

Market-Based Planning Tools: An Overview of TDRs and PDRs

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Introduction

Planners and local governments possess a myriad of tools with which they may restrict, facilitate, alter, and guide land use and development. Purchase of Development Rights (PDR) and Transferable Development Rights (TDR) programs are voluntary, market-based approaches that allow real property owners to receive monetary compensation in exchange for development rights. In effect, the landowner is restricted from developing her land in excess of a level determined by public policy, while permitted to realize financial gain as if the land were fully developable.

PDR Basics

There tends to be some confusion between a PDR program and a conservation easement. In sum, a PDR program is nothing more than a system in which a conservation easement is purchased from the landowner rather than donated by her. Unfortunately, this explanation is unhelpful without at least some understanding of a conservation easement. By definition, a conservation easement is “a negative easement . . . restricting residential, commercial, and industrial development of land . . .”¹ A negative easement is “[a]n easement, the effect of which

¹ N.C. GEN. STAT. §106-744(b) (2006).

is to *preclude* the owner of land subject to the easement from the doing of an act which if no easement existed, he would be entitled to do.”² Contrast this with a traditional easement, in which the easement holder is allowed to *do* an act which if no easement existed, he would *not* be allowed to do. Conservation easements are distinct from other types of negative easements in that their purpose is narrowly defined; namely, to preserve a natural resource.

Conservation easements are recorded, and the land use restrictions defined in the easement deed are permanent; the restrictions run with title to the land.³ Conservation easements may be sold to anyone. However, in many jurisdictions there are tax incentives which encourage transfers to qualified conservation entities.⁴ The practical effect of a conservation easement is to prevent development on a parcel of property in excess of a predetermined level. If the easement is donated, then the donor receives no direct financial compensation. If, however, the easement is purchased from the landowner as part of a PDR program, the landowner receives the monetary value of the foregone development rights.

Under most state level PDR programs, the conservation easement purchase is publicly financed, and must be made by a qualified conservation entity such as a non-profit land trust, public agency, or historic preservation organization.⁵ Participation in a PDR program is completely voluntary for landowners.⁶ Under a PDR program, the decision may be predicated primarily on the monetary compensation that is offered in exchange for the development rights. Just as a landowner analyzes costs and benefits prior to selling water or mineral rights away from a piece of property, so too a landowner weighs costs and benefits prior to selling development

² BALLENTINE’S LAW DICTIONARY (3d ed.).

³ *Purchase of Development Rights*, GATHERINGWATERS, Feb. 11, 2007, http://www.gatheringwaters.org/documents/land_owner_info_sheets/PDR.pdf.

⁴ See, e.g., N.C. General Statutes §105-130.34(b) (2006).

⁵ *Purchase of Development Rights: Conserving Lands, Preserving Western Livelihoods*, WESTERN GOVERNORS’ ASSOCIATION, Feb. 11, 2007, <http://www.westgov.org/wga/publicat/pdr.pdf>.

⁶ *Id.*

rights away from property.⁷ In an individual PDR transaction, development rights are purchased and retired, restricting additional development while permitting the property to continue to be used in its current capacity.⁸ The property owner receives the benefit of the cash payment for the development right, as well as the benefit of reduced property tax liability, resulting from the decreased value of the land (because it is now subject to a conservation easement).

A PDR transaction “need not hamper the future economic viability of working [waterfronts].”⁹ This is because “[t]he specific development rights that the landowner will forego or restrict in a PDR sale are fully negotiable . . . , allowing terms to be tailored to meet the needs of the landowner and to preserve the property.”¹⁰ Upon completion of a PDR transaction, the landowner will continue to enjoy complete ownership and use of the property, subject only to the restrictions of the conservation easement. The landowner also retains upkeep responsibilities, meaning the state assumes no duty to maintain the property as a consequence of its interest in the conservation easement.

Strategy for PDR Success

The primary challenge to a successful PDR program is funding.¹¹ Typically, the properties identified under a PDR program have significant marketability. In other words, the value of the land in the private market is very high. Therefore, to compete with market forces, the price that must be paid for development rights under a PDR program is also very high.¹² If a PDR program is able to “outbid” the market, then the property is preserved. This seems a very simple solution. However, it is unlikely that any PDR program will have enough public

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Julia Freedgood, *PDR Programs Take Root in the Northeast*, http://www.farmlandinfo.org/documents/29535/PDR_Programs_take_Root_in_Northeast.pdf.

¹² *Id.*

financing available to allow for the purchase of development rights on all threatened parcels of land. Therefore, a successful PDR program targets specific, critical properties, recognizing that not all threatened properties will be preserved.

TDR Basics

TDR programs, like PDRs, take advantage of the severability of development rights. However, TDRs preserve properties not by retiring development rights, but by transferring them. Under a TDR program, a market for development rights is created where one previously did not exist.¹³

A TDR program requires four elements: 1) Sending areas to be protected; 2) Receiving areas to be developed; 3) Transferable credits that serve to quantify the development rights being transferred and; 4) A procedure for facilitating the transaction.¹⁴ Sending areas are traditionally agricultural land, open space, historic properties, etc. The first step in the implementation of the TDR program is to rezone the sending area properties. The rezoning gives property owners a choice; they can either choose not to participate in the program (thereby retaining the right to develop their property to its maximum allowed capacity), or they can opt into the TDR program (thereby relinquishing the right to develop their property to its maximum allowed capacity).¹⁵ If the latter option is chosen, “the sending site owner enters into a deed restriction that [limits] the amount of future development . . . that can occur on the property.”¹⁶ These deed restrictions are permanent and run with the land.

