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# A Preservationist's Guide to Urban Transferable Development Rights

*by Jennifer Cohoon McStotts*





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Wouldn't it be nice if planners could easily redirect growth and development away from historic resources and toward areas where growth can be readily absorbed?

In 21st-century American land-use planning, there is an increasing trend toward market-based tools—those legal mechanisms driven by supply and demand that (hopefully) accomplish the same goals as traditional land-use regulation more efficiently and with less impairment of private property rights. One such mechanism that has worked particularly well for land conservation is the transfer of development rights (TDRs). TDRs can be equally effective for preservation of the built environment in urban areas, and numerous cities have used TDRs to encourage property owners to preserve their historic landmarks.

The purpose of this booklet is to explain how TDRs can be used to protect historic and cultural resources. Transferring development rights is a flexible tool that can be adapted by local governments to fit a variety of situations. The strength of TDRs comes from being a market-based mechanism; TDRs harness the economic forces of development and growth that threaten important resources and allow preservationists to use those same forces in favor of preservation. This booklet will help preservation advocates understand how TDRs can be used to ease the conflict between growth pressure and historic preservation.

## The Concept and History of TDRs

In a nutshell, a preservation TDR means one party—the sender or seller—sells his right to develop a historic property in whole or in part to another party—the receiver or buyer—who can use it to achieve a more intensive use of the property. As part of the bargain, the public gains the protection of the historic resource in the long term, if not permanently.

New York City became the first to adopt TDRs through its 1968 Landmark Preservation Law—the ordinance famously upheld by the U.S. Supreme Court in the *Penn Central* case, one of the first and most important legal victories of the preservation movement. A few other cities and counties followed suit in the 1960s and 1970s, but the first major wave of TDR programs crested in the 1980s when approximately 60 programs (mostly aimed at environmental protection) were created. Only seven of those focused on historic preservation. Today, less than 15 percent of the well-known programs deal exclusively with historic preservation, meaning approximately 20 cities and towns have preservation TDR programs.

## Understanding Development Rights

While the details of individual programs vary considerably, every TDR program is based on the same basic concepts of property ownership and market forces. In the United States, owning property actually means you own a volume of space—including the land you

stand on, the earth beneath it, and the air above it—as well as certain rights that come with the property. American lawyers and judges call these rights a “bundle of sticks” because each right—such as the right to mine, to harvest, to build on your land, or to exclude trespassers—can be limited, given away, bought, or sold, just like the property itself.

When you rent your property to a tenant, you give that person a stick that represents the right to live there for a certain amount of time in exchange for rent. Even though it is temporary, you are giving the tenant some of your rights as the property owner. Donating a conservation easement on your property is also equivalent to giving some of your sticks (rights) to the institution that holds the easement. Local land-use laws, even zoning laws, limit our property rights by tying up some of those sticks. Laws don't technically take away sticks entirely, however, since a law can always be changed.

When a preservation ordinance places development restrictions on newly designated properties, it binds up some of those sticks (rights) in limitations. What makes a TDR system so powerful is its ability to harness latent rights—the tied-up sticks—on historic or undeveloped properties, and connect them with a demand for development elsewhere without diluting the public benefits of preservation and other land-use laws. Unused rights are transferred to someone who can use them, possibly even someone who needs them to appropriately develop her property.

*Cover: San Francisco's TDR program was adopted as part of a larger comprehensive plan in 1985. This incentive program has helped the city maintain its distinctive character.*

*— Photo by Jennifer Cohoon McStotts.*

## TDRs – Key Terms

**Conservation easement:** A legal document limiting the right to develop a piece of land where the right of enforcement is given to the holder of the easement—a nonprofit organization or government agency.

**Density bonus:** Additional density allowed in a development built using TDRs above and beyond the combination of the underlying land-use laws and the value of the purchased rights. For example, a buyer of development rights might be allowed to build not just the square footage allowed on his lot plus the square footage he purchased from the sender but also an additional 5 percent as an increased incentive to use TDRs.

**Development rights:** The quantity and quality of development a property owner is entitled to build on her land under existing laws, including local land-use laws.

**Downzoning:** A reduction in the intensity or size of development allowed under local law, such as the lowering of a height limit or a decrease in the number of units per acre.

**Euclidean zoning:** Zoning in general is a type of land-use control that regulates the design and use of a community geographically by zone. Euclidean zoning specifically refers to the separation of uses characteristic of early zoning efforts and is named after the seminal *Village of Euclid v. Ambler Realty* case.

**Preservation easement:** A particular kind of conservation easement used to protect the facade, exterior, and/or interior of a historic building, as well as sometimes the landscape around it.

**Receiving parcel:** The piece of land (also called a lot or property) on which the transferred development rights are applied. Also referred to as the development lot or growth lot, or in mass, as the receiving, growth, or development area.

**Sending parcel:** The piece of land—often with a sensitive resource—from which the transferred development rights are severed and on which protection is placed. Some programs call the sending lot the transfer lot or the preservation lot. As a category or in a geographical group, sending parcels are sometimes referred to as the sending, transfer, protection, or preservation area.

**TDR or TDRs:** Refers to the transfer of development rights or the transferable development rights themselves.

**Transfer of development rights:** The process of legally removing unused development potential from one property and assigning it to another.

**Variance:** An administrative exception granted by a local government agency such as a planning commission that allows the applicant to build a structure or complete a development that would otherwise violate the land-use laws.

The right to develop—both what’s given up and what’s received—can be defined in a number of different ways. The owner of the sending parcel is typically giving up some or all of his rights to build on the property, though he could be giving up any property right—big or small—including the right to pave the site for parking spaces or make certain alterations. The receiving parcel’s owner typically gains the right to develop above and beyond what the local law would otherwise allow.

For example, imagine a landowner who resents the perceived loss brought on by new historic district restrictions that limit his right to build a tall building. In a common preservation TDR exam-

ple, the owner could sell the right to build what he would have if he did not own a landmark minus the size of the landmark itself. Perhaps he could build a ten-story building if it were not for the three-story landmark already located there; the seven-story difference could be transferred to a buyer, who would then be able to build additional stories above the height restriction.

### Why Create a TDR Program?

There are at least three common motivations for instituting a preservation TDR program, and they are found singly or in combination.

### TDRs as a Preservation Incentive

The first is the desire to create a financial incentive for owners of a historic property either to physically preserve or (where it is voluntary) to agree to designate their historic property locally. Such a program would provide owners with additional financial resources to preserve or rehabilitate their buildings upon the sale of unused development rights or simply encourage designation by making the sale of such rights a possibility. The standards that the preservation work will be held to depend upon the community.

Let's look at how a TDR program works as an incentive in the imaginary town of Encouragement. The downtown height limit is five stories. Mr. Sender's historic warehouse is only three stories tall. The local government would like to give Mr. Sender an economic incentive to volunteer to have his property designated locally and/or to rehabilitate the historic building. Mr. Receiver owns a nearby property in an ideal location for a hotel, but he would like to build a larger building than allowed by the local law.

The local government sees the two different pressures here: the need for a pro-preservation economic incentive for Mr. Sender and the potential for additional economic development on Mr. Receiver's property. TDRs could be used to relocate Mr. Sender's two stories of unused developable space to Mr. Receiver's lot. As a result, Mr. Sender would have the financial incentive to designate his property as historic (or rehabilitate if so required under the program), and Mr. Receiver would be paying to protect a historic building in exchange for his variance from the local law.

