Transfer of Development Rights

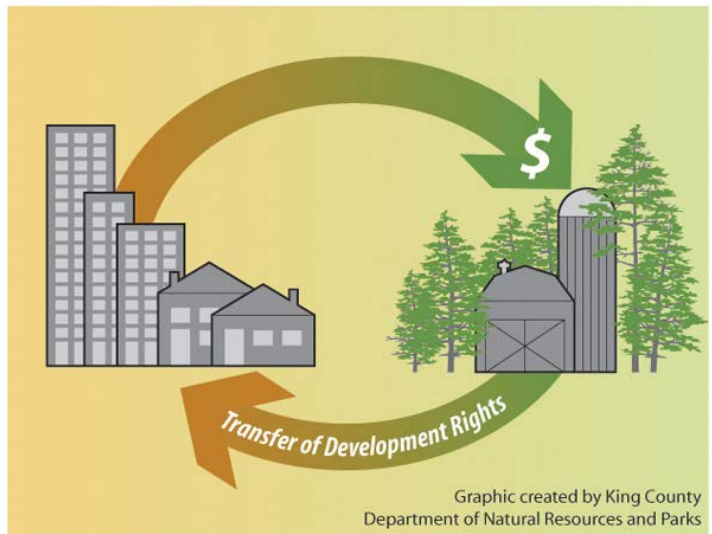
Transfer of Development Rights is a zoning technique that conserves land by redirecting development that would otherwise occur on the land (the sending area) to a receiving area suitable for denser development. The technique operates so that owners in the sending area can be compensated for their redirected development rights.

Introduction

Transfer of Development Rights (TDR) is a zoning technique used to permanently protect land with conservation value (such as farmland, community open space, or other natural or cultural resources) by redirecting development that would otherwise occur on this land (the sending area) to an area planned to accommodate growth and development (the receiving area).

TDR programs financially compensate landowners for choosing not to develop some or all of their land. These landowners are given an option under municipal zoning to legally sever the development rights from their land and sell these rights to another landowner or a real estate developer for use at a different location. The land from which the development rights have been severed is permanently protected through a conservation easement or a restrictive covenant. The development value of the land where the transferred development rights are applied is enhanced by allowing for new or special uses; greater density or intensity; or other regulatory flexibility that zoning without the TDR option would not have permitted.

TDR removes some of the windfalls and wipeouts associated with conventional zoning by allowing landowners in areas typically zoned for agricultural or very low-density residential use to capture some of the same financial rewards available to landowners located in areas zoned for suburban and urban land uses.



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TDR Use in Pennsylvania

Track Record

Pennsylvania municipalities have used TDRs since the late 1980s. Dozens of municipalities have incorporated the TDR tool into their zoning ordinances, and many have approved TDR transactions. Most active TDR programs operate in southeastern and southcentral Pennsylvania, where farmland preservation is a top priority for many communities

Some Pennsylvania municipalities with TDR programs have taken active roles in facilitating TDR transactions. These roles include:

- Helping fund the purchase of TDRs.
- Banking purchased TDRs until needed by local developers. (See "Banking TDRs for Future Use" for more information.)

- Selling TDRs to developers through a public bid process.
- Using funds from TDR sales to purchase new TDRs and agricultural conservation easements, thereby preserving more farms than could be preserved with county and state farmland preservation funding alone.

TDR vs. ACEPP

The TDR tool is distinctly different from what are often called "purchase of development rights" programs—in Pennsylvania, the Agricultural Conservation Easement Purchase Program (ACEPP):

- With TDR, the development rights purchased from the landowner can be used on another parcel. With ACEPP, the development rights are retired.
- Although Pennsylvania's TDR programs have focused largely on the protection of farmland, TDR has also been used to protect historic and natural resources. ACEPP focuses exclusively on farmland preservation.
- Money used to purchase TDRs usually comes from the private sector, as long as there are sufficient incentives to attract developers to voluntarily choose TDR. ACEPP relies heavily on public financing.
- The only criteria to qualify for TDR is that the land be located in an area designated in the zoning ordinance for sending development rights. To qualify for ACEPP, landowners must meet rigorous eligibility criteria.

