

**THE TDR SIREN SONG: THE PROBLEMS WITH
TRANSFERABLE DEVELOPMENT RIGHTS
PROGRAMS AND HOW TO FIX THEM**

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I. INTRODUCTION

In planning the future of any metropolitan area, it is important to plan for and create mechanisms to preserve targeted open space areas. There are many tools available for preserving open space and environmentally sensitive areas, some more effective than

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others. Transferable development rights (TDR) programs to date have by and large been ineffective tools for preserving open space²—and may, in many cases, even hinder open space preservation efforts. The ineffectiveness of traditional TDR programs raises a considerable danger that, in reliance on the TDR scheme, resources may be shifted away from bonds or other mechanisms to fund land preservation. By the time it becomes clear that the TDR program is ineffective, land prices may have escalated to the point at which it becomes extremely expensive to acquire key environmental areas and many areas targeted for acquisition may have been developed in the meantime. Moreover, typical TDR schemes act as a tax on density, thereby potentially increasing the development footprint of the metropolitan area and actually *reducing* the amount of open space.

There are many reasons why traditional TDR programs are not effective tools for preserving open space. First, very few TDR programs actually result in a significant number of transfers of development rights. Although a few programs since the 1980s have preserved thousands of acres of land, most programs have been unsuccessful, resulting in very few transfers of development rights.³ A 2003 study identified 111 TDR programs across the country designed to preserve land, of which forty-six programs—many of which had existed for decades—had preserved less than five acres.⁴ Only thirty-four of the programs, or less than one third, had preserved more than 100 acres, and only ten had preserved more than 1000 acres.⁵ Recent years have seen a remarkable proliferation of TDR schemes,⁶ but there is no indication that these programs are seeing any more success than previous schemes.

Second, even if traditional TDR programs create successful markets for transfers of development rights, they generally will

2. This article focuses on the use of TDRs to protect open space and environmental features, although many TDR schemes are used to preserve historic structures and protect agricultural and forest lands. See John B. Bredin, *Transfer of Development Rights: Cases, Statutes, Examples, and a Model*, 2000 APA National Planning Conference, Apr. 18, 2000, <http://design.asu.edu/apa/proceedings00/BREDIN/bredin.htm> (last visited Mar. 27, 2008).

3. "As of 1983, it was estimated that there were more articles on TDR than there were transactions." John C. Danner, *TDRs—Great Idea but Questionable Value*, 65 Appraisal J. 133, 136 (1997) (quoting Peter Pizor, Washington State Growth Management Program, *Transfer of Development Rights, Evaluating Innovative Techniques for Resource Lands*, Part 2:12 (Nov. 1992)).

4. See Rick Pruetz, *Beyond Takings and Givings* 169-450 (2003).

5. See *id.*

6. In 1987, there were 48 TDR programs in the United States. See Danner, *supra* note 3, at 136 & n.5. A 1997 study found 107 TDR programs. See Bredin, *supra* note 2. As of 2003, there were at least 134 such programs, of which 111 were designed to preserve land. See Pruetz, *supra* note 4.

not result in a desirable pattern of open space preservation. Because the programs rely on landowners' willingness to sell development rights, there is no guarantee that the most important environmental or open space areas will be preserved. Instead, those landowners whose land is farthest from existing urban areas, and therefore in the least danger of being urbanized, are most likely to sell development rights. If, on the other hand, the program is structured to designate only smaller, more sensitive areas as sending areas for transferable credits, the supply of credits shrinks and the market for such credits is less likely to work effectively.

Third, by making density more expensive, traditional TDR schemes can actually decrease densities and thereby result in more rapid land consumption than would allowing higher densities without purchase of TDRs. The more compact the development patterns in which new growth occurs, the less open space that new growth will consume through urbanization. By forcing developers to purchase TDRs in order to develop at densities above certain levels, typical TDR schemes increase the cost of, and therefore disincentivize, high density. Thus, traditional TDR programs will ordinarily result in *less*, not more, open space.

