural Resources – Specific Criteria: a) Proposed site is within a Natural Area or Significant Biological, Geographical or Riparian Habitat. b) Site is adjacent to or between land restricted to open space. c) Site would protect the views from highways and main collector streets. General Criteria allow the approval of sites that a) reduce erosion, b) further local land use goals (such as greenbelts) and c) provide passive public recreation.

Antiquated Subdivisions – Specific Criteria: a) Sites smaller than 20 acres that are located at least 10 miles from an urban or village reserve line. b) Sites smaller than 10 acres that are located 5 or more miles from an urban or village reserve line. c) Sites depicted on the County's map of antiquated subdivisions. General Criteria allow the approval of a) antiquated subdivisions with substandard improvements and b) sites that are distant from transportation and other public services.

Base credits are assigned to qualifying sending sites using one of two methods. Under the Existing Lot Method, the number of base credits equals the number of primary residences allowed on the underlying legal lots. Under the Development Value Method, the applicant submits an appraisal of the proposed sending site. If the applicant proposes to transfer title, the development value is equal to the property's full value. If the applicant proposes to retain title and continue to use the property for appropriate activities, the appraisal must estimate the development value by calculating the difference between the property's full value and the value of the property under the proposed deed restrictions. This development value is divided by $20,000 to determine the number of credits. This formula does not determine the price of TDCs, which is established by negotiations between private buyers and sellers. The formula is only used to fix the number of TDCs available for sale. For example, if an appraisal determines that the value of a property after imposition of an easement would decline $80,000, that sending site would be assigned four TDCs. The County based TDC allocations on value diminution out of a concern that only undesirable lots would be preserved unless property value was taken into consideration.

The County wanted to encourage the preservation of environmentally significant properties, such as wetlands, even if these properties have so little development value that they cannot qualify for a full development credit using the procedure described above. Consequently, the owners of such properties may request the assignment of one and only one development credit for land that meets the natural resources criteria or the bonus credits criteria described below.

In addition to the base credit calculation discussed above, sending sites that meet the agricultural and natural resource criteria may also qualify for bonus credits under two approaches. Under the Existing Documentation approach, a site may qualify for Bonus Credits if it is at least 1,000 acres in size. Alternatively it can qualify by including riparian habitat, a natural resource of state/national significance, a Sensitive Resource Area, Flood Hazard designation, Geologic Study Area, Earthquake Fault Zone, Historic designation or Very High Fire Hazard Area. Under the Special Study Criteria, a site may qualify if it 1) contains significant habitat for rare or endangered species, 2) provides a large habitat for any species, 3) includes large oak woodlands, 4) wetlands and 5) groundwater recharge areas. A ten percent bonus is granted for each criteria satisfied to a maximum of a 50 percent increase over the base credits.

After a completed application receives environmental review, the TDC Review Committee conducts a public hearing and decides whether the proposed site qualifies as a sending site and determines the number of TDCs assigned to the site. The decision of the TDC Review Committee is final unless appealed to the County Board of Supervisors. If no appeal is filed within 15 days of the Committee's decision, the Planning Director issues a Notice of Eligibility.

Conservation easements recorded on sending sites must prohibit land uses specified in the code. When owners receive bonus credits, additional restrictions may be required. For example, the conservation easement must address the resources for which bonus credits were provided.

When the easement is recorded, the TDC Administrator issues a Certificate of Sending Credits. Each TDC is assigned a serial number. Also, when these easements are recorded the County general plan is amended to designate the site as TDC Sending Site Combining Designation.

When Sending Site Certificates are sold, the TDC Administrator issues a Receipt of Transfer to the purchaser. The TDC Administrator must also issue a new Receipt of Transfer whenever the original Receipt of Transfer is sold.

Developers seeking receiving site designation must submit an application that demonstrates how the property meets the criteria for receiving sites. The TDC Review Committee examines the proposal for compliance with the following seven eligibility criteria. 1) Environmental documents indicate no significant adverse environmental effects from the proposed project. 2) The site is not within an Agricultural Preserve. 3) The site is within 10 miles of an urban reserve line. The development footprint is not within 4) an area with 30 percent or more slope, 5) areas designated as Sensitive Resource, Flood Hazard, Geologic Study, Earthquake Fault, Very High Fire Hazard or 6) Natural Areas, Significant Biological Geographical or Riparian Habitat. 7) The proposed development must meet with all development standards, land division rules and infrastructure requirements.

SAN LUIS OBISPO COUNTY

The County's TDR program is designed to reduce development in environmentally-sensitive areas, including steep slopes, wildlife corridors and habitat for the Monterey Pine

Sending-site owners are encouraged not to build on steep slopes by a slope-density formula that limits a house to a footprint of 400 square feet on a lot with a slope greater than 25 percent

Instead, these owners can sell development credits to the Land Conservancy of San Luis Obispo County

The Land Conservancy resells these rights to receiving site owners who want more floor area

The seed money for this program came from the California Coastal Conservancy

To date the program has doubled the original size of the revolving fund

So far, 85,000 square feet of floor area credits have been purchased preserving 230 lots.

In 1996, countywide TDC program was adopted to preserve environmental areas, farmland and antiquated subdivisions

Under the countywide program, the County has approved four receiving sites and seven sending sites with combined acreage of more than 8,300 acres

There are calls to change the countywide ordinance to a completely community-based program

Density bonus varies depending on the location of the proposed receiving site. When a site is within an incorporated city's reserve line, the density bonus must be consistent with that city's policies and the city must state in writing its support for the proposed project. When the proposed project is within an urban or village reserve line or within five miles of these lines, the density bonus may be 50 percent of the base density. When the proposed project is from five to ten miles from an urban or village reserve line, the density bonus may be 35 percent of the base density. When the proposed project is more than 10 miles from an urban or village reserve line, density bonus cannot be granted. In addition to the basic density bonus discussed above, receiving site projects can receive an extra bonus of up to 25 percent of the base density for offering special amenities such as trails, coastal access, public parks and transit features.

The San Luis Obispo County TDC program requires proximity of sending and receiving sites. Receiving sites must use TDCs from sending sites within a three-mile radius. If there are not enough credits within the three-mile radius, the TDCs must come from sending sites within the same geographical region. The code identifies seven of these regions.

Prior to recordation of the final or parcel map for a receiving site project, the developer must release ownership of the Receipt of Transfer of the Certificate of Sending Credits to the County. A note on the final or parcel map indicates the number of TDCs used for the project, the serial numbers of these TDCs and the location of the sending site.

Finally, the countywide program allows the Board of Supervisors to appoint a TDC Administrator to issue, monitor and maintain records of Certificates of Sending Credits and Receipts of Transfer. The code also specifies the composition of the TDC Review Committee.

PROGRAM STATUS

Cambria TDR Program - The San Luis Obispo County TDC program for the Cambria community has most of the features usually found in a successful program. The development restrictions on both the sending and receiving sites cannot be circumvented by variance or some other deviation process; consequently, owners either have to adhere to the code or buy TDCs in order to increase house sizes. The TDC bank services provided by the Land Conservancy make the process of acquiring TDCs fast, easy and dependable. And, by skillful management of the revolving fund, the Land Conservancy has more than doubled the original grant amount, ensuring that it can continue to buy sending sites to meet the demand. Finally, the TDC program has been supported by public education and involvement including questionnaires to property owners and workshops for real estate professionals.

Most importantly, the Land Conservancy of San Luis Obispo County has worked closely with the Coastal Conservancy and San Luis Obispo County to make the Cambria program a success. Because the Coastal Conservancy grant provided seed money, the Land Conservancy has been very active in SPA #1, Fern Canyon. Since the start of the program, the Land Conservancy has purchased 85,000 square feet of floor area credits. Approximately 230 lots have been protected as a result. The purchase price for these lots generally ranges from $4,500 to $6,000 per lot. These acquisitions have created a continuous open space area within Fern Canyon. Since 60,000 square feet of credits have been sold, the program bank contains 25,000 square feet of credits as of April 1997. At the average rate of 5,000 credits sold per year, the program probably has enough credits to last for five more years without having to buy any more lots.

In addition to the seed money provided by the Coastal Conservancy, Ray Belknap attributes the success of the Cambria program to five other factors.

- The receiving sites were scattered throughout the community; consequently no single neighborhood had to bear the entire burden of the additional density.
- The sending sites were prominent parcels, so the community clearly related to the objective.
- The people of Cambria are committed to the preservation of the Cambria Pine.
- The value of the transferred density stays within the community.
- And the program was tailored to the unique needs of the Cambria community.

In a status report prepared in 1993, the Land Conservancy made several observations about the program and suggested a few possible improvements. The adoption of the countywide TDC program has addressed some of the concerns expressed in the 1993 report regarding the need to expand the use of TDR to other areas. But in other respects, the observations may still be worth noting, as follows.

- As described above, the LCP allows lots which were acquired for preservation to be consolidated and resold as estate lots with special restrictions on the placement of improvements. The easements placed on the lots acquired to date have allowed for this possibility but, actually, there have to date been no resales of consolidated lots. The Land Conservancy recognizes that there would probably be a negative reaction to a proposed development on a site protected by an open space easement. Consequently, the Land Conservancy recommends the creation of two separate programs for acquired lots: preservation versus consolidation.

- Under the preservation option, when an acquired sending lot is environmentally sensitive, the Land Conservancy proposes that it be publicly-owned, perhaps in a forest management district. On the other hand, the Land Conservancy sometimes acquires lots that are not environmentally sensitive, often by owners who are donating these lots to the Land Conservancy. For these properties, the Land Conservancy suggests a lot consolidation program in which the open space easement is handled differently. Under this proposed program, larger lots with low environmental value would not receive an open space easement and could be resold. Smaller lots that are not environmentally sensitive could be restricted by easements but made available to adjacent property owners as open space.
- Some concerns have been expressed that the transfers of TDCs might allow houses that are too big for their receiving lots. The Land Conservancy evaluated every project that received transferred floor area in the first four years of the program. In the opinion of the Land Conservancy, only eight out of the 110 receiving lots had a house that appeared too big. The Land Conservancy concluded that the large appearance of these eight houses was not the result of excessive density but rather a factor of building design, the location of the house on the lot and the orientation of the house to the street.

In a 1997 update on the Cambria program, the Land Conservancy of San Luis Obispo County made the following observations.

- The Conservancy continues to urge that their land holdings be acquired by a public parks district.
- One important reason for public ownership is that the trees in Fern Canyon are susceptible to Pine Pitch Canker, creating an immediate need for pro-active management.

Countywide Program - Immediately following adoption of the countywide TDC program, San Luis Obispo County was sued by the Coalition for Rural Preservation. That lawsuit was still pending in July 2001. However the Coalition offered to settle the suit if the County changed the countywide program to allow only community-based programs.

The issue of local community control was raised again when the 2000/2001 San Luis Obispo County Grand Jury undertook a review of the TDC program in response to a complaint. The Grand Jury's report, dated March 2, 2001, recommended that the TDC ordinance be amended so that each of the County's five inland regions are given the option of developing a community based TDC program, adopting the countywide program or electing not to have a program. As of summer 2001, the County Board of Supervisors had not responded to the Grand Jury recommendations.

As of July 2001, four receiving site projects had been approved generated a demand for 167 credits. At that time, a total of the seven sending sites had been approved representing an assignment of 479.5 TDCs. As of July 2001, conservation easements had not yet been recorded on most of these approved sending sites. However, if all TDCs are eventually transferred from these seven approved sending sites, at least 8,300 acres of land would be preserved, as detailed below.

