

## **Chapter Five**

# **BENZIE COUNTY TDR ORDINANCE**

### **INTRODUCTION**

It is unlikely there will ever be enough money to buy the development rights to all priority land identified for preservation in Benzie County, let alone to buy the land outright. That is one reason why so many different techniques need to be utilized and coordinated together to achieve the best possible result. One of the most promising long-term preservation tools is transfer of development rights (TDR). As explained in Chapter Three, TDR involves the creation of sending zones and receiving zones. Owners of development rights in sending zones would be allowed to sell those rights to developers in receiving zones who would be permitted to build at a higher density because those development rights were purchased and transferred to the new location. Everyone benefits. The seller captures the development value of the land while still owning it and being permitted to continue to use for permitted open space uses. The developer who buys the development rights benefits by getting a higher return on his/her investment, because of the additional dwellings (higher density) permitted on the property. The community benefits in three ways:

- First, more open space lands are permanently preserved.
- Second, municipal infrastructure is used at or nearer its design capacity, making it both more efficient and less costly per unit of service.
- Third, growth pressures are guided into areas where there are adequate public services, and out of areas where they are inadequate to accommodate a growing population; this helps keep taxes down for everyone.

This chapter briefly examines some of the legal and structural issues associated with a local TDR Ordinance. A draft TDR Ordinance is presented at the end of the chapter. It is expected that this chapter will need to be modified and expanded if the Legislature enacts a TDR law.

### **STATUTORY STRUCTURE & LEGAL CONSIDERATIONS**

As mentioned in Chapter Three, there is no separate statutory authority to use the TDR technique in Michigan communities. While the Legislature has considered enacting such a law nearly every year since 1994, no action has been taken.

Some communities are actively exploring the immediate use of TDR anyway. Peninsula Township in Grand Traverse County and Alpine Township in Kent County have both prepared TDR plans which include the identification of sending and receiving zones. Legal advisors to these townships believe that the existing authority for establishment of PUD districts under the Township Zoning Act (PA

184 of 1943, Section 16c) is sufficient to set up a PUD overlay district with a sending zone and receiving zone in the same district. This would accomplish TDR, but would not permit cross jurisdiction transfers, which are usually necessary to make the TDR market viable, especially in a rural area where there may not be adequate receiving zones in every township.

The County Zoning Act (PA 183 of 1943) has an identical provision to that in the Township Zoning Act (even in the same location, Section 16c). Since county zoning applies in most townships in Benzie County, the cross jurisdiction transfer issue is partially solved. It is only partially solved however, since county zoning does not apply in cities and villages, and that is where existing sewer, water and other public services are located. Unless those services were extended into the neighboring township, there would be no urban services adequate to accommodate the necessary higher density for TDR to work. Thus, TDR could only be applied in those designated urban service districts outside existing city and village boundaries, where urban level services were available or would be made available for a TDR development. This greatly reduces the potential viability of TDR in Benzie County at this time.

In addition, the basic premise of the use of a PUD overlay zone for TDR has not been legally tested, and since counties generally have less police power authority than townships or cities and villages, there is a real possibility that a county lacks the necessary legal authority for TDR. While it may be possible to overcome cross-jurisdiction TDR transfer issues through use of the Urban Cooperation Act, and/or the Intergovernmental Agreements Acts, it is a complicated way to do it. Clearly state enabling legislation is a preferred way to proceed. Thus if the County wishes to pursue TDR in the near future, at a minimum, it needs to advocate on behalf of TDR before the Legislature.

Also, before the County decides to pursue TDR further, a legal opinion should be secured that defines the statutory and legal scope of authority that exists for a county to enact a TDR ordinance in a manner that presents acceptable risks. At that time, a number of other legal issues associated with operation of a TDR program should also be explored. These are pretty apparent simply from reading the draft TDR Ordinance at the end of this chapter.