### ***TDRs to Mitigate Economic Impact***

Second, where historic designation is involuntary, the local government may wish to institute a TDR program to mitigate any economic impact of the designation. Often, historic designation raises or stabilizes property values along with numerous other economic benefits, but it also may downzone the property. Although historic designation has been upheld against takings claims over and over again, local governments may be concerned about the impact of historic designation on property values, particularly in commercial areas, where the historic designation can

have the effect of downzoning. The rights lost by downzoning can be converted to transferable rights under a TDR program.

In addition, communities with preservation regulations may be interested in offsetting economic impacts for political reasons, to make involuntary designation more palatable to property owners.

For example, in the fictitious city of Little Relief, the historic downtown will soon be designated as a local historic district with a height limit of five stories. The local government is worried that property owners will object to the downzoning from the current ten-story height limit, even though there are no buildings downtown over five stories. One such property owner, who has the resources to sue, is Ms. Sender, the owner of a successfully rehabilitated warehouse-turned-retail establishment. Mr. Receiver owns a vacant lot nearby, and he would like to build a larger building than allowed by the local law. He isn't the only developer who will be seeking a variance if the downzoning is approved.

The local government understands the concerns of both types of property owners, who are foreseeing lost profits. To mitigate the impact of downzoning, TDRs could reallocate Ms. Sender's unused developable space to Mr. Receiver's lot. For full mitigation, Ms. Sender would be allowed to transfer any rights she had before the downzoning, although Mr. Receiver may be limited in how much he can exceed the new, lower restrictions even with his variance from the local law. On one extreme, Mr. Receiver could be allowed to build out to the previous restrictions (or even bigger) if he buys enough TDRs. Yet, if the community truly wants the average height downtown to be closer to five stories than to ten

stories, a ceiling on the application of TDRs may be imposed to ensure greater compatibility.

### ***TDRs as Growth Management***

Finally, although TDRs have made their name in environmental protection, their ability to direct growth away from a historic urban core or from significant landmarks is a third and important reason to implement TDRs. Bear in mind, TDRs can be effective, voluntary growth management tools, but they typically do not work as growth controls. The purpose of a transfer is to redirect development, not to stop it.

The imaginary streetcar suburb of Progressville has been experiencing increased growth pressure, and out-of-scale, inappropriately sited projects have begun to affect the town's historic character. Mr. Sender's historic home is on a larger-than-normal lot, and he has been considering demolishing the building in order to build something larger or subdivide the parcel. The local government would like to give Mr. Sender an incentive not to demolish or subdivide, though he has that right under current law. Nearby, Ms. Receiver owns vacant property zoned for low-density residential in an ideal location for apartments.

The local government sees two pressures—the need for a pro-preservation economic incentive for Mr. Sender and the potential for additional economic development and/or affordable housing on Ms. Receiver's property. TDRs could satisfy both sides by reallocating Mr. Sender's unused developable space in the form of housing units to Ms. Receiver's lot. As a result, Mr. Sender would have the financial incentive to preserve his residential property, while Ms. Receiver would be able to satisfy the market demand for housing.

## How TDRs Work

The local government's objectives determine what form a TDR program will take. Preservation TDRs typically take one of three forms:

1. **Adjacent-lot TDR**, meaning transfers to contiguous sites, often including lots across the street or catty-corner and sometimes including any contiguous lot connected in a chain of lots under the same ownership;
2. **District-wide TDR**, which means transfer to any property (except those designated as sending) within the district; or
3. **Inter-district TDR**, which requires transfers from a sending district to a receiving district. This type of program is best used to redirect growth, since development occurs outside of the protected area.

**Figure 1:** This illustration shows a two-story building on a corner lot. Under the current land-use laws, a building on this lot could extend farther back and higher up. The unused space (outlined in dashed black lines) represents the property owner's transferable development rights. In an adjacent-lot TDR system, the owner can transfer those rights to the lots in blue—those lots contiguous to, across from, and catty-corner to the lot. Modified forms of this system would also allow the owner to transfer the development rights to adjacent lots at an angle.

**Figure 2:** This illustration shows a hypothetical district-wide TDR program. The buildings in black represent the historic landmarks of the community (though there would likely be more in a district this size). The blocks in blue indicate the 20-block area of this zoning district—let's call it the Downtown District. This particular TDR program would allow the landmark property owners to transfer their TDRs—again, shown in dotted black as the volume of space above the buildings up to any height limit—to any other lot in the district except other designated sending properties.

**Figure 3:** This illustration shows an interdistrict TDR program. Imagine a small town with an intact historic Main Street. The community wants to protect the Main Street character, the views from the major approaches into town, and the early residential district behind the buildings on the north side of Main Street, but all of these property owners have the right to build bigger structures under current zoning laws. TDRs would allow those rights to be transferred to areas away from the main roads on the west and the scenic bridge on the east in order to accommodate the growth in areas out of sight of most tourists. Establishing these different districts—the Main Street and historic residential sending areas versus the younger receiving areas—creates the third type of TDR program, the interdistrict TDR.

### *Do the rights have to be transferred to a lot nearby?*

Not at all. One common misconception is that TDRs are only legally defensible for transfers in close geographic proximity (e.g., within 500 or 1,000 feet). The TDR program in Denver, for example, allows rights to be transferred anywhere downtown within a 40-block area. The

Fig. 1

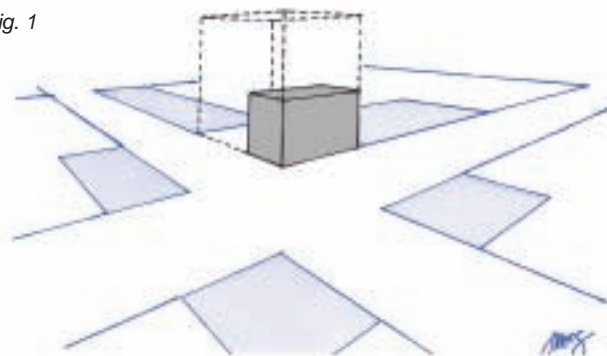


Fig. 2

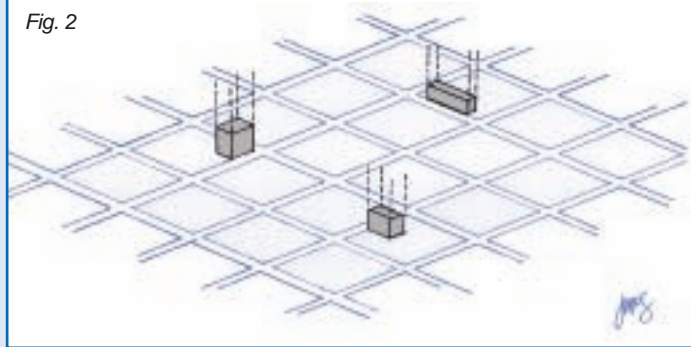
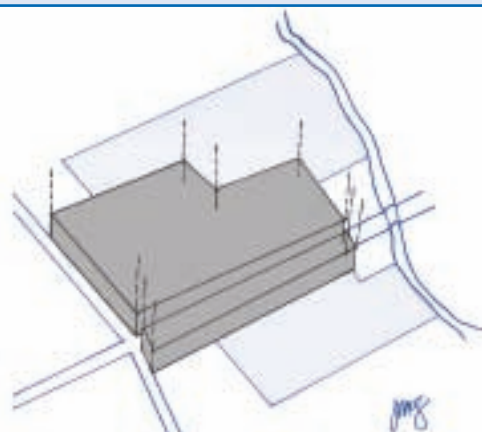


Fig. 3



most common receiving area for preservation TDRs is the remainder of the zoning district within which the historic structure is located. One notable exception is Washington D.C.'s TDR program, which transfers rights from the strictly height-limited downtown outward to the perimeter where height limits are higher and/or more flexible.