- Bonnheim Ranch – This 7,000-acre ranch was identified as a sending site in the General Plan and given final approval in 1998 due to significant historic, scenic and habitat resources. It was assigned 260 TDCs.
- Black Lake Canyon – This area was pre-approved in the TDC ordinance due to the presence of oak woodlands, chaparral and wetlands.
- Jafroodi – The County Board approved this 40-acre nursery as a sending site, creating 26 TDCs.
- Laetitia – The owner of this vineyard originally applied to preserve the entire 1,995-acre property. After concerns about the ability of infrastructure to absorb these TDCs, approval was granted for a 550-acre portion resulting in 41.5 credits.
- AJM Properties – Approval of this 726-acre horse farm resulted in the elimination of 76 legal lots from an antiquated subdivision. The property was assigned 122 credits.
- Wilkins – This land, used for vineyards and grazing, contains 16 legal lots from an antiquated subdivision.
- Denny – This 52-acre lot contains a vineyard and freshwater ponds. It was assigned 14 credits.

In July 2001, The Land Conservancy of San Luis Obispo County completed a report entitled An Examination of the Feasibility of Creating a TDC Bank for San Luis Obispo County. This report summarized the countywide program to date as follows.

- Sending Site Benefits – The report stated that five of the approved sending sites achieved the conservation goals of the TDC ordinance but two approved sending sites were questionable. One controversial sending site was a commercial nursery with a low priority for preservation. This approval raised several concerns because of the high transfer ratio; as mentioned above, seven units could be built on site while 26 TDCs were assigned for transfer. Furthermore, many residents did not want the credits for a receiving site in their community to come from a greenhouse and felt disenfranchised by the inability to have a voice in where the preservation would occur.

- Sending Site Financial Issues – Under the appraised value method of TDC allocation, one TDC can preserve substantial acreage, especially in outlying rural areas where development value is often \$300 to \$400 per acre. However, \$20,000 may not be an attractive incentive for sending site owners to retire an existing lot. Existing lots sell for up to \$45,000 even in rural areas. In May 2001, the County Board of Supervisors considered a eliminating the appraised value method of TDC allocation, allowing TDCs to be allocated only according to the number of existing houses that can be built on existing lots. The report states that the feasibility of the TDC program could be doubtful if this change is made since many potential sending site owners would receive only a fraction of the development value of their land.
- Receiving Site Acceptance – Community opposition to receiving site programs is often based on compatibility or density concerns. In the San Luis Obispo County program, two receiving site projects generated controversy based on compatibility. But notable controversy also resulted from the inability of the local community to control the location of the preservation that would be achieved with each receiving site project. For this reason, the Land Conservancy report concludes that community support would increase if the local community decided where the preservation would occur.
- TDC Bank Feasibility – The report concluded that a TDC bank could improve the effectiveness of the program. However the Land Conservancy would only recommend a TDC bank if three changes were made to the TDC program. 1) Establishment of a TDC price. 2) The purchase and resale of TDCs would have to be made through a non-profit organization. 3) Sending and receiving sites would have to be pre-approved through the General Plan update. Finally the Land Conservancy proposes several operational guidelines for a TDC bank. For example, the Land Conservancy believes that the TDC bank should pay a maximum of 50 percent of the appraised development value, sell TDCs for \$20,000 each (plus five percent commission to pay for fund management) and not own easements.

SEATTLE, WASHINGTON[18]

BACKGROUND

Seattle, Washington, population 563,374 (2000), adopted a new downtown plan in 1985. In addition to improvements in building and site design, the plan called for the preservation of historic landmarks and the provision of affordable housing in the downtown. To implement the plan, the City rezoned the downtown to lower density limits but offered density bonuses to projects which furthered the goals of the plan.

The 1985 Plan also called for the creation of a transfer of development rights system to achieve public benefits in four areas.

- The owners of low income housing can transfer unused development rights from the site of the housing to other downtown sites as long as the low income housing is brought into compliance with housing/building codes and as long as a specified amount of the low income housing at the sending site is retained as low income housing for at least 20 years.
- The owners of designated Seattle landmarks can transfer unused development rights, subject to numerous limitations, as long as the landmark is maintained or restored and as long as the owner commits to retain the landmark for the life of the project at the receiving site.
- The owners of compatible infill development in historic districts can transfer unused density subject to various limitations.
- And the owners of property in office/retail districts can transfer unused development rights between sites located on the same block in order to retain varied building scale.

PROCESS

Seattle's downtown plan provides a base density limit in several zones which can be exceeded, up to a specified maximum limit, by developments which provide specified amenities such as day care, movie theaters, retail stores, parks, rooftop gardens and sculptured building tops. The Seattle code also allows bonuses for performing arts theaters, museums, plazas, transit access, public atriums and housing. Furthermore, density can be increased by using various affordable housing programs. In addition, receiving site densities can be increased through a TDR system designed to achieve four goals: retain low-income housing, preserve historic landmarks, encourage compatible in-fill development in historic districts and provide incentives to vary building scale.

Sending sites can be located in most downtown districts; however, density cannot be transferred from sites within the Downtown Harborfront 1 and 2 districts and the Pike Market Mixed zone. In the Downtown Retail Core transfers can only take place between sites within the same block and zone.

For sending sites in office districts, the transferable development rights consist of the difference between the FAR allowed by the base commercial zoning and the actual floor area of the existing building. In retail, mixed-use and residential districts, the transferable rights are limited to the difference between FAR 6 and the floor area of the building on the sending site; however, in mixed-use and residential districts with 240-foot height limits, the transferable rights are the difference between the floor area of the sending site building and FAR 8.

In historic districts where transfers are allowed from in-fill development, the transferable rights are the difference between the sending site building and the maximum floor area permitted by the height and other development standards established by the zoning and overlay regulations.

Seattle, Washington uses TDR to help implement affordable housing, infill development, historic preservation and urban design goals for its downtown. By selling TDRs, the Paramount Theater, shown above, was rehabilitated as a live-performance theater and incorporated 40 single-room-occupancy housing units

Receiving sites are properties within the Downtown Office Core I, Downtown Office Core II and Downtown Mixed Commercial districts. In the Downtown Retail Core, transfers can only take place between sites within the same block and zone. Development rights cannot be received by sites within the International District Mixed, Downtown Mixed Residential, International District Residential, Pioneer Square Mixed, Downtown Harborfront 1, Downtown Harborfront 2 and Pike Market Mixed districts.

Seattle's downtown development codes include a matrix depicting the regulations concerning transfers. For example, sites in the Downtown Mixed Commercial district can only accept transferred density from low income housing and historic buildings in the Downtown Mixed Commercial, International District Mixed, Downtown Mixed Residential and International District Residential zones. Conversely, sites in the Downtown Office Core I and Downtown Office Core II districts can receive density from any sending district; however, if the sending and receiving sites are not within the same block, the density must be from either low-income housing or historic landmark sending sites.

Downtown Seattle zoning districts have a base density limit, a higher intermediate density allowed when a project achieves specified objectives and an even higher maximum FAR limit; in addition, the intermediate density is actually a range of densities with lower and upper limits.

The greatest opportunity for receiving transferred development is in the Downtown Office Core, (DOC), I and II Districts. DOC I, which has a height limit of 450 feet, has a base FAR of 5 and can reach FAR 14 with housing and amenity bonuses as well as TDR. DOC II is designed as a transitional zone allowing a base FAR of 4 which can be increased to FAR 10 with bonuses and transfers.

When receiving sites are in office districts, the amount of development which can be transferred to the receiving site is the difference between the base density limit and the upper limit of the intermediate density range. When accommodating density transferred from a low-income housing sending site, the receiving site can accept transferred floor area equivalent to the difference between the lower limit of the intermediate FAR range and the maximum density limit. However, before low-income housing development rights can be used, the receiving site project must first generate FAR 2 of extra density through on-site amenities or historic landmark TDRs.

In the Downtown Retail Core, where sending and receiving sites must be in the same block, the transferable floor area is limited to the difference between the base density limit and the maximum density permitted on the receiving site. Finally, in the Downtown Mixed Commercial district, the amount of floor area transferable is limited to the difference between the base density limit and the maximum FAR allowed on the receiving site.

In addition to the Downtown Plan and zoning code, guidelines for implementing the historic landmark TDR program were set forth in a Director's Rule. As part of an application for a Landmark TDR, the developer must submit drawings showing the proposed rehabilitation of the historic structure and be granted a certificate of approval for the proposed restoration from the Seattle Landmark Preservation Board.

As a condition of the transfer of development rights, the applicant must rehabilitate the landmark and implement a plan for maintaining the landmark after the rehabilitation is completed. To ensure that this occurs, the receiving site applicant is required to provide security for the completion of the restoration work. The TDRs must be sold and the funds needed for restoration must be deposited in an escrow account prior to the issuance of any building permits for the receiving site project.

In addition, the certificate of occupancy for the receiving site building cannot be issued until the rehabilitation of the historic property is completed. The sending and receiving site owners must sign an agreement, recorded as a covenant on both properties, which guarantees that the landmark on the sending site will be restored and preserved for the life of the new building on the receiving site.

SEATTLE

Sending sites are buildings with less density than the baseline zoning allows because they are historic structures or because they provide affordable housing or compatibly-scaled infill development

Receiving sites are in two office zoning districts in which maximum density can go from FAR 5 to FAR 14 or from FAR 4 to FAR 10 as a result of TDR and/or density bonuses granted for on-site amenities such as day care, retail, theaters, rooftop gardens and sculptured building tops

As a condition of TDR, historic structures must be rehabilitated

TDRs from landmark theaters have priority over TDRs from other historic structures

TDR has helped preserve two landmark performing arts theaters and 541 affordable housing units

Over 300,000 square feet of Major Performing Arts Facility TDRs have been sold as of January 2001 to finance the bonds used to build Seattle's Benaroya Symphony Hall

Seattle provides extra incentives for the owners of landmark performing arts theaters to preserve designated landmark theaters as well as theatrical activities. Under this program, if the owner of a landmark performing arts theater agrees to sell TDRs for an approved price, receiving site developers must purchase these priority TDRs before purchasing TDRs from other, non-theater landmarks. In return, the sending site owners must agree that theatrical performances will be the primary use of the theater for a period of at least 40 years.

In addition to landmark preservation, the Seattle TDR program is oriented toward retention of low-income housing in the downtown. In response to the loss of housing due to gentrification and replacement by non-residential uses, Seattle wants to maintain a supply of 7,311 low-income dwelling units in the downtown. Downtown Office CORE I buildings can increase density from FAR 10 to FAR 14 by participating in affordable housing programs.

Under one program, the Housing Bonus Program, a developer can obtain additional density through contributions to moderate-income housing; moderate income housing is housing that is affordable to households earning up to 80 percent of median household income for the Seattle metropolitan area. Bonus density can also be gained by transferring development rights created either through the preservation or construction of low-income housing units. Low income housing is affordable to households earning 50 percent or less of the median household income for the Seattle metropolitan area.

When development rights are transferred from sending sites, the housing must be in compliance with housing and building codes. Furthermore, the City requires that either 50 percent of the total floor area of the residential building or the floor area of the low-income housing units, whichever is greater, must be retained as low-income housing for at least 20 years.

To facilitate the buying and selling of these development rights, Seattle formed a TDR bank. The bank can buy the unused development rights from sending sites with affordable housing at any time and hold them. Developers wanting to buy TDR to increase density on receiving sites have the option of buying TDR from the City's TDR bank or directly from the sending site owners. Of course, developers may also gain additional density by participating in the moderate-income Housing Bonus Program mentioned above.

PROGRAM STATUS

Seattle's TDR program benefits from a healthy demand for high-density office space. Developers want to exceed the base densities in the downtown and can afford, at least in good economic times, to pay for this additional density.

