

Putting Growth In Its Place

WITH TRANSFER OF DEVELOPMENT RIGHTS

by Rick Pruetz, AICP

Most communities would like to save something. It might be environmentally-sensitive areas, farmland, historic landmarks, open space, or other places with special significance. But there is typically a dilemma. Elected officials are often reluctant to impose restrictive land use controls on property owners without providing some form of compensation. However, most communities have little or no money available for compensation.

Some communities address this dilemma by adopting what is called a "transfer of development rights" or TDR program. TDR is a market-based technique that encourages the voluntary transfer of growth from places where a community would like to see less development (called sending areas) to places where a community would like to see more development (called receiving areas). In this process, development pays for preservation.

With TDR, a community motivates sending site owners to record permanent deed restrictions on their property, forever ensuring that the land will only be used for approved activities such as farming, conservation, or passive recreation. When these deed-restrictions are recorded, transferable development rights, or TDRs, are created. Sending site owners are compensated for their reduced development potential by being able to sell their TDRs to the developers of receiving sites.


In the receiving areas, a TDR-based zoning code offers developers a choice.



The process of preparing a TDR ordinance helped Monterey County, California recognize the need to preserve the spectacular scenery of Big Sur.

TO BE SUCCESSFUL,
A MARKET FOR THE
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THAT MEANS
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Developers who decide not to buy TDRs are allowed less development on the receiving sites. But developers who purchase TDRs are allowed extra development, or bonus density. When a program is well designed, the extra revenues from higher-density projects make it more profitable for developers to use the TDR

option despite the extra cost of having to buy the development rights.  Using

TDRs: A Basic Example, p. 15

Not all TDR programs are successful. But when a community creates the components needed for a TDR market, everybody wins. Sending site owners are compensated for permanently preserving their properties. Receiving site developers enjoy greater returns even though they have to buy TDRs. And communities achieve their land use goals using private sector money rather than tax dollars.

If TDR Is So Great, Why Doesn't Everyone Use It?

As I learned by sending questionnaires to the 3,500 largest communi-

ties in the country, many people still consider TDR to be experimental. But, in fact, it is not a recent innovation. TDR has been in use for thirty years in the United States, dating back to the New York City Landmarks Preservation Law of 1968.

Nor is TDR untested. My survey uncovered 112 TDR programs in 25 states across the country. Of these 112 TDR programs, 47 are in cities, 30 in counties, and 30 in towns; another five programs are multi-jurisdictional, allowing transfers between different municipalities. While most programs are relatively small in scale, some programs have permanently preserved large amounts of land: 29,000 acres in Montgomery County, Maryland; 15,000 acres in the New Jersey Pinelands; and 5,000 acres in Calvert County, Maryland.

Some survey respondents reported

that they do not use TDR because there is little or no open space or farmland left in their communities. Admittedly, of the 112 TDR programs identified, most are aimed at saving undeveloped areas (63 focus on preserving ecologically-sensitive areas, natural resources, and open space; 21 on protecting agricultural land and rural character). But more than two dozen programs are designed to work in fully-developed communities by preserving historic landmarks, revitalizing downtowns, creating housing, protecting infrastructure capacity, encouraging desirable land uses, and promoting appropriate urban design. See, e.g., the sidebar on San Francisco's program aimed at historic preservation, on p. 19

Many respondents reported that they don't use TDR because their communities prefer to rely on traditional zoning and outright acquisition for preservation. This reliance is ironic since most of the respondents predicted that they will achieve no more than half of their land use goals given the strength of their present zoning controls and the amount of funding currently available for acquisition.

In fact, acquisition dollars can go further when used in conjunction with a TDR program. For example, a community can buy development rights itself and then resell these TDRs, using the proceeds to replenish a revolving fund which can be used over and over rather than for a single, one-time acquisition.

Finally, many people assume that TDR is used primarily as a legal defense against takings challenges — claims that a regulation goes so far that it "takes" private property for public use without just compensation. People who make that assumption are justifiably skeptical of TDR because the courts have not as yet directly ruled on TDR's role in the takings issue.

The case of *Suitum v. Tahoe Regional Planning Agency*, may eventually clarify TDR's ability to mitigate and/or compensate for takings. If the courts ultimately uphold the Tahoe Regional Planning Agency (which justified a prohibition on

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Using TDRs: A Basic Example

Let's say you own a farm on a two-lane rural road five miles from the nearest village. Under your county's zoning, you can create a maximum of seven residential lots on your land. Of course, once you sell the lots, you will lose the income you currently receive from farming the land.

However, because your community has a TDR program, and has included your land within a designated TDR "sending zone," you could choose to permanently deed restrict your land to agricultural use. In return, you will receive "development rights or credits." You decide to deed-restrict your land and receive six development rights from the county (calculated according to a formula in your the county's TDR ordinance).