Some programs require the unused development rights to be transferred to adjacent, across the street, or catty-corner parcels. The City of Philadelphia, among others, has rejected such a system precisely for the architectural problem it causes of dramatically incompatible scale.

In short, there is no predetermined geographical limit on transfers unless specified under state or local enabling acts. That said, TDRs should be part of a larger planning effort, like any planning tool, and there must be a rational justification for the program, such as a connection between the potential impacts and the selection of sending and receiving areas.

## TDRs and Existing Land-use Restrictions

Perhaps the most commonly asked question about TDRs, especially preservation TDRs, is, do the variances given to receiving property owners defeat the purpose of the underlying land-use restrictions? In most cases, the restrictions in the receiving area have to be tighter than the local community actually wants to see (lower heights, smaller volumes, etc.) for two reasons.

If the community really does not want buildings over a certain height or volume, more than a certain number of housing units per acre, or parking garages over a certain size, for example, then it must set the threshold that receiving parcels exceed even lower. Otherwise, the community runs the risk that the TDRs will be used to create something bigger than what is desired.

Second, stricter regulations may help create demand for TDRs, which will spread the incentive to preserve more historic buildings. If market pressures are light and developers are satisfied with the land-use restrictions as they are, TDRs will not provide an incentive for owners of historic properties because they will have no value in the marketplace.

It is worth mentioning that in some communities, nonprofit organizations acquire development rights either to buy a place at the table to determine the shape of the new development or for the purpose of “retiring” the rights—meaning to hold them permanently—rather than to allow them to be applied. This can affect calculations and predictions done to balance of supply and demand, which is discussed further below.



*The Supreme Court ruled that Penn Central Transportation Company had not been denied the use of its air rights entirely. It could develop them—subject to the Landmark Preservation Commission’s approval—or transfer them to neighboring properties via New York City’s early TDR program*

— Photograph by Eric Uhler.

### What happened to Grand Central Station’s development rights?

After the designation of Grand Central Station as a historic landmark by the New York City Landmark Preservation Commission, the property’s owners—Penn Central Transportation Company—applied for certificates of appropriateness from the commission for an addition of more than 50 stories. After they were denied, the owners brought suit claiming numerous constitutional violations. The Supreme Court Justices in *Penn Central* made a point of noting that Penn Central Transportation Company had not been denied the use of its air rights entirely. It could develop them—subject to the Landmark Preservation Commission’s approval—or transfer them to neighboring properties via this early TDR program.

In the years after the *Penn Central* decision, the city created a special subdistrict around the station, and rights from Grand Central can be transferred anywhere within this area. Transfers from the Grand Central Station Subdistrict included 75,000 square feet of development rights to the Philip Morris Building on the southwest corner of Park Avenue and 42nd Street in 1979. More recent transfers to the Bear Stearns headquarters in 1998 and two other Madison Avenue sites in 2000 total hundreds of thousands of square feet. Yet, over a million square feet of development rights are still left for the station’s owners to transfer.

### ***Can a TDR system work without zoning? Without historic districts?***

TDRs can work without traditional Euclidean zoning or traditional historic districts so long as there is enough demand for development on the would-be receiving parcels to create a market for the transferable development rights. In most cases, there has to be some land-use restriction (even if not zoning) that will be lifted or shifted as a result of the transfer in order to create a demand or market for development rights. On the other hand, TDRs can be equally effective with or without historic districts so long as the sending properties are otherwise identified, such as by a landmark ordinance or through a qualitative standard.

### **Local Government Authority to Enact a TDR Program**

As with zoning, historic preservation, and most planning tools, state enabling legislation permitting use of the tool should be in place before a local government enacts a TDR program. This may not be an issue in home rule states, where communities can take on those powers not explicitly withheld or reserved at the state level.

Consult with legal counsel familiar with state laws to determine if authority exists for a TDR program and what legal requirements govern its adoption. Most likely, the legal requirements will be similar to the state's zoning and/or comprehensive planning requirements. In some cases enabling legislation for land use is already broad enough to permit TDRs.

### **Basic TDR Mechanics**

There are five general steps most programs need to follow:

1. Define the rights to be transferred.
2. Provide a mechanism to sever them from the sending property.
3. Transfer them, typically in exchange for money, to another property where the development is better suited.
4. Apply them to the receiving property by a variance from local land-use laws.
5. Place long-term or permanent restrictions on the sending property.

Let's examine each step in greater detail.

#### ***1. Define Rights to be Transferred***

One of the most important questions in understanding or designing a TDR program is what right the seller will be transferring. Basically, what right will be removed from the sending property?

Theoretically, the seller could be foregoing any right on the property given the current land-use restrictions.

Imagine a historic home located on a substantial lot in an otherwise densely developed urban area. The property owner may be torn between seeking to preserve the integrity of the green space around the building and realizing the potential profit of subdividing and/or developing the unused areas of the parcel. If the local government wishes to create incentives for landowners like this one to protect similar landscapes, it could allow the owner to transfer a right associated with that unused space.

Perhaps the program would allow the sender to transfer the housing units or the area or volume of potential commercial space that otherwise could be built on the lot. Even if the right to build was already limited by local laws, the sender could forego paving the site to make a parking lot and transfer that right to another landowner. Remember, a local government establishing a TDR program can define the rights to be transferred as specifically or broadly as it wants to, from large to small sets of square footage or from housing units to parking spaces. In this situation, selling the potential parking spaces as a development right to another landowner would allow the buyer to build a parking garage or construct underground parking on his own lot.

Regardless, there must be a connection between the threat on the sending resource, the right to be transferred, the potential impacts of development in the receiving area, and the incentive given to the receiver. In the above example, a threatened landscape could be protected by limiting any of a variety of rights.

The important point to remember is that TDR programs can prescribe which rights can be transferable. If the perceived threat in the example was the loss of the building (not the landscape), allowing the owner to sell traditional development rights, such as unused square footage, will alleviate growth pressures more than the transfer of parking spaces.



### Calculating Development Rights

The standard method of defining most preservation TDRs is to calculate the difference between the total volume or square footage allowable under the baseline zoning and the total volume of square footage of the existing building. In short, what could be built on the lot minus what is already built there equals the transferable rights—the unused development potential of the lot. Washington D.C., San Francisco, and New York City—three of the more successful preservation TDR programs—all use this method.

One question that must be answered at this stage is whether the calculation will be offset by other development considerations and/or laws outside of the city's control. For example, if soil conditions or state laws make a portion of the lot unbuildable, should the landowner be able to transfer the right to develop that portion of the property as if it were developable? This is less of an issue with preservation TDRs than it is with open space TDR programs, but depending on the objectives of the community, it bears consideration.

