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Commentary

Transfer of Development Rights Turns 40

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Transfer of development rights, or TDR, allows increased development in places where a community wants more growth in return for reduced development in places where it wants less. TDR is described as creative, innovative, and even experimental. In fact, this "new" technique has been used since 1968 when New York City included a density transfer mechanism in its landmarks preservation law. As TDR approaches its 40th birthday, it seems appropriate to look back and ask the following questions: How does TDR work? What goes into a successful TDR program? How is TDR evolving? And what do the courts have to say about this aging innovation?

TDR 101

In TDR jargon, the areas where communities want less (or no) development are called sending areas. Sending areas can include environmentally sensitive places, farmland, historic landmarks, open space, or any other resources that a community wants to preserve. The areas appropriate for growth are called receiving areas. Receiving areas are suitable for development, typically because they are close to jobs, shopping, schools, infrastructure, public services, and other urban amenities.

TDR operates within a community's zoning code or similar land use regulation. It offers options to the owners of sending and receiving sites. Sending area landowners do not have to use the TDR option, but when they choose to participate, they record easements that restrict future development. When the easement is recorded, the property owners are allowed to sell transferable development rights, or TDRs. The compensation provided by the sale of these TDRs motivates sending area landowners to participate.

In receiving areas, the zoning code establishes a baseline density. No TDRs are needed to build at or below baseline density. However, developers who buy TDRs can exceed baseline density and build up to the maximum densities established in the zoning code. The extra profit made possible by increased density motivates these developers.

Most TDR programs use increased density as the incentive for developers to buy TDRs. But some communities let developers who buy TDRs exceed other development thresholds such as floor area, lot coverage, and building height limits. Likewise, communities with building permit quotas can give higher priority to projects using TDRs or exempt these projects from quotas entirely. These and other alternative incentives are discussed in detail below.

TDR is similar to PDR, the purchase of development rights. As with TDR, PDR allows landowners to sell their development rights in return for recording an easement on their property. In a PDR program, these development rights are retired and additional funding must be secured in order to preserve additional land. But with TDR, the development rights are not retired. Rather, TDRs are sold to developers and the proceeds from TDR sales can be used to buy additional TDRs, creating an ongoing revolving fund.

When TDR works, property owners in the sending areas continue to own their land and receive nondevelopment income while liquidating their property's unused development potential. In a sense, these owners tap into the development value of their property without having to undergo the expense and uncertainty of the development process. Similarly, developers in the receiving areas are able to achieve the increased profit made possible by extra development despite the cost of TDRs. And most importantly, communities are able to achieve their development and preservation goals without reliance on taxes.

TWO SUCCESS STORIES

We know of 181 TDR programs in 33 states that have preserved at least 300,000 acres of farmland, natural areas, and open space to date. Many of

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Sending-area owners are generally more motivated to use the TDR option if their properties are less suitable for development due to a remote location, limited infrastructure, poor soils, steep slopes, and other physical constraints.

these programs are discussed throughout this commentary to illustrate evolving TDR trends. But first, this section profiles two classic programs to demonstrate that TDR programs are as different as the communities they serve.

Montgomery County, Maryland. Montgomery County abuts Washington, D.C., and has experienced substantial growth pressure for decades. In 1980, the county rezoned 91,000 acres as an agricultural reserve, changing the zoning from an original maximum density of one dwelling unit per five acres to one dwelling unit per 25 acres. In this sending area, landowners could opt to deed-restrict their farms and sell the resulting TDRs at the rate of one TDR per five acres. Montgomery County amends its program periodically to add new receiving areas. The receiving areas operate at single-family residential as well as multifamily residential densities. For example, in one receiving zone, density can increase from five units per acre to seven units per acre when developers buy one TDR for each additional unit above the TDR baseline. This formula proved to be attractive to sending area landowners and receiving area developers alike, leading to the preservation of over 43,000 acres so far. In fact, the private market became so strong that the county ultimately eliminated a TDR bank that was designed to purchase TDRs from landowners who might be unable to find buyers on their own.

New Jersey Pinelands. In 1979, the state of New Jersey passed the Pinelands Protection Act, designed to preserve outstanding agricultural and environmental resources within a one-million-acre area in southeastern New Jersey. One year later, the Pinelands Commission adopted the Pinelands Comprehensive Management Plan, which identified areas appropriate for growth as well as agricultural and natural areas in need of preservation. The 60 jurisdictions within the planning area were required to adopt zoning codes that implement the plan, including a mechanism for the transfer of development rights, known in this program as Pinelands Development Credits or PDCs. Within the plan's growth area, 23 communities designated receiving areas capable of accepting PDCs transferred interjurisdictionally from sending areas in the preservation districts. In these receiving zones, developments in compliance with the TDR requirements are granted bonus density as a matter of right. A state agency monitors local planning approvals to ensure that extra density is awarded only to projects that use TDR. A TDR bank is used to market the program, administer transfers, and provide funding for the infrastructure needed to support higher density levels as well as buy and sell TDRs. As a result, this program has preserved over 47,000 acres so far.