Finally, traditional TDR programs, by forcing new high-density development to bear an inequitable burden of preserving open space, are unfair and potentially unconstitutional. Requiring those who develop at higher densities to purchase TDRs is akin to assessing an impact fee or requiring a dedication of property. In either case, U.S. Supreme Court case law suggests that the fee or dedication must have a "rough proportionality" relationship to the impact of the new development.⁷ It would be very difficult, however, to show that the TDR purchase requirement is proportional to the impact of new higher-density development. Rather than spread the cost of open space preservation equitably among all residents, the traditional TDR scheme places the bulk of the burden on new high-density development, imposing a cost on new residents usually far in excess of the amount contributed by existing residents to open space preservation. This burden is placed disproportionately on new high-density housing, rather than on low-density housing, despite the greater impact of low-density housing on open space.

Given the numerous flaws in traditional TDR schemes, one might assume that such programs are beyond rescue. There is, however, an alternative to the traditional TDR scheme that has the potential to remedy most or all of the defects of traditional

7. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

TDR programs. The primary problem with the traditional TDR program is that it taxes the wrong kind of development. Instead of taxing high-density development (exactly the kind of development that ought to be encouraged if preserving open space is the goal), TDR programs should instead tax *low-density* development. Requiring low-density—rather than high-density—development to purchase development rights is more likely to result in actual transfers of development rights, will encourage higher-density development, and, in accordance with constitutional law and fairness principles, tax the type of development that has the greatest impact on open space. Moreover, even if no transfers actually occur under this new type of TDR program, the increased densities that result will reduce the metropolitan area's urban footprint and increase the amount of open space that remains undeveloped.

II. THE TRADITIONAL TDR SCHEME

A. Market-Based Obstacles to Transfers of Development Rights

The traditional TDR program works by creating a “receiving zone” and a “sending zone.”⁸ Receiving zones are generally designated in areas where the government desires development at relatively high densities.⁹ In order to develop at densities above a set level (the “base zoning” or “base units”), a developer within a receiving zone must purchase transferable credits from one or more properties within the sending zone. The sending zone is generally designated in an area where the government would like to limit development.¹⁰ Properties within the sending zone are allocated transferable credits, which need not be equivalent to the underlying zoning for the property.¹¹ Once development credits have been transferred off of a property in the sending zone, that property is then preserved through a conservation easement or similar mechanism.

TDR programs thus offer an apparently elegant way to preserve open space without (1) falling afoul of the Takings Clause of the Fifth Amendment, or (2) expending significant government

8. See Julian Conrad Juergensmeyer, et.al., *Transferable Development Rights and Alternatives After Suitum*, 30 Urb. L 441, 444-48 (1997) reprinted in David L. Callies, et.al., *Land Use* 516 (4th Ed. 1999).

9. *Id.*

10. *Id.*

11. For example, a rural property in the sending zone might be zoned for development at one dwelling unit per ten acres, but is allocated two dwelling units per acre that can be transferred from the property to the receiving zone.

money to purchase land. Essentially, the traditional TDR program requires a developer who wants something—density—from the government, to fund the preservation of land in exchange for that something. The government thus uses its power to control land use through zoning to leverage developers into preserving land.

Unfortunately, of the TDR programs that have been in existence long enough to be properly evaluated, very few have seen substantial numbers of transactions.¹² Of 111 land preservation-oriented TDR schemes identified in 2003, 46 had preserved less than 5 acres, 77 had preserved less than 100 acres, and 101 had preserved less than 1000 acres.¹³ Montgomery County, Maryland and the New Jersey Pinelands have preserved over half of the total acres preserved through TDRs across the country.¹⁴ In 1997, John Danner identified sixteen TDR programs in Florida and reported that nine of the programs had seen no transactions, five had experienced only a few sales over ten years or more, and two had resulted in “periodic sales of TDRs.”¹⁵

Why have TDR programs by and large failed? Obstacles to successful implementation of traditional TDR programs are described below.

1. Allocation of Supply and Demand

TDR programs rely on a well-functioning market in which transferable credits are bought and sold in sufficient quantities to preserve an adequate amount of open space. Unfortunately, it is difficult to set the base units and transferable units available in both the receiving and the sending areas in a way that creates a functioning market.

On the demand side, it is important to structure the receiving area so that developers will be willing to purchase credits and will offer sufficient compensation that landowners in the sending area will be willing to sell. Montgomery County, home of one of the few extremely successful TDR schemes, was careful to structure its program “so that a developer’s extra costs for credits are more than offset by the increases in allowable density in the receiving ar-

12. See Danner, *supra* note 3, at 135 (“Historically, most municipalities across the country have found it difficult to translate the TDR concept into an efficient operating system.”).

