

Transfer of Development Rights for Balanced Development

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A TDR PARABLE:

It's simple. You just go to the farmer whose land you're trying to preserve and tell him that he can't develop his land because it is a "sending area" for your new Transfer of Developments Rights (TDR) program. At first, he's a bit upset. But as town planner you assure him that everything is OK because you've found a developer who will pay him for the development potential of his property in order to build a block of new houses on small lots in the quaint village center nearby. Everybody wins! It's easy, isn't it?

Well, not really. The farmer has been offered a lot more money by another developer who wants to build the kind of low-density gated community that professional refugees from the city really want. The farmer decides to sue you and the town, claiming that by depriving him of the right to develop his land there has been a "taking." Also, the villagers have decided that their community is dense enough and they would like you to find a different "receiving area."

Meanwhile, the original developer has figured out that he can use his development rights to build a new strip mall on a green-field site outside of town. This was a site you had hoped he would not use, although you had to include it as a receiving area in order to be sure the farmer's development rights had somewhere to go.

This parable is clearly an oversimplification, but it illustrates many of the challenges that TDR programs face. The allure of the TDR model is its seemingly simple ability to accomplish in one transaction two complementary goals: open space preservation and centered development. However, the promise of TDR has been stalled by a variety of political, economic and administrative obstacles.

The Lincoln Institute and Regional Plan Association (RPA) cosponsored a two-day conference in October 1997 to explore the potential and the limitations of using TDR programs. While the conference addressed a number of legal and planning issues, one of the central questions asked by the group was, "How can TDR pro-

grams be used to influence settlement patterns, not only to protect open space, but also to promote compact development?"

A presentation of research by the American Farmland Trust revealed that the use of TDR has expanded tremendously, and many programs are considered successful even though the overall picture is ambiguous. The list of success stories is still dominated by such well-known programs as Montgomery County, Maryland (1980) and the New Jersey Pinelands (1981). A number of more recent programs showing early potential are the Long Island Central Pine Barrens, New York (1995), Bucks County, Pennsylvania (1994) and Dade County, Florida, where TDRs are helping to preserve more than 100,000 acres of everglades ecosystems outside of the Everglades National Park.

Obstacles and Opportunities

Regardless of how many programs may be considered successful, the conference revealed that there are still many obstacles to establishing a working TDR program. Among them are:

- finding communities that will locate receiving areas for higher density development;
- calibrating values for development rights in sending and receiving areas to insure a market for the rights;
- creating a program that is simple enough to understand and administer, but complex enough to be fair;
- developing community support to insure that the program is used;
- avoiding litigation and evasion.

Building on the considerable experience of the participants and using an outline provided for the discussion by James Tripp of the Environmental Defense Fund,¹ the conference identified several components of successful TDR programs.

- TDR programs can avoid legal challenges by ensuring that the principles, definitions and language of the program conform with existing local regulations. Because the legal issues of TDR are not going to be resolved any time soon (as some who followed *Suitum v Tahoe*² had hoped), conformance will provide the timeliness and certainty the community needs.

- A credit bank, clearinghouse or other financial institution can be extremely effective in promoting the program, facilitating transactions and providing hard information about the dollar value of the rights. The "real value" of the rights helps support the legitimacy of the program.

- Effective state enabling legislation may be important in establishing the clear legal authority of the administering agency. The legislation should be specific enough to provide guidance and clarity, but broad enough to enable localities to tailor their programs to their own circumstances.

- The "takings issue" can be ameliorated by providing multiple options to the landowner (e.g., hardship exemption or outright purchase) and by preserving residual use for the land. However, the issue of preserving land versus the activity on it can also be problematic. How are the uses defined? Is "farming" the traditional "family farm" or an industrial-scale operation? At least in the short term, preserving productive activity on the land may be both politically valuable and necessary.

Impacts on Receiving Areas

The first half of the TDR equation (agreement on the resource to be protected) is generally not difficult. However, the second half (agreement on where the transferred development is to go and how it should be configured) has been extremely problematic.

