Recent Trends In TDR

Session: Reinventing TDR

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ABSTRACT: *Transfer of development rights, or TDR, has been used in the United States since 1968. Despite remarkable success in some communities, many existing TDR programs go unused and the technique is found in only a small fraction of the nation's jurisdictions. This paper reviews the TDR concept and those factors typically found in the most successful TDR programs. It then summarizes the current status of some classic TDR programs and describes some innovations developed by recently discovered TDR programs. Some of these innovations were designed to improve the effectiveness of the TDR program after adoption and some were intended to facilitate adoption itself.*

INTRODUCTION

This first transfer of development rights, or TDR, mechanism appeared in the New York City Landmark Preservation Law in 1968. Since then, this technique has been adopted by at least 134 communities throughout the country. Some of these programs have been very successful. For example, as detailed later in this report, TDR has preserved over 40,000 acres of farmland in Montgomery County, Maryland, more than 31,000 acres in the New Jersey Pinelands and over 8,900 acres in Calvert County, Maryland.

But unfortunately, there is no single formula that can assure the success of a TDR program. Every TDR ordinance has to be tailored to the unique circumstances of each individual community. This paper begins with a reminder of the factors that often result in successful TDR programs. It then reviews the results of some of the most successful TDR programs. Finally, explains how some cities and counties have invented alternatives to Traditional TDR ordinances. Some of these innovations involve the use of TDR to preserve new resources. Others are designed to increase incentives for landowners and developers to use the TDR option. Some of these communities have found new avenues for inter jurisdictional cooperation. And others have discovered TDR approaches that achieve preservation immediately though incremental procedures.

WHAT IS TDR?

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. In a traditional TDR program, the areas that the community wants to save are designated as "sending areas" and the locations that the community wants to grown are designated as "receiving areas".

Sending Areas
Sending areas can be agricultural land, open space, historic properties or any other properties that are important to the community. In a traditional TDR program, sending area properties are rezoned to a form of dual zoning that gives the property owners a 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. Alternatively, they can voluntarily elect 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".

In a traditional TDR program, the TDR ordinance specifies the number of TDRs that the sending site owner can sell once the deed restrictions have been recorded. Typically, the community does not directly establish the price per TDR. However, if a TDR ordinance allows sending site owners to sell enough TDRs, the proceeds from these TDR sales will approximate the development value of the sending site. By selling their TDRs, sending site owners often are fully compensated for the development potential of their property without having to endure the expense and uncertainty of actually trying to develop it. Also, when the sending sites have non-development income-producing potential, such as farming or forestry, the owners can continue to receive that income. Of course, that farming or forestry income is in addition to the proceeds from the sale of their development rights. (In other instances, the sending sites may have little income-producing potential after the sale of development rights; some TDR programs give the owners of such properties the option of conveying title to governmental agencies or private land trusts.)

Receiving Areas
In a traditional TDR program, receiving areas are places that the community has designated as appropriate for development. Often these areas are selected because they are close to existing development, jobs, shopping, schools, transportation, infrastructure and other urban services.

A traditional TDR ordinance creates a form of dual zoning for these receiving areas. Developers can elect not to use the TDR option provided under this dual zoning. Under the baseline option, they do not have to acquire TDRs but they also are limited to a lower, 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. The price of TDRs is typically freely negotiated between willing buyers and sellers. But, the TDR ordinance can influence the price through the number of TDRs that the sending site owners are allowed to sell. When TDRs remain affordable, developers are able to achieve higher profits through the extra development allowed under the TDR option despite the additional cost of the TDRs.

TDR Success Factors
TDR programs are not always successful. If TDRs are not affordable, 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. And if a TDR program fails to generate transfers, there may be calls to remove it from a community's zoning code.

However, 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 for non-development and, in some cases, income-producing activities. And finally, the community itself is able to implement its preservation goals without relying exclusively on tax revenues and other traditional funding sources, which are often difficult to adopt.

Example: Montgomery County, Maryland
Montgomery County abuts Washington, D.C. The southern half of the county has absorbed much of the growth spreading from the nation's capitol. But the northern half of Montgomery County is still primarily rural. In an effort to preserve its rural character, and prime farmland, the county adopted a rural preservation plan and changed its agricultural zoning from one unit per two acres to one unit per five acres. Despite that downzoning, the county still lost 18 percent of its agricultural land to development in the 1970s.