However, the historic landmark TDR program is hampered by procedural requirements. In retail zones, sending and receiving sites must be in the same block and the transferable density is limited to the difference between the FAR of the landmark and FAR 6. Furthermore, the historic preservation TDR program is more complicated than the alternative means of getting additional density for receiving sites. As discussed above, an office project may increase from FAR 5 to FAR 7 through amenities which improve the value and marketability of the project itself, such as daycare, plazas and retail space. To go from FAR 7 to FAR 14, developers often opt for the affordable housing rather than the historical TDR program because the historical TDR program requires extra reviews and approvals which could delay the application process and, consequently, increase development costs. To date, no transfers have occurred under Seattle's historic landmark TDR program.

Conversely, the affordable housing incentive prog-

Conversely, the affordable housing incentive programs have been doing very well. In a January 2001 update, Laura Hewitt Walker, Planning & Development Specialist, reported that three housing projects were negotiated directly between sending sites and receiving sites, resulting in 182 affordable housing units. The Housing Bonus Program helped fund another five projects, with 139 low- and moderate-income units.

But the biggest successes have resulted from the City's TDR Bank. The City initially funded the Bank with a $1.2 million appropriation. The Bank purchased development rights from seven affordable housing projects with 359 units for $1.9 million and sold them to developers for $2.2 million. The TDR Bank also facilitated construction of the Benaroya Symphony Hall using the Major Performing Arts Facilities TDR provisions. Of the original 423,000 square feet of TDRs, 313,000 had been sold as of January 2001. The sale of these TDRs is being used to pay down bonds issued by the City for that project.

The City also purchased TDRs from two Landmark Performing Arts Theaters. The City originally appropriated $3.1 million. Of that total, $1.8 million was used to buy TDRs from the Paramount Theater which has 40 SRO housing units in the same building with a 3,000-seat live-performance theater. Another $383,000 was used to buy TDRs resulting from the preservation and restoration of a 1925 building which once housed the national headquarters of the Fraternal Order of Eagles. The building includes 44 low-income units and two live-performance stages now known as Kreielsheimer Place. The remaining $917,000 from the appropriation was paid to the Eagles as a forgivable loan in consideration of other public benefits.

Since 1998, the City of Seattle and King County have cooperated on an inter jurisdictional pilot project in which TDR from rural county areas could be used, in part, to allow increased height within the Denny Triangle neighborhood of Seattle. For details on this project, refer to the King County, Washington case study.

In September of 2000, City staff prepared a draft ordinance designed to simplify the TDR procedures and refocus the program on high-priority objectives, particularly affordable housing. In January 2001, Laura Hewitt Walker reported that adoption of that draft or an alternative ordinance was expected by April 2001.

TAHOE REGIONAL PLANNING AGENCY, CALIFORNIA/NEVADA[19]

BACKGROUND

Lake Tahoe is 12 miles wide, 22 miles long and up to 1,645 feet deep. The entire Tahoe Basin comprises 207,000 acres of land and includes at least a portion of one incorporated city, (South Lake Tahoe), two counties in California and three counties in Nevada. The lake has an elevation of 6,225 feet above sea level and is surrounded by mountain peaks in the Sierra Nevada Mountains on the border between California and Nevada. The lake is well known for its clarity; it is possible to see up to 70 feet in depth. In fact, it has been designated as an outstanding national resource under the federal Clean Water Act.

The Tahoe area is very popular for tourism, vacation complexes and retirement homes thanks to the attraction of gambling, snow skiing and other outdoor sports as well as the natural beauty of the lake itself. The states of California and Nevada have long recognized the need to cooperate on methods of ensuring that Lake Tahoe's popularity does not endanger the fragile environment which makes the area so attractive.

In 1969, the Tahoe Regional Planning Agency (TRPA) was formed by the two states and ratified by the United States Congress. TRPA was strengthened in 1980 with a revised compact that gave the agency the authority to adopt environmental quality standards. Following the adoption of the 1984 Regional Plan, TRPA was sued by an environmental group and the California Attorney General's office for failing to implement the 1980 compact. An injunction on development was imposed and TRPA was sued by a property rights organization claiming that the new plan was a taking of property. A consensus-building approach led to the adoption of an amended regional plan in 1986 and implementing zoning codes in 1987. In 1987, the injunction was lifted and some of the lawsuits were dismissed. The 1987 ordinances have regulated development in the Tahoe Basin since that time.

The revised Regional Plan regulates land use, density, growth rates, land coverage, excavation and scenic impacts. TRPA is particularly concerned about land coverage because excess land coverage can lead to further degradation of Lake Tahoe's water quality. Excess land coverage increases water quality degradation by removing the land's ability to slow down storm water run-off, remove nutrients and reduce erosion. Over the past 30 years, water clarity has declined at the rate of about 15 inches per year.

To determine the percent of a site which can be covered by homes, driveways and other impervious surfaces, TRPA has created two methods of categorizing the capability of a site to withstand land coverage. Both methods evaluate land characteristics such as erosion hazard, runoff potential and presence of a stream environment zone. Based on the capability classification, each parcel is assigned an allowable lot coverage percentage. For example, under one assessment system, as much as 30 percent of a site could be covered by impervious surfaces if the site was in the highest land capability classification. On the other hand, if a site is in the lowest land capability classes, those that identify stream environments, extremely steep slopes and rocky terrain, almost no new land coverage is allowed except for limited purposes such as recreational improvements or site access; for example, in Stream Environment zones, only one percent of a parcel can be covered by impervious surfaces. If a parcel contains two or more capability classifications, coverage limits are determined by multiplying the coverage limits by the percent of the total parcel in each category; however, the actual coverage must be confined to the least-sensitive portion of the property.

Under the land coverage regulations, the owners of some parcels would not be able to build a small home or even add a small addition or garage to an existing dwelling. To provide some flexibility while still maintaining land coverage limits on average, TRPA instituted a land coverage transfer program. Under this program, receiving site owners can acquire coverage from a sending site in order to obtain the coverage rights needed for them to build or expand. In addition to the land coverage transfer program, TRPA also allows transfers of allocations plus transfers of development rights both from developed as

TAHOE REGIONAL PLANNING AGENCY

In 1987, TRPA adopted four transfer mechanisms designed to preserve the unique ecology of the Lake Tahoe Basin in general and the clarity of Lake Tahoe in particular

Development is severely restricted on highly sensitive land in the Tahoe Basin such as Stream Environment Zones

Property owners can sell their land coverage rights for use at appropriate receiving sites

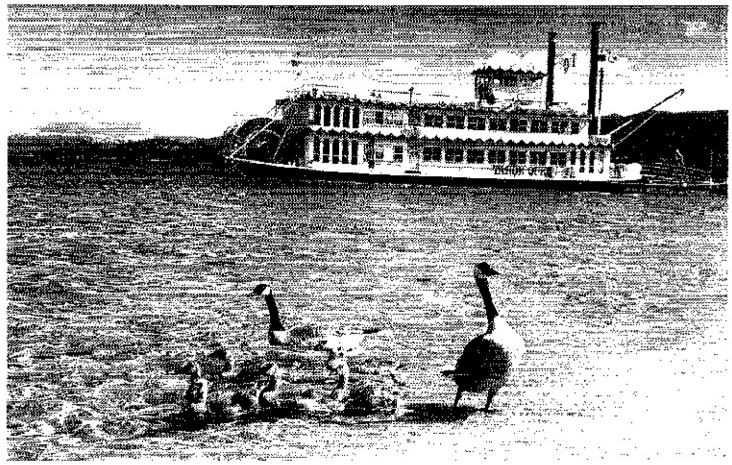
Property owners can also create allocations by deed-restricting their property; allocations are needed under TRPA's building quota system

Inappropriate buildings can also be removed from SEZs and the Existing Development Rights are not subject to the quota system

During growth periods, the demand for coverage rights, allocations and development rights is high

TRPA approves from 25 to 35 transfers per year of coverage rights alone well as undeveloped properties.

For a discussion of the 1997 U.S. Supreme Court decision in *Suitum v. TRPA*, see Chapter IV.



The Tahoe Regional Planning Agency uses four TDR mechanisms to protect the clarity of Lake Tahoe

PROCESS

TRPA allows transfers for four different purposes. The first program, as detailed below, is the land coverage transfer process. However, TRPA also allows transfers of allocations as well as the more traditional transfers of development rights. An allocation is a permit to build a residential unit under TRPAs building quota system. In the Tahoe Basin, a building allocation and a development right plus the necessary coverage rights are all needed before a building permit can be issued. In addition, TRPA makes a distinction between transfers of development rights from undeveloped properties versus properties that contain existing buildings. Consequently, in addition to the transfer of land coverage program, TRPA provides for three other types of transfers, which are individually described below: transfers of residential allocations, transfers of development rights from undeveloped property and transfers of development rights from properties which are already developed.

Transfer of Land Coverage – The TRPA code has two separate land capability rating systems: Bailey and Individual Parcel Evaluation System (IPES). For example, the Bailey system contains seven land capability districts. The most sensitive lands, those designated 1 and 2, are allowed only one percent coverage. These districts include Stream Environment Zones, or SEZs. The lands with the greatest development capability, in districts 7 and 8, are limited to 30 percent coverage. Transfers of coverage rights are allowed when sending sites are classified as being more sensitive than receiving sites as determined by a lower land capability classification. In addition, sending and receiving sites must be located in the same hydrologic region; there are nine hydrologic regions in the Lake Tahoe Basin. When coverage is transferred from a sending site, the sending site must be deed-restricted to reflect the retirement of land coverage rights.

With the exception of certain commercial projects, the program uses a one-to-one transfer ratio; the amount of coverage available for transfer equals the amount of coverage precluded at the sending sites. The maximum coverage allowed on receiving sites varies depending on the type of development. For example, total coverage on residential projects of one to four units increases with the size of the receiving project site. Specifically, a project area between 4,001 and 9,000 square feet could be allowed a maximum coverage (base plus transferred) of 1,800 square feet. But project areas larger than 200,000 square feet would be allowed up to 4,000 square feet of total coverage. TRPA sets different maximum coverage limits for commercial buildings, tourist accommodations and public facilities, including public roads. With the exception of the California Tahoe Conservancy bank, discussed below, transfers of coverage are handled through private transactions.

Allocations - TRPA limits the amount of development which can be added to the basin every year in order to ensure that the public infrastructure keeps pace with the rate of growth. Under this quota system, a different allocation is set for three different land uses. Residential uses in the Tahoe Basin are limited to 300 additional dwelling units annually. Commercial development is limited to 400,000 square feet of floor area for the ten-year period from 1987 to 1996; most of this amount is assigned to designated community plan areas. Tourist accommodations are limited to 200 room units for this same ten-year period. In addition, each tourist room allocation must be matched with a transferred existing tourist room before a new room can be constructed; these new tourist rooms must be built in community plan areas. Each year, TRPA transmits the allocations to the six jurisdictions; these jurisdictions determine their own methods for distributing these allocations.

To transfer allocations, the sending site must be a vacant parcel of land that is not eligible for development due to a highly sensitive land capability classification. After an allocation transfer, the sending site must be permanently precluded from development either by deed restriction or transfer of title to a public agency or non-profit agency established to preserve land for open space purposes. The site receiving the transferred allocation must be planned for residential development and must have a less-sensitive land capability classification than the sending site. The appropriate local unit of government as well as TRPA must approve the transfer.

Transfers of Development Rights From Vacant Land - In addition to transfers of land coverage and building allocations, TRPA provides the more traditional process of transferring development rights. An important feature of the TRPA program is the fact that any lot has the right to build at most one dwelling unit regardless of the density designation found in the zoning code. Development rights must be transferred to the receiving site in order to achieve the code-permitted density.

The rules for these transfers differ somewhat depending on whether the sending site is vacant or already contains some existing development. Transfers of development rights from property that is undeveloped must meet six provisions. For example, the development rights on the sending site must be retired following the transfer and the project proposed for the receiving site must comply with the use and density requirements for the property. Transfers between sites in different counties require the approval of affected local governments.