Advantages of TDR

Everybody Wins

When the TDR option is used effectively, everybody wins:

- The landowner receives market-determined financial compensation for conserving their land.
- The developer makes a profit by taking advantage of the regulatory flexibility of a TDR receiving area.
- The public enjoys the many economic, environmental, and health benefits of conserved land, such as reduced flooding and cleaner drinking water. Citizens also benefit from the potential for more diverse and affordable housing options made possible by higher-density development.
- Land trusts, municipal open space programs, and county farmland preservation boards can use their limited money to protect other important properties (i.e., conserving a property via TDR leaves limited conservation dollars available to protect a property somewhere else).

Taps Into Private Capital

There is simply not enough local, state, and federal conservation funding to protect all the land that needs protecting—and the relatively little funding that does exist is often in jeopardy. Unlike conservation techniques which rely solely on scarce public dollars, TDR conserves land by tapping into the vast amounts of private capital flowing into development projects.

Flexibility

TDR is a flexible tool—it can be made to fit many different land—preservation and growth-management scenarios.

For example, development rights can transfer to residential or non-residential developments. Residential developments using TDRs typically include added uses (e.g., townhouses in addition to single-family detached units), special uses (e.g., continuing care retirement communities), increased density (more dwelling units per acre), or flexibility with zoning's area and bulk standards (variations on setbacks, lot sizes, etc.). Non-residential developments using TDRs typically take advantage of increased floor-area allowances, maximum building-height allowances, or maximum impervious lot coverage allowances.

Designing and Implementing a Successful TDR Program

Tailor to Market Forces

Simply adding the TDR option to a municipal zoning ordinance does not mean that people will use it. TDR programs are usually only effective when:

- Buyers want what a developer can build using TDRs;
- Developers want to buy TDRs and transfer them to receiving areas; and
- Landowners are willing to sell TDRs while permanently restricting their land.

TDR programs have typically failed in situations where real estate market forces were not factored into the program's design. Consider the following scenario:

> *A municipality's base zoning allows residential developments to have up to three houses per acre without TDR, while the TDR option allows development density of up to six houses per acre. Subdivisions in the area are being developed at a density of three houses or fewer per acre.*

Even though using the TDR option would allow a developer to build more units, there is little to no market demand for higher-density developments. If, however, the base zoning only allowed residential developments at a density of up to one house per acre, but permitted up to three houses per acre through TDRs, the developer would be more likely to choose the TDR option in order to meet market demand.

Dollar Value of a TDR

The dollar value of a TDR, both for a sending-area landowner and for a receiving-area developer, depends on a number of market-related and other factors. For example, a landowner who wishes to sell TDRs will likely have a certain dollar value in mind for each TDR they plan to sell. Similarly, a potential user of TDRs will have a certain price they are willing to pay, and this price is usually based on the projected value that the purchased TDR will add to the development. A TDR deal typically occurs when some point of overlap is reached between the expectations of both the seller and buyer.

If a municipality or land trust is buying and banking TDRs (see "Banking TDRs for Future Use"), they must make a determination of how much they will pay. The average per-acre cost paid by the county agricultural land preservation board for agricultural conservation easements could be a useful starting point for determining the price per TDR (especially if the TDR sending area is farmland). For example, if the county is paying roughly $5,000 per acre for agricultural easements in a municipality, and the municipality's zoning ordinance allocates one TDR for every two acres to sending area landowners, the starting price per TDR might be around $10,000.

Make TDR Option Attractive to Sending Area Owners

Given the voluntary nature of using TDRs, TDR ordinance provisions should be designed so that the TDR option is much more attractive to a landowner in a sending area than the conventional lot-by-lot subdivision and land-development option.