Five miles away, a developer named Smith buys a parcel of land within an area the county has designated as a TDR receiving zone (because it is near utilities, transportation, public services, shopping, and employment as well as existing development). Smith could, by right, build on his site at a density of six units per acre. But, the TDR ordinance gives him the option of building at a higher density if he makes use of development rights.

Smith contacts you about purchasing your six development rights, which would allow him to build a 12-unit development. He calculates that his additional profit from building the 12-unit project will more than offset the expense of buying your development rights. You decide that his offer is acceptable, and sell Smith your six development rights.

The end result: You continue to farm your land while gaining income from the sale of your property's development rights. Smith is able to build a more profitable project. The community meets its goal of preserving farmland without spending additional tax dollars, and without forcing property owners to forego development-related profits.



Montgomery County, Maryland

The southern half of Montgomery County, Maryland contains the cities of Bethesda, Silver Spring, Rockville, and other suburbs of Washington, D.C. To preserve the rural character of the northern half of the County, the County changed its agricultural zoning from one unit per two acres to one unit per five acres in 1974. Nevertheless, sprawl consumed almost 20 percent of the County's agricultural land in the 1970s.

A County-appointed task force concluded that it would be far too costly to buy agricultural easements on all the land that needed to be preserved. In addition, the task force believed it would be unfair to simply downzone all farmland without providing some form of compensation. Furthermore, the task force concluded that growth would have to be allowed in appropriate areas in order to avoid the unintended effect of encouraging the development of large-lot estates on land zoned for agricultural preservation.

Using these assumptions, the County adopted a comprehensive plan in 1980 designed specifically to be implemented through TDR.

The County rezoned a 91,000-acre agricultural reserve from a maximum density of one unit per five acres to one unit per 25 acres (this minimum lot requirement was based on a study indicating that 25 acres was the smallest farm that could function on a cash crop basis in Montgomery County). But property owners in the agricultural reserve who agree to permanently deed restrict their land for agricultural use are allowed to sell their development rights at the rate of one TDR per five acres. This five-to-one ratio provides an attractive incentive for owners to sell their development rights rather than build on 25-acre lots.

The County designates receiving zones based on their proximity to transportation, urban services, and existing development. Within these receiving zones, developers are given a choice: develop without TDRs at a lower density, or buy TDRs and build at a higher density. The density bonuses are high enough that developers find it cheaper to buy development rights than acquire

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Montgomery County, Maryland

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additional land. However, the bonuses are not so high that the additional development could overwhelm the capacity of the infrastructure system in the receiving areas.

Except for projects providing affordable housing, higher densities are only available for projects that make use of TDRs. Since there is a market for higher-density development that can only be met by using transfers, there is a strong demand for TDRs. As a result, over 29,000 acres of farmland have been permanently preserved to date — about one-third of the County's 91,000-acre goal.



New Jersey Pinelands

The New Jersey Pinelands is a one-million-acre area occupying much of the southeastern quarter of the state of New Jersey. The area is agriculturally productive, particularly for cranberries and blueberries, and contains one of the largest and least polluted aquifers in the northeastern United States. Its swamps and forests are home to 1,200 species of plants and animals, causing it to be designated as the country's first National Reserve in 1978.

Following that designation, the State of New Jersey established the Pinelands Commission, a regional agency covering seven counties and 53 local jurisdictions. The State required all 60 communities to amend their plans and codes to conform with the Pinelands Comprehensive Management Plan, adopted in 1980. The Pinelands Comprehensive Management Plan is designed to be implemented by various tools including federal and state land acquisition funding, land use controls, and TDR.

The Plan includes strong environmental protections for the 368,000 acres of land in the designated preservation and agricultural districts. However, landowners in these districts who record conservation easements on their property receive development rights (known as Pineland Development Credits or PDCs) which can be sold to the developers of receiving sites located in 23 different jurisdictions.

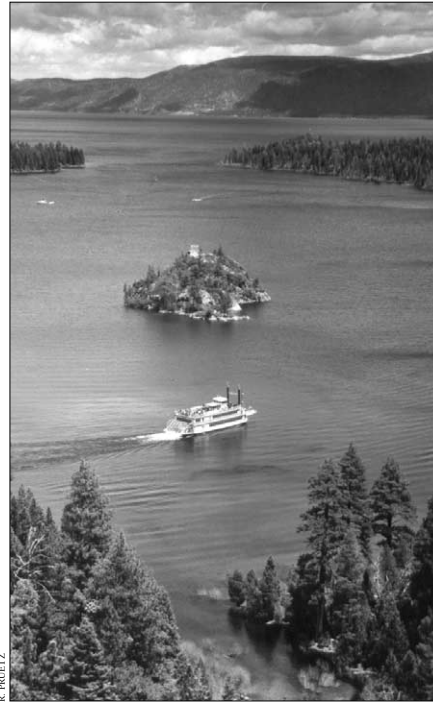
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development in certain designated environmental zones by the availability of TDRs to the owners of undevelopable parcels), we can expect a significant increase in the use of TDR.