TDR SUCCESS FACTORS

For every TDR rule, there are typically several exceptions. Nevertheless, many successful TDR programs have some common traits in their sending areas, receiving areas, and incentives. (Programs can also be greatly assisted by the innovations presented in the following section on New TDR Techniques.)

Sending Area Success Factors

In a successful TDR program, strong public support for preservation of the sending area is often evident in the community's general (or comprehensive) plan. In addition, sending area landowners are more likely to participate if their properties are subject to the following natural and man-made development limitations.

Development constraints. Sending-area owners are generally more motivated to use the TDR option if their properties are less suitable for development due to a remote location, limited infrastructure, poor soils, steep slopes, and other physical constraints. This factor may disappoint those who want to create sending areas that are contiguous to new subdivisions in hopes of using TDR to preserve land under immediate threat of development. Preservation of areas directly in the path of growth is possible. But because the development value of this land is high, the amount of land preserved per TDR is likely to be low.

Regulations. It is helpful if the zoning in the sending area implements the general plan goals for the sending site. For example, if the area has an agricultural designation, the zoning would ideally impose a minimum lot size capable of supporting agriculture. Unfortunately, agricultural zoning districts in some communities allow lots to be as small as five acres or less. This makes landowners doubt the long-term viability of farming. Consequently, these landowners may not participate unless they are allowed to sell more TDRs per acre, thus decreasing the amount of land preserved per TDR. Some communities downzone the sending area by increasing the minimum lot size and offering TDR to the affected landowners as mitigation. This approach is sometimes referred to as a mandatory TDR program. As discussed above, Montgomery County downzoned its sending area from one unit per five acres to one unit per 25 acres, but allowed the landowners to sell one TDR per five acres. However, many communities are unwilling to downzone the sending areas and rely on a liberal application of TDRs to motivate sending area landowners to participate.

Infrastructure requirements. Finally, sending-area landowners are more likely to participate if the community requires development within sending areas to pay its fair share of the infrastructure needs it generates. Paradoxically, some communities unwittingly encourage development in areas they want to save by making it much cheaper to build there than in areas where they want development. For example, developers might have to pay an array of impact fees when they build within a city but not when they build in rural areas under the jurisdiction of the surrounding county. However, over time, communities can fix this unintentional incentive to develop in sending areas by improving their development requirements.

Receiving Area Success Factors

Receiving areas are planned for development and ideally are located close to schools, jobs, and shopping. Early in the development of a TDR program, it

Within a TDR receiving zone, developers who follow all the rules and comply with the TDR requirements are assured of being able to achieve the maximum density allowed in that zone.

is important for the general public to understand that TDR is intended to implement rather than circumvent community plans. Of course, many citizens are not aware of the contents of the general plan. Others may be familiar with the plan but disagree with it. Nevertheless, most participants in the development of a TDR program ultimately recognize that growth will occur with or without a TDR program and that a TDR program allows the community to achieve its preservation goals in conjunction with its development goals. As described below, receiving areas can be established through a comprehensive process, an incremental approach, a combination of these methods, and finally, by interjurisdictional agreements.

Comprehensive approach. Some communities select a single place to designate as a TDR receiving area. The development community typically plays a significant role in the selection of this site and, it is hoped, assures the community that it will use that site and comply with all the corresponding TDR requirements. To win the cooperation of developers, the community can rezone the receiving site to a TDR receiving zone. Thereafter, developers would not need to endure the extra cost, delay, and uncertainty of applying for rezonings. Within a TDR receiving zone, developers who follow all the rules and comply with the TDR requirements are assured of being able to achieve the maximum density allowed in that zone. An advantage is that the development and adoption of a TDR receiving zone involves extensive public involvement, thereby reducing the likelihood of public opposition after it is approved. The disadvantage is that putting all these pieces in place requires a lot of time. This could be particularly detrimental if development continues unabated while a comprehensive receiving area plan and code are hammered out.

Incremental approach. In contrast with the comprehensive process, some communities choose an incremental approach. In this alternative, developers apply for changes to higher density zoning districts consistent, of course, with the general plan. If the jurisdiction approves these applications, the new zoning identifies each dwelling unit in excess of the maximum density of the former zone as a bonus dwelling unit. These bonus units are subject to TDR requirements as set forth in the community's zoning code. A benefit to this is that the TDR requirement can be adopted quickly because the task of rezoning the individual receiving areas is postponed until a developer applies for a rezoning. The disadvantage is that this approach provides developers with little certainty.

Combination. As a third option, communities can use both the comprehensive and incremental approaches. They can adopt a policy stating that TDR requirements apply to bonus units resulting from all future upzonings regardless of whether they are initiated by local government or developers. Thereafter, the community can use the comprehensive approach to plan and rezone those areas generally acknowledged as the most promising receiving areas.

Interjurisdictional agreement. Finally, the best receiving areas are often in a different jurisdiction than the sending areas. That can be particularly true for counties that want to save rural areas but lack a sewage treatment facility and other infrastructure needed to accommodate urban densities. Some counties, like Calvert County, Maryland, have been successful using low-density receiving sites that do not require sewer systems and other urban services. But in at least 10 cases, interjurisdictional TDR programs allow the transfer of density from sending areas under one jurisdiction into receiving areas under another jurisdiction. The most successful of these programs have been formed by state governments that require cross-border transfers. Examples of state-mandated interjurisdictional programs include those run by the New Jersey Pinelands and Tahoe Regional Planning Agency.