For example, the agricultural zoning district and TDR sending area in Warwick Township (Lancaster County) allows landowners the ability to subdivide their land for non-farm residential purposes generally at a ratio of one lot for every 25 acres. Under the TDR option, these same landowners can sever and convey TDRs at a ratio of one TDR for every two acres. A 100-acre farm can generate up to four residential lots through the traditional zoning option or 50 TDRs.

Where effective agricultural zoning is not already in place, some municipalities have downzoned the TDR sending area to increase the attractiveness of the TDR option to landowners. Similarly, some municipalities have downzoned the TDR receiving area(s) so that the TDR option results in more uses, more development, or other flexibility when compared to conventional development approaches (but without having significantly more development than would have been allowed before the TDR option was introduced).

Municipal officials should ensure that their TDR programs are designed to require use of the TDR option as the only means to achieve the highest possible density in the receiving area. Where developers are able to simply obtain a zoning change to allow a higher residential density or greater non-residential density in the receiving area, they will not use the TDR option.

Implementation Steps

Establishing a TDR program involves the following basic steps. If possible, use a professional planning consultant who has TDR program design experience.

1. Establish the TDR option and administrative provisions within the municipal zoning ordinance. TDR use must be voluntary.
2. Establish the sending area. This should be an area of high conservation value such as farmland or community open space. The sending area is usually a defined geographic area, but can also be based on specific locational criteria.
3. Determine the number of TDRs allocated to each landowner within the sending area. This is usually based on a simple mathematical formula such as one TDR for every five acres. Some formulas exclude constrained lands (i.e., those not easily buildable, which arguably have reduced development value). Most municipalities also establish a threshold for minimum parcel size eligible for the TDR program.
4. Establish the procedure for severing TDRs. Usually this procedure is written as part of the zoning ordinance provisions and requires a deed of transferable development rights. The ordinance can include a sample deed document approved to form by the municipality's solicitor. The procedures must also require that an executed deed be recorded with the county recorder before the municipality approves development in a receiving area.
5. Establish the procedure for permanent protection of the land from which the TDRs were severed. Normally this procedure requires the use of a restrictive covenant, or preferably a conservation easement held by a third party.
6. Establish the receiving area. This should be an area (or areas) planned to accommodate growth, preferably where public utilities like water and sewer exist or are planned. Ideally, both sending and receiving areas will have been previously determined during a comprehensive plan update process by the municipality or region considering the use of TDR. Potential receiving areas can be residential, commercial, industrial, or institutional in character, or any combination thereof. Designated growth areas as defined by the Pennsylvania Municipalities Planning Code (MPC) are very appropriate for consideration as TDR receiving areas.
7. Establish the plan-submittal requirements for developments in the TDR receiving area. (Note: A development subject to TDR receipt can be made a conditional use within the zoning ordinance, or participation in a Traditional Neighborhood Development Overlay District can be made subject to purchase of some number of TDRs.)

Concerns of Receiving Area Neighbors

The greatest challenge in designing a successful TDR program lies in finding one or more suitable receiving areas. Some municipalities cannot overcome local opposition, which usually comes from residents adjoining potential receiving areas and is typically based on a belief (whether factual or not) that TDR will result in more new development than would have otherwise occurred. Some residents fear that increased development will worsen traffic, raise property taxes, reduce property values, or diminish quality of life.

TDR programs can be designed with attention to these potential concerns. For example, programs can cap the maximum permitted density in a TDR receiving area so that a residential development using TDRs—even with the added units—will not exceed the residential density that was available to those parcels prior to the establishment of the TDR program.

More TDR Options

Banking TDRs for Future Use

Severed TDRs can be held ("banked") and auctioned off for future use in TDR receiving areas. For example, several municipalities in Lancaster County have acquired TDRs from landowners in township-designated sending areas and held them in a TDR bank. Once banked, those TDRs could either be retired by the elected officials or sold to a developer.