Alternatively, a jurisdiction may elect to provide development rights in excess of a 1:1 ratio.

The City of Denver, for example, utilizes this approach. Historic property owners who choose to rehabilitate their buildings can receive a density bonus of four square feet for each square foot of the rehabilitated structure. In essence, they can transfer the right to build a structure four times the size of their landmark building to a developer in the same district. To qualify, the rehabilitation must conform to the Secretary of the Interior's Standards, the standards of the landmark preservation commission, or to the Denver Building Code. (See subsection 59-223(b) of the Revised Municipal Code of the City and County of Denver, Colorado.)

### 2. Severance and Certification

A landowner can sever and sacrifice property rights of his own accord, such as with the donation of a preservation easement. These are the same rights—in most cases—that the owner transfers in the TDR process. One issue under a TDR program is how to define these rights as something separate from the property itself so that their transfer can be documented. Remember the idea of property rights as a bundle of sticks. Each of those sticks is figuratively stuck in the ground because the rights come with land ownership. Severance is the act of pulling those sticks out of the ground; it is the legal step of separating the right from the property.

The severance procedure can vary between cities, and in some cases, the local government may want to approve or certify the rights to be transferred separately from and prior to the transfer itself. Typically, the administrator for the TDR program issues the property owner a certificate that sets forth the amount and quality of the available transferable development rights. For example, the government might define the transferable rights as one certificate for 50,000 square feet of unused space and allow the owner to transfer all or part of it; alternatively, the same owner could receive 50 indivisible certificates each worth 1,000 square feet of unused space.

The rights must be clearly defined before the transfer so that the owner knows how many and which sticks he's giving away, but at what point does he take the sticks out of the ground? Some communities certify the rights and declare them transferable in advance of the transfer; these systems only require the severance (or sacrifice) to be made legal at the time the rights are transferred and



Several buildings in Denver, Colo., have taken advantage of the city's TDR program including the Navarre Building (pictured here), the Denver Athletic Club, and the Odd Fellows Hall.

— Photograph by Seth Wilcher.

applied to the receiving property. Denver follows this latter technique in its ordinance, which reads: "Upon the issuance of a certificate of undeveloped floor area by the zoning administrator, undeveloped floor area shall be created and shall be an independent right in the owner to whom the certificate is issued and may be transferred. Such transfer need not be made appurtenant to another zone lot until a permit is requested using the undeveloped floor area." (Subsection 59-223(b)(3)f.5.) It is worth noting that the Denver certificate of undeveloped floor area

reads: “The future development of this property is physically limited as a result of this certification.”

In contrast, other communities issue the certificate only after the property owner has duly recorded a deed restriction or some sort of permanent protection into the chain of title for the property (see the section below on protection). This early protection requirement withholds from property owners the physical papers they will need to sell their rights until the rights are legally severed by other means.

### 3. Transfer Procedures

The transfer of development rights is essentially a private transaction, though in most TDR programs—preservation and environmental conservation alike—the transaction is supervised or even approved by the local government. For example, although certificates remain in a government registry, negotiation over price is a private affair.

Here is another important distinction between different types of TDR programs—those with concurrency requirements and those that treat TDRs as commodities.

Concurrency requirements are rules built into the design of the TDR program and its ordinances that force the transfer of TDRs to occur at the same time as the application for the variance from the local land-use laws. A developer seeking to use TDRs to build above a height restriction, for example, would be required to find a willing sender at the same time he proposes his development and requests the variance from the height restriction. The challenge this creates is a disincentive for the developer because there are increased transaction costs in finding a seller willing and ready to sell at precisely the right time.

Depending on motivations, community interest, and taxation issues, the community may choose to treat TDRs as commodities, meaning they can be purchased by anyone, and bought, sold, or even held freely, and there is no rule requiring concurrency between transfer and development. This model better accommodates the desires of interested nonprofits, alleviates timing concerns, favors the developer’s schedule, and permits the operation of TDR banks. (For an explanation of TDR banks, see page 12.)

How much are TDRs going to sell for? The answer depends on a number of different factors:

- What rights will be surrendered?
- How much is the protected property worth, as is and as fully developed under the local law?
- How much would a comparable preservation easement be worth?
- How much will the property’s assessed value for tax purposes be reduced as a result of the transaction?
- What is the ratio of development to unused rights on the sending parcel?
- What rights are gained by the receiver?
- What is the profit to be gained by the variance or bonus that comes with applying the TDRs to the receiving property?
- What would the developer be willing to pay for the variance or bonus? What would a reasonable impact fee be for the increased development?
- How much development pressure is on the community—both the sending and receiving areas?

Depending on the characteristics of the property and the factors listed here, TDRs can sell from between 25 percent to 90 percent of the property’s estimated value if it were fully developed. Again, the importance of a balanced system both in terms of program success and in price setting cannot be underestimated.

### 4. Application—Buyer’s Incentive

The transferred rights can be used to lift or shift any development restriction. The most common mechanism gives the receiver additional square footage or increased volume, but other programs provide additional housing units, grant bonus floor-area-ratio, or raise the height restriction. Essentially, transferred development rights are useable by the recipient for whatever purpose the community decides they are worth, because it is the local land-use ordinances—the TDR ordinance specifically—that determine how the rights will be applied to the property.

One important aspect to keep in mind during program design is that the bonus—whatever it may be—needs to be an incentive for the receiver; hence, it must be something receiving developers want enough to pay for it. With environmental protection TDRs—especially those programs in underdeveloped areas—this can be easier to accomplish if development pressures are strong and TDRs can make a substantial difference in the amount of development allowed. The challenge in preservation TDRs—especially those in developed areas—is that the difference for the developer between building with and without the TDRs is not always as substantial as under conservation TDR programs because the sending parcel is already developed.

The Chattahoochee Hill Country—a 40,000-acre area of undeveloped land south of downtown Atlanta—adopted a TDR program in the spring of 2003. The principal goal of the program was to redirect growth pressures in the area to nodes designated for increased development. For that reason, the entire community was designated as a sending area except for the receiving area nodes.

In this situation, no downzoning was required—the entire community was zoned for 1:1 development, meaning one house per acre. That underlying zoning was kept, and landowners in either the sending or receiving areas can develop to those specifications without special permission. However, landowners in the receiving area can develop up to 14 units per acre. For each additional unit a developer wishes to build, he must acquire one TDR, meaning one acre somewhere else will be protected—one unit, one acre. Here, the development pressure is strong and the bonus substantial enough that vast amounts of land can be conserved.

That is not to say that the incentive cannot be compelling for developers receiving TDRs under a preservation program. Careful thought—and research—must be given to what developers want and need in the potential receiving areas. In addition, it is often most effective if there are a limited number of ways in which developers can receive the bonuses they seek. For example, if because of an overall height cap, a developer can earn the same increased floor-area ratio by either purchasing TDRs or by designing the building with plazas, pedestrian-friendly features, and other amenities, many developers will choose the latter option as easier and more efficient, especially if those amenities are something they likely would have built anyway.