Transfers of Existing Development Rights - Finally, TRPA encourages the elimination of existing structures from stream environmental zones and other sensitive land capability areas by allowing property owners to create development rights through the demolition of inappropriately located structures. In addition to creating a transferable development right, the demolition also creates the equivalent of a building allocation because no new structures are created when a building is demolished. The combination of a development right and a building allocation can be very valuable under TRPA's quota system, giving property owners a strong incentive to remove improperly sited buildings. The types of existing development that can be transferred include residential units, tourist accommodations, commercial space, public service uses and recreational facilities.

Under the transfer of existing development ordinance, transfers must comply with nine requirements including the following: the transfer is limited to the type of development being removed from the sending site; the transferred use must be a permitted use on the receiving site; the proposed development must comply with the site development requirements for the receiving site; the appropriate local governments must approve the transfer; the proposed building removal must be consistent with all TRPA plans and codes including provisions for historic structures; the receiving site must be in one of the less-sensitive land capability districts.

When transfers of existing development occur, the existing structures or facilities must be removed and the land restored to as natural a state as possible. When all existing development has been transferred from environmentally sensitive lands, the sending sites must be permanently deed-restricted to open space. When only a portion of existing development is removed from a sensitive sending site, an easement must be recorded preventing transfers of development back to the sending parcel. However, when existing development is removed from non-sensitive land, development may be transferred to the sending site under limited circumstances.

The most common recipients of parcel donations are the US Forest Service, the Nevada Division of State Lands and the California Tahoe Conservancy. The California Tahoe Conservancy, a state agency created in 1984, began a Land Coverage Bank in 1987. The Land Coverage Bank performs three important functions. 1) It creates land coverage rights, allocations and development rights by acquiring and restoring sending sites. 2) It maintains an inventory of rights. 3) It provides an easy way for developers to comply with TRPA regulations by buying rights rather than having to acquire, restore and retire properties themselves. The proceeds from the sale of these rights are, in turn, used to acquire additional sending sites.

TRPA supports its TDR program with non-TDR mechanisms. For example, construction within sensitive areas is sometimes unavoidable. For example, when public agencies build roads or other facilities. To mitigate their impacts, these agencies can buy developed properties in sensitive areas and restore them to a natural state. Alternatively, these agencies can buy restoration credits from the California Tahoe Conservancy. The CTC creates these credits by acquiring and restoring sensitive properties.

PROGRAM STATUS

TRPA has all of the ingredients needed for a successful TDR program. The demand to build in the Lake Tahoe area is high. And the limitations placed on development provide a strong motivation to buy coverage rights, development rights and buildings allocations. In fact, the market is so strong that developers are willing to buy the rights created by the demolition of existing structures so that their projects are not subject to the annual quota system. In addition, the transfers of development rights are the only way for landowners to achieve the density limitations provided by the zoning for their properties.

As a result, the TRPA program is one of the most active in the nation, with an estimated 25 to 35 transfers per year of land coverage rights alone. In its July 1997 Progress Report, the California Tahoe Conservancy stated that its Land Coverage Bank spent more than $4.9 million acquiring over 1.2 million square feet of previously-covered land had been restored to its natural condition. The Land Coverage Bank had also transferred coverage and other marketable rights to more than 215 receiving area projects. These activities generated over $2.3 million for reinvestment in additional preservation/ restoration projects.

In May 1997, the U.S. Supreme Court remanded the case of *Suitum v. Tahoe Regional Planning Agency* to the lower courts. However, this case was settled in 1999 leaving the relationship between TDRs and the takings issue unresolved, as described in detail in Chapter IV.

In 1998, TRPA adopted three program amendments. Residential units can now be transferred between sensitive lands within community plan areas when there is a 1,200 square foot per unit reduction in land coverage on the sending or receiving parcel. Secondly, the amendments allow for conversions of residential units to commercial floor area when such conversions would achieve important goals such as protection of sensitive lands or the elimination of non-conforming uses. And, finally, TRPA now allows for the transfer of commercial floor area displaced by public service uses.

In a January 2001 update, John Marshall, TRPA Agency Counsel, reported that a group associated with the League to Save Lake Tahoe was conducting an examination of TRPA's TDR programs.

WASHINGTON,D.C.[20]

BACKGROUND

Washington D.C. wants to create a "living Downtown" by promoting dwelling units, preserving historic structures, encouraging mixed uses and creating preferred uses such as arts corridors and a shopping district. To implement these goals, Washington offers bonus density to new buildings which provide these preferred uses. However, buildings in downtown Washington D.C. are limited by relatively strict height regulations imposed by a 1910 Height Limit Act. These building height limitations make it very difficult to use bonus density on site. Consequently, Washington D.C. also offers a transfer of development rights program which allows bonus density to be transferred to receiving sites both within the Downtown and in two edge-of-downtown areas.

The TDR mechanism was first mentioned in the 1984 Downtown Plan, which divided the Downtown into several districts including a Landmark District, an Arts District, a Retail Core, a Housing Area and a Chinatown District. In 1989, the Downtown Plan was partly implemented through the creation of a special retail overlay district; in this district, all new projects had to include some retail and developers were compensated through TDR. In 1991, the Downtown Development District expanded the TDR program to implement the land use goals of other districts and compensate the owners of historic properties for development restrictions.

PROCESS

In 1991, Washington D.C. amended its codes to include a Downtown Development District overlay zone which modifies the underlying zones with restrictions and incentives designed to achieve four overall goals. The first goal of the Downtown Development District is to create a mixed-use, "living Downtown" with seven key features:

- Retail, hotel, residential, arts and entertainment uses as well as offices;
- Preservation of historic buildings;
- A strengthened Chinatown;
- Retention and expansion of housing;
- A performing arts corridor and a visual arts corridor;
- A concentrated Downtown Shopping District; and
- In combination, a downtown that is active at all times and interesting to visitors.

The second overall goal of the Downtown District is to avoid "formless office sprawl" which would replace distinctive subareas with an eight-hour downtown that does not achieve its economic potential. The third goal is to build on the downtown's assets such as its location, transit system, street/open space plan and multiple uses as well as significant museums, historic structures, monuments and federal buildings. The fourth downtown goal is to complete the current rebuilding cycle, despite the economic downturn, in a way that Washington D.C. can have one of the greatest downtowns in the world.

To reach these goals, the Downtown Development overlay imposes design standards and use provisions which apply to all property in the downtown. In addition, special provisions are added to achieve objectives in five areas.

- In the Downtown Shopping District, new buildings must provide up to a floor area ratio (FAR) 2.0 of retail. (However, due to slow market conditions, the City was considering reducing the minimum retail requirements in 1995.) In addition, bonus density is granted to projects which offer certain desired uses. For example, three square feet of bonus density is granted for each square foot of department store space, or a bonus ratio of 3:1. Other preferred uses receive the following bonus ratios: legitimate theater - 2:1; anchor store, movie theater, performance arts space, small, minority or displaced business - 1:1.
- In the Downtown Arts District, at least 1.0 FAR of a building's total floor area must be occupied by art, retail or entertainment uses of which 0.25 must be "true art" uses. Bonus FAR is granted for various art uses with art schools, art centers and other major facilities granted the highest bonus ratios.
- In the heart of Chinatown, bonus density is available to various uses including retail space greater than FAR 1.0.
- In the Residential and Mixed Use districts, varying amounts of residential development are required in all buildings and bonus density is provided for grocery stores, drug stores and other retail uses.
- Finally, in the Downtown Historic District, overall density is restricted but unused development capacity can be transferred to receiving zones as outlined below. In addition, landmarks and contributing buildings in historic districts cannot be altered or demolished without special permission; typically, permission to alter a historic structure is limited to allowing changes to the rear elevations of a building in order to permit building enlargements.

To assist property owners, Washington D.C. provides a mechanism called combined lot development, which allows two lots within the same preferred use subarea to be treated as one lot for the purpose of complying with the preferred use requirements summarized above. For example, two buildings of equal size in the Downtown Shopping District could each meet their requirement to provide 2.0 FAR of retail by creating a combined lot development in which one building provides 1.0 FAR of retail while the other building provides 3.0 FAR of retail.

As explained above, developers can generate bonus density by providing preferred uses identified in the code. The combined lot development mechanism can be used to transfer bonus density to receiving sites within the Downtown Development District. However, all of the preferred use subareas are within the Downtown District. Since all land in the Downtown District is subject to relatively low building height limits, it can be difficult to use the bonus density within the heart of the downtown.

Consequently, Washington D.C. has identified two receiving areas at the edge of Downtown. These receiving areas are two commercials zones in which the normal 6.5 FAR and 90-foot height limits can be exceeded by transferring development rights. In one of these edge-of-downtown districts, Downtown East, the maximums allowed via TDR are 9.0 FAR and 110 feet. In the other district, New Downtown, the limits applicable to projects using TDR are 10.0 FAR and 130 feet in height as long as that height is allowed by the 1910 Height Act.

More options are available to development rights transferred from historic properties. As discussed above, up to 4.0 FAR of unused density can be transferred from a historic property. The transferred density from historic properties can be transferred anywhere within the Downtown as well as the two edge-of-downtown receiving areas: Downtown East and New Downtown.

In the first step of the transfer process, the density bonus is established when the property owner and the City execute and record a covenant on the sending site

WASHINGTON, D.C.

In 1984, Washington, D.C. adopted a Downtown Plan which provides density bonuses to projects that meet various goals including historic preservation and the provision of affordable housing, retail, theaters and art

These bonuses can be hard to use on site because of the building height limits imposed in downtown Washington

Unused density can be transferred to districts at the edge of the downtown which allow projects using TDR to achieve greater building heights and densities

So far, development rights have been generated by five historic structures, a moderately-scaled infill building, a landmark theater and five buildings which include retail shopping which secures the amenity desired by the City. To facilitate the process, the City has developed a standard TDR covenant form which includes the following: sending site restrictions and a schedule for implementing any required renovations or land use conversions; restrictions on any liens which could extinguish the covenant; provisions for maintaining the amenity; and notification requirements. The City also provides a standard form for the TDR certificate, which records the TDRs removed from the sending site and identifies the owner of those TDRs. Once these documents have been reviewed by the City's planning and historic preservation staff and approved by the City's corporation counsel, the documents are executed by the City.

After the covenant and TDR certificate are executed, the TDRs can be used immediately at a receiving site or held for future use like any commodity. The second step in the process occurs when the bonus density is actually transferred to a receiving site. Under the Downtown Development District code, the use of TDRs at a receiving site is permitted as a matter of right and requires only administrative review to ensure compliance with the code.

PROGRAM STATUS

In the Downtown Shopping District, five buildings have generated transferable credits by providing retail uses. For example, the Thurman Arnold Building (Manulife) Building, at 555 11th Street, N.W. is a major office building which incorporates four floors of department store space with 107,000 square feet of floor area including open floor plates, high ceilings, escalators and an atrium. At the 3:1 bonus ratio, this design created 321,000 square feet for transfer, of which 75,000 square feet were used in this building to exceed the FAR limits allowed as a matter of right. The remaining 246,000 square feet are available to be transferred to other sites. Although a department store operator had not been identified as of mid-1996, the office floors of this building were occupied in Spring 1995.

In the Arts District, the Warner Theater, a designated landmark, was restored and preserved. The 54,451-square foot theater earned 108,902 square feet of transferable square footage for theater uses and 97,905 square feet of rights for historic preservation, based on the difference between the density of the existing building and the density allowed by the code as a matter of right. This bonus density was transferred to a project at 19th and K streets, N.W.