13. See Pruetz, *supra* note 4.

14. See *id.*; see also American Farmland Trust, Farmland Info. Ctr. Fact Sheet: Transfer of Development Rights (2001)(providing a compilation of TDR acreage data in table entitled “Local Governments with TDR Programs for Farmland, 2000”).

15. Danner, *supra* note 3, at 141.

eas.”¹⁶ To this end, the base zoning for the receiving area must be sufficient to “ensure development is economically viable.”¹⁷ On the other hand, the base density allowed must be set far enough below market demand that developers have an incentive to purchase TDRs.¹⁸

On the supply side, the program should provide enough transferable credits to landowners in sending areas to induce them to sell (but not so many that very little land is preserved), while also creating sufficient demand for credits so that landowners are adequately compensated for sales. It is key to structure the transferable credits “so that they accurately reflect the development potential of the preserved land.”¹⁹

Essentially, it is a difficult balance to ensure that credits are cheap enough that developers will make use of them, but expensive enough that landowners will sell them.²⁰ It has been recommended that the ratio of sending credits to potential receiving credits should be at least two to one,²¹ but it is important to tailor each program carefully to the development market and political climate of the locality in question.²² Effective TDR schemes generally involve continual government monitoring and adjustment of the program.

2. *Inconsistent and Flexible Zoning*

If needed density is easily available through mechanisms other than TDRs, there will be little market demand for the credits. For example, if incentive zoning, zoning amendments, and variances are easily obtainable in receiving areas, TDRs are unlikely to be purchased.²³ Similarly, if landowners in sending areas can achieve

16. Robert A. Johnston & Mary E. Madison, *From Landmarks to Landscapes: A Review of Current Practices in the Transfer of Development Rights*, 63 J. Am. Plan. Ass'n 365, 369 (1997) (internal citation omitted).

17. Bredin, *supra* note 2.

18. *Id.*; Jason Hanly-Forde et al., *Transfer of Development Rights Programs: Using the Market for Compensation and Preservation*, Cornell University, <http://government.cce.cornell.edu/doc/pdf/Transfer%20of%20development%20rights.pdf> (last visited Mar. 2, 2008).

19. Johnston & Madison, *supra* note 16, at 375.

20. See Rick Pruetz, *Recent Trends in TDR*, 2002 APA National Planning Conference Proceedings, Apr. 16, 2002, http://conserveland.org/lpr/download/12999/pruetz_tdr.pdf (“If TDRs are not affordable, developers will not buy them because TDR costs will make the TDR option less profitable than the baseline option. Similarly, if the TDR ordinance does not allocate enough TDRs to sending areas, the property owners may decline to sell their TDRs.”).

21. Hanly-Forde et al., *supra* note 18.

22. See Pruetz, *supra* note 20.

23. Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. Envtl. Aff. L. Rev. 565, 577 (1992).

significant development densities through similar mechanisms, they are unlikely to sell development rights.

3. *Transaction Costs*

TDR transaction costs can be very high, discouraging potential transactions. These costs include “time-consuming negotiations over price, preparation of purchase and sale agreements and other documents, and closings. Valuation difficulties plague buyers and sellers alike,”²⁴ creating problems both for landowners negotiating transfers and for governments trying to avoid takings,²⁵ partly due to the lack of a functioning market that indicates appropriate prices for TDRs. Governmental regulation of transfers can impose steep costs in scrutinizing and monitoring individual transactions.²⁶ Moreover, transactions will only occur “if a seller and a buyer are simultaneously ready to sell and develop.”²⁷ Inability to obtain title insurance and financing for transferred development rights presents another difficult obstacle.

The program should be structured so that it “is easy for the municipal staff to administer and the public to understand with designated personnel to manage and track the program.”²⁸ Government-created TDR “banks” can help minimize transaction costs by setting minimum purchase prices to resolve valuation and marketability problems, “guaranteeing loans that use TDRs as collateral, and purchasing the TDRs outright.”²⁹ However, there is no evidence that a TDR bank is a cure-all for transaction cost problems.

