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INTRODUCTION

In 1998 the state of Georgia passed enabling legislation which authorizes local jurisdictions to implement transferable development rights (TDR) programs in their communities. This report offers an introduction to transferable development rights and presents a series of case studies of TDR programs around the United States. These experiences should be helpful to local governments in Georgia that are considering creating their own TDR programs.

The Purpose of a Transferable Development Rights (TDR) Program

The concept of transferable development rights (TDRs) is a recent innovation in land use control that allows communities to:

- ◆ preserve ecologically sensitive lands and historic landmarks,
- ◆ preserve important agricultural and forested areas,
- ◆ stimulate economic growth,
- ◆ manage urban development by targeting growth to desirable areas, and
- ◆ revitalize downtown districts by attracting new businesses and industries.

How TDR Programs Work

Under a TDR program, the development rights from a naturally or historically significant parcel of land are separated from the land and are sold for use on another tract. TDR programs channel development away from sensitive areas and into areas where such growth is sustainable and desirable. TDR programs allow communities to regulate land use and protect valuable resources while compensating landowners for the loss of development potential. TDR programs work through the free market at a significantly lower cost to taxpayers than many other regulatory systems.

TDR programs require the establishment of two designated regions: the sending area and the receiving area. Sending areas are sites in which development is limited, while receiving areas are sites where increased development is encouraged. Property owners in the sending site can voluntarily give up the right to develop their land and receive TDR credits in return. These credits can be freely sold or traded to anyone; the price for



this transaction is left up to the participants and the free market, just as if the land itself were being sold. The sending site is then placed under a conservation easement which is a legal agreement to restrict development. When a property owner in the receiving area purchases the development rights, he is allowed to expand development beyond current zoning limitations up to a specified maximum. Typically, the buyer is either a residential developer, who can build houses on smaller lots with TDR credits, or an industrial developer who can increase the floor size of the work area on the lot as dictated by the number of credits purchased.

In a successful program, the TDR credits are worth more to the seller than the unused development potential on the land. This is essential if the TDR program is optional to encourage participation in the program. The system must also be economically beneficial to the buyer, whose profit from the increased development must exceed the cost of the TDR credits.

An Example of a TDR Program

The following example illustrates how a local government in Georgia can use transferable development rights to achieve land use goals:

After several years of steady residential growth, a mostly rural county outside Atlanta decides it would like to manage further development to encourage balanced economic growth while preserving the natural and agricultural resources that make the area such a desirable place to live. Most of the remaining agricultural lands and natural areas are concentrated in the eastern half of the county. Most of the development is currently occurring in a haphazard, sprawl fashion along highways in the west, which is inconsistent with the county's goal of concentrating growth in designated centers to save on infrastructure

costs. The county has instituted zoning and developed a comprehensive plan with a map that shows the desired future land use. Using the future land use map as a guide, the county designates the most valuable portions of the eastern half of the county as TDR sending areas. Areas of the western half of the county that lie within designated growth centers, for example, new towns and cities, are identified as TDR receiving areas. Growth is restricted in the sending areas, but the landowners may obtain compensation by selling TDR credits to landowners in the receiving areas. When these credits are applied to a parcel in the receiving area, the owner may develop that parcel more densely, within established limits, and increase profits.



BUILDING A SUCCESSFUL TDR PROGRAM

This section offers a step-by-step discussion on how counties can create a transferable development rights program.

Legal Authority

To avoid challenges, a local government should have clear legal authority to develop and implement a TDR program. Local governments can exercise only those powers that have been granted to them in express terms or are necessarily implied or absolutely essential to the declared goals of state legislation. The force of this rule is significantly lessened in states such as Georgia where the state Constitution provides broad authority (known as home rule powers) to municipalities and counties. Home rule powers are generally construed liberally and would seem to include the power to implement TDR programs. However, explicit authority to create TDR programs was provided by the General Assembly of Georgia through the passage of House Bill 1540, which was signed by Governor Zell Miller on April 24, 1998. This law (attached as Appendix 1) specifically authorizes local governments to develop TDR programs and establishes guidelines for the program's operation. Programs established in accordance with this law should withstand legal challenges. Additionally, courts have recognized that local governments have wide latitude to zone for the public welfare. In so holding, the courts have upheld innovative land use techniques such as planned unit developments and cluster subdivisions even in states where no specific language in the state zoning enabling act authorized these innovations.

To meet the requirements of the TDR enabling law and to ensure due process, a local government should pass an ordinance outlining the process for the establishment

of and the use of TDRs. A sample ordinance is included (Appendix 2). The ordinance should specify the public purposes of the program, such as preservation of agricultural lands or urban renewal. Multiple purposes can and should be identified because it allows for flexibility in defining the sending areas. These purposes should be consistent with local governments' mandate to conserve and promote the public health, safety and general welfare.

Local planning changes may also be necessary. These can include:

- ◆ zoning and planning amendments,
- ◆ establishment of TDR sending and receiving areas in local comprehensive plans,
- ◆ creation of TDR overlay zones for receiving areas,
- ◆ adjustments to zoning maps,
- ◆ requirement of preliminary subdivision plans involving property in receiving areas accepting TDR credits,
- ◆ proper recordation of TDR transactions in land records,
- ◆ and the establishment of a coordinating body if the program is to serve more than one jurisdiction.

Legal documentation that may be a necessary part of a TDR program includes but is not limited to:

- ◆ a deed of transfer of development rights to purchaser,
- ◆ a partial release applicable to any outstanding mortgage,
- ◆ and a conservation easement on land from which TDR credits have been removed.



In sum, clear authorization to create a TDR program, combined with adequate planning, will head off legal challenges to the program's implementation.

Mandatory versus Optional Programs

Any successful TDR program is the product of intensive foresight and planning. After the public purpose is established, it is necessary to determine whether downzoning will be *mandatory* or *optional*. Under a mandatory TDR program, the local government restricts the land use in the sending area beyond current zoning limitations. The landowner is then compensated for the loss of development potential with TDR credits that he may sell. Ideally, the credits will be worth more than the development potential under the previous zoning restrictions. A mandatory program ensures that development will be restricted in the sending areas.

For example, current zoning in the sending area may allow development of one dwelling unit per acre. Under the TDR program, the sending area may be downzoned to allow development of one dwelling unit per five acres. An owner of a five-acre parcel would be given five development credits. He may use one credit to build a dwelling unit and sell the remaining four, or he may sell all five credits and permanently prohibit development on his five-acre tract.

Under an optional TDR program, the local government does not mandate downzoning, but only designates the sending areas. Landowners in those sending areas may continue to develop their property at the current zoning level, or they may sell their development credits and permanently restrict development on their land. Most optional programs allow the landowner to sell the development credits from a portion of his land. Ideally, the value

of TDR credits would be greater than the value of the development potential of the land to encourage landowners to sell their credits. An optional program does not ensure that development will be restricted in the sending areas and the program must be carefully designed to garner sufficient participation from the landowners.

In addition, the local government must decide whether increased development in the receiving area can only occur through the TDR program, or whether the local government will continue to allow increased development through petition to the planning board or other means. If the only way to achieve denser development is through the TDR program, it should ensure a demand for TDR credits. Moreover, mandated use of TDR credits for increased development does not require the additional effort and expense of persuading developers to use TDR credits. Developers with other options may choose more traditional and familiar methods, even if purchasing TDR credits would ultimately be more profitable. Although giving developers the option to increase density without using TDRs is less controversial, it may undermine the effectiveness of the TDR program. Interestingly, most of the TDR programs reviewed here have not required developers to use TDR credits to increase development in the receiving areas.

Establishing the Receiving Area

Determining the geographic boundaries of the receiving area is often quite challenging. The receiving areas may be defined parcel by parcel or much more broadly; however, the designation of all receiving areas must be consistent with the purposes of the program.



When a TDR program is established to channel development into a specific area, for urban renewal for example, the choice of receiving areas is obvious. More often, the choice of receiving areas is not obvious. There are two principle types of receiving areas: industrial and residential. Finding the appropriate area for residential development largely involves determining which area can best bear the hidden costs of infrastructure. Increased residential development requires sufficient roads, schools, sewer capacity, police protection, etc. Increased industrial development puts a lesser burden on an area's infrastructure but it must be accounted for nonetheless. Additionally, the receiving and sending areas should not be so far removed that the population in one region suffers a net loss in economic development while the other is burdened with excessive development. However, to adequately preserve sensitive areas, the sending and receiving areas must be separate.