Under the city's historic preservation provisions, five buildings have taken advantage of TDR. Exterior restorations earned 169,568 square feet of development rights for St Patrick's Church, 52,915 square feet for Calvary Baptist Church and 15,180 square feet for the University of Southern California Building; almost all of this bonus floor area has been used on receiving site projects. The Old Masonic Temple was rehabilitated by selling TDRs to two receiving site projects. In addition, 53,000 square feet of development rights were transferred to a receiving site from a sending site project which earned 53,000 square feet of rights by providing a moderately-scaled building in the historic district.

As explained by Nate Gross, Plan Implementation Director, the actual transfers are being hampered by the current recession and its impact on the office market. Since the late 1980s, there has been little demand for new office space which, in turn, has reduced the incentive for developers to obtain transferable density by providing preferred uses and preserving historic properties.

When the Warner Theater was permanently preserved in Washington, D.C., 109,000 square feet of transferable floor area were generated in return for protection of theater uses and 98,000 square feet of transferable floor area were created in return for deed restricting a historic landmark

APPENDIX B. TAKINGS LAWS BY STATE

Reprinted, with permission of author, from *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges,* shown as Appendix A, p. 475-488

SUMMARIES OF STATE TAKINGS LAWS

This appendix summarizes all the state takings laws that the author could find as of July 2000. (The Florida laws are included in their entirety as a reference to the discussion found in Chapter II.)

ARIZONA

The Arizona statutes include eight code sections related to takings:

Sections 9-500.12 and 11-810 grant property owners the right to appeal, at no charge, an exaction or dedication required as a condition of granting an approval for the use, improvement or development of property. The appeal is made to a hearing officer designated by the city, town or county. In these appeals, the government has the burden of establishing that there is an essential nexus between the dedication and a legitimate governmental interest and that the proposed exaction or dedication is roughly proportional to the impact of the proposed use, improvement or development. The hearing officer has the authority to modify or delete the required dedication or exaction. If property owners are not satisfied with a hearing officer's decision, they may file a complaint for a trail de novo in superior court. The court may award attorney's fees to be prevailing party. Furthermore, the court may award damages to compensate the owner for project delays on a finding that the government acted in bad faith in requiring the dedication or exaction.

Sections 9.500.13 and 11- 811 require Arizona cities, towns and counties to comply with the U.S. Supreme Court decisions in the Dolan, Nollan, Lucas and First English cases as well as Arizona and federal appellate court decisions that are binding on Arizona cities, towns and counties interpreting or applying those cases.

Section 41-1312 establishes an ombudsman office in the Arizona legislative council. Section 41-1313(A) allows the ombudsman to research issues related to constitutional takings and to advise private property owners on these issues. The ombudsman may also prepare and present briefs and arguments, intervene or appear on behalf of private property owners in judicial, legislative or administrative hearings or proceedings.

Section 41-1313(B) requires the ombudsman to receive complaints from private property owners about constitutional takings and to provide annual reports to the Arizona senate, house of representatives and governor's office.

Section 41-1313(C) requires the ombudsman to determine the concerns of private property owners and allows the ombudsman to advise owners of the services available from other governmental and private agencies.

COLORADO

Sections 29-20-201 through 205 or the Colorado statutes deal with regulatory impairment of private property rights. In section 201, the legislature declares that governmental regulation should "...balance the needs of the public with the rights and legitimate expectations of the individual;...". It also states that "...an individual property owner should not be required, under the guise of police power regulation of the use and development of property, to bear burdens for the public that should more properly be borne by the public at large." It further clarifies that this statute in intended to "...codify certain constitutionally-based standards that have been established and applied by the courts." The provisions apply to local land use approvals, meaning the final action of a local government that has the effect of authorizing the use or development of a particular parcel of real property. Section 203 states that dedications or exactions required as a condition of land use approval must advance a legitimate public interest and be roughly proportional, both in nature and extent, to the impact of the proposed use or development.

Section 204 establishes a process in which a property owner can challenge an alleged violation of Section 203. First the owner must notify the local government and, within 30 days of receipt of that notice, the local government must inform the property owner whether the application will proceed as originally proposed, be modified or be discontinued. Only if they have gone through this first step may property owners file a petition with a district court for relief. This section establishes specific procedures and deadlines for cases brought under this code section. The local government has the burden of proving that the required conditions are roughly proportional to impact. The code section provides four criteria for the courts to use in determining whether to uphold the local government's requirement, require the local government to modify the requirement or invalidate the requirement. This statute does not preclude property owners from bringing actions under other state statutes relating to eminent domain and takings.

DELAWARE

Section 605 of the Delaware statutes requires the attorney general to provide a written review of all proposed rules and regulation proposed by state agencies to determine their potential to result in a taking of private property. The term "taking of public property" is defined as an activity that would require compensation under the Fifth and Fourteenth Amendments of the U.S. Constitution or any similar Delaware law. The statute states that this law does not affect any otherwise available judicial review of agency action.

FLORIDA

Florida has three statute sections that address takings: the Bert Harris Private Property Protection Act (FS70.001), the

Florida Land Use and Environmental Dispute Resolution Act (FS Sec. 70.51) and Section 70.80. Due to their significance to this book, they are reproduced here in their entirety.

70.001 Private property rights protection.

(1) This act may be cited as the "Bert J. Harris, Jr., Private Property Rights Protection Act." The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

(2) When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

(3) For purposes of this section:

(a) The existence of a "vested right" is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state.

(b) The term "existing use" means an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

(c) The term "governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies, or an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority, when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.

(d) The term "action of a governmental entity" means a specific action of a governmental entity which affects real property, including action on an application or permit.

(e) The terms "inordinate burden" or "inordinately burdened" mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. The terms "inordinate burden" or "inordinately burdened" do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.

(f) The term "property owner" means the person who holds legal title to the real property at issue. The term does not include a governmental entity.

(g) The term "real property" means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner had a relevant interest.

(4)

(a) Not less than 180 days prior to filing an action under this section against a governmental entity, a property owner who seeks compensation under this section must present the claim in writing to the head of the governmental entity. The property owner must submit, along with the claim, a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property. If the action of government is the culmination of a process that involves more than one governmental entity, or if a complete resolution of all relevant issues, in the view of the property owner or in the view of a governmental entity to whom a claim is presented, requires the active participation of more than one governmental entity, the property owner shall present the claim as provided in this section to each of the governmental entities.

(b) The governmental entity shall provide written notice of the claim to all parties to any administrative action that gave rise to the claim, and to owners of real property contiguous to the owner's property at the addresses listed on the most recent county tax rolls. Within 15 days after the claim being presented, the governmental entity shall report the claim in writing to the Department of Legal Affairs, and shall provide the department with the name, address, and telephone number of the employee of the governmental entity from whom additional information may be obtained about the claim during the pendency of the claim and any subsequent judicial action.

(c) During the 180-day-notice period, unless extended by agreement of the parties, the governmental entity shall make a written settlement offer to effectuate:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.
2. Increases or modifications in the density, intensity, or use of areas of development.
3. The transfer of developmental rights.
4. Land swaps or exchanges.
5. Mitigation, including payments in lieu of onsite mitigation.
6. Location on the least sensitive portion of the property.
7. Conditioning the amount of development or use permitted.
8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
9. Issuance of the development order, a variance, special exception, or other extraordinary relief.
10. Purchase of the real property, or an interest therein, by an appropriate governmental entity.
11. No changes to the action of the governmental entity. If the property owner accepts the settlement offer, the governmental entity may implement the settlement offer by appropriate development agreement; by issuing a variance, special exception, or other extraordinary relief; or by other appropriate method, subject to paragraph (d).

(d)

1. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.
2. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

(5)

(a) During the 180-day-notice period, unless a settlement offer is accepted by the property owner, each of the governmental entities provided notice pursuant to paragraph (4)(a) shall issue a written ripeness decision identifying the allowable uses to which the subject property may be put. The failure of the governmental entity to issue a written ripeness decision during the 180-day-notice period shall be deemed to ripen the prior action of the governmental entity, and shall operate as a ripeness decision that has been rejected by the property owner. The ripeness decision, as a matter of law, constitutes the last prerequisite to judicial review, and the matter shall be deemed ripe or final for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies.

(b) If the property owner rejects the settlement offer and the ripeness decision of the governmental entity or entities, the property owner may file a claim for compensation in the circuit court, a copy of which shall be served contemporaneously on the head of each of the governmental entities that made a settlement offer and a ripeness decision that was rejected by the property owner. Actions under this section shall be brought only in the county where the real property is located.

(6)

(a) The circuit court shall determine whether an existing use of the real property or a vested right to a specific use of the real property existed and, if so, whether, considering the settlement offer and ripeness decision, the governmental entity or entities have inordinately burdened the real property. If the actions of more than one governmental entity, considering any settlement offers and ripeness decisions, are responsible for the action that imposed the inordinate burden on the real property of the property owner, the court shall determine the percentage of responsibility each such governmental entity bears with respect to the inordinate burden. A governmental entity may take an interlocutory appeal of the court's determination that the action of the governmental entity has resulted in an inordinate burden. An interlocutory appeal does not automatically stay the proceedings; however, the court may stay the proceedings during the pendency of the interlocutory appeal. If the governmental entity does not prevail in the interlocutory appeal, the court shall award to the prevailing property owner the costs and a reasonable attorney fee incurred by the property owner in the interlocutory appeal.

(b) Following its determination of the percentage of responsibility of each governmental entity, and following the resolution of any interlocutory appeal, the court shall impanel a jury to determine the total amount of compensation to the property owner for the loss in value due to the inordinate burden to the real property. The award of compensation shall be determined by calculating the difference in the fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, whichever the case may be, and the fair market value of the real property, as it existed at the time of the governmental action at issue, as inordinately burdened, considering the settlement offer together with the ripeness decision, of the governmental entity or entities. In determining the award of compensation, consideration may not be given to business damages relative to any development, activity, or use that the action of the governmental entity or entities, considering the settlement offer together with the ripeness decision has restricted, limited, or prohibited. The award of compensation shall include a reasonable award of prejudgment interest from the date the claim was presented to the governmental entity or entities as provided in subsection (4).

(c)

1. In any action filed pursuant to this section, the property owner is entitled to recover reasonable costs and attorney fees incurred by the property owner, from the governmental entity or entities, according to their proportionate share as determined by the court, from the date of the filing of the circuit court action, if the property owner prevails in the action and the court determines that the settlement offer, including the ripeness decision, of the governmental entity or entities did not constitute a bona fide offer to the property owner which reasonably would have resolved the claim, based upon the knowledge available to the governmental entity or entities and the property owner during the 180-day-notice period.
2. In any action filed pursuant to this section, the governmental entity or entities are entitled to recover reasonable costs and attorney fees incurred by the governmental entity or entities from the date of the filing of the circuit court action, if the governmental entity or entities prevail in the action and the court determines that the property owner did not accept a bona fide settlement offer, including the ripeness decision, which reasonably would have resolved the claim fairly to the property owner if the settlement offer had been accepted by the property owner, based upon the knowledge available to the governmental entity or entities and the property owner during the 180-day-notice period.
3. The determination of total reasonable costs and attorney fees pursuant to this paragraph shall be made by the court and not by the jury. Any proposed settlement offer or any proposed ripeness decision, except for the final written settlement offer or the final written ripeness decision, and any negotiations or rejections in regard to the formulation either of the settlement offer or the ripeness decision, are inadmissible in the subsequent proceeding established by this section except for the purposes of the determination pursuant to this paragraph.

(d) Within 15 days after the execution of any settlement pursuant to this section, or the issuance of any judgment pursuant to this section, the governmental entity shall provide a copy of the settlement or judgment to the Department of Legal Affairs.

(7)

(a) The circuit court may enter any orders necessary to effectuate the purposes of this section and to make final determinations to effectuate relief available under this section.