4. *Public Outreach and Education*

One of the most important factors in TDR program success is an extensive effort to educate the public about the existence and nature of the TDR scheme.³⁰ This effort could include public workshops and mailings, as well as assistance of program staff, who can

24. *Id.* at 578.

25. Sarah J. Stevenson, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. Rev. 1329, 1331 (1998). It is possible that if landowners in sending areas do not receive adequate compensation for their development rights, their property has been taken without just compensation in violation of the Fifth Amendment. See, e.g., Jennifer Frankel, *Past, Present, and Future Constitutional Challenges to Transferable Development Rights*, 74 Wash. L. Rev. 825, 837-41 (1999).

26. Kayden, *supra* note 23, at 578-79.

27. Stevenson, *supra* note 25, at 1331.

28. Danner, *supra* note 3, at 135.

29. Stevenson, *supra* note 25, at 1331-32 (footnote omitted).

30. See Danner, *supra* note 3, at 135.

aid developers and landowners in navigating the legal aspects of the program.³¹

B. Traditional TDR Programs: Undermining Open Space Preservation?

In the rare case in which a traditional TDR program is successful, there are usually better ways to accomplish the program's goals. When, as is more often the case, a traditional TDR program is unsuccessful, it can actually undermine open space preservation goals. Because it is virtually impossible to limit regional growth without harming quality of life so that the region is no longer a desirable place to live, preserving regional open space is best done by directing growth into compact development patterns.³² Traditional TDR schemes, by conditioning density increases on purchases of development rights, increase the expense of higher-density development, thereby likely limiting density to a level below what the market would otherwise support. If the program does not successfully create a market for transfers, it will just cap densities and result in a potentially significant increase in land consumption as compared to simply increasing the densities that are allowed without requiring the purchase of TDRs. Even in a successful TDR market, as in any functioning market, there will be buyers unwilling to buy and sellers unwilling to sell at the market price; therefore, even a functioning traditional TDR market will limit the achievable densities and result in less, not more, open space preservation than would occur if higher densities were permitted without the purchase of TDRs. This effect can be mitigated by reducing the size of the receiving area or increasing the allowable density under the base zoning, but there will be an adverse impact on the TDR market because of reduced demand for the TDRs.

Furthermore, enactment of a TDR scheme may lead to complacency towards open space preservation and diversion of resources to other needs. In reliance on the TDR scheme, governments and others may direct efforts and resources away from open space preservation. Because the TDR scheme likely will not lead to preservation of significant open space, and indeed will cause lower densities and therefore more development of open space, the reliance will be misplaced. While land acquisition efforts are delayed,

31. See Hanly-Forde et al., *supra* note 18.

32. Infill and redevelopment may mitigate some of the need to develop open space to accommodate new growth, but the market generally will only support a certain amount of infill and redevelopment for a variety of reasons, and political opposition to "densifying" existing neighborhoods is often high.

land prices may escalate, increasing the financial hurdles involved in preserving sensitive lands. In addition, land that is targeted for preservation may be consumed by development as time passes.

Although a traditional TDR scheme is not likely to be useful in increasing the amount of open space preserved, it may be argued that in limited cases a traditional TDR scheme can be used to permanently preserve key environmental landscapes. Unfortunately, the program probably will not result in a desirable pattern of open space preservation unless the sending area is limited to key environmental areas. Indeed, those landowners whose land is farthest from existing urban areas, and therefore in the least danger of urbanization, will have the greatest incentive to sell development rights, due to the low development value of their property. It is possible to limit sending areas to important environmental areas, but the more the sending area for TDRs is limited, the less likely it is that a strong market will be created, since an inadequate supply will likely limit market activity.

C. Fairness and Legality of Traditional TDR Schemes

Another, but not unrelated, problem with traditional TDR schemes is that they place the burden of permanently preserving open space solely or primarily on new higher-density development. This result is not only inequitable, it is potentially illegal. Federal constitutional law places strict limits on governmental exactions of property, and state law often limits the imposition of impact fees.³³ Whether traditional TDR requirements are more akin to exactions or impact fees, they seem to run afoul of the law, and are unfair in any case.