On the other hand, most interjurisdictional programs have resulted from voluntary cooperation. In Boulder County, Colorado, seven cities have agreed to accept TDRs from land under county jurisdiction. Part of this willingness to accept transferred development reflects an enlightened citizenry that understands the need to safeguard farmland and the rural character outside the city limits. In Boulder County, these cities also craft their agreements to ensure that the TDRs result in the creation of greenbelts and community separators, implementing the land use goals of the city as well as the county. Not all cities, however, dictate where preservation will occur when they accept TDRs. Seattle, for example, accepts TDRs from sending areas throughout King County in recognition that the city's quality of life is dependent on the environmental health and recreational opportunities of the surrounding countryside.

Incentive Success Factors

Developers have to want what they receive in exchange for buying TDRs. In the majority of programs, TDRs allow developers increased residential density. Other incentives offered by TDR programs include increased floor area, bonus structure height, additional lot coverage, and the ability to start construction within a community's building permit quota system. These non-density incentives are discussed in the next part of this commentary. This section focuses exclusively on using residential density as the incentive and how communities can increase their chances of success by optimizing baseline density, limiting other ways that developers can achieve bonus density, consistently requiring TDRs for bonus density, creating effective market factors, adjusting the program when necessary, and establishing different bonus density for different development products where warranted.

Baseline density. Baseline density must be low enough that developers want to exceed it, or no transfers will occur. Baseline density is typically equal to or greater than the maximum density allowed in a receiving area prior to adoption of the TDR provisions. Consequently, there could be concern if few developers are using the maximum density allowed under current zoning.

Communities can respond to this problem in at least three ways. First,

In many programs, one TDR simply allows one bonus dwelling unit regardless of the nature or location of that dwelling unit.

they can encourage developers to build to smart growth densities. Second, they can adopt TDR zones in which the baseline density is lower than the maximum density allowed by the prior zoning. This can work when an entire planning area, such as a downtown, is downzoned. In general, though, downzoning a receiving area is politically difficult and likely to cause problems in those states where any reduction in development value triggers compensation.

In the third alternative, communities create receiving areas at the expanding urban fringe, where developers typically want to convert low-density rural zoning to higher density urban zoning. This urban edge land can be changed to a TDR receiving zone that uses the maximum density allowed under the rural zoning as baseline density, assuring that most developers will be motivated to use the TDR option.

Bonus density options. If communities offer other attractive alternatives for exceeding baseline, developers will be less inclined to use TDR. For example, in many communities, developers can achieve bonus density by proposing additional open space, clustered site design, architectural refinements, recreational amenities, and other project features. In contrast with the purchase of TDRs, which pays for off-site preservation, these on-site amenities increase project value. When offered alternatives, developers are likely to choose on-site features rather than buy TDRs. Consequently, TDR programs are likely to be more successful if TDR is the only way for developers to achieve bonus density, with the possible exception of an affordable housing density bonus. This affordable housing exception reflects the importance of this competing goal. In fact, some states require communities to provide a density bonus for affordable housing. While an affordable housing density bonus may effectively raise baseline density, it does not necessarily prevent a community from allowing developers to exceed that increased baseline using TDR.

Consistent application. Communities must consistently require TDRs for all bonus density in order to maintain the credibility of the TDR program. If public officials make exceptions and grant upzonings that circumvent TDR requirements, all developers are likely to request similar exceptions, effectively neutering the TDR program.

Market factors. Finally, the incentives will not generate transfers unless both the sending area landowners and the receiving area developers find transactions mutually beneficial. Specifically, a TDR must be affordable, creating increased profits that equal or exceed the cost of the TDR. Likewise, when selling a TDR, the sending-area landowner must be satisfied that the sales price equals or exceeds the property value reduction created when a conservation easement is placed on the land.

For example, let's say that after interviewing developers, talking with appraisers, or even conducting a full-blown economic analysis, you estimate that receiving area developers will pay $10,000 per TDR. Likewise, after talking with landowners, learning about the costs of existing easements and contacting appraisers and other real estate experts, you estimate that typical sending area landowners will deed-restrict their land in return for $2,000 per acre. Under these circumstances, the TDR ordinance might allow sending area landowners to sell one TDR per five acres. That allocation rate of one TDR per five acres gets sending area landowners the $2,000 per acre they want while keeping the cost of a TDR at $10,000, which developers can afford. Monetary considerations are used only to develop an allocation rate that generates transfers. These numbers do not appear in a community's TDR ordinance and they are not intended to dictate the price at which TDRs sell. The price of TDRs is privately negotiated between receiving areas developers and sending area landowners.

Program adjustments. Ideally, a program's components will create a viable TDR market on the first try. The community, however, should monitor transfers and make adjustments if needed. For example, officials in Douglas County, Nevada, realized that its program was failing to generate transfers because sending area landowners were originally required to preserve too much land per TDR. In 2001, the county increased its allocation rate and the program started to generate transfers. Between 2001 and 2005, it preserved 3,628 acres using TDR.