*Local landmarks such as the Alcazar Theater, shown here, are eligible to sever and transfer their development rights under the city of San Francisco's TDR program.*

*— Photo by Jennifer Cohoon McStotts.*

## San Francisco

San Francisco's TDR program just celebrated its 20th year and is considered one of the most prolific programs, with dozens of transfers in its illustrious record. The program's success is due to a number of critical details.

First, the program was adopted as part of a larger comprehensive plan in 1985, simultaneously with the designation of the downtown's architecturally significant buildings—an assembly now numbering more than 250 buildings, each of which is a sending parcel. Part of that plan includes strict architectural controls on these significant structures, creating an adequate supply of TDRs.

Second, rights can be transferred from any of those architecturally significant buildings to any other lot in the zoning district. The only exception is that contributing and significant properties cannot also be receiving parcels.

Third, and perhaps most important, with the trio of the comprehensive plan, historic designations, and TDR program also came the downzoning of the downtown area. This reduction in density created an incentive for transfers (and therefore preservation) because no other mechanism exists by which developers can exceed the density restrictions set by the plan.



*Funds generated from Seattle's TDR programs helped pay for Benaroya Hall, home of the Seattle Symphony.*

*— Photograph by David Lipe.*

### **5. Permanent Protection**

After the rights are defined, severed, transferred, and applied, the final question that remains is how the sending property will be protected. This can be accomplished in one of two ways: a deed restriction, such as an easement, or a recorded agreement between the sender and the municipality.

These documents are recorded in the chain of title to prevent the development of the sending property in violation of the forfeited rights. Either a deed restriction or recorded agreement will accomplish the same goal of preventing the property owner from using the rights she transferred, though the latter runs a certain risk. The drawback to the recorded agreement is that it can be voided; if the property owner and government officials both change their position on the protection of the his-

toric building, an agreement can be rescinded, while other more permanent deed restrictions cannot. Some communities have avoided this problem by requiring a third party—such as a preservation-oriented nonprofit organization—to sign the agreement as well, meaning the agreement cannot be voided as easily.

Still other communities require the sending property owners to donate preservation easements to qualified organizations. Most conservation TDR programs require permanent easements to be recorded as part of the transfer process. Surprisingly, some preservation TDR programs do not require permanent protection.

Decisions regarding the degree of protection that will be required are political and, obviously, variable. The advantage of conditioning the use of TDRs on the donation of a

preservation easement is the permanence it affords (although easements can be dissolved and lifted in extreme circumstances). Temporary protection, such as short-term or conditional easements, is easier to negotiate and require. Also, it is possible that temporary protection is a better, more flexible reflection of the market's demand. Some communities have chosen to limit the restriction on the sending property to the same length of time the bonus or receiving project exists, which affords the transfer a temporary, though long-term, quality that a preservation easement does not have.

Other temporary protections vary. The sending sites in Seattle's TDR program, for example, are downtown buildings with less than baseline density that are either historic buildings, affordable housing, or compatible infill development. The development rights are quanti-

fied in square footage, specifically the difference between a baseline of floor-area-ratio and the landmark's square footage.

In the Seattle, the sending building must be restored or rehabilitated to qualify to transfer the unused development rights. Historic theaters have priority in the process, and the city-created TDR bank has been very successful, as have its arts-related TDR programs, especially in funding construction of the Benaroya Symphony Hall. For the first 12 years of the Seattle TDR program, the city was the sole purchaser of rights, which came from historic buildings as well as low-income housing. Later, these rights and others from major performing arts facilities would be sold to developers and the funds used for rehabilitation and new construction.

Furthermore, the city requires the sending and receiving site owners to record an agreement that the landmark will be preserved for the life of the new building. As a result, the Seattle TDR program requires both rehabilitation and long-term protection. Some critics believe that despite Seattle's noteworthy success stories, the program is, overall, flawed because the baseline floor-area-ratio from which the TDRs are taken is too low and the historic preservation TDRs require additional reviews that are not required for other density bonuses, such as affordable housing (which is where Seattle's program is most prolific). In addition, a proximity restriction on transfers within retail areas (the development rights must be transferred on the same block) is considered too limiting by some.

Beyond the common requirement of a deed restriction, Philadelphia, for example, has an additional safeguard to ensure the

preservation of the sending site. When the TDRs are sold, all proceeds are placed into an escrow or trust account for future maintenance or rehabilitation of the historic building. The work is then reviewed by the Philadelphia Historical Commission. Only a small minority of the programs require sending property owners to use the proceeds for rehabilitation, and some, like Seattle, require the sending site to be rehabilitated in advance.

### Balancing Supply and Demand

To be successful, a TDR program must be carefully balanced in both supply and demand. The balance can be thrown off by a number of factors:

#### *The sending area is too limited.*

If there are too few historic landmarks to provide development rights for buyers whose ability to develop relies on TDRs, then development in a receiving area could occur at a less-than-desirable pace. Sizing the sending and receiving areas carefully and the use of build-out models will help to avoid this problem. Keep in mind that the ratio at which rights are exchanged does not have to be 1:1. A small sending area can supply a large receiving area if each TDR is worth a substantial amount of development to the buyer, such as if the rescue of one significant building allows the construction of additional square footage at a 1:2 or 1:5 ratio.

#### *Senders are unwilling to transfer.*

It is possible but rare that the owners of the sending properties may be unwilling to transfer their rights. Some may see greater financial benefit in retaining their

development rights, while others may be reluctant to support a particular development without having a voice in its design, and others may be opposed to the increased density on principle. Because TDR exchanges are interpersonal transactions, there is always a possibility that personal issues and politics may affect the market. Understanding the community and delineating a sufficient and diverse sending area will help address this problem

#### *The receiving area is too limited.*

Perhaps worse than insufficient supply is insufficient demand. If the receiving area is not large enough to create adequate demand for transferred rights, then sending property owners will have less of an incentive to preserve. This is obviously a problem where TDRs are being relied upon as a motivator or as mitigation for the economic impact of historic district or landmark designation, because the TDRs won't have economic value.

#### *The receiving area is overdeveloped.*

This problem is not one of quantity but rather quality. For example, TDR programs that require senders to transfer the rights to an adjacent lot should first examine the intensity of existing development around landmark buildings. If most are already surrounded by substantial development, either there will be a lack of interest in the incentive, or worse, the program will backfire and create an incentive for adjacent landowners to build higher or larger in order to use the TDRs, possibly demolishing their buildings in the process. The same can be true of district-wide or inter-district TDR programs.

### ***There is no growth in the receiving area.***

Further causes of insufficient demand include poor selection of receiving areas or an overestimation of development pressures in the receiving areas. If there is insufficient demand to buy development rights because of a temporary downturn in the market, the major danger will be the loss of an incentive to historic property owners.

Alternatively, if the TDR program is primarily a mitigation measure, then such owners are already prevented from altering or demolishing their properties; the problem of restless or litigious landowners without a place to sell their TDRs can be easily solved by a TDR bank (see below). If the program has been designed to create an incentive for designation or rehabilitation, then insufficient demand for TDRs will lead to less preservation activity.

If the problem is a lasting disinterest in development in the receiving areas, then the TDR program is not functioning as it should, either because the choice of receiving areas was poor for any of a variety of reasons or because other aspects of the program (such as its procedures) are flawed. One possibility in this situation is to redefine the receiving area or alter the program to increase the incentive to develop in those areas; this choice will vary based on the situation. In contrast, if the problem is a temporary downturn in the market—where development has declined throughout the community, not just in particular areas—it is likely better to wait out this cycle in the economy.