Establishing the Sending Area

Selecting the sending area is often quite simple, since many TDR programs are created for the protection of specific geographic regions. It is important not to make the sending area too large, or the market will be flooded with TDR credits for which there is no market. Programs with mandatory downzoning must be especially careful to avoid a situation where the value of TDR credits is far below the lost development value of the land. Note, however, that downzoned sending areas pay reduced property taxes to reflect the loss of development value. This can provide at least partial compensation for the loss of development potential.

Land in the sending area must be assigned a value in credits. In many programs, this is a fixed per-acre value, such as one

credit per acre. This is effective when all land has roughly the same conservation value, as may be the case for some agricultural areas. Alternatively, a TDR program could assign a higher number of credits for more sensitive or valuable lands. For example, forest might be valued at one credit per acre while wetlands are valued at 1.5 credits per acre. There is no inherent right or wrong way to assign credits, but the method will influence the supply and demand for the credits both from landowners (when downzoning is optional) and from developers. It can be a balancing act between fairness, effectiveness, and simplicity.

Some TDR programs allow landowners of sending properties to repurchase development rights at a later time. The option of "buybacks" may help obtain participation from some landowners, but it removes the guarantee of permanent protection for sending areas.

Balancing Supply and Demand of TDR Credits

When establishing the sending and receiving areas, it is essential to balance the supply and demand of TDR credits. The demand from the receiving area will help determine the value of TDR credits. Moreover, it will set a limit as to how many credits could reasonably be placed on the market at one time.

In establishing a TDR program, the local government should try to avoid flooding the market with TDR credits, which will result in the devaluing of TDRs. For example, a local government would not want to establish sending areas that would produce far more TDR credits than could be used in the receiving areas. Moreover, when an area is zoned for a particular use there is, of course, a limited amount of demand for that use. Under a TDR program, a receiving area is zoned to allow



denser development of a particular type, for example, denser industrial development. But, if current zoning regulations satisfy the demand for development in that area, there may be no demand for TDR credits to provide additional development.

If downtown is zoned for industrial development and there is no demand for increased industrial development in that area, there will be no demand for TDR credits. The value of TDR credits would decrease, and landowners in the sending area would not be fully compensated for the loss of their development potential. It is of critical importance to ensure that supply and demand are well balanced when establishing a TDR program or at least some of the credits will be without value.

Development Potential of TDR credits

In establishing a TDR program, decisions must be made as to the development potential attached to each TDR credit. For example, one TDR may allow a developer to increase density by one dwelling unit per acre. If there are multiple receiving areas then it must be determined if credits will provide equal development increases for each of these areas. It is easier if a development credit allows the same amount of density increase regardless of the tract on which it is to be used, but it may result in uneven demand if one receiving area is substantially more attractive than others to developers. For example, to encourage development in receiving area A, a TDR may allow an increase of two dwelling units per acre, whereas in receiving area B, where demand for denser development is already high, one TDR may allow an increase of only one dwelling unit per acre.

The local government must also decide the upper limit of development density. This results in a two-tier zoning structure for receiving areas. The base zoning level is

that level of development permitted without TDR credits. The upper zoning tier reflects the maximum development density allowed with the purchase of TDR credits. Generally, this upper tier should be the development density indicated in the future land use map created for the government's comprehensive plan. A local government may also choose to add an intermediate level that specifies the minimum increase in density with TDR credits.

For example, an area has a base zoning allowance of one dwelling unit per acre. By purchasing TDR credits, a developer could develop six dwelling units per acre, using one TDR credit for every dwelling unit above the base allowance of one. To build six dwelling units, a developer would need to purchase five TDR credits. The local government may specify that in order for the TDR transaction to be worth while, the developer must use TDR credits to build at least four dwelling units per acre. Therefore, the developer would have the option of using four, five, or six TDR credits on the acre.

Valuation of TDR Credits

The valuation of TDR credits is left up to the free market. Price is generally determined by the number of credits assigned per acre in the sending area, the number of acres in the sending area, the demand for increased development in the receiving area, and the amount of development in the receiving area that each credit permits. If TDRs are not the only method of increasing density in the receiving area, then the value of these credits will also be influenced by developers' preference for TDRs versus other methods.

Encouraging Participation

Education is critical to the success of TDR programs. The operation and function



of TDR programs are not well known and may be intimidating to potential participants. This is particularly problematic in programs without mandatory participation. Education is the first way to encourage participation. The more a prospective participant knows the less time he or she should have to invest in order to become active in TDR exchanges. Realtors are important partners in TDR exchanges. They can aid in promoting TDR transactions to potential developers.

The American Planning Association (APA) recommends that, initially, the planning department engages in extensive efforts to ensure community awareness of the program. The planning staff must then monitor the program to identify stakeholders' concerns and work to rectify any procedural problems. These officials should regularly report to elected community officials and the public at large about the success of the program. The APA also recommends that agencies specifically identify both the actors in the real estate market who will be affected by the TDR program and understand their economic motivations. Typically there are four essential parties to any TDR transaction:

- ◆ the developer of land in the receiving zone,
- ◆ the owner of protected land in the sending zone,
- ◆ the units of local government, and
- ◆ the mortgage lenders.

There will be no transfers if there is no market for increased development. Developers must be anxious to buy and use TDR credits, while the owners of sending parcels must be presented with adequate compensation for loss of development potential. Support of the local government must be apparent to the community. Planners and

city officials must work together to determine the effect of a TDR program on property taxes, to determine other possible problems and solicit full community discussion, and to rally support for the program before implementation. According to the APA, there are several major benefits to developers:

- ◆ Decreased cost to produce subdivided lots
- ◆ Increased profit per unit sold
- ◆ Increased certainty of planning and zoning approval, or faster approval timetable

TDR Banks

Temporary and permanent TDR banks have been established to provide reassurance to landowners in sending areas that they will recoup lost development potential and to catalyze the sale of TDR credits. Generally, a TDR bank is a governmentally funded agency with the power to purchase TDR credits from landowners in sending areas if they are otherwise not able to sell them. If a program is properly established, a TDR bank will provide peace of mind to landowners but ideally should not have to be used as a buyer of last resort. Because the bank will facilitate the sale of TDR credits through the open market, participants should get more money from developers in the receiving area than from the TDR bank. TDR banks can serve as centers for contact between landowners and developers and thereby catalyze the sale of TDR credits. They can put interested landowners in touch with interested developers. Some form of catalyst to encourage this communication is important to a TDR program and real estate agents should also be able to aid in the sale of TDR credits.

The APA has concluded that TDR banks instill confidence in the community



that credits will be bought for resale at a later date. In addition, it may act as a stabilizing force by controlling supply when the prices for credits becomes too low or too high. However, for communities that are considering TDR banks, it is recommended that appropriate legislation authorize the establishment of this bank. In addition, local government must decide how much funding to allocate to this bank.

In some TDR programs, the government or non-profit organizations may also purchase TDR credits for the purpose of retiring them, rather than applying them to other properties. These programs essentially pay landowners to place conservation easements on their properties.

Administrative and Procedural Issues

The agency or department given the responsibility of establishing the TDR program must have the *capacity* both to design and to implement the program. The administrative system should be as fair and simple as possible. Streamlining the system so that there is a quick response time will help garner voluntary participation in the program. The administration of the program should reside within a single department, although input regarding the legal, economic, scientific and planning aspects should be sought from other departments and outside sources, when necessary. Scientific input is especially important for programs designed to protect ecologically sensitive areas.

Finally, it is necessary to establish a *recording mechanism* for TDR transactions to validate the transactions and prevent abuses. Without such recordation the system cannot be evaluated and, worse, cannot hope to function properly.