1. Federal Constitutional Law Governing Exactions

The Supreme Court has ruled that conditions placed on property owners as conditions of development approvals must bear an “essential nexus” to the impact of the new development³⁴ and have a “rough proportionality” to that impact.³⁵ Although a local government can likely show an essential nexus between open space preservation and the loss of open space through new development, it will be much harder to demonstrate that the government has made the necessary “individualized determination” that the TDR

33. See *infra* Part II.C.1-3.

34. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

35. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

purchase requirement “is related both in nature and extent to the impact of the proposed development” under the rough proportionality test.³⁶

It is unclear whether the government would have to show only that the entire proposed development’s impact is roughly proportional to the required TDR purchase or that the incremental increased density is roughly proportional to the purchase.³⁷ In the latter case, it would be very difficult for the government to argue that five units on one acre, as opposed to two units on that same acre, have an impact roughly proportional to the preservation of three acres (or much more, depending how the sending area TDRs are structured) of open space. The government may have an easier time showing that the entire five units have an impact roughly proportional to the preservation of three (or more) acres, but even that demonstration is unlikely to be persuasive, given that only one acre is being developed. In fact, the impact to regional open space will be lower in the case of higher-density development. If the urban area grows by ten units in one year, development at five units per acre will consume only two acres of open space (assuming no infill or redevelopment), whereas development at two units per acre will consume five acres of open space.

The only saving argument for the government would appear to be that *Nollan* and *Dolan* do not apply to TDR schemes. Some courts and commentators have read the cases to apply only to conditions that involve (1) required land dedications or other conditions involving forfeitures of constitutional rights, as opposed to fees; and (2) conditions applied through administrative, rather than legislative, procedures.³⁸ Nevertheless, there is little reason to think that *Nollan* and *Dolan* would not apply to a TDR program. Indeed, “[c]ourts are increasingly rejecting the idea that *Nollan* and *Dolan* can be limited to their facts.”³⁹

The Takings Clause of the Fifth Amendment to the U.S. Constitution exists “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be

36. *Id.*

37. See Frankel, *supra* note 25, at 850 n.234.

38. See, e.g., J. David Breemer, *The Evolution of the “Essential Nexus”: How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373, 382-95 (2002) (summarizing judicial opinions discussing the applicability of *Nollan* and *Dolan* in cases involving monetary exactions and legislatively-enacted conditions); Matthew P. Garvey, *When Political Muscle is Enough: The Case for Limited Judicial Review of Long Distance Transfers of Development Rights*, 11 N.Y.U. Envtl. L.J. 798, 818-19 (2003) (arguing that *Dolan* does not and should not apply to TDR schemes).

39. Breemer, *supra* note 38, at 407.

borne by the public as a whole.”⁴⁰ Requiring the purchase of TDRs for those who seek higher densities could be used “to force a landowner to shoulder a disproportionate share of a public burden just as easily as a demand for a dedication of real property,” whether the TDR requirement is characterized as a fee or an exaction.⁴¹ Indeed, traditional TDR programs could be characterized as a way to force a small subset of people—new residents of higher-density development—to shoulder the burden of preserving significant amounts of open space, a burden that in all fairness should be shared equally by all residents, or at least should also be shared by residents of new lower-density development. Insofar as the existing residents have not funded the preservation of open space to the same extent that new residents are asked to do so, the burden on the new residents seems particularly unfair and unrelated to the actual impact of the new development, particularly when low-density development is exempted from the TDR purchase requirement. Fairness would seem to dictate that any increase in the acreage of preserved open space per resident or dwelling unit should not be funded solely or primarily by the new residents of high-density development.

Although it is true that TDR programs are generally established legislatively rather than administratively, “[i]t is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking.”⁴² “From the landowner’s point of view, there is nothing magical about the fact that a law that takes property applies equally to a large number of people.”⁴³ Insofar as a governmental entity is seeking to unfairly shift to new residents of high-density development a burden that in all fairness should be borne by the public as a whole, it is not clear why legislative enactment should save such an action from unconstitutionality. Indeed, new residents are by and large unrepresented in government legislatures, and it may be easy for existing residents to shift the cost of social programs such as open space preservation to new residents who are generally unable to protect themselves within the political process.

40. *Dolan*, 512 U.S. at 384 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

41. Breemer, *supra* note 38, at 397-98 (footnotes omitted).

42. *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of certiorari).