Differential bonus density. In many programs, one TDR simply allows one bonus dwelling unit regardless of the nature or location of that dwelling unit. Many communities prefer the simplicity of this one-size-fits-all approach. However, when TDR requirements apply to dwelling units in a wide density range, some differentiation may be warranted to ensure that the TDRs remain affordable. In the Montgomery County, Maryland, program, one TDR allows one bonus single-family detached residence or two multifamily residential units. In Livermore, California, two TDRs are required per bonus single-family residential unit but one TDR allows two multifamily attached units. Dade County, Florida, provides 18 different zoning districts capable of receiving TDRs. A TDR allows various density bonuses and other requirement exceptions in these 18 districts.

TDR INNOVATIONS AND TRENDS

In the 40 years since TDR first appeared in the U.S., communities have constantly discovered new resources appropriate for TDR protection and innovative ways to tailor the tool to meet their particular situations.

Evolving TDR Uses

TDR started as a landmark protection technique. But today communities use it to achieve a wide range of purposes including environmental protection, farmland preservation, historic preservation, community revitalization, and economic development.

Environmental protection. Of the 181 TDR programs known to the authors, almost two-thirds are designed at least primarily for environmental protection. Within this category, some communities seek to protect their natural areas and open space as a whole. Others target specific resources including wildlife habitat, water quality, wetlands, coastal areas, hillsides, groundwater, mineral

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resources, and scenic views. Not surprisingly, TDR program goals respond to emerging environmental concerns. Since the adoption of the Collier County TDR program in 1973, several Florida communities have included barrier islands as potential sending areas in their TDR programs. But increases in coastal development and hurricane activity have recently led some Florida communities, including Sarasota and Charlotte counties, to specify storm surge zones as TDR sending areas. The disastrous 2005 hurricane season might lead other storm-prone communities to do likewise.

Farmland preservation. TDR programs with a farmland preservation emphasis account for another 20 percent of the TDR programs in our 181-program database. Of these 36 programs, more than half are located in Maryland and southeastern Pennsylvania. This concentration may partly be explained by the high productivity of farms in this region and the desire of its farmers to stay in agriculture, particularly the Amish and Mennonite farmers in Chester and Lancaster counties in Pennsylvania.

Historic preservation. Historic preservation TDR programs, which account for roughly one-tenth of the programs in our database, originally appeared in larger cities including New York, Los Angeles, Dallas, San Francisco, Denver, Seattle, Portland, Atlanta, New Orleans, Pittsburgh, and Minneapolis. More recently, medium-sized cites, like West Palm Beach, Florida, and small cities, like Aspen, Colorado, have turned to TDR to protect historic structures.

Community revitalization. For decades, several central cities have used TDR to implement multiple goals in their downtown plans. In 1975, Los Angeles adopted a Central Business District Redevelopment Plan that used TDR to promote housing, open space, historic preservation, cultural and community facilities, and transportation improvements. Similar programs were adopted by Seattle in 1985 and Portland in 1988. The Washington, D.C., downtown plan goes beyond historic preservation and housing, using TDR to promote the evolution of specific land uses within specialized districts for shopping and the visual and performing arts. In 1998, New York City adopted a Theater District zone that allows the owners of Broadway theaters to transfer their unused development rights if they not only preserve and restore their buildings but also deed-restrict those theaters to operate only as live performance venues.

Economic development. In a sense, all TDR programs have some form of economic development objective. For example, environmental protection programs often safeguard a community's water supply, protect property from environmental hazards, and preserve scenic areas that support tourism. However, some TDR programs are more explicitly intended to protect a specific local industry. For example, marble quarrying is important to the economy of Carroll County, Maryland. The county prohibits the creation of new lots in areas underlain by marble and other recoverable minerals. It also mitigates the impact of that prohibition by allowing restricted property owners to transfer development rights.

Similarly, the Fallon Naval Air Station accounts for one-third of the economy of Churchill County, Nevada. In 2006, the county adopted a TDR program to encourage the removal of development potential from the air station's 24,000-acre buffer zone. Beaufort County, South Carolina, is now contemplating a similar TDR mechanism to retain agriculture and open space within the buffer zone of the Marine Corps Air Station Beaufort.

NEW TDR TECHNIQUES

TDR seems to inspire communities to think outside the box. This section includes a sample of some recent twists that have been used to adapt TDR to local needs, including reversible sending area easements, alternative incentives, TDR conversions, density-neutral TDR, leveraging funding, and density transfer charges.

Reversible sending site easements. In almost all TDR programs, the sending area resource is secured in perpetuity. People usually agree with the need for permanent preservation when the sending areas are wildlife habitat, aquifer recharge zones, scenic views, and other natural resources. But disagreement can arise in farmland preservation programs due to uncertainty about the future of agriculture and the need to accommodate future urban expansion. Farmland owners sometimes worry that they could preserve their farms only to have them surrounded by future development if their neighbors decline to sell their TDRs. Mesa County, Colorado, addresses this concern by granting TDRs to landowners who record 40-year deed restrictions on their land. In a truly pioneering program, the Town of Hatfield, Massachusetts, allows TDR easements to be released if the landowner buys back the development rights and if two-thirds of both branches of the Massachusetts general court determine that the land in question is no longer suitable for agriculture.