¹³ TDRS AND OTHER MARKET BASED LAND MECHANISMS: HOW THEY WORK AND THEIR ROLE IN SHAPING METROPOLITAN GROWTH, The Brookings Institution Center on Urban and Metropolitan Policy (June 2004), available at http://www.brookings.edu/urban/pubs/20040629_fulton.pdf.

¹⁴ THE FEASIBILITY OF A TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM, Athens-Clarke County Planning Department (Feb. 2, 2005), available at http://www.rivercenter.uga.edu/service/tools/tdr/acc_tdr.pdf#search=%22florida%20transferable%20development%20rights%22.

¹⁵ *What is TDR*, BEYOND TAKINGS AND GIVINGS, available at <http://www.beyondtakingsandgivings.com/tdr.htm>.

¹⁶ *Id.*

After the deed restriction is recorded, the sending site owner obtains the right to sell a commodity known as a transferable development right (TDR).¹⁷ “In a traditional TDR program, the TDR ordinance specifies the number of TDRs that the sending site owner can sell . . .”¹⁸ In other words, the “quantity” of TDRs is established by statute based upon the extent of the development rights foregone by the sending site property owner.

The demand for TDRs (and consequently, their monetary value) is determined by the demand for development in the receiving zone. Receiving zone properties may be developed in excess of their maximum zoned capacity if the receiving zone property owner purchases TDRs. Only properties in the statutorily identified receiving zone may make use of TDRs. Typically, receiving zones are areas which have the infrastructure to absorb increased development.¹⁹ Oftentimes, in a TDR program, TDR banks are established to facilitate transactions. The banks basically serve as brokers for buyers and sellers.²⁰

In sum, TDR programs allow development rights to be severed from one parcel of land and traded (sold) for use in developing another, distinct parcel.²¹ Typically, the purchasing party seeks to obtain these additional development rights because his property has already been built out to its maximum zoned capacity. For example, suppose Landowner A owns a fish house along the shoreline (sending zone), and Landowner B owns a high-rise condominium complex in the “business district” (receiving zone). Further suppose that, as currently zoned, Landowner B cannot add any more condo units to his property. A TDR program allows Landowner A to voluntarily restrict the development of his own waterfront property and instead trade (sell) these

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ TDRS AND OTHER MARKET BASED LAND MECHANISMS: HOW THEY WORK AND THEIR ROLE IN SHAPING METROPOLITAN GROWTH, The Brookings Institution Center on Urban and Metropolitan Policy (June 2004), available at http://www.brookings.edu/urban/pubs/20040629_fulton.pdf.

²¹ *Id.*

development rights to Landowner B. Landowner B is then permitted to use these additional development rights to increase his condo units in excess of the baseline zoning capacity.

The basic idea behind landmark preservation TDR programs is to compensate, through free-market transactions, property owners whose development rights are voluntarily restricted.²² Theoretically, this has the effect of permitting property owners to benefit financially from the appreciated value of their land, while still effectuating, through zoning, the public's interest in restricting the use of the property.

Strategy for TDR Success

The most important component of a successful TDR program is the proper identification of sending and receiving areas. Regarding receiving areas:

It is usually easy for a community to identify which land it wants to preserve. It can be much more difficult for a community to identify which neighborhoods or areas should be developed at higher densities as part of that trade-off. In many cases, communities designate too few receiving areas or the TDR program cannot withstand political opposition from neighbors in the receiving areas. Successful programs designate adequate and viable receiving areas and stick by them.²³

Regarding sending areas:

Unfortunately, many programs attempt to save areas that are under immediate threat of development, such as land flanking highways or on the developing urban fringe. Land under immediate threat of development will typically have a high development value, forcing high TDR allocation rates in an attempt to motivate owner participation.²⁴

In other words, it is unwise to attempt to apply a TDR program to properties that are already “in the line of development,” or to property that is an enclave within a highly developed area.

²² *See, e.g., id.*

²³ *Id.*

²⁴ *Id.*

Two of the more successful TDR programs in the country were implemented in Montgomery County, Maryland and Collier County, Florida.²⁵ Both were aimed at preserving large, contiguous tracts of land.²⁶ Although other programs have attempted to identify and preserve specific properties, they have met with much less success, and the number of transactions within these programs is comparatively low.²⁷

Permissibility

TDR programs are statutorily defined. They are the products of legislation. There is no common law right to trade development rights. Consequently, the State dictates not only the terms of a TDR program, but must act to permit the existence of such a program in the first place. The North Carolina General Assembly has passed enabling legislation, allowing for the implementation of TDR programs. However, this legislation is very limited, applicable only to sending areas used for “street or highway purpose[s].”²⁸ The General Assembly would have to act to enable local governments to implement TDR programs under which working waterfronts could be identified and protected as sending areas.

PDR programs, since they are nothing more than a series of publicly funded purchases of conservation easements, do not require enabling legislation. A PDR program raises no concerns if the purpose of the conservation easement is recreational access, open space preservation, etc. A program directed solely at preserving water access could be implemented immediately without any legislative action. However, there could be some issues with a PDR program directed at preserving a traditional use rather than a natural resource. Such a program

²⁵ *Id.*

²⁶ TDRS AND OTHER MARKET BASED LAND MECHANISMS: HOW THEY WORK AND THEIR ROLE IN SHAPING METROPOLITAN GROWTH, The Brookings Institution Center on Urban and Metropolitan Policy (June 2004), available at http://www.brookings.edu/urban/pubs/20040629_fulton.pdf.

²⁷ *Id.*

²⁸ N.C. General Statutes §136-66.10

could raise some “public purpose” concerns. It would be advisable to have an explicit legislative grant of authority (such as that obtained for farmland preservation)²⁹ for a PDR program directed at traditional uses rather than public access.

²⁹ N.C. General Statutes S106-744 (2006).