The Takings Issue

One of the areas of greatest concern among local governments regarding land

sue control is the issue of "takings." The Fifth Amendment in the Bill of Rights guarantees that government can not take physically take property for public purposes without paying for it. This clause permits the government to physically appropriate private property for government or public use, such as taking land for a public highway, by compensating the landowner. In some circumstances, the court has held that the government has regulated the use of property to protect the public health and welfare in such a manner that it is equivalent to a physical taking. In determining whether a taking has occurred, courts inquire whether the owner is left with a reasonable economic use of the property. A regulation that denies the most the most lucrative use of a property does not give rise to a taking if the landowner still has a reasonable economic use of the property.

Regulations have also been struck down as takings when they are found to serve no legitimate public purpose. Courts consistently recognize that the goals of TDR programs, such as the protection of open-space and agricultural lands, historic landmarks and environmentally sensitive areas, are valid public purposes.

The United States Supreme Court has upheld the TDR program as a valid legal tool for historic preservation and environmental conservation. In the landmark 1978 *Penn Central v. City of New York* case, the Court held that the city could prevent development of a 70-foot office tower on top of the Beaux Art Grand Central Station. The Court said that by prohibiting development on top of the station, the city had not denied the landowner of all reasonable economic use of the property. In reaching its conclusion, the court found that the landowner had not exercised his right to transfer the development rights to the space above the station. The potential to sell the development rights above the



station was a reasonable economic use of that property. This decision validated the use of TDR programs as a conservation tool.

Although the Supreme Court has indicated that TDR credits constitute a significant part of the determination of whether a taking has occurred, it has not decided whether TDR credits alone can be sufficient to ward off a taking. In dicta, i.e. non-binding discussion, the court acknowledged that TDR credits could be a factor in a takings analysis but did not discuss what weight this factor could carry. Justice Scalia, in *Suitum v. Tahoe Regional Planning Agency*, indicated that TDR credits could speak only to the determination of whether the landowner was adequately compensated to thereby avoid a taking. In a few cases TDR programs have been challenged on technical grounds. A well-crafted ordinance, backed by state enabling legislation and the local comprehensive land use plan, should withstand legal challenge on technical grounds.

The question of when a party can sue for a taking was also addressed in *Suitum v. Tahoe Regional Planning Agency*. The court held that a plaintiff need not attempt to sell TDR credits before suing for a taking. A two-pronged test was established to determine the "ripeness" of the claim. The plaintiff must receive a "final" decision from the agency running the TDR program concerning the affected property and the plaintiff must exhaust the State's procedures for compensation. In *Suitum*, the agency running the TDR program downzoned the property and had no more control over the value of the TDR credits so the State's procedures were exhausted. The plaintiff did not have to go to the free market for compensation before suing under a takings theory. The Court decided that the value of the TDR credits could be

gleaned from an estimation of their market value without actually conducting the transaction. The Court's decision might have been different if the state had provided a TDR bank as a purchaser of last resort because in that situation, the State would, to an extent, control the value of the TDR credits.

In sum, TDR programs have withstood legal challenge under a takings theory. A well-constructed TDR ordinance created under state enabling legislation or through a municipality or county's home rule powers is likely to withstand legal challenge. The true challenge is designing a TDR program tailored to the needs of the county that will be well supported by landowners and developers.

Sources

Richard J. Roddewig and Cheryl A. Inghram, *Transferable Development Rights Programs: TDRs and the Real Estate Marketplace*, American Planning Association (APA) (1985).

Transferable Development Rights, <<http://www.patuxent-tidewater.org/TDR.html>>

Dennis J. McEleney, *Using Transferable Development Rights to Preserve Vanishing Landscapes and Landmarks*, 83 Illinois Bar Journal 636 (1995).

Norman Marcus, *Transferable Development Rights: A Current Appraisal*, 1 Probate and Property 60 (1987).

American Farmland Trust Report, *Transfer of Development Rights: What Works* (1997).

World Wildlife Fund Report, *Statewide Wetland Strategies: Protecting and Managing the Resource*.



CASE STUDY

Montgomery County Program (Maryland)

Purpose of the Program

The Montgomery County TDR program was created in 1978 in an attempt to control and manage urban encroachment from its southern neighbor, Washington, D.C. Montgomery County still has valuable rural and agricultural land in need of protection and sustainable development.

Synopsis of the Program

The program is highly successful and touted throughout the country as a model TDR program. As of November 1997, 6,000 TDRs have been purchased and approved for use in receiving areas, protecting 43,000 acres of farmland.

History of the Program and Characteristics of the Area

Montgomery County has a population of roughly 580,000 and a land area of 323,000 acres and is bordered by the Potomac River and Frederick and Howard Counties. Urbanization of the county has proceeded at a rapid pace. In 1973, the county adopted a five-acre minimum lot-size requirement in an effort to stem residential development in prime agricultural areas. That failed to prevent urban encroachment, which continued to devour prime agricultural land. During the 1970s, Montgomery County lost 18 percent of its farmland.

The Montgomery County Planning Commission's concern about further loss prompted the appointment of a task force to explore methods of preserving agricultural uses in the county. Three alternatives were considered: downzoning, outright purchase of agricultural land, and a TDR program. The task force concluded that

downzoning would be unfair to property owners and the public acquisition of farmland would be too costly. It settled on a TDR program to preserve both farmland and the viability of agricultural enterprise in the county.

Prior to the enactment of the TDR program, about 3,500 acres of farmland were converted to urban use each year. Since its enactment in 1980, only 3,000 total acres have been converted, an undeniable result of the TDR program combined with the county and state easement purchase programs.

How does the TDR Program Operate?

In 1980, the county approved and adopted the agricultural and open space preservation plan, designating an Agricultural Reserve of 110,000 acres (more than a third of the county) and downzoning and classifying it as a Rural Density Transfer Zone. Planners determined that a farm needed at least 25 acres in order to operate profitably; thus, the maximum allowable density within the Agricultural Reserve was reduced from one dwelling unit per five acres to one unit per 25 acres. Property owners within the Agricultural Reserve were given one development right for every five acres of farmland they owned. In 1981, an initial receiving area was established for up to 3,000 development rights, large enough to receive transfers from 15,000 acres of Agricultural Reserve land. Thirty-five to fifty additional receiving areas have since been identified.

The Maryland-National Capital Park and Planning Commission, a regional planning agency, worked closely with Montgomery County to provide both the



land-use planning and economic analysis to ensure that the program would work effectively. Planners and economists recognized that unless their program design was based on the realities of the private real estate market, the program would fail. Although the program is mandatory in that downzoning occurred, property owners are not required to sell their development rights.

By purchasing development rights, developers in the receiving districts can increase the base density of building sites by varying amounts, depending on the zoning classification. For example, where the underlying zoning classification permits five units per acre, the TDR program allows an increase of two units per acre to a total of seven units per acre.

The density increase on the receiving parcels must be at least two-thirds of the possible maximum density in order to both:

- 1) ensure that receiving areas are developed to a density sufficient to sustain market demand for TDRs and
- 2) avoid spreading a few TDR rights across a large number of receiving parcels.

For example, on a 20-acre site with base zoning permitting a total of 100 units and a density option of an additional 40 units, the developer must purchase at least 27 TDRs and construct at least 127 units ($100 + (40 \times .667)$).

The procedure for a development rights transfer is as follows. First, the farmland owner sells his rights or an option to a developer who plans to build in a receiving area. The developer then files a preliminary plan of subdivision for the property with the Montgomery County Planning Board, using at least two-thirds of the possible development rights transferable to that

property in accordance with a specific designation on the Approved and Adopted Area Master Plan. Once the preliminary plan is approved, the developer files a site plan. Following site plan approval, the developer prepares a record plat and submits it to the Montgomery County Planning Board along with proof of TDR ownership.

An easement restricting the number of one-family dwellings and other development that can be constructed on the farmland in the sending area is prepared. This restrictive easement is conveyed to the County and filed with the deed prior to recording the plat for the receiving area. It is binding on all future owners of the property.

Realtors list TDRs and earn a commission on transactions; appraisers are using comparable sales of TDRs to value the rights. Development rights are valued in the private market, without government involvement; the price is established between buyer and seller.