Alternative incentives. As discussed above, the classic TDR program involves the transfer of residential density from a place where less density is desired to a place where more density is wanted. However, in many TDR programs, developers buy TDRs in order to achieve something other than an increase in the number of residential units.

In most historic preservation programs, when property owners preserve (and in many cases restore) a historic landmark, they are allowed to sell the unused potential floor area, meaning the total floor area allowed by the zoning code minus the total floor area in the historic structure. Sites that qualify as receiving areas have baseline density limits that are usually expressed as a floor area ratio, meaning the total area of all floors divided by the lot area. For each square foot of floor area in excess of baseline, developers must typically buy one square foot of unused potential floor area transferred from a preserved landmark.

The transferable floor area incentive started in historic preservation programs, which predominantly operate in older downtowns. But the Cambria TDR program in San Luis Obispo County, California, uses the transfer of

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residential floor area to protect the habitat of a rare pine tree. Within this program's project area, houses can be limited to as little as 600 square feet of total floor area unless they buy unused potential floor area transferred from preserved sending sites. Similarly, in Pitkin County, Colorado, a baseline residential floor area of 5,750 square feet applies in many zones unless developers buy bonus floor area at the rate of 2,500 square feet per TDR.

In some programs, developers buy TDRs to exceed baseline lot coverage. In the Tahoe Regional Planning Agency program, the amount of a lot that can be covered by impervious surfaces is limited based on development capability. Within certain limits, property owners may exceed these limits by buying transferred lot coverage from more sensitive sending properties. Similarly, Warwick Township in Lancaster County, Pennsylvania, limits coverage to 10 percent of the land area in its industrial receiving zone but allows developers to achieve up to 70 percent lot coverage when they buy bonus lot coverage at the rate of 4,000 square feet per TDR.

In addition to density, floor area, and lot coverage, some programs offer other incentives when developers use TDR. In Pacifica, California, developers using TDR can be granted exemptions from open space, setback, coverage, landscaping, and parking requirements as long as these exemptions will not adversely affect the receiving site development or adjacent properties. Similarly, Charlotte County, Florida, allows deed-restricted property at sending sites to satisfy open space requirements at receiving sites.

In addition to the amount of development, communities can control the pace of development using permit quota systems. Some communities, like Morgan Hill, California, give priority to building permits for developments that include TDRs. Tahoe Regional Planning Agency allows landowners to create something called an "allocation" by removing an existing nonconforming structure from a sensitive stream environment zone. Allocations created in this way are not subject to Tahoe's permit quota system, making them extremely valuable to developers who would not otherwise be able to obtain a building permit. Finally, in Livermore, California, developers can use TDRs for bonus density or to secure a permit under the city's housing permit allocation system.

TDR conversions. In some communities, the development incentive allowed by a TDR at a receiving site may differ from the development reduction that created that TDR at a sending site. For example, in the Pitkin County program discussed above, TDRs granted for the preservation of sending area land are used by receiving area developers to achieve bonus residential floor area. In Warwick Township in Pennsylvania, TDRs are granted to sending area landowners for the preservation of farmland but are used by receiving-site developers to achieve greater lot coverage within an industrial zone. In one of the receiving areas in the Long Island Pine Barrens program, one TDR can be used either for a bonus residential unit or for an amount of bonus nonresidential development capable of generating 300 gallons of sewage flow per day. Finally, the Media District TDR program in Burbank, California, allows conversions from one land use to another as long as the reduction in vehicular trip generation achieved at the sending site equals the increase in trip generation created by the bonus development at the receiving site.

Density-Neutral TDR. Ideally, developers will find that it is more profitable to use the TDR option not just to exceed baseline density but also to achieve the maximum density allowed by receiving site zoning. Nevertheless, some communities are concerned that TDR requirements could create a disincentive for developers to build to maximum densities since the greater the density, the more TDRs they must purchase. In the Rural Lands Stewardship Program in Collier County, Florida, developers must acquire eight credits for each receiving area acre developed. This makes the use of Stewardship Credits density neutral since developers are required to provide the same number of TDRs regardless of whether they build at mid-range density or the highest density allowed by code for the receiving area.

Leveraging funding sources. TDR banks are public agencies that buy TDRs from sending-site owners and hold them for eventual resale to receiving site developers. TDR banks stabilize TDR markets, facilitate transactions, and assure developers that they will be able to comply with TDR requirements without having to negotiate directly with sending-area landowners. TDR banks have been in use for at least 25 years. But recently, communities have discovered the benefits of combining TDR with traditional funding sources.

King County, Washington, used general fund money and the proceeds from a dedicated portion of county property taxes to buy the TDRs on more than 90,000 acres of forested land and open space. King County's TDR bank now sells these TDRs to developers of receiving areas in King County and, in some cases, within incorporated cities like Seattle. The revenues from the sale of these TDRs can be used to purchase additional TDRs, making money that would otherwise be used for a single purchase into an ongoing revolving fund for preservation.