To stem these losses, the County appointed a task force that concluded that it would be far too costly for the County to try to buy agricultural easements. It also rejected the option of simply downzoning all farmland to a density of one unit per 25 acres. This alternative was considered unfair to the owners of farmland and also might have the unintended result of encouraging the development of 25-acre country estates.

So, the county turned to TDR-based zoning. A 110,000-acre area, called the Agricultural Reserve, was designated as the sending area, more than one third of the County's total land area. Over 90,000 acres in this Reserve were rezoned to a Rural Density Transfer Zone. Prior to the rezoning, development could occur on-site at a density of one unit per five acres. After the rezoning, density was limited to one unit per 25 acres for development on the sending site itself. This rezoning alone provided a disincentive to build on sending sites. But in addition, the county added an incentive for farmers to deed-restrict their land through agricultural easements and sell their development rights for off-site use. The incentive is that the farmers can sell TDRs at the rate of one development right per five acres. In other words, the permitted density of sending site properties increases five fold when development rights are used to allow development on receiving sites rather than on sending sites.

Likewise, the county identified receiving areas. These are areas that are appropriate for higher density development because they can easily be served by transportation and other public services. These receiving sites were also rezoned and assigned two alternative densities: when developers have not acquired transferred development rights, they may build at a lower baseline density; but when the project incorporates TDRs, a higher "with TDR" density is permitted. Montgomery County has TDR receiving zones at various densities. In one of these zones, the baseline zoning allows five units per acre. With TDR, developers in this receiving zone can achieve seven units per acre.

Under the Montgomery County TDR program, sending site owners can continue farming but still 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 through recorded agricultural easements. On receiving sites, developers have found that it is more profitable to buy TDRs in order to achieve higher densities in receiving site projects. And, of course, TDR-based zoning has allowed the county to permanently preserve almost half of its farmland preservation goal in 20 years. Perhaps more importantly, the county has been able to achieve these land use goals by harnessing private market forces rather than using public funds.

STATUS REPORT ON THREE TDR PROGRAMS EXAMINED IN *SAVED BY DEVELOPMENT*

The author's 1997 book, *Saved By Development,* included case studies of 112 TDR programs. This section updates the status of three of the most successful of these programs. For the background and procedures used in these programs, please refer to *Saved By Development*.

Boulder County, Colorado

Boulder County's clustering technique, non-urban planned unit development or NUPUD, has preserved over 10,000 acres of land so far. But the original transferring mechanism, non-contiguous non-urban planned unit development or 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 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.

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, 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.

Calvert County, Maryland
According to Gregory Bowen, Deputy Director of the Calvert County Department of Planning and Zoning, the success of the Calvert County TDR 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.

New Jersey Pinelands
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.

RECENT TDR DEVELOPMENTS

Since the publication of Saved By Development in 1997, the author has run across another 27 TDR programs. These regional distribution of the new programs indicate that the Mountain West Region has spawned the most new TDR programs recently: Mid Atlantic 6, Pacific West 5, South 0, New England 3, Plains/Midwest 3 and Mountain West 10. The following paragraphs highlight some of the innovations from these newly discovered TDR programs.

Carroll County, Maryland
The County uses TDR to encourage the transfer of development away from known deposits of Wakefield Marble, a resource that is critical to the local construction materials industry, which is important to the County's economy. This adds "mineral deposits" to the list of resources that communities have sought to save with TDR.

Charlotte County, Florida
The County's TDR ordinance allows developers to buy TDRs for the purpose of returning development potential to sending areas from which TDR s were previously transferred. The County intended this provision to be used in the event that sending areas were rendered inappropriate for preservation after they had been saved. The example used was that of an environmentally sensitive area destroyed by a hurricane. However, this provision also shows that we may eventually see TDR programs in which sending areas are allowed to convert to receiving areas. Of course, this conversion would only be appropriate if the developer buys the required number of TDRs and if the community's general plan is amended accordingly. This procedure could make it feasible to adopt TDR programs in communities that are paralyzed by the fear of preserving an area that could someday be considered ideal for urban expansion.