(b) An award or payment of compensation pursuant to this section shall operate to grant to and vest in any governmental entity by whom compensation is paid the right, title, and interest in rights of use for which the compensation has been paid, which rights may become transferable development rights to be held, sold, or otherwise disposed of by the governmental entity. When there is an award of compensation, the court shall determine the form and the recipient of the right, title, and interest, as well as the terms of their acquisition.

(8) This section does not supplant methods agreed to by the parties and lawfully available for arbitration, mediation, or other forms of alternative dispute resolution, and governmental entities are encouraged to utilize such methods to augment or facilitate the processes and actions contemplated by this section.

(9) This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution. This section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking. The provisions of this section are cumulative, and do not abrogate any other remedy lawfully available, including any remedy lawfully available for governmental actions that rise to the level of a taking. However, a governmental entity shall not be liable for compensation for an action of a governmental entity applicable to, or for the loss in value to, a subject real property more than once.

(10) This section does not apply to any actions taken by a governmental entity which relate to the operation, maintenance, or expansion of transportation facilities, and this section does not affect existing law regarding eminent domain relating to transportation.

(11) A cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is first applied by the governmental entity to the property at issue. If an owner seeks relief from the governmental action through lawfully available administrative or judicial proceedings, the time for bringing an action under this section is tolled until the conclusion of such proceedings.

(12) No cause of action exists under this section as to the application of any law enacted on or before May 11, 1995, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date. A subsequent amendment to any such law, rule, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended.

(13) This section does not affect the sovereign immunity of government.

70.51 Land use and environmental dispute resolution.

(1) This section may be cited as the "Florida Land Use and Environmental Dispute Resolution Act."

(2) As used in this section, the term:

(a) "Development order" means any order, or notice of proposed state or regional governmental agency action, which is or will have the effect of granting, denying, or granting with conditions an application for a development permit, and includes the rezoning of a specific parcel. Actions by the state or a local government on comprehensive plan amendments are not development orders.

(b) "Development permit" means any building permit, zoning permit, subdivision approval, certification, special exception, variance, or any other similar action of local government, as well as any permit authorized to be issued under state law by state, regional, or local government which has the effect of authorizing the development of real property including, but not limited to, programs implementing chapters 125, 161, 163, 166, 187, 258, 372, 373, 378, 380, and 403.

(c) "Special master" means a person selected by the parties to perform the duties prescribed in this section. The special master must be a resident of the state and possess experience and expertise in mediation and at least one of the following disciplines and a working familiarity with the others: land use and environmental permitting, land planning, land economics, local and state government organization and powers, and the law governing the same.

(d) "Owner" means a person with a legal or equitable interest in real property who filed an application for a development permit for the property at the state, regional, or local level and who received a development order, or who holds legal title to real property that is subject to an enforcement action of a governmental entity.

(e) "Proposed use of the property" means the proposal filed by the owner to develop his or her real property.

(f) "Governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies.

(g) "Land" or "real property" means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the owner had a relevant interest.

(3) Any owner who believes that a development order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of the owner's real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section.

(4) To initiate a proceeding under this section, an owner must file a request for relief with the elected or appointed head of the governmental entity that issued the development order or orders, or that initiated the enforcement action. The head of the governmental entity may not charge the owner for the request for relief and must forward the request for relief to the special master who is mutually agreed upon by the owner and the governmental entity within 10 days after receipt of the request.

(5) The governmental entity with whom a request has been filed shall also serve a copy of the request for relief by United States mail or by hand delivery to:

(a) Owners of real property contiguous to the owner's property at the address on the latest county tax roll.

(b) Any substantially affected party who submitted oral or written testimony, sworn or unsworn, of a substantive nature which stated with particularity objections to or support for any development order at issue or enforcement action at issue. Notice under this paragraph is required only if that party indicated a desire to receive notice of any subsequent special master proceedings occurring on the development order or enforcement action. Each governmental entity must maintain in its files relating to particular development orders a mailing list of persons who have presented oral or written testimony and who have requested notice.

(6) The request for relief must contain:

(a) A brief statement of the owner's proposed use of the property.

(b) A summary of the development order or description of the enforcement action. A copy of the development order or the documentation of an enforcement action at issue must be attached to the request.

(c) A brief statement of the impact of the development order or enforcement action on the ability of the owner to achieve the proposed use of the property.

(d) A certificate of service showing the parties, including the governmental entity, served.

(7) The special master may require other information in the interest of gaining a complete understanding of the request for relief.

(8) The special master may conduct a hearing on whether the request for relief should be dismissed for failing to include the information required in subsection (6). If the special master dismisses the case, the special master shall allow the owner to amend the request and refile. Failure to file an adequate amended request within the time specified shall result in a dismissal with prejudice as to this proceeding.

(9) By requesting relief under this section, the owner consents to grant the special master and the parties reasonable access to the real property with advance notice at a time and in a manner acceptable to the owner of the real property.

(10)

(a) Before initiating a special master proceeding to review a local development order or local enforcement action, the owner must exhaust all nonjudicial local government administrative appeals if the appeals take no longer than 4 months. Once nonjudicial local administrative appeals are exhausted and the development order or enforcement action is final, or within 4 months after issuance of the development order or notice of the enforcement action if the owner has pursued local administrative appeals even if the appeals have not been concluded, the owner may initiate a proceeding under this section. Initiation of a proceeding tolls the time for seeking judicial review of a local government development order or enforcement action until the special master's recommendation is acted upon by the local government. Election by the owner to file for judicial review of a local government development order or enforcement action prior to initiating a proceeding under this section waives any right to a special master proceeding.

(b) If an owner requests special master relief from a development order or enforcement action issued by a state or regional agency, the time for challenging agency action under ss. 120.569 and 120.57 is tolled. If an owner chooses to bring a proceeding under ss. 120.569 and 120.57 before initiating a special master proceeding, then the owner waives any right to a special master proceeding unless all parties consent to proceeding to mediation.

(11) The initial party to the proceeding is the governmental entity that issues the development order to the owner or that is taking the enforcement action. In those instances when the development order or enforcement action is the culmination of a process involving more than one governmental entity or when a complete resolution of all relevant issues would require the active participation of more than one governmental entity, the special master may, upon application of a party, join those governmental entities as parties to the proceeding if it will assist in effecting the purposes of this section, and those governmental entities so joined shall actively participate in the procedure.

(12) Within 21 days after receipt of the request for relief, any owner of land contiguous to the owner's property and any substantially affected person who submitted oral or written testimony, sworn or unsworn, of a substantive nature which stated with particularity objections to or support for the development order or enforcement action at issue may request to participate in the proceeding. Those persons may be permitted to participate in the hearing but shall not be granted party or intervenor status. The participation of such persons is limited to addressing issues raised regarding alternatives, variances, and other types of adjustment to the development order or enforcement action which may impact their substantial interests, including denial of the development order or application of an enforcement action.

(13) Each party must make efforts to assure that those persons qualified by training or experience necessary to address issues raised by the request or by the special master and further qualified to address alternatives, variances, and other types of modifications to the development order or enforcement action are present at the hearing.

(14) The special master may subpoena any nonparty witnesses in the state whom the special master believes will aid in the disposition of the matter.

(15)

(a) The special master shall hold a hearing within 45 days after his or her receipt of the request for relief unless a different date is agreed to by all the parties. The hearing must be held in the county in which the property is located.

(b) The special master must provide notice of the place, date, and time of the hearing to all parties and any other persons who have requested such notice at least 40 days prior to the hearing.

(16)

(a) Fifteen days following the filing of a request for relief, the governmental entity that issued the development order or that is taking the enforcement action shall file a response to the request for relief with the special master together with a copy to the owner. The response must set forth in reasonable detail the position of the governmental entity regarding the matters alleged by the owner. The response must include a brief statement explaining the public purpose of the regulations on which the development order or enforcement action is based.

(b) Any governmental entity that is added by the special master as a party must file a response to the request for relief prior to the hearing but not later than 15 days following its admission.

(c) Any party may incorporate in the response to the request for relief a request to be dropped from the proceeding. The request to be dropped must set forth facts and circumstances relevant to aid the special master in ruling on the request. All requests to be dropped must be disposed of prior to conducting any hearings on the merits of the request for relief.

(17) In all respects, the hearing must be informal and open to the public and does not require the use of an attorney. The hearing must operate at the direction and under the supervision of the special master. The object of the hearing is to focus attention on the impact of the governmental action giving rise to the request for relief and to explore alternatives to the development order or enforcement action and other regulatory efforts by the governmental entities in order to recommend relief, when appropriate, to the owner.

(a) The first responsibility of the special master is to facilitate a resolution of the conflict between the owner and governmental entities to the end that some modification of the owner's proposed use of the property or adjustment in the development order or enforcement action or regulatory efforts by one or more of the governmental parties may be reached. Accordingly, the special master shall act as a facilitator or mediator between the parties in an effort to effect a mutually acceptable solution. The parties shall be represented at the mediation by persons with authority to bind their respective parties to a solution, or by persons with authority to recommend a solution directly to the persons with authority to bind their respective parties to a solution.

(b) If an acceptable solution is not reached by the parties after the special master's attempt at mediation, the special master shall consider the facts and circumstances set forth in the request for relief and any responses and any other information produced at the hearing in order to determine whether the action by the governmental entity or entities is unreasonable or unfairly burdens the real property.

(c) In conducting the hearing, the special master may hear from all parties and witnesses that are necessary to an understanding of the matter. The special master shall weigh all information offered at the hearing.

(18) The circumstances to be examined in determining whether the development order or enforcement action, or the development order or enforcement action in conjunction with regulatory efforts of other governmental parties, is unreasonable or unfairly burdens use of the property may include, but are not limited to:

(a) The history of the real property, including when it was purchased, how much was purchased, where it is located, the nature of the title, the composition of the property, and how it was initially used.

(b) The history or development and use of the real property, including what was developed on the property and by whom, if it was subdivided and how and to whom it was sold, whether plats were filed or recorded, and whether infrastructure and other public services or improvements may have been dedicated to the public.

(c) The history of environmental protection and land use controls and other regulations, including how and when the land was classified, how use was proscribed, and what changes in classifications occurred.

(d) The present nature and extent of the real property, including its natural and altered characteristics.

(e) The reasonable expectations of the owner at the time of acquisition, or immediately prior to the implementation of the regulation at issue, whichever is later, under the regulations then in effect and under common law.

(f) The public purpose sought to be achieved by the development order or enforcement action, including the nature and magnitude of the problem addressed by the underlying regulations on which the development order or enforcement action is based; whether the development order or enforcement action is necessary to the achievement of the public purpose; and whether there are alternative development orders or enforcement action conditions that would achieve the public purpose and allow for reduced restrictions on the use of the property.

(g) Uses authorized for and restrictions placed on similar property.

(h) Any other information determined relevant by the special master.

(19) Within 14 days after the conclusion of the hearing, the special master shall prepare and file with all parties a written recommendation.

(a) If the special master finds that the development order at issue, or the development order or enforcement action in combination with the actions or regulations of other governmental entities, is not unreasonable or does not unfairly burden the use of the owner's property, the special master must recommend that the development order or enforcement action remain undisturbed and the proceeding shall end, subject to the owner's retention of all other available remedies.

(b) If the special master finds that the development order or enforcement action, or the development order or enforcement action in combination with the actions or regulations of other governmental entities, is unreasonable or unfairly burdens use of the owner's property, the special master, with the owner's consent to proceed, may recommend one or more alternatives that protect the public interest served by the development order or enforcement action and regulations at issue but allow for reduced restraints on the use of the owner's real property, including, but not limited to:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.
2. Increases or modifications in the density, intensity, or use of areas of development.
3. The transfer of development rights.
4. Land swaps or exchanges.
5. Mitigation, including payments in lieu of onsite mitigation.
6. Location on the least sensitive portion of the property.
7. Conditioning the amount of development or use permitted.
8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
9. Issuance of the development order, a variance, special exception, or other extraordinary relief, including withdrawal of the enforcement action.
10. Purchase of the real property, or an interest therein, by an appropriate governmental entity.