But a loss for the Tahoe RPA is not likely to have a significant effect on most TDR programs because unlike the Tahoe



The Tahoe Regional Planning Agency, formed by the states of California and Nevada, uses four TDR techniques within a 207,000-acre basin to minimize further degradation of Lake Tahoe's water clarity.

program few other TDR programs prohibit all development on sending sites. Of the 112 programs I surveyed, all but seven either allow some development on sending sites as a matter of right or provide a process for allowing some development under specified circumstances (such as hardship or a demonstration that environmental impacts can be mitigated). In other words, almost all communities with TDR programs do not rely on TDR as their only legal defense against a takings claim.

[Editor's Note: More details on the Summit case are available on the PlannersWeb site: www.plannersweb.com/tdr.html]

How Does TDR Compare With Other Preservation Techniques?

The best combination of preservation techniques varies depending on the circumstances of the individual community. A community might be able to achieve its land use goals using only acquisition if it has relatively little land to preserve and sufficient public support to adopt funding mechanisms to pay for outright acquisition. But elsewhere, acquisition might only achieve a fraction of a community's goals since the public would not approve the funding needed for outright acquisition of all the land that needs to be preserved.

Rather than use tax revenues, some communities generate the funding for land acquisition through fees imposed on new development. However, since these fees are not collected until new development is approved, complete reliance on this method provides no protection for significant properties until development occurs and the fees are collected.

Many communities primarily rely on zoning. But how effective is zoning in protecting special natural areas, open space, farmland, and historic structures?

To begin with, zoning does not provide any form of permanent protection. Zoning evolves as roads and other infrastructure make outlying land more buildable. We are all aware, also, that zoning can change as the local political winds shift. Moreover, many planners have come to recognize that zoning sometimes does not achieve its desired effect. For example, many communities thought they had safeguarded their rural areas with low density, large-lot zoning only to discover that many people were willing to buy and develop ten-, twenty- and thirty-acre lots for their country estates, farmettes, and ranchettes.

Some communities have turned to newer zoning techniques such as clustering, allowing individual property owners to transfer density within a single parcel. Because no transactions are needed, property owners find clustering very attractive. But clustering often allows the development of land that

ought to be preserved and, ironically, can end up promoting the development of small urban-style enclaves in the middle of rural areas. Even worse, some communities simply rezone land for higher densities without requiring TDRs or any other form of preservation. Needless to say, a developer will not pay for extra density when the community gives it away for free.



Boulder County, Colorado has entered into inter-governmental agreements allowing transfers to receiving sites within the City of Boulder and two other incorporated cities from sending sites within unincorporated areas of the County, like this dairy farm outside the City of Longmont.

SUCCESS FACTORS

In studying the 112 TDR programs uncovered in the survey, I tried to identify factors that were more likely to contribute to a successful program. Since TDR markets are driven by supply and demand, a TDR program works best when it motivates sellers to sell and buyers to buy.

1. Encouraging TDR Sales

TDR programs typically identify sending areas where TDRs will be made available to property owners. These are the areas that the community wants to protect from over-development, such as important natural areas, farmland, historic landmarks, and so on. The

compensation offered property owners by TDRs often makes it possible for communities to adopt strong land use measures that might otherwise be considered politically unacceptable.

However, to be successful, a market for the development rights must be created. That means encouraging *both* the sale *and* the purchase of the development rights.

Successful TDR programs encourage TDR sales by reducing the development potential of the sending sites through zoning restrictions, environmental regulations, farmland protection measures, and ordinances that require adequate public facilities before development can occur. In addition to prompting transfers, these sending site restrictions, of course, help to protect the resources that the communities want to save.

Just as sending site owners need to be encouraged to sell their development rights, receiving site developers must be motivated to buy TDRs. Developers will only buy TDRs if they can make a greater profit from a project that uses TDRs.

Unfortunately, a number of TDR programs have failed to create enough of an incentive in their designated receiving zones for developers to want to purchase TDRs — in other words, allowable densities are high enough *without* TDRs that developers do not see enough reason to purchase TDRs. Similarly, some developers may avoid the higher density allowed by TDR because it would require the installation of sewerage or other infrastructure at prohibitive expense. Some communities address this problem through capital improvements in receiving areas.