## **OTHER TDR ORDINANCE ISSUES**

### **Purpose of TDR Ordinance**

The purposes of a TDR Ordinance parallel those of the Land Preservation Ordinance (see last chapter), but extend further, since they focus so sharply on guiding new development into locations where public services are adequate to accommodate it. That of course will necessitate the provision of adequate public sewer and water in all of the villages in Benzie County. Initiative to provide this level of improved service in the villages in Benzie County cannot begin too soon if TDR is to be an effective tool to guide growth and protect open space. It is

likely the County Board would have to pledge the "full faith and credit" of the County to back any bonds for such improvements, and may find that creation of a public works authority that built and maintained such facilities was the best way to proceed. A feasibility study of the most cost-effective options would probably be the best place to start.

### **Benzie Land Preservation Advisory Committee**

While TDR programs do not involve competitive application submittal, review and approval procedures like PDR does (since all sales are within the private sector between willing buyers and willing sellers), they still involve staff review and a determination of compliance with adopted standards. They also require considerable public education, and monitoring of property from which development rights have been transferred. These are real tasks that require time and commitment. Since these duties parallel those of the Benzie Land Preservation Advisory Committee, and it makes no sense to create a second body to do very similar tasks, it is recommended that the full range of PDR duties assigned to the Benzie Land Preservation Advisory Committee be extended to include TDR.

### **Application, Review and Approval Procedures**

Again, since there is no competitive review and approval process, the submittal and review of TDR applications is less complicated than for PDR applications. Basically, County Planning staff would receive and review TDR applications, determine that all submittal and eligibility requirements were met, verify the details of the sending and receiving properties and prepare a recommendation for the County Board of Commissioners. If approved, all the necessary legal documents would be recorded and the transfer of development rights would occur and necessary building permits would be issued. These procedures are spelled out in more detail in the draft TDR Ordinance at the end of this chapter.

### **Location of Sending and Receiving Zones**

While there is no need to score TDR applications, the sending and receiving zones need to be clearly identified as a part of the TDR Ordinance. The logical sending zones in Benzie County are the priority properties identified for preservation on Map 9. The logical receiving zones are the lands within the urban services area on Map 4-8 of the 2020 Comprehensive Plan that are not identified as priority lands for preservation (on Map 9 in this Plan).

### **Number of Rights to be Transferred**

The biggest issue that must be resolved prior to establishing a TDR Ordinance (other than the legal issues identified earlier), is the number of development rights that may be sold in the sending zone and the bonus density permitted to be used in the receiving zone. These are both fundamental zoning issues that must be carefully resolved after study of a number of issues, not the least of which revolve around similar decisions associated with a PDR program and Land Preservation Ordinance as presented in the last chapter. The larger the number

of development rights that may be sold (the higher the permitted development density), the more land that needs to be available in receiving zones to accommodate the transferred rights and the more capacity that must exist in public services in the receiving zones. These issues require careful study, interjurisdictional dialogue and thorough public debate prior to a decision and implementation. They may also lead to the need for amendments to the 2020 Comprehensive Plan as well as to density changes in the County Zoning Ordinance.

### **Permitted and Prohibited uses**

The lists of permitted and prohibited uses to be detailed in the conservation easement for any TDR are essentially the same as those for PDR (see list in the last chapter). Again however, these need to be detailed in the specific TDR agreement. A sample list of permitted and prohibited uses is included in the draft TDR in Appendix N.

### **TDR ORDINANCE**

In Appendix N is a draft TDR Ordinance for Benzie County. It is based on a model ordinance drafted by Biko Associates, Inc. for the Minnesota Environmental Protection Agency and adapted to fit the situation in Benzie County. This sample ordinance is not as thorough as the draft PDR ordinance in the last chapter and should be supplemented once the parameters for a TDR program are better defined. It will also need to be supplemented based on any TDR legislation that may be passed. In any event, it should not be utilized until the legal issues identified at the start of this chapter are resolved and until it has been submitted to an attorney for a legal review and revision prior to adoption.