(c) This subsection does not prohibit the owner and governmental entity from entering in to an agreement as to the permissible use of the property prior to the special master entering a recommendation. An agreement for a permissible use must be incorporated in the special master's recommendation.

(20) The special master's recommendation is a public record under chapter 119. However, actions or statements of all participants to the special master proceeding are evidence of an offer to compromise and inadmissible in any proceeding, judicial or administrative.

(21) Within 45 days after receipt of the special master's recommendation, the governmental entity responsible for the development order or enforcement action and other governmental entities participating in the proceeding must consult among themselves and each governmental entity must:

(a) Accept the recommendation of the special master as submitted and proceed to implement it by development agreement, when appropriate, or by other method, in the ordinary course and consistent with the rules and procedures of that governmental entity. However, the decision of the governmental entity to accept the recommendation of the special master with respect to granting a modification, variance, or special exception to the application of statutes, rules, regulations, or ordinances as they would otherwise apply to the subject property does not require an owner to duplicate previous processes in which the owner has participated in order to effectuate the granting of the modification, variance, or special exception;

(b) Modify the recommendation as submitted by the special master and proceed to implement it by development agreement, when appropriate, or by other method, in the ordinary course and consistent with the rules and procedures of that governmental entity; or

(c) Reject the recommendation as submitted by the special master. Failure to act within 45 days is a rejection unless the period is extended by agreement of the owner and issuer of the development order or enforcement action.

(22) If a governmental entity accepts the special master's recommendation or modifies it and the owner rejects the acceptance or modification, or if a governmental entity rejects the special master's recommendation, the governmental entity must issue a written decision within 30 days that describes as specifically as possible the use or uses available to the subject real property.

(23) The procedure established by this section may not continue longer than 165 days, unless the period is extended by agreement of the parties. A decision describing available uses constitutes the last prerequisite to judicial action and the matter is ripe or final for subsequent judicial proceedings unless the owner initiates a proceeding under ss. 120.569 and 120.57. If the owner brings a proceeding under ss. 120.569 and 120.57, the matter is ripe when the proceeding culminates in a final order whether further appeal is available or not.

(24) The procedure created by this section is not itself, nor does it create, a judicial cause of action. Once the governmental entity acts on the special master's recommendation, the owner may elect to file suit in a court of competent jurisdiction. Invoking the procedures of this section is not a condition precedent to filing a civil action.

(25) Regardless of the action the governmental entity takes on the special master's recommendation, a recommendation that the development order or enforcement action, or the development order or enforcement action in combination with other governmental regulatory actions, is unreasonable or unfairly burdens use of the owner's real property may serve as an indication of sufficient hardship to support modification, variances, or special exceptions to the application of statutes, rules, regulations, or ordinances to the subject property.

(26) A special master's recommendation under this section constitutes data in support of, and a support document for, a comprehensive plan or comprehensive plan amendment, but is not, in and of itself, dispositive of a determination of compliance with chapter 163. Any comprehensive plan amendment necessary to carry out the approved recommendation of a special master under this section is exempt from the twice-a-year limit on plan amendments and may be adopted by the local government amendments in s. 163.3184(16)(d).

(27) The special master shall send a copy of the recommendation in each case to the Department of Legal Affairs. Each governmental entity, within 15 days after its action on the special master's recommendation, shall notify the Department of Legal Affairs in writing as to what action the governmental entity took on the special master's recommendation.

(28) Each governmental entity may establish procedural guidelines to govern the conduct of proceedings authorized by this section, which must include, but are not limited to, payment of special master fees and expenses, including the costs of providing notice and effecting service of the request for relief under this section, which shall be borne equally by the governmental entities and the owner.

(29) This section shall be liberally construed to effect fully its obvious purposes and intent, and governmental entities shall direct all available resources and authorities to effect fully the obvious purposes and intent of this section in resolving disputes. Governmental entities are encouraged to expedite notice and time-related provisions to implement resolution of disputes under this section. The procedure established by this section may be used to resolve disputes in pending judicial

proceedings, with the agreement of the parties to the judicial proceedings, and subject to the approval of the court in which the judicial proceedings are pending. The provisions of this section are cumulative, and do not supplant other methods agreed to by the parties and lawfully available for arbitration, mediation, or other forms of alternative dispute resolution.

IDAHO

The "Idaho Regulatory Takings Act" was codified as Title 67, Chapter 80, sections 67-8001 through 67-8004. The act is designed to provide a consistent review process, prepared by the Idaho attorney general, that enables state and local governments to evaluate whether proposed regulatory or administrative actions may result in a taking. The act is not intended to expand or reduce the scope of private property protections provided in the state and federal constitutions. The attorney general's advisory memorandum offers general background principles and a process consisting of five questions. 1) Does the regulation or action result a permanent or temporary physical occupation? 2) Does the regulation or action require a property owner to dedicate property or grant and easement? 3) Does the regulation deprive the owner of all economically viable uses of the property? 4) Does the regulation have a significant impact on the landowner's economic interest? 5) Does the regulation deny a fundamental attribute of ownership? The memorandum refers to court decisions to consider regarding these questions and profiles the significant aspects of these decisions.

INDIANA

The Indiana attorney general is charged with reviewing state administrative rules and procedures in Section 32, Chapter 2, Article 22 of Title 4: State Offices and Administration. In each review, the attorney general must consider whether the rule may constitute a taking of property without just compensation to an owner. If such review determines that a rule may constitute a taking, the attorney general must advise the governor and the head of the applicable state agency in a confidential attorney-client communication.

KANSAS

The Kansas Private Property Protection Act includes sections 77-701 through 77-711, Article 7, Chapter 77. This Act requires "...that state agencies, in planning and carrying out governmental actions, anticipate, be sensitive to and account for the obligations imposed by the fifth and 14th amendments of the constitution of the United States and section 18 of the bill of rights of the constitution of the state of Kansas. It is the express purpose of this act to reduce the risk of undue or inadvertent burdens on private property rights resulting from certain lawful governmental actions." "Governmental action" is defined to include proposed legislation, proposed rules and regulations or directives and proposed agency guidelines concerning the process of issuing permits and licenses. The Act specifies that "governmental action" does not include "...the repeal of rules and regulations, elimination of governmental programs, or amendment of rules and regulations such that limitations on the use of private property are reduced or removed;...".

Section 77-704 requires the attorney general to establish guidelines to assist state agencies in determining whether a proposed action may constitute a taking. These guidelines must be updated annually and published in the Kansas register. Before initiating any action, a state agency must follow the attorney general's guidelines in preparing a written report. Each state agency must submit a copy of the takings assessment report to the governor and attorney general before implementing a governmental action. In addition, Section 77-707 requires Kansas state agencies to prepare a report by January 1, 1997 evaluating all of the agency's rules and regulations according to these guidelines. Section 77-708 states that property tax valuation must reflect any court or agency determination that a governmental action has caused a taking. Section 77-709 allows courts to award reasonable attorney fees and expenses to property owners who succeed in establishing that a taking has occurred.

Taking Guidelines

As called for in the Private Property Protection Act, the Kansas Attorney General issued guidelines to "to assist state agencies in evaluating proposed governmental actions and in determining whether such actions may constitute a taking." The first section of these guidelines summarizes the provisions of the Act. The second section reviews the constitutional framework and explains that regulations that go "too far" will be recognized as a taking. This section states that the U.S. Supreme Court has avoided establishing a set formula for determining how far is too far. Nevertheless, the courts have required just compensation to be paid for regulations resulting in the permanent physical occupancy or permanent physical invasion of property and regulations that effectively eliminate all economically productive or beneficial use of the property. As an exception to that rule, the Guidelines say that compensation may not be required if common law doctrines of nuisance or other limitations on the use of the property preexisted the owner's interest in the property. The Guidelines then provide a definition of nuisance in Kansas and explain that the existence of a nuisance depends on particular facts and circumstances surrounding each case such as the type of neighborhood, the nature of the activity, the proximity and the damage or annoyance that results.

In the final section of the original guidelines, a "Takings Checklist" is provided that prompts the state agencies to ask the following five questions. 1. Does the governmental action result in a permanent or temporary physical occupation or invasion of private property? 2. Does the governmental action deny or abrogate a fundamental property right? 3. Does the governmental action deprive the owner of all economically viable uses of the property? 4. Does the governmental action substantially further a legitimate state interest? 5. Are the proscribed uses or physical occupation part of a preexisting limitation on the landowner's title?If the action in question appears to meet one of the checklist criteria, agency staff are advised to carefully review the proposed action with legal counsel to determine whether, in that particular instance, compensation is required.

Louisiana

Section 3608 of the Louisiana statutes, Minimization of governmental action, establishes four requirements on governmental entities to minimize the impact of governmental actions affecting private agricultural property and private agricultural property rights.

(1) Avoid imposing an undue burden on the resources of the governmental entity by actions that require compensation of private agricultural property owners under the United States Constitution or the Constitution of Louisiana.

(2) Avoid diminution in value of private agricultural property which is used in agricultural production or which may potentially be used in agricultural production.

(3) Expedite a decision by the entity in cases in which a delay of the decision will substantially interfere with the use or value of private agricultural property rights.

(4) Avoid unnecessary delays in compensating owners of private agricultural property when diminution in value occurs by governmental action.

Maine

Maine's Title 5, Administrative Procedures and Services, includes a land use mediation option for state and local land use decisions. Two other statute sections create procedures for new state agency rules to be reviewed by the Attorney General and the Maine legislature.

3341 – Land Mediation Program is designed to provide property owners with a prompt, independent, inexpensive and local forum for mediation of governmental land use decisions as an alternative to court action. The purpose of the mediation is to facilitate, within existing land use laws, ordinances and regulations, an acceptable solution to a conflict between a landowner and a governmental entity regulating land use. At the municipal level, landowners can apply for mediation if they have been denied a permit, variance or special permit and have pursued all reasonable avenues of administrative appeal. At the state level, property owners can apply if they have been denied approval for a land use and qualify for judicial review under a separate statute. Applications are filed at the appropriate county courthouse. As a result of mediation, a government may reconsider its original land use decision as long as that reconsideration does not violate any substantive application or review requirement.

8056 – Filing and publication requires state agencies to submit new rules to the Attorney General for approval as to form and legality. Once it has been signed by the attorney general, the rule must be provided to anyone requesting such rules and a notice of rule adoption must be published. In reviewing each rule, the Attorney General may nor approve a rule if it is reasonably expected to result in a taking of private property unless such a result is directed by law to allow for a variance designed to avoid such a taking.

8072 – Legislative review of major substantive rules calls for state agencies to submit "provisionally adopted" rules to the state legislature prior to final adoption. The appropriate joint standing committee of the legislature reviews each provisionally adopted rule and makes a recommendation to the full legislature regarding whether the rule conforms with the legislative intent of the statute that the rule is intended to implement. For a rule that is reasonably expected to result in a significant reduction in property values, the committee's review must include whether sufficient variance provisions exist in law or in the rule to avoid an unconstitutional taking, and whether, as a matter of policy, the expected reduction is necessary or appropriate for the protection of the public health, safety and welfare advanced by the rule. After legislative approval, the rule can be formally adopted by the state agency.