In Warwick Township, applicants for development in TDR receiving areas have the option to publicly bid on the township's banked TDRs at an advertised auction and use newly acquired TDRs to enhance their developments. The township reinvests the proceeds from TDR sales in new TDR purchases, creating a revolving fund.

Similarly, the Lancaster Farmland Trust (LFT) acquires TDRs from farmers and holds them until a suitable buyer wants the TDRs, often selling them along with those sold by the municipality. LFT also serves as a TDR bank and program administrator for some rural municipalities in Lancaster County. When selling TDRs, LFT is not required to follow public bid requirements (even though its sale price per TDR is normally similar to the municipality's offering price).

Transferring TDRs Across Municipal Boundaries

Section 1105(b)(2) of the MPC allows severed TDRs to be transferred from one municipality to another in Pennsylvania. Necessary ingredients include all of the following:

- An adopted county or multi-municipal comprehensive plan;
- Zoning ordinance provisions in the participating municipalities that enable the use of TDRs;
- The designation of sending and/or receiving areas in these municipalities; and
- An executed Agreement for Intermunicipal Transfer of Development Rights.

For example, Honey Brook Township has had an active TDR program with both sending and receiving areas since the mid-2000s. In 2015, the township joined with nearby Honey Brook Borough to adopt a multi-municipal comprehensive plan. Borough officials agreed for the borough to serve as one of several receiving areas for TDRs generated in the township, and in 2018 both municipalities adopted new zoning ordinances enabling TDR transfer across their boundaries. Honey Brook Township has zoning districts for TDR sending and receiving; Honey Brook Borough has zoning districts permitting the receipt of TDRs generated in the surrounding township.

Mixing and Matching

TDR is one of many tools available to municipalities and regional organizations to help manage growth and permanently protect valuable agricultural, natural, and cultural resources; TDR can be even more effective when mixed and matched with these other tools. Examples include:

- A landowner could donate a conservation easement on the portion of their land that doesn't have TDRs due to environmental sensitivities (e.g., wetlands or steep slopes), while selling the TDRs on their cornfield to a developer for use in a receiving area.
- A municipality could adopt a Traditional Neighborhood Development ordinance to ensure that developments in a TDR receiving area have certain characteristics, such as walkable neighborhoods, diverse housing, and public green spaces.
- By implementing Conservation by Design (through amendments to its zoning ordinance and SALDO), a municipality could ensure that open space and sensitive features within the TDR receiving area are protected. Plus, the assessment and planning process that is part of Conservation by Design could a help a municipality identify the most appropriate TDR sending and receiving areas.
- A municipality could adopt agricultural protection zoning (APZ) to promote continued agricultural activities on lands that are outside of a TDR sending area and that, perhaps due to lack of development pressure in the foreseeable future, aren't good candidates for being in a TDR sending area.

Enabling Law

Under Pennsylvania law, TDR use must be voluntary. A municipal zoning ordinance cannot mandate that a landowner or developer use TDRs, but it can make the TDR option very attractive.

The following sections of the MPC enable the use of TDRs:

- § 603(c) (2.2)—Ordinance Provisions: Allows municipalities to establish TDR provisions within municipal zoning ordinances provided the option is permitted as voluntary and not mandated.
- § 619.1—Transferable Development Rights: Creates TDRs that can be severed and conveyed as a separate interest in real estate; requires municipal approval of TDR transfers; limits the sending and receipt of TDRs to within a single municipal

boundary unless two or more municipalities have a joint zoning ordinance or written intergovernmental agreement.

- § 1105(b) (2)—Intergovernmental Cooperation: Allows TDRs across municipal boundaries without the need for a joint zoning ordinance. (See "Transferring TDRs Across Municipal Boundaries" for more information.)

The most recent version of this guide and related resources can be found online at https://conservationtools.org/guides/12.

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