San Luis Obispo County, California
This County has produced some of the most important TDR innovations. In its original TDR program, it authorized a local land trust to administer its TDR program. That land trust received a $175,000 loan to start a revolving fund. That fund buys environmentally sensitive properties, records deed restrictions on those properties and sells the resulting TDRs. The proceeds from these sales are used to buy additional properties from willing sellers. This original program has preserved 230 properties to date and doubled the amount of money in the revolving fund.

In a second, Countywide program, San Luis Obispo County allows TDRs to be transferred from land with significant differences in natural resources, development capability and marketability. Instead of predetermining the number of TDRs that can be sold on each site, the County requires a site-specific appraisal of the conservation easement's monetary value. This value is then divided by 20,000 to determine the number of TDRs available for sale from that site. With this approach, San Luis Obispo County addresses the problem of uniform TDR allocation to sending sites that actually have very different development values.

Thurston County, Washington
This County's agricultural preservation TDR program is similar to the program in Montgomery County, Maryland. However, three cities in the County have entered into inter jurisdictional agreements with Thurston County for the purpose of accepting TDRs. Of these three communities, Olympia offers a unique provision. Olympia targets from 5 to 7 units per acre as its ideal receiving area density. As with most TDR programs, Olympia allows developers to increase density from 7 to 8 units per acre by buying TDRs. But, Olympia also allows developers to reduce density from 5 to 4 units per acre via TDR. Through this mechanism, when Olympia allows lower than ideal density, it at least achieves the preservation of land in the sending area.

Larimer County, Colorado
Larimer County adopted a TDR pilot program for an area immediately south of the City of Fort Collins. The County and the City have an inter jurisdictional agreement. The receiving areas are under County jurisdiction. Fort Collins agrees not to annex the receiving areas before Larimer County approves the receiving area development, securing the preservation of sending areas in the process. In return, Larimer County uses the Fort Collins development standards and even gives Fort Collins an important role in the approval process. Every development in the receiving area has used the TDR option. Within the near future, all of the receiving area land will be developed and pilot program is expected to conclude with total participation.

Berthoud, Colorado
The incorporated Town of Berthoud, 40 miles north of Denver, started to develop a traditional TDR program. But planners soon realized that it could take years to resolve some important issues, such as the final Town limit and the desired proximity between the Town Center and the preservation area. The Town also saw problems with government-initiated rezonings of the receiving areas. Consequently, the Town adopted a density transfer fee. Developers still apply to receive the Town's urban density zoning. But, for that zoning, they must pay a fee of $3,000 per additional unit allowed by the change in zoning. The Town uses the proceeds of this fee exclusively to purchase land or easements from willing sellers of land in the greenbelt surrounding the Town. With this procedure, the Town was able to institute a preservation program immediately and benefit from hundreds of homes that were expected to be approved in the near term future. The Town's elected officials also were able to respond to developer applications rather that initiate receiving area rezonings that could have the appearance of being pro-growth.

Santa Fe County, New Mexico
Santa Fe County wanted to use TDR to encourage the preservation of over 5,000 acres of natural and scenic land flanking two highways. In 2001, it adopted a TDR ordinance that designated five receiving areas. In one of those receiving areas, planning was sufficiently developed to create a TDR receiving zone complete with maximum density and development standards. In the four other areas, the County established a TDR density threshold. Beyond that threshold, developers must buy one TDR for each additional unit requested in develop-initiated applications for general plan and zoning code amendments. Further planning is proceeding in these receiving areas that will eventually allow the County to consider TDR receiving area zoning complete with maximum density and development standards. But while this work progresses, the County has a viable preservation tool in place.

CONCLUSION

Every community has its own culture of land use traditions and development stakeholders. This precludes cookie-cutter approaches to stamping out TDR programs. The communities mentioned in this paper found ways to adapt the TDR concept to their unique needs. Sometimes innovations were designed to improve the effectiveness of TDR programs following adoption. In other cases, new ideas were used to create incremental TDR programs that are easier to adopt than Traditional TDR programs.

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