43. Breemer, *supra* note 38, at 403.

2. State Law Governing Impact Fees

Laws in many states provide extra support for the illegality of traditional TDR programs. For example, Florida law requires that monetary exactions, or impact fees, pass a rigorous “dual rational nexus test” in which the government “must demonstrate reasonable connections between (1) the need for additional capital facilities and the growth in population generated by the subdivision and (2) the expenditures of the funds collected and the benefits accruing to the subdivision.”⁴⁴ Traditional TDR schemes are very similar to impact fees in that they require developers to pay for the right to develop. It is unlikely that a government enacting a traditional TDR program could show both that the cost of the TDRs is related to the need for open space generated by the new development and that the preserved open space directly benefits the new development.

Similarly, Utah state law requires that impact fees “must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred.”⁴⁵ It seems unlikely that the benefit to residents of high-density development of open space preservation is, to any significant extent, proportionately higher than the benefit to other residents, including the residents of new lower-density housing.

Thus, while it may be possible to argue that traditional TDR programs are not subject to the *Nolan* and *Dolan* analysis because they are more akin to impact fees than to exactions of real property, the law governing impact fees in many states does not support the legality of traditional TDR programs.

3. Federal Substantive Due Process Standards

A further legal problem surrounding traditional TDR programs is that it can be argued that either the base zoning of the program is overly restrictive or the purchase of TDRs allows overly intensive development.⁴⁶ Zoning has traditionally been intended to create a well-ordered community in which intensity and types of use are planned according to the characteristics of different areas of the community, whereas traditional TDR schemes leave to developers the decision as to the upper limit on intensity of use, without

44. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 134 (Fla. 2000) (internal quotation marks omitted) (quoting *St. Johns County v. Ne. Fla. Builders Ass'n, Inc.*, 583 So. 2d 635, 637 (Fla. 1991)).

45. *Banberry Dev. Corp. v. S. Jordan City*, 631 P.2d 899, 903 (Utah 1981).

46. See Frankel, *supra* note 25, at 841-43.

reference to the characteristics of particular areas. If the density allowed with the purchase of TDRs is compatible with the characteristics of a given area, then the base zoning is overly restrictive for that area. If, on the other hand, the base zoning is not overly restrictive for an area, then the higher density allowed with the purchase of TDRs must be harmful to the health and safety of the community. This use of the zoning power may arguably be violative of federal substantive due process standards that require zoning to be exercised reasonably,⁴⁷ and is inconsistent with traditional zoning concepts.

D. Summary

Given the significant questions about the fairness, legality, and effectiveness of traditional TDR schemes, governments are well advised to look elsewhere for mechanisms to protect open space. To the extent that a government's goal is to protect as much open space as possible, that government would do best by providing incentives, as opposed to disincentives, for density. To the extent that the goal is to permanently preserve specific sensitive areas, TDRs may be useful, but the government must be careful to structure the program so that it is successful, fair, and constitutional. Given that it may be very difficult, if not impossible, to arrange the program in such a manner, the best way to preserve the sensitive areas may be to spread the cost evenly among all residents, rather than forcing new development to bear a disproportionate burden of preserving open space.

III. AN ALTERNATIVE TDR CONCEPT

In a nutshell, the practical, legal, and equitable problems with traditional TDR schemes can be boiled down to the statement that they tax the wrong people to pay for open space preservation. If the goal is to preserve open space, taxing higher density development is counterproductive because it disincentivizes the very type of development that will reduce urban footprints and lead to more undeveloped land. Similarly, in order to be fair and legal, a TDR scheme should place burdens on development and new residents in proportion to their impact, yet it is higher density development that will reduce the impact of growth on open space by reducing the amount of land consumed by new development.

47. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); see also Frankel, *supra* note 25, at 842 (summarizing *Village of Euclid*, 272 U.S. at 395).

The solution would seem to be to reverse the TDR program so that low density—rather than high density—is taxed to pay for open space preservation. Thus, the base zoning for an area would have a minimum density, as opposed to a maximum density (although a maximum density could be used as well), and the purchase of TDRs would be required in order to develop at densities lower than the base minimum density. For example, densities below three units per acre could require purchase of one transferable credit per unit subtracted from the base minimum, with one transferable credit allocated to each open space acre desired to be protected.

