

Transferable Development Rights and Density Transfers

I. Nature of the Tools

Property rights are often thought of as a bundle of different rights. Development rights, part of this bundle, can be transferred under the provisions of zoning laws.¹ Transferable Development Rights (TDR) programs make it possible for there to be a free exchange (buying and selling) of development rights without having to buy or sell the land with which the development rights are associated.

TDR programs have been proposed and adopted as a method for protecting natural resource areas, including coastal lands and historic landmarks. They allow for planning on an area-wide basis by allowing landowners in restricted or protected (sending) areas to sell (or transfer) development rights and densities to landowners in developable (receiving) areas, who may use the TDRs for more intensive development.² TDRs provide financial compensation to property owners while local governments impose land-use regulations to direct growth and development.

Density transfers represent a similar strategy. A parcel can be zoned so that part of the parcel contains stricter limitations on development, but the lost right can be transferred to the remainder of the parcel, thus increasing that portion's density.

II. Relationship to Waterfronts

At least one Florida court of appeal has found that protecting the value of an unspoiled, undeveloped beach is a legitimate government purpose, and that it is reasonable to transfer the right to develop housing units to another portion of the property at a higher density as compensation for any loss.³ On parcels with a zoning classification allowing residential or other non-water-dependent uses and where the parcels have waterfront, density transfers could be utilized. They could prohibit any residential or other non-water-dependent use on the waterside portion of the property and allow this development occur on the parcel away from the water.

TDR programs may also be utilized in waterfront and coastal areas to protect the few remaining undeveloped properties by sending any non-water dependent use development rights to an appropriate receiving area. In this regard, TDRs are conservation programs. TDRs can also be used to preserve and promote recreational and working waterfronts. By limiting the development type and density on recreational and working waterfront parcels and providing TDRs and greater density to developers who convey public access easements, docks, slips or other public use elements to the local government, both the public and the developer benefit. Additionally, TDRs can be used to entice developers to build outside the working waterfront area, thereby protecting the existing waterfront.

III. Legal Issues

¹ See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997).

² Montgomery County Maryland adopted a TDR program for agriculturally zoned areas and has been quite successful. See Md. Ann. Code art. 66B, §11.01; see also DANIEL R. MANDELKER, *LAND USE LAW*, §12 (5th Ed., 2003).

³ *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332, 1335 (Fla. 4th DCA 1983).

TDR programs may present legal problems but have generally survived constitutional takings claims. The local government may need to rezone the receiving areas in order to make purchase of development rights in these areas more attractive. Rezoning for this purpose could be challenged; however, at least one Florida court has found that limiting future development in light of environmental, public welfare and historical concerns is a legitimate legislative action.⁴ A TDR program may also be challenged as violative of the statutory uniformity requirement for zoning regulations within zoning districts.⁵ However, when a legislative body has properly exercised its zoning powers, a TDR program may be viewed as creating uniform sub-units within each zone.⁶ A *quid pro quo* where a developer takes advantage of the increased density via the TDR and the local government permanently preserves the waterfront, a marina, or other public access through a TDR program is constitutional and positive.⁷

The most common issue for TDR programs are takings claims. The U.S. Supreme Court first gave credence to TDR programs in the landmark takings case *Penn Central Transportation Co. v. New York City*.⁸ In *Penn Central*, the Court found that even if a taking had occurred, the TDRs available “undoubtedly mitigate whatever financial burdens the law imposed...[and] are to be taken into account in considering the impact of the regulation.”⁹ Subsequently, dicta in the U.S. Supreme Court case of *Suitum v. Tahoe Regional Planning Agency* implies that TDRs are relevant in setting the amount of compensation, and not in determining whether a taking has occurred.¹⁰

Most programs in Florida are voluntary rather than mandatory. Implementation of a voluntary program may avoid the legal taking issue that could result from mandatory programs. Florida courts have upheld TDR programs adopted to preserve lands in agricultural and natural resource areas.¹¹ In *Glisson v. Alachua County*, an appellate court upheld an ordinance that restricted development in an area with both historic and ecological significance on the grounds that protecting the area from development was a legitimate public purpose, and because TDRs would allow reasonable use of property.¹²

IV. Pros and Cons

On the positive side, local governments may use TDR programs to mitigate the financial impact of regulations, specifically, following the dictum in *Suitum*, to compensate landowners for any

⁴ See *Lee County v. Morales*, 557 So. 2d 652, 655 (Fla. 2d DCA 1990).

⁵ A response to this issue is that transfer sites are similar to planned unit developments where uses and densities are mixed.

⁶ See *West Montgomery County Citizens Assoc. v. Maryland-National Capital Park and Planning Commission*, 522 A. 2d 1328, 1333 (Md. 1987).

⁷ See *Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332, 1338 (Fla. 4th DCA 1983).

⁸ 438 U.S. 104 (1978).

⁹ *Id.* at 137.

¹⁰ 520 U.S. 725, 747 (1997).