Palm Beach County, Florida, also converted what would otherwise have been a traditional open-space bond into the seed money for its TDR bank. The county used the $100 million bond to buy 43,000 acres of environmentally sensitive land. It severed the development rights from this land and stocked its bank with 9,000 TDRs, which it now sells for $25,000 each.

The innovative use of TDRs is not confined to large jurisdictions. Warwick Township in Lancaster County, Pennsylvania, primed its TDR bank with general fund money. The township now goes into partnership with the county's purchase of development rights program when it preserves an individual farm. The county allows the township to bank and resell all of the resulting TDRs from these preserved farms as long as the proceeds from TDR sales are reinvested in future farmland preservation.

There are more than 100 reported decisions that involve TDR in one way or another.

Density transfer charges. The availability of TDR banks gives developers some assurance of being able to find TDRs when they need them; however, this assumes the bank has enough TDRs on hand to meet the demand. Some programs give developers the option of meeting their TDR requirements using cash in-lieu payments. The community uses revenues from in-lieu payments exclusively for the acquisition of sending area easements. In addition to giving developers peace of mind, the in-lieu payment option allows the community to target these revenues for the acquisition of high-priority easements. In Livermore, California, developers can pay $24,000 in lieu of each TDR that would otherwise be required. In Berthoud, Colorado, developers are allowed their choice of deed-restricting one acre of sending-area land per bonus single-family residential or making an in-lieu payment of $3,000. Unlike other communities, Hatfield, Massachusetts, does not give developers the option of buying TDRs themselves. Instead, developers must meet their TDR requirements through a cash contribution in lieu of TDRs to the town's Land Preservation Fund.

LEGAL CONSIDERATIONS

In the last 40 years, 26 states have adopted TDR enabling legislation. State courts have issued scores of decisions in cases involving TDR, and the U.S. Supreme Court has weighed in on the question of TDRs and regulatory takings.

TDR Enabling Legislation

The authors have identified statutes in 23 states that authorize some or all jurisdictions to use TDR to implement a broad range of land use goals: Arizona, Connecticut, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, and West Virginia. In Illinois, North Carolina and South Dakota, TDR is authorized for limited purposes.[1]

We could not find formal enabling legislation in some states that have TDR programs: California, Colorado, Louisiana, Michigan, Montana, Nevada, Oregon, South Carolina, Texas, Utah, Wisconsin, and Wyoming. However, TDR-enabling legislation from the state is not necessarily a precondition to adopting a TDR program. TDR is a mechanism for implementing land use goals, and all states delegate the authority to regulate land use and development to local governments in some form. To the extent that this delegation includes a broad range of land use regulations, local jurisdictions may rely on that general police power authority to adopt TDR programs. However, in some states, and in some types of jurisdictions in some states, powers granted by the state to localities must be specific and explicit, including the authority to adopt TDR ordinances. Unfortunately, it is not always clear whether a jurisdiction can rely on its general authority to regulate land uses or whether that jurisdiction should rely only on specific enabling legislation. This question is best answered by the jurisdiction's attorney.

State Courts and TDR

There are more than 100 reported decisions that involve TDR in one way or another. This section provides examples from three states that have been in the forefront of TDR: California, Maryland, and New Jersey.

California. In *Aptos Seascape Corp. v. Santa Cruz County*, a landowner of property in Santa Cruz County sued the county, claiming that a zoning ordinance constituted a taking under the Fifth Amendment.[2] The plaintiff owned 70 acres of beach property, 40 contiguous acres of higher ground known as bench lands, plus an additional 200 acres of uplands located away from the beach and bench lands. The county general plan stated that development should be prohibited on beaches but that higher densities should be permitted on other parts of a property under the same ownership. The lower court held that the rezoning amounted to a taking because it precluded all reasonable use of the 70 acres of beach lands and ordered the county to pay just compensation.[3] The California Appellate Court reversed and held that "when government action has divided contiguous property under single ownership into separate zones and has restricted development in one of those zones, a provision allowing some transfer of development rights from the restricted property or awarding compensating densities elsewhere may preclude a finding that an unconstitutional taking has occurred."[4] The Appellate Court reversed the award of damages on the condition that the county award compensating densities to Seascape or some other transfer of development rights in exchange for the prohibition against building on the beach lands.[5]

Maryland. In *West Montgomery County Citizens Assn. v. Maryland-National Capital Park & Planning Comm'n*, the county adopted a new zoning plan to preserve open space and agricultural land as described above.[6] It implemented a TDR program to compensate landowners