Activity

As of November 1997, 6,000 TDRs have been purchased and approved for use in receiving areas. About 43,000 acres of farmland have been preserved. (In 1985, these figures were 1,145 TDRs protecting 5,725 acres of land.) A one-acre lot in the Agricultural Reserve currently is worth \$5,000; the value would rise dramatically if the restrictions on the land were removed.

Incentives to Use the TDR Program

There were many incentives that contributed to the success of this program. The sending areas had enough development potential to make the sale of development rights financially attractive to the farmers who owned the land, and the receiving sites were in areas where development demand was strong enough to create a



market of willing buyers. Because there has been a soft market for multifamily housing in the county, the rights can be applied only to single-family and townhouse development, to ensure that prices and demand for TDRs will be high. The provision of water and sewer services to properties where TDRs are applied is a priority of the county government. Furthermore, the County launched an extensive educational effort to sell the program to both buyers and sellers.

Education Efforts

The county's educational program included comprehensive reports to the public on the Montgomery County Master Plan and a Questions & Answer booklet for property owners.

Purchase of Development Rights (PDRs)

A County Development Rights Fund was established to act as buyer of last resort and to provide guarantees for loans that used the value of development rights still attached to farmland as collateral. The fund was designed to "bank" TDRs, then sell them at auction to the highest bidder. Loan guarantees are available for up to 75 percent of the market value of the farm for a term not to exceed five years. Because the private market has been strong enough to support the TDR program, the county fund has not been used.

Buybacks

TDRs cannot be recaptured or bought back. When TDRs are sold, they are permanently removed from the property described in the easement.

Administrative Costs

The initial effort required the allocation of staff resources. Montgomery County

reports that ongoing administrative costs are negligible as the TDR process is incorporated into the subdivision review and approval process.

Montgomery County has full legislative control over both sending and receiving areas, having omitted incorporated areas from the TDR program. Consequently, developers do not have to cope with a multi-tiered review and approval process, and the county does not have to be concerned about compatibility with other local governments' planning and zoning requirements.

Litigation

In the first case against Montgomery County, the court ruled that the downzoning necessary to implement the TDR program was legal. The court said that the zoning ordinance substantially advanced legitimate government goals, and the economic impact was not so severe as to amount to a taking of property. In so ruling, it was not necessary to examine the legality of the TDR program.

In *West Montgomery County Citizen's Association v. Maryland National Capital Parks and Planning Commission* (1987), Maryland's highest court ruled against the county's TDR plan because it designated receiving zones by amendments to the master plan instead of amendments to the zoning ordinance. The court ruled that there are substantial differences between the planning and zoning functions. The court said it was necessary to amend the zoning ordinance and the zoning map, which was subsequently done.

The final case against Montgomery County's TDR program challenged the county's policy that TDRs could not be transferred outside the area covered by a given master plan. The court ruled that the county could not restrict TDR transfers to a given master plan area.



Why was the program successful?

Montgomery County's TDR program succeeded because it fulfilled the following critical conditions for a workable program:

- ◆ There were sufficient restrictions on sending areas to give rise to TDR sales.
- ◆ Receiving sites were designated that had infrastructure capability and sufficient development demand to make additional density increases attractive to developers.
- ◆ There was a recognition of the economic and financial conditions that underpin a TDR market and determine the value of TDRs to both sellers and buyers.
- ◆ The program design is simple and understandable and does not require complex approvals.
- ◆ The local government had a commitment to an educational effort to inform landowners, developers, realtors, and attorneys about the program. The emphasis is on the TDR program as "working in conjunction with the housing market" rather than as a "no growth scenario." "Market forces are not stopped, but are redirected."

Sources

Interview with Dennis Canavan, Maryland-National Capital Park and Planning Commission, 8787 Georgia Avenue, Silver Spring, MD 20910-3760. Phone (301) 495-4595; Fax (301) 495-1306.

Evaluating Innovative Techniques for Resource Lands, Part II: Transfer of Development Rights. State of Washington, Department of Community Development, Growth Management Division, 1992.

Fehr, Stephen C. "Montgomery's Line of Defense Against the Suburban Invasion." *The Washington Post*, page A01, Tuesday, March 25, 1997.

Heilberg, Dana E. "The Reality of TDR." *Urban Land* 34 September 91.



CASE STUDY

The Pinelands Commission Program (New Jersey)

Purpose of the Program

The Pinelands Commission's goal is to preserve and protect the natural resources of the Pinelands region. This objective is obtained by transferring development credits from designated preservation areas to designated growth areas. The transfer achieves the goal of conserving the Pinelands natural resources, compensating the property owners, and allowing developers to increase density where appropriate.

Synopsis of the Program

The Pinelands program is multi-jurisdictional, encompassing seven counties. It has been very successful, protecting over 100,000 acres of land. The vast scope of the program coupled with its overwhelming success has made the Pinelands a national model for transferable development rights programs. The history of the Pinelands program exemplifies the cooperation needed between the state and the various counties and municipalities to commence a successful and long lasting land management program.

History of the Program and Characteristics of the Area

In the 1970's the expansion of Atlantic City combined with the growth of the gambling industry, retirement housing, and other development threatened the Pinelands region, which is an ecologically significant area in southeastern New Jersey. The Pinelands Commission was formed in 1979 to develop a plan to protect the forests, wetlands, creeks and rivers of the area.

Federal legislation was passed establishing the Pinelands Preserve and a regional

planning body. State legislation—the Pinelands Protection Act—endorsed the planning process and also promulgated Transferable Development Rights as one possible method of controlling growth and development.

A unique aspect of the Pinelands plan is that it encompasses seven counties (Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, and Ocean) and fifty-three municipalities. These seven counties were required to prepare local land-use regulations consistent with the comprehensive plan. The region was divided into management districts to aid in rezoning and the allocation of development rights based upon the land type. The management districts include: Preservation (for the most sensitive land-wetlands), Forest, Agricultural, Rural Development, Regional Growth, and Pinelands Village and Towns District.

How does the TDR Program Operate?

The Pinelands Development Credit (PDC) program is a major component of the comprehensive management plan. It creates development rights that are given to property owners in regions that are designated as preservation areas. The property owners in these areas are then able to sell the rights to developers in areas that have been designated as regional growth areas. Once the property owner sells the PDCs they are required to deed restrict their land through conservation easements to insure that future development is prohibited. Thus, the property owners are compensated for the loss of future development, developers are allowed to increase densities in



specified growth areas, and the land is preserved for generations to come.

The PDC program operates in 39-acre increments. Woodlands, for example, are given one development credit per 39 acres. Farmland, because it is more valuable than woodland, is given two development credits per 39 acres. Because wetlands have the least development potential, they have been assigned 0.2 credits per 39 acres. Each development credit allows the purchaser to develop four extra residential units in the designated growth areas.

A recent key addition to the PDC program has been the institution of the Pinelands Development Credit Bank, authorized by the New Jersey legislature, which has helped to bring interested parties together and also to acquire credits and preserve particularly sensitive regions. The bank was created with \$1.5 million in bonds with the goal of stimulating the private market and acting as a buyer of last resort. In its first years the bank purchased 91.75 PDCs and sold 8.75. The program has subsequently provided for the preservation of over 100,000 acres of land. The sale price has typically been \$10,000 for one Pineland Development Credit. Since the creation of the bank there has been an appreciable increase in the amount of trading. The Bank's role in the future will likely be to identify sellers of PDCs and then inform developers who are willing to purchase the credits, but who may have problems identifying and contacting sellers. It is likely that there would have been a much more active trading market had the bank, acting as the middleman, been in place since the start of the program.

Activity

Over 85,000 acres of the Pinelands have been transferred to state ownership under the PDC program. In 1996 the Com-

mission handled over 1,287 development applications. There was a definite increase in the program's activity once the PDC bank was established to facilitate the transactions between developers and property owners. With a greater demand for PDCs than available PDCs, interest in the Pinelands program should remain strong.

Incentives to Use the TDR Program

The major incentive is the requirement that developers must purchase PDCs in order to increase density. In other words, the Pinelands Commission created the incentive by eliminating other methods of increasing density. This insures that the program will have a potential user base and therefore increases the likelihood of activity. It has made the purchase of PDCs relatively easy with little or no transaction costs.