Michigan

Chapter 24, Sections 24.421 though 24.425, constitute Michigan's Property Rights Preservation Act. This Act requires the attorney general to develop takings assessment guidelines to assist the Michigan state departments of natural resources, environmental quality and transportation in the identification and evaluation of governmental actions that may result in a constitutional taking. The governmental actions include a decision on an application for a permit or license, proposed rules that, if enforced, may limit the use of public property, required dedications or exactions and enforcement of a statute or rule. The attorney general's guidelines are to be based on the decisions of the supreme courts of the United States and Michigan and must be updated annually. Prior to taking a governmental action, the three state departments must review the attorney general's guidelines and consider the likelihood that the action may result in a constitutional taking.

Missouri

Section 536.017 of the Missouri Statutes, Title XXXVI, defines a taking as an activity wherein private property is taken such that compensation to the owner of the property is required by the fifth and fourteenth amendments to the Constitution of the United States or any other similar or applicable law of Missouri. State agencies are required to prepare takings analyses of any proposed rule or regulation that limits or affects the use of real property. However, these analyses are not required for emergency rules, federally mandated regulations or rules that codify existing federal or state law. The state agency must certify that a takings analysis has occurred when transmitting the rule to the Missouri secretary of state.

Mississippi

MC 49-33, the Mississippi Agricultural and Forestry Activity Act, is designed to compensate landowners for state actions that prohibit or severely limit agricultural or forestry activity. The Act refers to prohibitions and severe limitations as "inverse condemnation". In defining state actions that constitute an inverse condemnation, the Act excludes the prohibition of activities that harm public health and safety and orders issued in response to a violation of state law. The terms "prohibits or severely limits" are defined to mean a reduction of more than 40 percent in the fair market value of forest or agricultural land, forest products or personal property rights associated with conducting forestry or agricultural activities. A landowner may file an inverse condemnation action before any court having jurisdiction over the county in which the land is located. Before the court decision is rendered, the state agency may repeal the action that led to the lawsuit, entitling the landowner to recover only damages and reasonable litigation costs. Once a court renders a decision in an inverse condemnation suit, the state agency must pay the resulting judgement even if the agency repeals or rescinds the action that originally led to the lawsuit. Finally, the Act prohibits state agencies from requiring landowners to waive their ability to bring inverse condemnation claims as a condition of approval for any permit or entitlement.

Montana

Sections 2-10-101 through 2-10-105 constitute Montana's Private Property Assessment Act. The Act is not intended to expand or diminish private property protections provided in the federal and state constitutions. It establishes a process designed to enable state agencies to evaluate whether an action might result in the taking or damaging of private property. The actions to be evaluated include proposed state agency administrative rules and policies as well as denials or conditions of approval pertaining to land and water management permits or other environmental matters. Under the Act, the attorney general must develop guidelines, including a checklist, to assist state agencies in identifying and evaluating actions with taking or damaging implications. These guidelines must also include a provision that state agencies should consider and follow obligations imposed by the United States and Montana constitutions as construed by the U.S. and Montana supreme courts.

Each state agency must assign a qualified person the duty and obligation to complete a taking or damaging impact assessment before proceeding with any action with taking or damaging implications. That person must follow the attorney general's guidelines in preparing an assessment that includes an analysis of three factors. 1) Is a court likely to hold that the proposed action is a taking? 2) Are there alternatives to the proposed action that would fulfill the agency's statutory obligations while reducing the risk for a taking or damaging? 3) What is the estimated cost of any financial compensation by the state agency to one or more persons that might be caused by the action and the source for payment of the compensation? A copy of the impact assessment must be given to the governor before proceeding with the action.

Oregon

Section 527.714 of the Oregon Statutes establishes procedures that the Oregon State Board of Forestry must use when considering rules that set new standards for certain forest practices. Prior to rule adoption, the Board must determine that five facts exist including the fact that alternatives to the proposed rule were considered and the proposed rule is the least burdensome to landowners and timber owners while still achieving the desired level of protection. This statute also requires that the economic and fiscal impact statement for the proposed rule provide an expanded analysis. This expanded analysis must contain information derived from consultation with potentially affected landowners and timber owners and an assessment of the economic impact of the proposed rule under a wide variety of circumstances.

Tennessee

Sections 12-1-201 through 12-1-206 of the Tennessee Code deal are intended to provide a mechanism for education of, and, consideration by, state agencies and the public regarding what government actions may result in an unconstitutional taking. Its purpose is not to enlarge or reduce the scope of private property protections afforded by the constitutions of the United States or Tennessee. It requires the attorney general to develop guidelines to assist in the identification and evaluation of government actions that may result in an unconstitutional taking as articulated by the Unites States and Tennessee supreme courts. Furthermore, in approving rules in the process of promulgation, the attorney general shall not approve rules that would effect an unconstitutional taking. If a court determines that a governmental action has resulted in an unconstitutional taking, the effect on property valuation must be taken into account in determining the value of the property for property tax purposes. Finally, a property owner who successfully establishes that a governmental action is an unconstitutional taking requiring payment of just compensation is entitled to recover allowable attorneys' fees and expenses.

Texas

Sections 2007.01 through 2007.044 constitute the Texas Private Real Property Rights Preservation Act. The Act primarily affects the actions of boards, commissions, councils, departments and other agencies of the state.

In addition to the common constitutional definition, the Act further defines a taking as "...(B) a governmental action that: (I) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner" right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

The Act applies to the adoption of ordinances and rules, the enforcement of those ordinances and rules and actions that impose a physical invasion, dedication or exaction or private real property. However, the Act does not apply to 14 types of actions including: "...(6) an action taken to prohibit or restrict a condition or use of private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state;" and "...(11) an action taken by a political subdivision (A) to regulate construction in an area designated under law as a floodplain; (B) to regulate on-site sewage facilities; (C) under the political subdivision' statutory authority to prevent waste or protect rights of owners of interest in groundwater; or (D) to prevent subsidence;...".

Landowners can bring a lawsuit under this Act against a political subdivision and can file a contested case with a state agency. The landowner must file no later than the 180th day after the date the owner knew or should have known that the governmental action restricted or limited the owner's property rights. If the trier of fact in a suit or contested case finds that the governmental action is a taking as defined by this Act, the property owner is only entitled to invalidation of the governmental action or the part of the governmental action resulting in the taking. However, the governmental entity may elect to pay compensation. If the government elects to pay compensation, the portion of the judgement rescinding the governmental action is withdrawn. Anyone aggrieved by a judgement in a lawsuit filed under the Act may appeal as provided by law. Anyone dissatisfied with the final decision in a contested case is entitled to judicial review.

The Act requires the attorney general to prepare guidelines to assist governmental agencies in identifying and evaluating governmental actions that may result in a taking. Political subdivisions and state agencies that propose to engage in governmental actions that may result in a taking must prepare a takings impact assessment of that proposed action. The takings assessment must determine whether engaging in the proposed governmental action will constitute a taking and whether alternatives to the proposed action would further the specified purpose and still constitute a taking. The takings assessment is public information. If an assessment is not prepared on a governmental action that requires an assessment, a property owner may bring suit to invalidate the action.

Utah

The Utah code contains provisions for takings analysis on impact fees, the creation of a private property ombudsman and a Private Property Protection Act.

Section 11-36-201 requires local political subdivisions to analyze the effects of new and existing impact fees. Before adopting impact fees, political subdivisions must prepare a capital facilities plan either separately or as part of the general plan. In addition, the political subdivision must prepare a written analysis demonstrating whether or not the proportionate share of the costs of public facilities are reasonably related to the new development activity. A separate section of the Utah code establishes procedures to be followed if the validity of impact fees is challenged.

Section 63-34-13 creates a private property ombudsman in the Utah Department of Natural Resources. The ombudsman assists state agencies and local governments in analyzing actions with potential takings implications, advises private property owners with takings claims against a governmental entity and, if requested, mediates or arbitrates disputes between property owners and governmental entities involving taking issues and other matters. Either party may submit the award issued through this process to the district court for review.

Sections 63-90-1 through 63-90a-4 constitute Utah's Private Property Protection Act. Under this Act, "governmental action" means proposed rules, permitting conditions, dedications and exactions that may limit the use of private property. Each state agency is required to adopt guidelines for the identification of actions that have constitutional takings implications. The agencies must use these guidelines to prepare assessments which include the likelihood that an action may result in a taking, alternatives to the proposed action that could fulfill the agency's obligations while reducing the risk of a constitutional taking and an estimate of the financial cost to the state for compensation and the source of payment if a constitutional taking is determined. Before the state agency implements an action, it must submit a copy of the takings assessment to the governor and the Legislative Management Committee.

In addition to the requirements discussed above for state agencies, each political subdivision in the state must adopt guidelines to assist in identifying actions involving physical taking or exaction of private property that may have constitutional taking issues. In addition, each political subdivision must enact an ordinance that establishes a procedure for review of actions that may have constitutional taking issues. A property owner subject to a physical taking or exaction by a political subdivision may appeal that decision to the legislative body of that political subdivision. The legislative body must hear and approve or reject that appeal within 14 days.

Virginia

Section 9-6.14:7.1 primarily establishes procedures that state agencies must use when adopting new regulations. In addition to public notice and review, the code section requires the Department of Planning and Budget to prepare an economic impact analysis of the proposed regulation. Amongst other economic impacts, this analysis must include a review of the impact of the regulation on the use and value of private property. The agency proposing the regulation is allowed to respond to the impact analysis. Before promulgating any regulation, a summary of the impact analysis and other key information must be published in the Virginia Register of Regulations.

Washington

Section 36.70A.370, protection of private property, is not intended to expand or reduce the scope of private property protections provided in the state and federal Constitutions. It requires the attorney general of the State of Washington to establish a process, including a checklist, that better enables state agencies to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. Local governments that are required to or choose to comply and state agencies must use the process established by the attorney general to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of public property.

West Virginia

Sections 22-1A-1 through 22-1A-5, West Virginia's Private Real Property Protection Act, is not intended to reduce or expand the scope of private real property protections provided in the state and United States constitutions. Whenever the state's division of environmental protection considers any action that is reasonably likely to deprive a real property owner of his or her property in fee simple or to deprive an owner of all productive use of his or her private real property, it must prepare an assessment that includes at least six components. In one of these components, the assessment must state the reasons why the action is likely to result in requiring the state to compensate the owner of private real property and describe how the action affects the use or value of real property. In another component, the assessment must estimate the cost to the state for compensation in the event that compensation is required. When a court of competent jurisdiction determines that an action of the department of environmental protection requires that compensation is required pursuant to the state or US constitutions or the principles of nuisance laws, the private property owner is also entitled to reasonable attorney fees if the department failed to perform the required assessment or if the division failed to conclude that its action was reasonably likely to be paid to the private property owner.

Wyoming

Sections 9-5-301 through 9-5-305, in the Wyoming Regulatory Takings Act, are not intended to expand or reduce the scope of private property protections provided in the state and federal constitutions. The Act pertains to rules proposed by a state agency that, if adopted, may limit the use of private property as well as required dedications or exactions of private property by a state agency. The Act specifically exempts six other forms of governmental action including activities in which the power of eminent domain is exercised formally and actions needed to maintain or protect public health and safety. The attorney general must develop guidelines and a checklist to assist government agencies in the identification and evaluation of actions that have constitutional implications that may involve a taking. The Act requires the attorney general to consider eight components for these guidelines, including the likelihood that the action may constitute a taking and alternatives to the action that would reduce the regulation's impact on private property. State agencies are required to use the guidelines to evaluate proposed administrative actions or regulations that might have constitutional implications.

APPENDIX C. PERMISSION TO REPRINT MATERIALS

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June 19, 2007

Sharon Downs
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SUBJECT: PERMISSION TO USE PORTIONS OF MY BOOK

Dear Sharon Downs:

This letter confirms that I am the author of and copyright holder for *Beyond Takings and Givings: Saving Natural Areas, Farmland and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*. I give you permission to reproduce portions of this book for your TDR study as long as you identify the source.

Best regards,

Rick Pruetz