Shifting the TDR system to tax lower-density rather than higher-density development seems to solve or mitigate many of the problems with and obstacles to traditional TDR schemes discussed above. The following sections discuss the relationship of the proposed alternative TDR program with the various issues discussed above in connection with traditional TDR schemes.

A. Market-Based Obstacles to Transfers of Development Rights

The alternative TDR concept may mitigate many of the market-based obstacles to transfers of development rights. In many, if not the vast majority, of the regions of the country, developers and homebuilders have tended toward lower-density products for a variety of reasons, including financability, market demand, easier approvals, lower development and infrastructure costs, and developer familiarity.⁴⁸ Higher-density products may be unfamiliar and seen as more risky. Adding a TDR scheme's tax onto the costs of higher-density development may be the final straw that prevents developers and homebuilders from shifting toward higher-density products, whereas developers and homebuilders may be more likely to actually pay the TDR tax on low-density development,

48. See Christopher B. Leinberger, *The Need for Alternatives to the Nineteen Standard Real Estate Product Types*, Places J. 25 (Jul. 1, 2005) available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1947&context=ced/places> (asserting that the market has focused on nineteen standard product types that "almost guarantee[] low-density sprawl."); David Rusk, *Growth Management: The Core Regional Issue*, in *Reflections on Regionalism* 78, 78 (Bruce Katz ed., 2000) ("Urban sprawl is consuming land at almost three times the rate of population growth."); Michael S. Carliner, *Comment on Karen A. Danielson, Robert E. Lang, and William Fulton's "Retracting Suburbia: Smart Growth and the Future of Housing,"* 10 Housing Policy Debate 549, 550-51 (1999) ("Even where higher densities theoretically are permitted, builders generally find it easier to obtain regulatory approval for low-density projects than for higher density ones, and they generally encounter fewer regulatory costs and delays for construction of any kind at the urban fringe than in cities or close-in suburbs. . . . Surveys and marketplace experience show that, below some personal threshold, home buyers will only accept a smaller lot as a last resort.").

thereby causing the TDR program to work.

Moreover, the alternative TDR program more easily facilitates a governmental TDR bank. In such an alternative program, the government could simply charge a developer an impact fee for low-density development, and then use the proceeds to purchase sensitive lands. In a traditional TDR scheme, however, there may be insurmountable legal hurdles to charging an open space impact fee that increases for higher-density development.⁴⁹ For example, under the Florida law cited above, it is difficult to argue that higher-density development has a greater impact on open space than does lower-density development.⁵⁰

The ability in an alternative TDR program to use impact fees to create a bank for open space preservation avoids many, if not all, of the market-based obstacles to traditional TDR programs discussed above. Although it will be important to set the fee at appropriate levels and to pay appropriate amounts for preserved land, there is no need to ensure that the supply and demand balance is exactly right to make transactions occur. Similarly, transaction costs are greatly diminished for both developers and those who are willing to sell development rights, since the unfamiliar TDR transaction is eliminated and replaced by more traditional impact fees and outright purchase of development rights. Moreover, public outreach and education is not as important because there are no private transactions that the government needs to encourage; instead, the government is directly involved in charging the impact fee and purchasing the development rights.

B. The Alternative TDR Program: Incentivizing Open Space Preservation

One elegant beauty of the alternative TDR program is that, even if it does not work, meaning that no TDR transactions occur, the governmental jurisdiction employing the program will have successfully preserved open space. If no developers purchase TDRs (or pay impact fees) under the alternative program, it follows that no developers are developing at low densities. The higher density development that occurs puts more new growth on less land, reduces the urban area's footprint, and increases the amount of open space that remains undeveloped.⁵¹

49. A traditional TDR scheme, even without the impact fee component, is potentially unconstitutional and illegal, as discussed above. Shifting the program to an impact fee program, however, highlights the legal problems with the program.

50. See *supra* Part II.C.2.

51. There may be other benefits to increasing the amount of higher-density develop-

If, on the other hand, the TDR program is somewhat or very successful in encouraging TDR transactions, it will thereby permanently preserve some open space. In addition, the tax on low-density development will undoubtedly lead to a higher average density than would otherwise occur, thereby again reducing the urban footprint and increasing the amount of undeveloped open space.