Education Efforts

The Pinelands Commission has one staff member in charge of educating the public about TDRs and the Pinelands project. It also has a web page that provides information about the history of the Pinelands and explains how to obtain newsletters and other information. From its inception, the Commission made the community aware of the program's goals and how it would operate.

TDR Banking

The Pinelands Commission has set up a PDC banking system that facilitates the transfer of development credits from the property owners to the developers. The bank will also act as a buyer of last resort and will purchase development credits to preserve land that it deems critical.

Buybacks

Buybacks are not allowed under the Pinelands TDR Program.



Administrative Costs

The 1997 operating budget of the Pinelands Commission is \$3,358,392. Because of the enormous breadth of the Pinelands operation there is a great deal of administrative cost. A large portion of the money, approximately \$2,700,000, comes from the state of New Jersey. The additional money is acquired through the federal government, the accumulation of interest, and other sources. The largest expense is personnel. Other categories of expenses include: supplies, services, maintenance, capital improvements and acquisitions, debt service, and local grants.

Litigation

Though there have been challenges to the Pinelands Commission, they have never been successful in part because the Commission's power is derived from both federal and state enabling legislation.

Why was the program successful?

It is important to understand why the Pineland PDC program has been so successful:

- ◆ The counties and municipalities cooperated to make their individual plans and zoning ordinances consistent with the comprehensive Pinelands plan.
- ◆ The Pinelands Commission is involved in all potential development changes that the various communities propose.
- ◆ The Pinelands Commission has a permanent staff with expert knowledge in technical problems, economics and the law.
- ◆ The development exchange is the primary mechanism for developers to increase their zoning density. It is difficult to upzone, so the easiest

way to increase density is by using the Pinelands Development Credits. The Commission has control over both the PDC sending and receiving sights.

- ◆ The Commission has clearly spelled out the objectives and operation of the program.
- ◆ There is a strong regional interest in protecting the New Jersey Pinelands.
- The Development Credits may be applied within a wide area. The Pinelands are in close proximity to Atlantic City, Philadelphia, New York City/Northern New Jersey. This leaves a large market in which the development credits may be used, and there is a perceived need for increasing the density of development in these areas.
- ◆ The program is set up so that property owners know the category that their land falls within and the number of PDCs that they will receive for their land.
- ◆ The Pinelands Development Credit Bank has helped reduce transaction costs so that they are now minimal.

Sources

Pinelands Web Page: www.burlco.lib.nj.us/pinelands.

Thurston County, Washington Transfer of Development Rights Feasibility Study.

Transferable Development Rights Programs: TDRs and the Real Estate Marketplace. Richard J. Roddewig and Cheryl A. Inghram.



"New Jersey's Special Place: Pinelands National Reserve." Terrence D. Moore. *New Jersey Lawyer, the Magazine*, April 1995.

Impact of Regional Land-Use Controls on Property Values: The Case of the New Jersey Pinelands. W. Patrick Beaton. *Land Economics*, May 1991.

Recent Developments in Environmental Preservation and the Rights of Property Owners. Linda Bozung and Deborah J. Alessi. *Urban Lawyer*, Fall 1988.

Institutional Guidelines for Designing Successful Transferable Rights Programs. James T.B. Tripp and Daniel J. Dudek. *Yale Journal on Regulation*, Summer 1989.

Interviews with Betsy Carpenter (609) 894-9342 and Larry Liggett: (609) 894-9342 of the Pinelands Commission.



CASE STUDY

Calvert County Program (Maryland)

Purpose of the Program

The purpose of Calvert County's transferable development rights program is to offer incentive for the preservation of the remaining agricultural and forested land within the county and to guide development to more suitable areas. The TDR program allows the county to benefit from the conservation of these lands without burdening taxpayers with acquisition costs. Finally, the transfer of development rights can help maintain the rural atmosphere that attracted so many of the current residents to the area.

Synopsis of the Program

A landowner within an Agricultural Preservation District (APD) may sell their development rights while maintaining the right to continue farming or engaging in forestry activities. These transferred development rights can only be applied to the construction of family or tenant housing with no allowance for commercial or industrial use. Free market forces determine valuation of all development rights. The county's major role in these transactions is to qualify lands for participation (for both sending and receiving areas), to officiate the actual transfer of development rights, and to approve the language of the conservation easement placed on the sending site.

History of the Program and Characteristics of the Area

This program was enacted in 1978 with the goal of preserving the remaining farm and forested land in the county through the development of Agricultural Preservation Districts (APDs). Calvert was the first county in Maryland to establish an APD

program.

After several years of successful development right transfers, Calvert County amended the TDR program. The first change was the designation of receiving areas to streamline the process. Prior to 1993, receiving areas were designated on an as needed basis which slowed the transfer process. The designation of receiving areas was accomplished via the creation of a Transfer Zone Districts Overlay for the county zoning plan. Another change was the creation of the Purchase and Retirement Fund (PAR) whereby the county can purchase and retire a certain number of development rights each year (see more on PARs in the Purchase and Retirement section below). The final amendment was the Mandatory Clustering Provision which requires that 50-80% of the land within all new subdivisions be preserved as open space. Three new zoning overlays that assist in the preservation of rural and farming communities as well as other significant natural resource areas were added.

The TDR program has resulted in the preservation of one-third of Calvert County for agricultural or forestry production.

How Does the TDR Program Operate?

For a landowner to qualify to sell development rights, their property must be enrolled within an Agricultural Preservation District. They may apply to either the state or county APD program or both, but the landowner cannot gain financial benefit from both. If an application is successful, it is recorded with either the state or county.



Once the property is enrolled, the landowner prepares a plan documenting land use (agricultural or forest). The number of development rights accompanying the land is certified and a covenant restricting the land's use to farming or forestry activities is recorded. Finally, a development option agreement is negotiated. At this point, the rights may be transferred

If the owner has chosen the state APD, the rights can be sold to the state in the form of a conservation easement. The transfer of an easement involves (1) the implementation of a soil and water conservation plan; (2) a calculation of the value of the easement; and (3) acceptance of the application by the Maryland Agricultural Land Preservation Foundation which makes decisions on a biannual basis.

Both the state and county programs are driven by a free-market system in which buyers and sellers make all decisions regarding the price paid for development rights.

Activity

By all accounts, the Calvert County program has achieved its target goals. Of the desired 20,000 acres for preservation, nearly 18,000 have been enrolled in either the County or State Agricultural Preservation Districts.

Within a recent two-month period approximately \$900,000 of development rights were transferred via the programs. For the year 1997, development rights sales averaged \$2,400 per acre.

Incentives to use the TDR program

There are incentives for both landowners and developers who use the TDR program. Once a tract is enrolled within an APD the owner does not pay property taxes on the land itself though taxes are still assessed on houses and house lots. Land in an APD is protected from condemnation by

the county for public facilities and utilities. The most obvious benefit from having one's land in an APD is the potential of selling the development rights.

For developers, the main incentive for using the TDR program is the ease with which it allows for the densification of a property. The developer does not have to submit a time-consuming application for increased development with its attendant meetings with the Planning Commission. Although it is possible to petition the Planning Commission for increased density, it is easier to receive a density increase through the TDR program. In fact, there have not been any applications for upzoning since the TDR program began in 1978. The Transfer Zone District Overlay created in 1993 makes use of the TDR program even easier than before.

Education efforts

This program has been so overwhelmingly supported by the landowners and developers in Calvert County that very little outreach was necessary to generate interest in the program. Recently, a part-time employee was hired to inform the remaining landowners of the TDR program's existence and benefits. The new education coordinator conducts group and individual meetings.

Purchase and Retirement Fund

The county annually purchases development rights through the Purchase and Retirement Fund (PAR). This is a program operated with county funds matched by state funds from the Agricultural Transfer tax. The rights are permanently retired rather than made available for re-sale to developers. The PAR has funded the preservation of approximately 2,000 acres.

Additionally, there is a conservation easement program at the state level. Through this program, the state purchases



conservation easements from farmers. The value of an easement, which is paid by the state, is the difference between the land's value for development and its value as farmland. The state retires the development right permanently.