Conference participants acknowledged that while the goal of transferring density away from preservation areas and into growth areas was being accomplished by a number of TDR programs, the programs have not been effective in influencing the design and character of development in the receiving areas. Local municipalities are or at least should be obligated to identify sites for increased density, but the use of that density may not be constrained beyond the existing town zoning bylaws. The unfortunate result is that the increased density is as likely to be used for a suburban strip development as for compact, centered development, thus creating localized sprawl within the receiving area.

In the case of the Long Island Pine

Barrens, some towns intentionally spread out their receiving areas to avoid the political fallout of higher-density development. When the TDR program was being developed, the Pine Barrens Commission was working on design guidelines meant to promote compact town planning. However, this layer of complexity and restriction was too burdensome to be incorporated into each of the local town plans.

While there is broad agreement that controlling the character of development in receiving areas is a desirable idea, it also raises a number of questions. First, the administering agency may not be able to deal with the additional complexity of design controls. Second, the market for new development in the receiving areas may not be strong enough to support the additional burden of cluster design. The need to guarantee a market for the transfer rights also works against the creation of controls that would concentrate development. An advantageous ratio of receiving areas to sending areas (as high as 2.5:1) tends to create large receiving areas.

Conference participants from around the country also confirmed what they perceive as a knee-jerk reaction against higher density. Despite the influences of New Urbanism and neo-traditional planning,

the general public does not value centered development. Residents of fast-growing communities might be more receptive to clustered residential designs if they could understand what different types of development would look like by reviewing three-dimensional representations in drawings and models.

Land use attorney Charles Siemon suggested that many town planners seem to want compact, centered development, but are not willing to acknowledge that it can be more expensive to private developers. Perhaps another approach, one that is outside of the TDR marketplace, is needed, such as a fund that buys the development rights and agrees to sell them to developers at a discount if they build in town centers. Lexington, Kentucky, is experimenting with this kind of arrangement.

Evaluating TDR

How do you measure the success of a TDR program? By the amount of open space preserved? The number of acres kept in farming? The number of transactions? The quality of development in the receiving areas? And, over what time period? Charles Siemon suggested that a TDR program might be considered a success even if no transactions take place. How? Because,

in the context of a larger land use plan, the TDR program can make a preservation program more palatable by providing the landowner with additional options.

It became clear during the conference that the perceived success or failure of TDR programs was deeply colored by excessive expectations. The notion that a TDR program would, by itself, protect open space, preserve activities such as farming, help create appealing village centers, and do all of this simply by offering a mechanism for moving development around is simply not realistic. Some participants asked, "Why should a TDR program be expected to accomplish more than any other single land use tool, such as zoning?"

This question reflected the most fundamental conclusion of the conference: TDR programs work only when they are part of a larger, long-term land use plan that has the commitment and political will of the community behind it. This commitment to the larger goals of the plan and to the particular resource being protected is the real answer to legal and other challenges. A comprehensive plan is more likely to accommodate multiple avenues of relief for landowners who feel unfairly treated. TDR programs that are created within the context of a comprehensive plan are much more likely to be tailored to the specific political, economic and geographic circumstances of their location. Finally, in terms of creating balanced and centered development, it is within a land use plan that the design guidelines and other controls that result in the best town planning principles may reside. **L**

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NOTES:

1. James Tripp and Daniel J. Dudek, "Institutional Guidelines for Designing Successful Transferable Rights Programs," *Yale Journal on Regulation* (Summer 1989).
2. In the summer of 1997, the U.S. Supreme Court heard *Suitum v Tahoe*, a challenge to a TDR program. Although some of the justices took the opportunity to talk about various legal dimensions of TDR, the case did not address the fundamental legality of TDR. Instead, it focused on the "ripeness issue." Did Mrs. Suitum have to try to sell her rights through the program before challenging its legitimacy? The Court ruled that she did not. The conference participants felt that in the short term the case may create pressure for TDR programs to assign real dollar values to the rights or credits that are being transferred. This is consistent with the finding that a TDR bank, capable of assigning such values, can play an important role in the success of a TDR program.