Another benefit of the alternative TDR system is that, because a governmental jurisdiction can structure the program as an impact fee program in which the government acts as a bank, the government can ensure that the expenditure of money for land acquisition is targeted towards prioritized lands that are sized and located in appropriate ways to protect key species and other landscape features. In the traditional TDR scheme, on the other hand, the government is at the mercy of the market as to which lands are actually preserved.

C. Fairness and Legality of Alternative TDR Schemes

Although an alternative TDR program could run afoul of federal constitutional law or state law if, for example, the TDR requirement or impact fee is excessive, it is possible to structure the program to meet federal and state legal requirements in that the TDR requirement or fee is proportional to the actual impact of the new development on open space.

1. Federal Constitutional Law Governing Exactions

As discussed above, conditions placed on property owners as conditions of development approvals must bear an essential nexus to the impact of the new development and have a rough proportionality to that impact. Whether the program is a traditional TDR scheme or an alternative TDR system, the governmental jurisdiction can likely show that there is an essential nexus between open space preservation and the loss of open space through new development. An alternative TDR program, however, is much more likely to meet the rough proportionality requirement because the TDR or fee requirement increases for the type of development that has a higher, rather than a lower, burden on regional open space.

For example, if an urban area increases by 1000 households in

ment, ranging from reduced infrastructure costs to increased housing choices and lower housing costs.

a given year, an average density for new development of two units per acre will require 500 acres of new development to accommodate the new growth. That could mean 500 acres of open space lost to new development.⁵² If, on the other hand, the average density for new development is five units per acre, only 200 acres will be needed to accommodate the growth, saving 300 acres, with a potential net savings of 300 acres of open space. Thus, the rough proportionality test would seem to favor a higher open space fee or exaction for low-density development than for high-density development. This is not to say that *any* level of fee for low-density development will pass constitutional muster, but rather that the concept of increasing the TDR requirement for low-density development is more likely to be constitutional than the traditional TDR scheme. The governmental jurisdiction will still need to carefully calibrate the TDR requirement or fee to ensure that it is roughly proportional to the actual impact of the new development on open space.

2. *State Law Governing Impact Fees*

An alternative TDR program is much more likely to pass muster under state impact fee laws than is a traditional TDR scheme. Under Florida law, for example, it will likely be possible to show that the need for open space preservation is reasonably connected to the population growth generated by the new development. A ten-acre subdivision that accommodates fifty people will have a greater effect on regional open space than will the same ten-acre subdivision that accommodates 500 people. Moreover, because it is possible in an alternative TDR system for the government to actually direct the expenditure of funds for open space preservation, it will likely be easier to ensure that the expenditure of the open space fee collected creates benefits accruing to the new development from which the fee was collected.

3. *Federal Substantive Due Process Standards*

An alternative TDR program seems less likely than a traditional TDR scheme to run afoul of federal substantive due process standards. Whereas under a traditional TDR scheme it is arguable that the governmental zoning authority has deliberately lim-

52. Infill and redevelopment could reduce the amount of acreage required to accommodate the new growth. Thus, infill and redevelopment projects probably should not face the same TDR requirements as do greenfield projects.

ited base zoning well below the carrying capacity of the land in order to exact open space preservation from developers, under an alternative TDR program the government can plausibly argue that the base minimum density has been established to maximize efficiency of infrastructure expenditures and reduction of overall urban footprint. The government will then allow a developer to build at lower densities than the base minimum, but it will require the developer to fund the preservation of open space (and potentially infrastructure as well) to offset the impact of the lower-density development.

IV. CONCLUSION

Sometimes the most elegant solutions are the simplest solutions. Despite its original promise to preserve open space at no cost to existing residents, the traditional TDR scheme has not fulfilled that promise. Perhaps partly because of the lack of success of such programs, their legality and fairness has not fully been explored to date, but it is clear that there are substantial questions in these areas. Moreover, the incentive structure of traditional TDR programs is diametrically opposed to their stated purpose of preserving open space.

The elegant solution may be too obvious to have been noticed. Essentially, the problem is that we have been taxing the wrong kind of development. If the goal is to reduce the urban footprint of our metropolitan areas and retain more open space, the solution seems to be staring us in the face: tax the very kind of development that is causing the problem in the first place.