1. Arizona Rev. Stat. Ann. 9-462.01(A)(12); Conn. Gen. Stat. Chap. 124, 8-2, 8-2e and 8-2f; Delaware counties (each county has its own legislation; the following example is from Kent County) Title 9: 4953; Delaware municipalities: Title 22: 310; Fla. Stat. 163.3202 (3); Georgia Code. Ann. 36-66A1 to 36-66A-2; Idaho historic: 67-4619; Idaho general: 67-6515A; Illinois municipalities: 65ILCS 5/11-48.2-1A; Illinois county: 55ILCS 5/5-30004(12); Kansas: 12.755(2); Ky. Rev. Stat. Ann. 100.208; Maine Rev. Stat. Ann. 30-A, Ch. 187, 4328; Md. Code Ann., Art. 66B, 11.01; Mass. Gen. Laws, Ch. 40A-9; Minnesota counties: Minn. Stat. 394.25; Minnesota municipalities: 462.357; N.H. Rev. Stat. Ann. 674:21; N.J. Stat. Ann. 40:55D–137 to 40: 55D-163; N.M. Stat. Ann. 5-8-43; New York cities: N.Y. Gen. City Law 20-f; New York towns: N.Y. Town Law 261-a; New York villages: N.Y. Village Law 7-701; N.C. Gen. Stat. 136-66.10 to 11; Pa. Cons. Stat. 10619.1; R.I. Gen. Laws 45-24-33(b)(2); S.D. Stat.1-19B-26; Tenn. Code. Ann. 13-7-101(a)(2); Vermont 24 V.S.A.: 4407(16); Va. Code15.2-2316.2; Washington RSW 36.70A.090; W.Va. Code 7-1-3mm.
2. Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal.App.3d 484, 188 Cal. Rptr. 191 (Cal. App.1982).
3. *Id*. at 491.
4. *Id*. at 496.
5. *Id.* at 506.
6. West Montgomery County Citizens Assn. v. Maryland-National Capital Park & Planning Comm'n, 309 Md. 183, 522 A.2d 1328 (1987).

TDR has been linked in many people's minds with the issue of regulatory takings.

whose property had been downzoned. The appeals court invalidated the original Montgomery County TDR ordinance on the grounds that, under the Maryland zoning enabling statutes, the designation of receiving parcels and the permissible density on those parcels was a rezoning and thus a legislative act, and could not be assigned to the planning board as the ordinance provided.[7] However, Montgomery County amended its ordinance to resolve that technical problem and the county's TDR program went on to become one of the most successful in the country.

New Jersey. In *Gardner v. New Jersey Pinelands Commission*, the owner of farmland within the protected New Jersey Pinelands sued the New Jersey Pinelands Commission when he was not allowed to subdivide his property into 10-acre "farmettes" under the Pinelands Comprehensive Management Plan (CMP). The CMP provides three options for residential development in Agricultural Production Areas including development at a density of one unit per 40 acres when 39 of those acres are preserved for agriculture by a permanent deed restriction. Under the CMP, the plaintiff could also transfer development potential to Regional Growth Areas at the rate of two Pinelands Development Credits, or PDCs, per 39 acres.[8] The Supreme Court of New Jersey held that the CMP advanced legitimate state interests and did not amount to a taking, because: (1) plaintiff could continue beneficial use of his property; (2) the restrictions did not interfere with plaintiff's investment-back expectations; and (3) plaintiff could offset loss of value to his property by transferring development credits.[9] With regard to TDR, the decision echoes the U.S. Supreme Court's *Penn Central* decision: "In addition, Penn Central could offset its loss by transferring valuable property rights to other properties, even if such transfers did not fully compensate it. Plaintiff possesses the similar right to offsetting benefits; it may receive Pinelands Development Credits in return for recording the deed restrictions."[10]

Regulatory Takings and the U.S. Supreme Court

TDR has been linked in many people's minds with the issue of regulatory takings. The Fifth Amendment of the U.S. Constitution prohibits government from taking private property for public use without just compensation. Although originally related to physical takings for roads, parks, and other public facilities, the U.S. Supreme Court ruled that regulations can also cause a taking when they "go too far."[11] That conclusion was reached in 1922, yet to this day the U.S. Supreme Court has avoided making a predetermination of what "too far" means, relying instead on factual inquiries in each specific case. However, some principles have resulted from the Court's regulatory takings cases. Based on the Court's ruling in *Lucas v. South Carolina Coastal Council*, a regulation may cause a taking if it deprives a property owner of all economically beneficial use unless that use would have been prohibited under a state's nuisance or property law.[12]

In 1978, the U.S. Supreme Court ruled that New York City had not taken the property of Penn Central Railroad by prohibiting the placement of an office tower on top of the historic Grand Central Station.[13] The Court ruled that no taking had occurred because the zoning law did not prohibit "any" development of the airspace. The Court held that the city's prohibition of the most profitable use of the airspace above one's property does not constitute a taking.[14] Moreover, the Court held that the terminal was still "economically viable" because it continued to function as a working railroad station.[15] The New York City Landmark Preservation Law allowed Penn Central to transfer the unusable potential floor area from the Grand Central Station site to several nearby properties. The availability of the transfer mechanism was not central to the decision that a taking had not occurred. Nevertheless, the Court mentioned that while the transferable development rights "may not have constituted 'just compensation' if a taking had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on the appellants and, for that reason, are to be taken into account in considering the impact of regulation."[16]