Buybacks

The Calvert County system does not provide an opportunity for landowners to repurchase development rights they sold in the past. Instead land from which development rights have been sold is permanently committed to agriculture or forestry. Landowners are permitted to construct tenant housing so long as the density does not exceed one house per 25 acres.

The state system allows for a rights buyback. However, this can occur only after the development rights have been sold for 25 or more years. This option has not been used by landowners in Calvert County.

Calvert officials feel that a buyback provision would substantially weaken their TDR program. They suggest that a TDR should be like most other forms of real estate transactions (i.e., outright sale of land, sale of mineral rights, etc.) which are permanent in nature.

Administrative costs

Throughout the history of this program, the administrative costs have been very low. The only staff necessary to process applications and file transfers are a full-time secretary and the deputy director, who spends approximately one tenth of his time administering the program. Recently, the

county added a part-time employee to assist in landowner education.

Litigation

There is no litigation pending against Calvert's TDR plan, nor has there been any in the past. The program seems to be well accepted by all parties.

Why was the program successful?

The Calvert County TDR program was successful because of the valuable incentives for landowners and developers to use the program. Moreover, the program was designed to preserve the rural nature of the county which attracted many landowners to the area in the first place.

Sources

Chesapeake Bay Program WWWpage, Case study on Calvert County
<www.epa.gov/r3chespk/old/dop_home/localgovold/mtc/mtc033.htm>

Interview with Gregory Bowen, Deputy Director, Calvert County Department of Planning and Zoning, 176 Main Street, Prince Frederick, MD 20678, (410) 535-2348

Agricultural Preservation Rules and Regulations, Prepared by the Calvert County Agricultural Preservation Advisory Board, July 1, 1996.

Calvert County Agricultural Preservation Program Brochure, Prepared by the Calvert County Agricultural Preservation Advisory Board, January 1995.



CASE STUDY

San Luis Obispo County Program (California)

Purpose of the Program

San Luis Obispo (SLO) County developed a transferable development credit (TDC) program in order to retire rural lots in areas of the county where infrastructure is lacking. In addition to reducing development in the outlying rural areas, the program preserves agricultural and other natural resources.

The 1996 amendments to the TDC legislation characterize the primary purpose of the TDC program as one designed "to promote appropriate settlement patterns while maintaining an overall level of development within the capacities of transportation and other public service systems. As a countywide program it endeavors to:

- ◆ protect both land with agricultural capability and the business of agriculture itself;
- ◆ reduce development potential within land divisions or other areas that do not have adequate services for residents;
- ◆ protect important or extraordinary natural areas, habitats or cultural resources; reduce development potential in areas that may have the potential for landslides, fires, or other hazards;
- ◆ and reduce air quality impacts associated with locating residential development distant from jobs, schools, shopping and recreation." (Amendments to Framework for Planning—Inland Adopted October 8, 1996 Resolution No. 96-385)

Synopsis of the Program

The program is voluntary, incentive-based, and market driven between willing sellers and willing buyers. Landowners are not obligated to use this technique to request an amendment to the general plan or to subdivide property in conformance with existing regulations.

History of the Program and Characteristics of the Area

In 1989, the Board of Supervisors of San Luis Obispo County appointed a Blue Ribbon Committee to study the county's growth patterns. Rural areas were of particular concern. The resulting *Rural Settlement Pattern Strategy* suggested a phased approach whereby the county surveyed available lots and growth patterns and then issued recommendations on how to cope with the effects of growth on environmental resources. It concluded that a TDC program would best achieve these aims.

The county's resources as outlined by the *Strategy* are presented below:

- ◆ A large number of existing vacant lots in the rural areas of the county would support development without the need for further subdivision.
- ◆ The overall pattern of development (as seen in building permit activity, creation of new lots and certificates of compliance) had shifted into the outlying rural areas. New development was occurring farther away from the edge of existing rural communities.



- ◆ The historical pattern of land use decisions and new development, as projected by the existing general plan, was putting pressure on prime agricultural lands.
- ◆ Many "rural" areas of the county were committed to residential home sites.

The *Strategy* also determined that the outlying rural areas of the county, where parcels were larger than 160 acres, contained a majority of the county's agricultural and natural resources. Serving residential uses of those areas would be expensive as adequate infrastructure did not exist. Therefore, those areas were deemed to be the most suitable for protection. The *Strategy* determined that land adjacent to existing urban areas was the only suitable area for increased development.

The *Strategy* outlined, in order of priority, the following objectives for land use planning in SLO County:

- ◆ Concentrate development in urban areas.
- ◆ Locate new development in close proximity to existing urban areas.
- ◆ Look carefully at the "critical transition area" surrounding the urban areas. This is where there is a fragmented pattern of development and where the county could lose its rural character.
- ◆ Hold the line in outlying areas. Protect the existing agricultural and rural character of the areas by retaining existing uses and lot sizes.

In order to further these objectives, the *Strategy* recommended the TDC program.

It noted that the acceptance of a TDC program in a community was going to depend upon the acceptability of the specific areas to be protected and the manner in which additional development would be designated and developed.

In 1993, the Transfer of Development Credit Technical Advisory Committee (TAC) began to review the issues associated with the development of a TDC program. TAC was comprised of citizens ranging from ranchers to real estate brokers. This committee documented settlement patterns on a regional basis and suggested criteria for sending and receiving areas. However, one of its most salient recommendations was a pilot project that the Board of Supervisors approved.

TAC changed some aspects of the program based on the results of this trial run. First, it determined the program should run countywide instead of on a regional basis. Second, TAC designated more sending and receiving sites. TAC has subsequently issued a number of project reports summarizing the experiences of the two-and-a-half years of the pilot.

How Does the TDC Program Operate?

To be eligible for the TDC program, the sending tract must meet criteria for either agricultural land, resource land (wetlands, oak wetlands, etc.), or antiquated subdivisions. Antiquated subdivisions are defined as lots without adequate infrastructure or services that if developed, would result in growth above that anticipated by the general plan. Both specific and general criteria have been established; the specific criteria are designed to be clear and easy to understand while the general criteria provide flexibility when the area does not satisfy specific standards.

Development potential of a tract may be limited by easement in one of two ways.



One easement removes the potential for any residential use. This easement is used for sites that qualified using the agricultural criteria. A second easement is even more restrictive. As an incentive to encourage landowners to enter into more restrictive easements, bonus credits are available for any natural resources that will be protected on the land.

The landowner submits an application along with a deed to the county. The application will designate the sending parcel as eligible for either full or partial development rights. If the owner wishes to reserve some development potential (aside from residential development), he/she must apply for a partial development credit. If the owner wishes to give the entire property to a public or non-profit (tax-exempt) agency, he/she will receive TDCs based upon the full value of the property. The number of credits that will be assigned to a specific tract will be based on the value of the land as determined by a professional appraiser.

The TAC formally reviews the application and sends a "Notice of Eligibility" notifying the owner of qualification as a sending site and the amount of credits the land will receive.

The owner then enters into a permanent conservation easement to run with the land. After this easement is recorded, the TDC Administrator issues a TDC Certificate of Sending Credits. The county then amends the General Plan to mark this property as a sending site. At this stage, the owner may also apply for a review of the property tax assessment. The degree of the local property tax relief is dependent on the facts of the particular situation.

In order to use the TDCs on a particular receiving site, the developer may file either for a "Preliminary Determination" or a "Determination with Tentative Map". A

Preliminary Determination does not guarantee that the property will be eligible as a receiving site. It is a simplified review process for those owners curious about the potential for TDCs.

The planning staff reviews the application and submits a recommendation to the applicable Review Authority (in the case of a tentative map) or the TDC Review Committee. The county decides if the site is eligible and how much of a density bonus should be granted.

The buyer may then shop for TDCs. The buyer and seller fix the price for the credits. There are no specifications on the kind of financial arrangement made between the two parties. A seller may participate as an equity participant in the project where TDCs are used.