### ***TDR Banks***

TDR banks facilitate the purchase and sale of TDRs. Some banks may surpass the role of intermediary between conservation-minded sellers and pro-development buyers by

buying TDRs from ready sellers and holding them until willing buyers arrive on the market. The banks are typically nonprofit institutions supported by revolving funds and donors. Sometimes a local government itself may serve as the bank.

The types of entities that can serve as TDR banks as well as how they can and should operate are typically issues determined by state TDR enabling legislation. In the absence of such guidance, either a nonprofit organization or an agency of the local government can serve as the bank, so long as there is no conflict of interest and nothing to prohibit it in state law. Some systems allow any conservation or preservation nonprofit to hold TDRs, which eliminates the need for a formal bank while allowing nonprofits to play an important part in the process. As a result, preservation groups can guide new development using the rights they sell, support the cause of preservation directly by protecting sending parcels, and often stabilize a sluggish market. A bank or other TDR holder on its own, however, is never a guaranteed way to balance supply and demand.

Some nonprofit organizations, including but not limited to TDR banks, purchase development rights to “retire” them, meaning to take them off the market and prevent that development permanently. One issue that is not clear legally is what these nonprofit groups can or must do in order to “retire” the rights; is it enough if the certificates are destroyed or an official announcement made? It isn’t settled in every state whether rights can officially be retired or destroyed by a holder who seeks to dissolve those rights. For the most part, nonprofit organizations seeking to do this may, in the future, still be able to resell those rights, though to this author’s knowledge, no one has yet tried.

### ***Purchase of Development Rights Programs***

TDR banks hold development rights until a willing buyer comes along, shifting administrative costs from the seller and buyer to the bank operator. Purchase of Development Rights programs (PDR), in contrast, involve acquisition of development rights by the local government to “retire” those rights. In PDR programs, perpetual easements or other permanent deed restrictions are required because the rights will never be returned to the sender or applied by a receiver.

Along with this advantage of permanence, PDR programs can be administratively simpler than TDRs, especially if executive officials can set aside a portion of the budget for PDRs or if the purchases are funded by grants. Nonetheless, PDRs have the disadvantage of requiring public funding for conservation, taking the issue away from the market. In addition, they work best for purposes of mitigation and do not work as a growth management tool, since the rights will not be applied elsewhere.

### ***TDRs and Teardowns***

One particularly appealing feature of TDRs for preservationists is how they can be used to calm the teardown trend. For the purposes of this booklet, a “teardown” is not just any demolition but specifically the destruction of an older home to build a larger, incompatibly-scaled home. Teardowns are not a result of growth pressure per se because the new development that replaces older, modest single family houses is still a single family residence. A community becomes no denser as a result of teardowns, the buildings just get bigger.

Unfortunately, no one solution exists for the teardown problem; TDRs are just one potential tool

in the preservationist’s arsenal. Depending on the community, they can be effective either as an incentive to landowners not to succumb to teardown pressure or as a mitigation measure if a historic neighborhood is downzoned in terms of house size to prevent teardowns and over-scaled additions. Even a single inappropriate or incompatibly-scaled addition or new home can disrupt one block’s streetscape. The effectiveness of TDRs, however, may be limited without broad participation. Some holdouts may choose to demolish and rebuild after most of the block is protected by the TDR program. Property values are generally diminished by this sort of intrusion.

Finally, a TDR program for protecting historic residential neighborhoods threatened with teardowns requires (1) that the neighborhood be designated as a sending area and (2) that there be a receiving area able to accept the increased development. Adjacent-lot TDRs and district-wide TDRs are inappropriate in this case, while interdistrict TDRs will be most effective.

## The Role of Unified Lot Zoning

As explained earlier, adjacent-lot TDRs are programs which require that the unused development rights be transferred to a lot contiguous to, across from, or catty-corner from the sending lot. One variation on this system is unified lot zoning (ULZ), a.k.a. combined lot development or lot merger. The ULZ approach brings urban design principles into play and essentially eliminates the transfer step while accomplishing similar goals to adjacent-lot TDRs. In fact, New York City’s TDR program evolved out of its merged lot zoning technique.

Under ULZ, adjacent lot owners apply to the local government to be treated as a single lot for the purposes of applying land-use laws. The form and size of the new building can be quite different because the development can be clustered as if the lots were legally merged into one.

The advantage of ULZ is it provides a simplified process similar to project or design review with increased control by the local government. (Some communities choose to monitor development rights transfers or have increased design review over the application of development rights, especially in urban areas but not all do.) In our scenario, for example, the local government might place a limit on design and height to control the possible incompatibilities of scale that can result from ULZ treatment.

Why would property owners want to pursue ULZ? The advantages are quite similar to TDRs; in most cases, there will be a private cash exchange or transfer of some other benefit to the owner of the landmark property “transferring” the undeveloped density. Such bargaining will be totally private and uncontrolled in a ULZ system, and permanent protection is not typically required, though the city does record the unification.

Why would the local government want to pursue ULZ instead of TDR? ULZ offers the local government more control over the final product that arises from development adjacent to and around significant landmarks. Overall height, scale and massing can be controlled more closely, as can other finer details of the design, under ULZ but are not typically so closely watched under TDR. One disadvantage that remains is the same major disadvantage as adjacent-lot TDRs. Transferring density or development rights to a

contiguous lot can create sharp disparities in scale or volume between the historic building and the new development in the absence of sensitive design or powerful review. The counter argument is that ULZ allows for a more involved design review process aimed at compatibility in which the landmark property owner also has a voice—an element missing from TDRs unless the landmark owner demands control as a condition of the transfer.

## Downzoning and the Transfer of “Existing Development” Rights

Downzoning is not always necessary for the creation of a TDR program, nor is it always necessary for the program’s success. If existing land-use restrictions are already structured in such a way as to create adequate supply of and demand for TDRs, and if lifting and shifting those restrictions is acceptable to the community and parallel with its objectives, then the existing zoning can be left alone. For example in Fulton County, Ga., downzoning was not necessary because the community was satisfied to take the chance that landowners would build either to the new densities available with TDRs or to the previous standards. Whether it is necessary in your community is a question to be answered by your planners and your citizens.

In rare circumstances, a community will downzone and non-historic obsolete buildings that no longer conform to the land-use laws will be left, larger than the new buildings around them. While such buildings could be grandfathered in (or amortized out), the community may instead want to give the landowner an incentive to replace the obsolete building with a code compliant, smaller building. TDRs give them the ability to do

that, as they did in Santa Barbara, Calif. There, the city allowed such landowners to transfer the difference between the old building and the new building to another site free of the city's development quota system. Such programs are referred to as Transfer of Existing Development Rights.

## Voluntary TDRs

One motivation for TDRs is to encourage or create incentives for designation and/or rehabilitation, and in this way, most programs function as an active incentive promoting the community's goals and plans, including preservation. Some TDR programs, however, serve as passive incentives for preservation. In such cases, TDRs aren't about growth management or active preservation; they aim to provide an option to local residents who already have an interest in and tendency toward conservation or preservation but are seeking a greater incentive than the deduction available for an easement donation. The local government (or TDR bank) can capture those transferable development rights, which can then give them an increased degree of control later over developments that would seek to buy and use those TDRs. Seattle has done this with numerous projects created using rights the city collected in small increments over more than a decade.