The *Penn Central* decision recognized TDR as a means of reducing the fiscal impact of regulations. Twenty years later in *Suitum v. Tahoe Regional Planning Agency (TRPA)*, the U.S. Supreme Court had another opportunity to weigh in on TDR.[17] The plaintiff was the owner of environmentally sensitive land that was not allowed to develop under TRPA's regulations, designed to preserve the clarity of Lake Tahoe. Suitum applied for relief and was told to sell the TDRs available to her property under TRPA's TDR program. She refused and instead filed a federal suit against TRPA claiming that a taking had occurred since she had been denied all economically beneficial use of her property. The lower courts agreed with TRPA that a takings claim was not ripe for adjudication because the plaintiff had not exhausted her

7. *Id.* at 1337.
8. Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193, 593 A.2d 251 (1991).
9. *Id.* at 205, 212-213.
10. *Id.* at 213.
11. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 28 A.L.R. 1321, 67 L.Ed. 322 (1922).
12. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 34 ERC 1897, 120 L.Ed.2d 798, 60 USLW 4842, 22 Envtl. L. Rep. 21,104 (1992).
13. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 11 ERC 1801, 57 L.Ed.2d 631, 8 Envtl. L. Rep. 20,528 (1978).
14. *Id.* at 138.
15. *Id.*
16. *Id.* at 137.
17. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 117 S.Ct. 1659, 44 ERC 1673, 137 L.Ed.2d 980, 65 USLW 4385, 27 Envtl. L. Rep. 21,064, 97 Cal. Daily Op. Serv. 3917, 97 Daily Journal D.A.R. 6507, 97 CJ C.A.R. 763, 10 Fla. L. Weekly Fed. S 483 (1997).

Consequently, more and more communities will turn to TDR as one way of preserving the best of what is left.

remedies by selling her TDRs. The U.S. Supreme Court reversed the lower courts, holding that TRPA had rendered its land use decision when it denied plaintiff's request for relief.[18] The U.S. Supreme Court sent the case back to the lower courts for a decision on the takings claim. However, the case settled before the courts could address this issue.

Since the *Suitum* decision did not resolve the issue of whether TDR can compensate for a taking, communities are well advised not to rely entirely on TDR as their sole defense against a taking claim. In fact, most TDR programs to date are associated with regulations that come nowhere near depriving a property of all economically beneficial use. However, when a community adopts a TDR program with the intention of mitigating the effects of new regulations, that program should ideally deliver on that intention.

TDR IN THE FUTURE

Our crystal ball shows that communities will increasingly turn to TDR. We consider that to be a pretty safe prediction because TDR is often a response to growth, and growth is not likely to decline anytime soon. The United States will add another 100 million to its population over the next 40 years. Communities will continue to find themselves in a classic dilemma. They will want to preserve their remaining natural areas, farmland, landmarks, and identity. The desire for preservation will be felt most acutely in high-growth states, particularly those that are rapidly running out of open space. The competition for finite tax dollars will continue to be intense. Consequently, more and more communities will turn to TDR as one way of preserving the best of what is left.

18. *Id.* at 734.

ABA SEEKS COMMENTS ON DRAFT LAND USE PROCEDURES

Nova Development Corporation

A draft recommendation on local land use procedures by a Joint Committee of two Sections of the American Bar Association ("ABA") is open for comment to planners, lawyers and the general public. The draft is the work of representatives of the Sections of Administrative Law and Regulatory Practice and State and Local Government Law, who have worked on the draft for over a year.

The Task Force members included:

Edward J. Sullivan, Portland, Oregon, Chair
Michael Asimow, Los Angeles
David E. Cardwell, Orlando, Florida
Cynthia Drew, Washington, D.C.
John Gedid, Harrisburg, Pennsylvania
Jim Godlewski, Neenah, Wisconsin
Otto Hetzel, Bethesda, Maryland
Richard Lehmann, AICP, Madison, Wisconsin
Robert Lincoln, Sarasota, Florida
Daniel Mandelker, FAICP, St. Louis
Christine Monte, Fair Lawn, New Jersey
Ed Schoenbaum, Springfield, Missouri
Bryan Wenter, Walnut Creek, California
Hon. Alexander White, Chicago

The draft arose out of general dissatisfaction with state enabling legislation relating to local government land use procedures, particularly with those lawyers familiar with administrative law in other areas, and over the lack of efforts to reform such procedures since the drafting of the Standard Planning and Zoning Acts of the mid-1920s. Only the Model Land Development Code of the American Law Institute (1975), which was adopted in Florida, and the Growing Smart project of the American Planning Association of 2002 were exceptions to the general rule of ignoring local land use procedures.

The draft is based on Chapter 10 of the Growing Smart Model Legislation, which deals with administrative and judicial review. Among other things, the draft addresses the basics of fair legislative and quasi-judicial land use hearings, including notice, opportunity to be heard, ex parte contacts, bias, findings and judicial review. Professor Daniel Mandelker, who was the legal advisor to the Growing Smart project, authored the draft with the advice and comments of members of the Joint Committee. Following review and comment by the public, the draft will be sent to the governing bodies of both sections for adoption and would, if approved, be sent to the House of Delegates of the American Bar Association for adoption and recommendation to the states.

The draft may be found at the website of the ABA Section of State and Local Government Law at www.abanet.org/statelocal/home.html. Comments may be directed to that Section's Chair, Edward J. Sullivan, at esullivan@gsblaw.com.