In addition, the buyer is not required to show proof of ownership (or spend any money on TDCs) until he/she is ready to record the final map. When the map is ready to be recorded, the seller and buyer go to the TDC Administrator to obtain legal title to the TDCs. If all credits are not desired by the buyer, the seller receives a new certificate for the remainder. Once the buyer purchases the TDCs, they must be used on the project. The ordinance has been written to prevent speculation by private individuals. However, non-profits may purchase TDCs to permanently retire the lots. The definition of a non-profit is any tax-exempt organization and may include churches, libraries, and environmental organizations.

After the Receipt of Transfer is recorded with the county, the map is recorded with the additional densities allowed by the TDCs.

Until a TDC Administrator is hired, the planning department is performing the Administrator's functions. These include keeping track of how many TDCs are as-



signed to a property, which TDCs have been used, to whom TDCs were transferred, and how many TDCs are available for sale. The Administrator typically would be a title company charging a fee for its services.

The county is not involved in buying credits to retire them. However, the ordinance is designed to allow non-profit and government agencies to buy credits for that purpose.

Activity

There has been no transfer of TDCs to date due to pending litigation. (See the section on Litigation, below.) However, there have been two applications for sending sites. The first site is a ranch owned by an elderly man who wishes to leave to his daughters the development credits, and his son the actual land. The land is extremely valuable. The rancher wants to ensure that his son will not be forced to pay enormous inheritance taxes, thus he is severing the development rights to decrease the land's worth. The second site is also a ranch whose owner is interested in decreasing development potential in order to decrease both property and income taxes.

Incentives to Use the TDC Program

The ordinance attempts to provide incentives to both sending and receiving site owners to use the program. Sending sites are awarded credits based upon the development worth of the land. The landowner may determine this value through a professional appraisal by subtracting the "before and after" values of development. However, for those who would prefer to avoid the cost of an appraisal, the ordinance allows the use of a figure of 50% of the worth of those properties that have been recently assessed. The credits themselves are a valuable asset to many farmers. For those who wish to remain on the land

and farm, selling the TDCs may result in enough funding to retire outstanding loans.

Receiving sites may be developed more densely than normally allowed when the owners purchase TDCs. The criteria for bonus densities are based on the distance from urban areas and the availability of services. In addition, planning staff will prioritize the processing of applications for those sites that have qualified for density bonuses based upon protection of natural resources.

Under current regulations, the owner is not obligated to use TDCs when applying for denser development of their property and can obtain approval for denser development through a General Plan Amendment or subdivision of their property. However, planners hope that the TDC program will be a more attractive option than amending the General Plan. California law dictates that the plan may only be amended three times per year in coastal zones and four times per year in inland zones. This requirement makes applications tedious and slow for developers wishing to exceed current density regulations. There have been no amendments to the General Plan since the TDC program was implemented, indicating that upzoning has not contributed to the program's inactivity.

Education Efforts

The county has prepared a question and answer brochure to assist the public. The members of the TAC also present the ordinance to civic organizations and answer questions. The ordinance provides for the early notification of neighbors of potential receiving sites so they may comment upon the request.

When the program was first implemented, the planning staff organized a conference to educate potential participants about the program. In addition, the



TDC program was covered extensively in the media, as it is an innovative program and the first of its kind in the area. The planning staff has been reluctant to continue advertising efforts until it resolves the issues associated with the pending litigation.

Some Amendments Resulting from the Pilot Project

- ◆ Environmental review is required of all actions, even a sending site designation. The ordinance emphasizes timeliness and prompt response from the county to the landowner.
- ◆ Criteria (general and specific) are used instead of mapping sending sites. There were two reasons for this decision. First, the county determined that pre-designation of sending sites might adversely affect the owner's ability to borrow money on the land. Second, a landowner may have better knowledge of important natural resources than the government does. In addition, the specific criteria make it easy for landowners to determine if they qualify, and the specific criteria allow for more flexibility.
- ◆ The TAC developed bonus credits for sending sites to preserve natural resources as a further incentive. For each wetland, woodland, etc., listed in the existing documentation criteria in the ordinance, the county awards an extra ten percent of the total credits for which the land was eligible.
- ◆ The ordinance also requires that buyers of TDCs search for credits within a three-mile radius. This ensures that those who live near a receiving site will also benefit from

the decreased development of the sending site nearby. However, if the buyer can demonstrate that there are no TDCs available, the buyer may search for credits within a broader geographic region.

- ◆ The TAC established a TDR Review Committee to make decisions regarding the eligibility of sending sites, sending site bonuses, and preliminary determinations for receiving sites. This committee is comprised of eight people from the community with a variety of experiences.
- ◆ To instill confidence in the system, there is a three-step process to confirm that the county has a record of all TDC transactions. First, the Final Map incorporates a note indicating which TDCs were used by specifying their registration numbers. The Administrator will also be notified that the TDCs have been released to the county. In addition, the landowner turns over the Receipt of Transfer to the county.

Buybacks

In order to receive TDCs, the owner of the sending parcel must enter into a conservation easement. California law dictates that only a court proceeding can dissolve an easement. The county planner explained that the only feasible way for the owner of a sending area to repurchase development rights is to later qualify as a receiving site. However, this is improbable in most cases. Currently, county planners direct landowners concerned about permanently selling the development rights to subdivide the parcel before applying for credits, thereby only placing the easement on part of the land.



Litigation

The county is currently involved in litigation concerning the TDC program. Citizens for Rural Preservation, a group comprised of county developers, has challenged the program, asserting that the receiving sites will generate environmental impacts and under the California Environmental Quality Act, the county must prepare an environmental impact statement (EIS) for each of these sites. The county's defense is that by its very definition increased development of an acceptable receiving site will not create an environmental impact. A court date has not yet been set.

Why hasn't the program been successful?

Because of pending litigation, the program has stalled. Moreover, the election of a pro-development Planning Board may jeopardize the time and resources the staff devotes to the success of the program.

Sources

Transfer of Development Credits: The San Luis Obispo County TDC Program.

Interview with Kami Griffin, Senior Planner, San Luis Obispo County Department of Planning and Building, 805-781-5193.



CASE STUDY

Thurston County Program (Washington)

Purpose of the Program

Thurston County is committed to preserving its natural and scenic resources. Ordinance No. 11069, 01/01/96 states, "The purpose of this chapter is to encourage the conservation of long-term commercially significant agricultural lands by allowing owners of such lands to realize the equity in the land's development potential without conversion to non-agricultural uses."

Synopsis of the Program

The Transfer of Development Rights (TDR) program is a voluntary program whereby property owners may sell county-awarded TDR credits to other parcels of land. There is no expenditure of public funds as the system is market-driven. The county designated a "Long-Term Agricultural District" in which all areas of land receive one credit per five acres.

History of the Program and Characteristics of the Area

In the 1990s, the county began to focus upon agricultural preservation issues. While researching strategies, the Board of Supervisors conducted a TDR feasibility study to determine if the community would support such a program. After extensive research, the county adopted the program and enacted an ordinance effective January 1, 1996.

How Does the TDR Program Operate?

In order to sell TDRs, the property owner must complete an application with the following pieces of information:

- ◆ A map of the proposed Sending Area parcel (based on a field survey) prepared by a registered land surveyor

- ◆ Legal description and parcel numbers of the Sending Area parcel
- ◆ A title report showing that the applicant is the owner of the subject sending area parcel
- ◆ Number of non-family member units and non-farm housing units on parcel
- ◆ Number of family member units and farm housing units on parcel
- ◆ A review fee

After the county reviews this information, it awards the property owner a Certification of Transferable Development Rights. The landowner records an easement with the Thurston County Auditor. Thurston County holds the easement.

When the landowner is ready to sell the TDRs, he/she presents the Thurston County Auditor with a Deed of Transfer form that the Auditor will record, along with the easement. Applicants pay recording, application and transferring fees.

Although a developer may petition for denser development, the county planner stated that it is not used very often, as it requires an amendment to the General Plan which is only permitted once per year.

Anyone may purchase TDRs; however the county does not purchase credits to permanently retire the development rights. The ordinance allows for sellers of TDRs to transfer credits to an intermediate transferor or broker who may hold them for a period of time before they are used on a receiving area parcel.



Activity

Since the program was enacted in 1996, there has been no activity. The county planner attributed inactivity to skepticism of county government. In addition, she stated that the requirement that owners of sending areas present the county with a survey in order to receive certificates was another hindrance. Many farmers do not have the funds available to hire professionals to survey the land. On the receiving side, she noted that the market has not been such that developers are anxious to exceed current density levels.