## Lessons from the Field

Beyond the theory and scholarship on TDRs, important lessons can be learned from actual TDR programs.

### ***1. Integrate TDRs into a comprehensive plan.***

The most successful programs do not approach TDRs as a tool solely for preservation. Rather,

they combine consideration of historic preservation concerns with other community issues such as growth, aesthetics, housing, and so forth. This is not to say that TDRs cannot be adopted separately from a full comprehensive planning effort and succeed, but like any planning or preservation tool, they rely on the research and deliberation that comes from comprehensive community planning.

Some of the most active programs, such as San Francisco, were adopted simultaneously with and as a part of a greater plan. Likewise, the Seattle program was also adopted with a new downtown plan. Timing, however, is not always the key. Some programs, like New York City's TDR system, were adopted independently and have proven successful as a means of furthering the community's greater economic and growth goals and adapting to changing conditions in the city.

### ***2. Keep infrastructure in mind.***

One key point to remember here is the relationship between TDRs and infrastructure. Receiving sites logically may require additional infrastructure to meet the demands resulting from increased density. Some TDR programs have faltered because they failed to take into account this need and did not have adequate infrastructure in place and new infrastructure could not be added as needed.

For example, in Cape Elizabeth, Maine, in the 1980s, receiving sites had to be able to connect to the public sewer but were not given special consideration under the town's growth-neutral policy that limited sewer connections based on lot frontage. The sewer policy was amended in the 1990s to connect more lots, and the TDR program was amended to allow sites with on-site sewage disposal

to be receiving sites as well. With maximum density bonuses of greater than 200 percent and adequate infrastructure (now), the program will likely be more successful in the future.

### ***3. Don't put too much trust in the market.***

In some communities, the success of a TDR program will always be measured in quantity—the number of transfers, or the number of buildings protected—rather than quality—the benefits the projects generate and the significance of the buildings that were saved. Communities concerned with quantity should not depend on the market alone to make the program work. Temporary downturns have been known to cast programs in a negative view in the public's eye, but as market-based tools, TDR programs are at the whim of the market.

For communities using TDRs as an incentive to designate (or rehabilitate), relying on the market is too risky for the resources. Having a TDR bank that functions as a willing buyer can compensate for a sluggish market, though communities like San Francisco have chosen not to create TDR banks precisely to avoid interfering in the market's influence on pricing.

Planners and preservationists should be prepared to fight for high quality development and preservation in the early uses of the TDR program. This will accomplish two goals. First, high profile transfers for projects that community can be proud of will convince citizens of the program's success in terms on quality. Second, these early efforts will set a precedent for future projects.



#### **4. Use a simple formula for calculating TDRs and limitations.**

The most effective systems use the simplest ratios for applying TDRs, such as 1:1 or 1:4. Most of the successful programs, from New York to San Francisco, use a 1:1 transfer ratio, such as for each square foot of unused space, one square foot is added to the receiving parcel. Some calculate TDRs in larger units, such as 100 or 250 square feet, but still use a simple ratio. Keep in mind, the easier a system is to understand, the easier it is to use, and the more likely it will be used!

That's not to say that a 1:1 ratio is the only answer, nor does it mean there should not be a clear cap on how many rights can be transferred. Refer back to the City of Denver, which goes beyond the standard method of calculating TDRs. In Denver, historic property owners who rehabilitate receive a density bonus of four square feet per square foot of the rehabilitated structure. The 1:4 ratio of this bonus is still fairly clear, as is the cap on receiving TDRs: no receiver can increase the development by more than six times the lot size. This establishes a clear but relative ceiling on development using TDRs, as do similar caps based on floor-area-ratio.

#### **5. Keep the process simple.**

As with any planning tool, the more streamlined the process is the more effective and appealing it will be. The timing of key steps in the process, for example, should not be burdensome. Receivers should not be required to secure the transferred development rights before preliminary project approval. If possible, municipal approval of the transfer itself (though not the project) should be ministerial or administrative in order to avoid additional review requirements; a well-pre-

pared ordinance will make transfer approval unnecessary. If timing proves to be a hurdle, the procedure should be changed or a TDR bank created, so there will be as few gaps between the participants and their goals as possible.

One challenge TDR programs sometimes neglect to deal with is the issue of landowner cooperation, especially with multiple sellers. If the ratio of transfers is such that multiple properties' worth of TDRs must be required to attain the receiver's incentive, the increased difficulty of timing the transactions and negotiating with multiple sellers may prove greater than the incentive and stop potential buyers in their tracks.

The TDR program of Brisbane, Calif., is an excellent example of how small towns can use TDRs and how even programs with enormous potential can be held back by overly complex procedures. Brisbane has a population of less than 4,000 people, but the resource it was seeking to protect by adopting TDRs was the hill-sides and steep slopes in and around the town. These steeper areas are farther from and harder to serve with infrastructure, so they compose the sending area. Flatter areas closer to existing systems are the receiving areas. For every 20,000 square feet of land protected in the sending zone, one additional housing unit can be built on a receiving lot.

Nonetheless, this incentive has not proved strong enough to overcome the procedure's one problem. To acquire the development rights to 20,000 square feet of land would require the cooperation of multiple landowners, a feat no one has yet accomplished. Without a TDR bank, transfers under this procedure are simply too expensive in terms of transaction costs.

#### **6. Know your community.**

The calculations, procedures, outreach, and objectives of the TDR program may all be just right, but if the community itself is either opposed to the increased density of receiving area projects or is simply not interested in receiving the bonus, the TDR program will fail.

#### **7. Don't provide too many other alternatives.**

As mentioned above, part of San Francisco's success stems from the fact that developers can't achieve increased density without buying TDRs. Where there is no alternative, the incentive to use TDRs is obviously greater.

In contrast, San Diego's Golden Hill TDR program proved to be short lived (1981-1989) because of a lack of consensus about the community's planning goals. It is also clear that San Diego's program didn't create sufficient demand for receivers to buy TDRs.

Under San Diego's program, TDRs could be used to earn a density bonus up to 24 percent, but there were comparable density bonuses for amenities related to other city goals, such as environmental protection and energy conservation, affordable housing, and even specific design features. While these bonuses could combine with TDRs, in reality there wasn't sufficient demand for such densities; the underlying zoning already allowed 43 units per acre.

#### **8. Keep the TDR program up to date with changes in the law.**

Atlanta, Ga., created a TDR program in 1980 and amended it slightly to facilitate downtown Atlanta's only transfer—the transfer of 80,000 square feet to an 800,000-square-foot tower adjacent to a local landmark known as The Castle. At the time the ordinance was enacted,

and again when it was amended, Georgia had no enabling legislation to permit the program. That alone didn't cause a problem, as the TDR was presumably authorized under the general purview of the state's zoning and planning laws.

However, in 1998 the state passed enabling legislation, which required, among other things: protection of the sending parcel's character that would run with the property (such as an easement); clear procedures for severance, delayed transfer, and exchange; monitoring of the exchange; the rights of the local government and individuals to purchase and hold TDRs; and explanation of the taxation of TDRs. Atlanta's ordinance was missing all of these features, either entirely, in part, or as the law was interpreted to intend them. While the City of Atlanta has begun exploring what needs to be done to update or revise its program, this legal limbo is a strong disincentive to landowners considering using TDRs.