¹¹ See *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. 1st DCA 1990) (TDR program a factor in dismissing takings claim against wetlands regulation); *City of Hollywood v. Hollywood, Inc.* 432 So. 2d 1332 (Fla. 4th DCA 1983) (on-site compensating densities to preserve beachfront).

¹² 558 So. 2d 1030.

loss of a property right. TDR programs also provide private funding for protection. Finding funds to protect open space, historic buildings and waterfront property is increasingly difficult. By implementing a TDR program, local governments can leverage the existing market to achieve such goals.

TDR programs are more permanent than zoning. Zoning ordinances can change over time and with different administrations. In contrast, because TDR programs use deed restrictions or conservation easements to limit development rights, public values such as beaches, open space and historic buildings are more permanently protected.¹³ In addition, TDR programs give local governments an alternative to buying land in fee simple, can reduce the harshness of restrictive zoning, and can result in a “win-win” outcome. The sending area is protected and the receiving area landowner is able to build at greater densities, thereby realizing the market value of the land.

Considerations for local governments include ensuring a market exists, prioritizing the locations of sending and receiving areas, and determining the maximum number of rights to be sold. Density bonus determination, fast and easy TDR approvals and monitoring and enforcement are also critical areas for the local government to consider. Additionally, following *Penn Central*, TDR programs may be considered in determining whether a taking has occurred, rather than as compensation.¹⁴

On the negative side, what works well in theory may not be effective in practice. While TDRs appear to be an effective method of preserving open space and natural resources, like waterfront property, the reality of the situation is that they have had little effect. Where considerable sprawl exists within the sending area, as in many waterfront communities, it may be too late for a TDR program to be successful. TDR programs may also be more complicated and expensive to implement than traditional zoning. Local governments must administer and enforce the program, including overseeing the market, enforcing deed restrictions, and defending them in court.

A critical problem associated with the implementation of TDR programs is that communities may not support them. It may be difficult to find areas willing to accept higher density development (receiving areas), since it is often perceived that high density development decreases property values and quality of life.

Finally, TDR programs generally protect preservation values permanently. This can be viewed as both a benefit and a drawback. The drawback is that TDR programs limit the future options of an area, regardless of the shifts in societal values or community characteristics.

Density transfers also present advantages and drawbacks. On the positive side, density transfers could present a strategy to avoid rezoning of areas that currently allow residential into zones forbidding residential. On the negatives side, in waterfront areas where residential is still permitted as of right, problems may occur if the parcels are so small as to prevent establishment of a water-dependent use on the waterside portion of the parcel and the residential use on the remainder of the property. In such a situation, either an exception would have to be granted or a

¹³ There is room to debate the assertion that TDRs are more permanent than zoning. Just as zoning may be changed by the local government, a conservation easement held by the government body may be released by the government body. However, it is to be hoped that this would be less politically acceptable than trying to change zoning.

¹⁴ See discussion of *Penn Central* and *Suitum*, *supra*.

takings claim could result from a denial of a residential building permit since such a use is granted as of right by the underlying zoning. Two strategies might avoid this problem. First, downzone areas that still permit residential development to either forbid residential development or make it a conditional use subject to exactions related to loss of public access or recreational and commercial waterfronts. Second, limit application of density transfers to planned unit developments, clustered multifamily projects in multiple-family residential zoning districts, or other development types which inherently require larger spaces.

V. Best Policy Practices

Collier County, Florida's Public Beach Access ordinance has been documented by scholars as a successful TDR program. Article III of Collier County's Code of Ordinances provides that where a developer has voluntarily conveyed beach access lands to the county, the county commissioners may authorize TDRs to lands contiguous to those conveyed.¹⁵ The ordinance provides formulas for determining the ratio of the transfer; the formula providing the greatest number of units becomes the base.¹⁶ However, the board of county commissioners reserves the right to restrict the number of TDRs where the formulas provide numbers that are contrary to public interest.¹⁷

The Conservation Element of Destin, Florida's Code of Ordinances prohibits development of any kind¹⁸ within 50 feet landward of the mean high water line along the Gulf of Mexico.¹⁹ The element provides for a one-to-one transfer of density from the protected area to the developable portion of the parcel.²⁰

¹⁵ See Collier County, Florida, Code of Ordinances, Art. III, §146-65 – Approval of Development Plans.

¹⁶ *Id.* The formulas are: (1) The number of dwelling units which may be transferred equals the number of dwelling units per acre on contiguous land under the existing zoning classification, divided by the number of acres conveyed. (2) The number of dwelling units which may be transferred equals the number of dwelling units per acre as established by the official land use guide, divided by the number of acres conveyed. (3) A transfer of one dwelling unit per acre or portion of an acre conveyed. Notwithstanding the above, the board of county commissioners shall have the authority to authorize the transfer of a lesser number of development rights, where it finds that the transfer of a greater number would be contrary to the public interest.

¹⁷ *Id.*

¹⁸ The sole exception to this prohibition are dune walkovers.

¹⁹ See Destin, Florida, Code of Ordinances, Policy 5-1.4.11: Development in Beach/Dune Area.

²⁰ See *id.* Protected areas include the 50 foot protected area as well as other natural resource areas like dunes and wetlands.