Incentives to Use the TDR program

Besides awarding development credits, the county has not created additional incentives for preserving sensitive land. The county planner explained that the feasibility study recommended several tiers for awarding credits, but county officials decided this system was too complex for landowners to understand and would hinder their willingness to participate in the program. As a result, all agricultural land receives the same amount of credits.

Education Efforts

At the beginning stages of the program's implementation, the county held a public forum where thirty potential program participants were able to ask questions and voice concerns. There have been few subsequent educational efforts, although most citizens are aware of the program through media exposure. The county has compiled a folder with easy to read, color-coded sheets detailing steps for applying for credits or receiving site status. Planning staff appealed to the Board of Supervisors for permission to devote more time to educational efforts, but the Board decided that the staff had other priorities.

Buybacks

The easement placed upon the sending areas is perpetual. TDRs may not be bought back at a future time.

Administration Costs

The county planner estimated that the county spends \$10,000 and 10 days of staff time per year on administrative costs related to the program.

Litigation

There has been no litigation in Thurston County related to the TDR program.

Why wasn't the program successful?

The Thurston County program did not have adequate incentives for landowners to sell TDR credits. In addition, there was little or no demand for denser development in the receiving area.

Sources

Thurston County Transfer of Development Rights Program Information Kit

Interview with Jacqueline Kettman, Associate Planner, Thurston County Community and Environmental Programs.



CASE STUDY

Collier County Program (Florida)

Purpose of the Program

The TDR program in Collier County was intended to protect more than 40,000 acres of environmentally sensitive land, including barrier islands, mangroves, salt-water marshes, coastal beaches, and cypress stands, especially lands important to water storage and recharge in areas of cypress growth. The concept is to offer an alternative method of protecting these environmentally sensitive areas through the transfer of residential development permitted on these lands to properties better suited for development.

History of the Program and Characteristics of the Area

Collier County, on the west coast of Florida, is the state's second-largest county in land area and one of its fastest growing. Naples, the principal city, has a population of about 20,000 out of a total county population of 117,000. Of the county's 1.3 million acres, fully 40 percent is under federal or state ownership, and governmental acquisition of sensitive Everglades and Big Cypress Preserve lands continues.

Collier County passed its first TDR ordinance in 1974 and substantially amended it in 1979. Modifications eliminated a requirement that transfers occur between parcels of contiguous, environmentally sensitive land and parcels of non-sensitive land. They also streamlined the review and approval process. Somewhat surprisingly, however, more TDR activity occurred prior to the 1979 amendments than after them.

How Does the TDR Program Operate?

The ordinance created an overlay zoning classification for environmentally sensitive lands known as the Special Treatment Overlay District. The initial designation was not accompanied by downzoning (downzoning of the overlay districts did occur some years later in 1982) but new development was regulated and could not occur without review of site development plans by the planning commission and approval by the board of county commissioners.

The development rights are considered as interests in real property and can be transferred in portions or as a total. Once used, the residential development rights shall not be used again and the residential development rights of the subject lands providing them shall be severed forever.

Landowners with two or more acres, excluding submerged land, in the overlay zone may elect to transfer up to one-half (.5) of a residential unit for each acre owned. Upon approval of the transfer, the ordinance encourages property owners to donate the land to a private not-for-profit conservation or environmental organization, but gives the option of entering into an agreement with the county to maintain the land as undeveloped open space. The county must approve the transfer, although the TDRs do not have to be committed to a particular receiving site at the time they are severed from the parcel.

The development rights may be transferred to residential multifamily and residential tourist districts. Depending on the zoning classification of the receiving site, density increases of 10 percent or 20 percent over the underlying zoning may be



achieved. Only lands with an "ST" designation can be sending areas; these include lands that are environmentally sensitive or have historical or archaeological significance and that are not adequately protected by the underlying zoning district regulations. However, a concern of planners in Collier County is that by limiting a TDR program to ST lands, many other properties are precluded from using the TDR program.

Any owner of eligible land may apply for a TDR either separately or concurrently with rezoning, zoning ordinance amendments, preliminary subdivision plat or development plan. Prior to the approval of any TDR or the issuance of any building permits in connection with the use of any transfer of development rights, the petitioner submits the following information and data to the development services director for review and action by the board of county commissioners.

1. Name and address of property owner of sending land.
2. Name and address of property owner of receiving land.
3. Legal description of sending land from which transfer of residential development rights is petitioned.
4. Survey of sending land from which transfer of residential development rights is requested.
5. Legal description of receiving land which receives the transfer of residential development rights.
6. Survey of the land that receives the transfer of residential development rights.
7. Three copies of an executed deed of transfer of ownership of the sending property to the county or a state or federal agency, or to a private not-for-profit conservation or environmental organization.

8. The owner of the sending land will provide a guarantee, agreeable to and approved by ordinance of the board of county commissioners, that the sending land will be utilized only for one or more of the following purposes:

- ◆ increasing public recreational and/or educational opportunities,
- ◆ creation of linkages between public and private open space,
- ◆ protection of critical habitat/ecosystems,
- ◆ or other public purpose as specified in the ordinance of adoption.

Such a guarantee should be recorded with the clerk of the circuit court of Collier County, Florida as a recorded restriction of the use of such land and shall be binding upon all present and subsequent owners, heirs, or assigns of such property. Such restriction may not be amended, deleted, or otherwise altered, except by a majority vote of the board of county commissioners.

Status of the residential units may vary depending on when they were constructed. Upon the issuance of any permit for the construction of residential unit(s) upon the receiving land, the first residential units built thereon are considered the residential units approved for the TDR. The succeeding residential units constructed will be considered the residential units permitted under the basic zoning district regulations. This provision eliminates confusion as to which particular construction on the receiving land has been approved to supersede the zoning development or density allowances.



Activity

Collier County has had only one major transfer in 15 years. Over 350 rights were transferred in a single transaction from land owned by the Deltona Corporation to another site owned by it on Marco Island. The developer subsequently donated the environmentally sensitive land to the county. One developer transferred 960 development credits from an estuarine area to the upland portion of a site. A number of such intrasite transfers have occurred, but the county does not include them in its TDR transaction count.

Incentives to Use the TDR Program

Requirements for landscaping, off-street parking, and open space are waived as necessary to accommodate the additional density.

Education Efforts

There have been minimal education efforts.

Buybacks

Buybacks are not allowed; once the development potential is severed, there can be no more development in the future.

Administrative Costs

Projected administrative costs are minimal.

Litigation

There has been no litigation thus far.

Why has there been limited use of the program?

New construction in the overlay zone is only regulated, not prohibited, so many properties in the environmentally sensitive area have been developed. In addition, there is an option to include unbuildable or environmentally sensitive areas in the density

calculation for the entire site and therefore shift the density from one portion of the same parcel to another without using the TDR program. There has not been adequate demand for increased density because developers in Collier County normally do not build to the density permitted by the underlying. The approval process reportedly deterred some developers. Prior to the 1979 amendments, the process involved a technically detailed application and required the review and approval of seven advisory boards and governmental agencies.

Collier County is on the coast and residents of coastal areas perceived little direct benefit from a program to preserve interior lands. Moreover, there has been some resistance from property owners in the designated receiving areas to the additional density that transfers would impose. The county has been unable to overcome the negative perception of the TDR program. Lack of sufficient staffing in the county planning office has prevented the county from promoting the program to landowners and developers who might use TDRs.

Sources

Interview with Barbara Cacchione, Collier County Government, Community Development and Environmental Services Division, Planning Services, 2800 N. Horseshoe Drive, Naples, FL 33942. Phone (941) 403-2300; Fax (941) 643-3266.

Roddewig, Richard J. and Cheryl A. Inghram. *Transferable Development Rights Programs: TDRs and the Real Estate Marketplace*. Planning Advisory Service Report No. 401. Chicago: American Planning Association, 1987.

Simon, Charles, Lee Worsham, and Bruce McLendon. *Marketable, Transferable or Purchasable Development Rights*.