## Recipe for Success

There is—unfortunately—no way to guarantee that a TDR program will work. That's the risk of market-based tools and any mechanism that leaves part of its chance for success in the hands of the public. Nonetheless certain elements are essential for a successful TDR program, whether you measure success quantitatively or qualitatively. In addition, certain elements can nurture and support a TDR program including;

### 1. Supply

If there are not enough TDRs available to transfer, or enough to make the transfers worthwhile, then the program will not be used. The number of TDRs available (and their relationship to the num-

ber needed by developers) will directly affect the success of the program. Too few will make transfers cost-prohibitive or too unmanageable to pursue; too many will glut the market, drive down prices, and possibly force buyers to acquire from multiple landowners, which adds time and expense to the process.

Beyond sheer quantity, it is important to remember that senders must have an incentive to sever and transfer their development rights. Some programs have had inadequate activity because senders had more to gain by using their development rights than by transferring them. Strict controls on the sending area and/or lucrative transfer exchanges will keep the supply of development rights steady.

### 2. Demand

On the flip side of the coin from supply is demand; here the community must be sure that what the bonus developers stand to gain is worth the time, effort, and money of acquiring development rights, which is not always as easy as it sounds. First, time and effort can be reduced by simple, easy procedures (see below), but price will be set by the market. The relationship of supply and demand needs to be such that the price will be reasonable for the bonus received.

Second, the bonus must be something the developer wants and stands to gain in the end. The designers of the TDR program in Birmingham Township, Pa., fell victim to this problem; the restriction that will be lifted with the application of TDRs is the density restriction, but the real estate market and developers are most interested in houses on large lots, hence there is more to be gained from developing without TDRs than with them.

As with supply, both the quantity and the quality of TDR demand must be researched and planned for carefully. Finally, bear in mind that excessive TDR demand may indicate that the receiving areas should be expanded or the transfer ratio should be adjusted, depending on the community's goals.

### 3. Ease

The third essential element of any TDR program is simple, efficient, easy procedures. For the increasing number of local governments trying to take a one-stop-shopping approach to development, this may be a familiar concept, though a challenge to embrace. It is worth it to be careful in drafting the ordinance, designing the procedures, and even amending them if necessary in order to best facilitate transfers.

Also, try to avoid requiring excessive review at any stage of the process, but especially of the transfer. This is particularly tricky, as one of the advantages of TDR for some communities is the opportunity to have heightened review of projects with greater than average effects on landmarks. This will vary from community to community, but keep in mind that having a TDR program with such clear guidelines that developers can almost be assured approval for projects that meet certain criteria ensures more transfers and therefore more preservation.

Further, the application of the rights isn't the only stage for review, so be careful of excessive oversight from the private parties' perspective. In Georgia, the state enabling legislation has been interpreted to require municipal approval of all transfers, a step most communities wished to avoid to save on administrative costs as well as to facilitate transfers.

Finally, if possible, avoid requiring the cooperation of too many landowners in any given transaction or project. This isn't always possible—and is even more challenging in urban TDR programs where large landowners are less common—but it is an important part of facilitating the TDR process with simple, easy procedures. If the numbers require multiple landowners be involved in most transactions, consider using a TDR bank as intermediary to gather development rights from a variety of landowners and package them for developer application.

#### **4. Adaptability**

As most local governments already know, it is impossible to adapt the laws, policies, and procedures to accommodate every scenario. Nonetheless, it is important that the local government monitor the TDR program to ensure it is accomplishing the community's goals and to assess whether it could easily be adapted to be more effective or efficient.

#### **5. Protection**

In the absence of specific documentation or in the presence of corruption or mistake, a landmark property could be developed despite the sacrifice of development rights to the receiver. After the development rights have been severed from the sending property and transferred to the receiving parcel, some protection must be put into place to ensure the property is not developed using the transferred development rights. This protection may be temporary (a deed restriction for the life of the receiver's project or a 50-year easement), indefinite (a covenant with the city or county), or permanent (such as a preservation easement). In any case, the sender should not gain the benefit of the

transfer as well as the use of his forfeited rights or the public will be the one to lose.

#### **6. Purpose**

To return to a question addressed earlier, a community does not need a historic district or even a landmark ordinance to enact TDRs, even for preservation purposes. Furthermore, the TDRs don't need to rely on a preexisting list, nor does the ordinance need to create one. What a successful TDR program needs is a clear definition of what and where the sending and receiving parcels are. In addition, those parcels must be chosen based on rational criteria to support the greater purpose of the program.

Undoubtedly, sending parcels can be defined geographically by delineating a historic district as a sending area, but that is not the only way. The definition of sending parcels can reference an existing designation, such as the National Register of Historic Places or a state-supported list. An important rule when using either of these lists is to reference the list as it exists on the day of the ordinance's passage and to include any new properties added to those lists after review. In addition, consider any consent issues that apply in your state. Additionally, sending properties can be defined qualitatively. For example, the TDR program could include all properties eligible for the National Register as determined by the state historic preservation officer, or any lots with structures totaling less than a certain square footage and older than a certain age.

In the end, the TDR ordinance itself must also have a clear purpose, and all definitions—from sending parcels to the allocation of rights, from receiving parcels to the protection required—must relate to and support that purpose.

#### **7. A Nurturing Environment**

A TDR program's success is in substantial part reliant on the community and the environment in which the program is enacted. There are certain characteristics of the environment (political, economic, etc.) in which TDRs are more likely to succeed.

The community—from citizens to developers to leaders—needs to support the purpose of the TDR program and believe in its capacity to work as a planning tool of those goals. Politics—meaning the conservative or liberal composition of the community—are unimportant, because as a preservation, market-based tool, TDRs appeal to a variety of groups. What is important is community consensus and outreach.

The former can be dealt with by appropriate research; in some cases, TDRs will not be appropriate because of the opinions of one or more of those groups that compose the environment for TDRs. Perhaps the leaders are adverse to innovation or the risk involved in market-based tools. Regardless, belief in TDRs and persuasion efforts should not overpower an objective assessment of whether or not the community supports TDRs.

The second aspect of a supportive environment is an informed community, including leaders and developers, as well as preservation nonprofits. In this respect, a clear ordinance and simple program will translate into easy outreach efforts. Potential senders and receivers, as well as preservationists, other advocates, journalists, real estate professionals, and many others in the community should understand the basics of how the community's TDR program will work.

Finally, the third characteristic of a nurturing environment for TDRs is growth. While not every

TDR program must concentrate on growth management, there must be enough growth that some development is going on in the community, especially in the potential receiving area. In the best-designed TDR programs, where the incentive is strongest, developers will use TDRs to build somewhere that they would not have developed otherwise.

Ultimately, if the community on the whole understands and supports the TDR program, and the growth pressure is sufficient, a TDR program will be successful, in that it will generate transfers. What will make the quality of the preservation and the development projects successful depends on the substance of the TDR program as well as underlying land-use regulations. The transfer of development rights is a flexible tool that can direct growth in a variety of forms away from sensitive cultural resources. We'll be seeing it more often in coming years as the second generation of TDR programs comes on the scene.

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