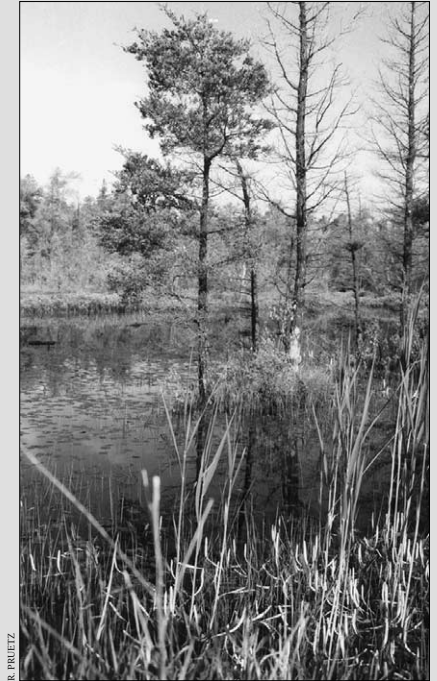
2. Selecting Receiving Sites

The selection of the receiving areas is also critical to the success of TDR programs. Sometimes it has been difficult for rural communities to develop workable receiving areas. Again, receiving areas will only work if there is sufficient demand for higher density development (allowing for use of the additional density provided by the development rights).

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The receiving sites are capable of accepting more than double the number of PDCs that can be generated by the sending sites. This ratio is intended to ensure that the PDCs will remain marketable. Density bonuses are awarded to receiving sites as a matter of right to eliminate any uncertainty that a developer might have about the ability to use TDR.



The New Jersey Pinelands is home to some 1,200 species of plants and animals.

In addition, the Pinelands Commission monitors land use approvals throughout the planning area to make sure that communities are only awarding increased density to developments that use PDCs.

The State of New Jersey maintains a Pinelands Development Credit Bank as a “buyer of last resort,” although most PDC transactions are handled privately. The State also markets the program, administers the transfers, and provides financing for infrastructure improvements in receiving areas. Due to this ongoing support, as well as the comprehensive nature of the original plan, the Pinelands program has permanently preserved over 15,000 acres of land to date.



Cupertino, California

While most TDR programs transfer floor area or dwelling units, Cupertino, California's program transfers vehicle trips.

Cupertino, population 40,000, is located five miles west of downtown San Jose, California. In 1973, the City imposed new development limits in its DeAnza/Stevens Creek commercial corridor in order to keep traffic within the capacity of the street system. However, Cupertino recognized that some land uses would be well below these development limits while other uses would not be able to locate there without some relief from these limits. The City decided to use a transfer mechanism to provide flexibility in locating a mix of land uses and densities while still maintaining an overall development limit that could be accommodated by the transportation system.

Specifically, the development limit is 16 one-way, peak-hour vehicle trips per acre of commercial land. A manual developed by the City lists the trip-generation rates for various land uses. Through a Use Permit process, the City approves trip transfers as long as a reasonable amount of development potential stays on the sending site to ensure the economic viability of that parcel.

In Cupertino, receiving site developers are motivated to buy trips because there are few other mechanisms available for getting the extra density they want. The sending site owners are motivated to sell because the high demand for trip rights creates an attractive selling price. At one point, the estimated value of a trip right reached \$50,000. In fact, some developers acquired trip rights early in the program believing that their value would increase over time.

Under the Cupertino program, transfers have been so active that the development capacity of the corridor has been reached. In the last transfer, a 785,000 square foot research and development office park was built using 322 trip rights purchased from three separate sending sites. In this transaction, Cupertino was able to allow its major employer, Apple Computer, to expand without overwhelming the capacity of the City's street system.

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One approach is for the community to consider designating village or hamlet areas where more concentrated development will be encouraged. TDRs can then



By allowing the transfer of rights from three separate sending sites, Cupertino, California was able to approve an office park for Apple Computer on this receiving site without overburdening the City's transportation system.

be used to obtain the higher densities.

Alternatively, some programs have overcome this problem when one or more jurisdictions with good receiving sites voluntarily agree to accept rights transferred from sending sites in other jurisdictions. Such voluntary inter-jurisdictional transfers occur in Morgan Hill,

California and Boulder County, Colorado.

Regional programs work even better at balancing sending and receiving zones. The Tahoe Regional Planning Agency's TDR program, for example, provides for transfers of development

rights among six different communities in the states of California and Nevada. The New Jersey Pinelands program involves even more jurisdictions.

New Jersey Pinelands. p.16

3. Facilitating Use of TDRs

Some communities approve transfers of development rights administratively, without public hearings or discretionary decisions.

This approach can increase the use of TDRs since it gives developers greater certainty over the cost, timing, and approval of their projects.

Many communities also facilitate transfers by treating TDRs as a commodity, available for sale to anyone at any time. In addition, some programs



Using a TDR program designed to protect areas subject to landslides and other hazards, Pacifica, California preserved this 20-acre bluff top overlooking the Pacific Ocean.

feature a “TDR bank” which serves as a buyer and seller of TDRs when private transactions become too time consuming. Finally, the most successful TDR programs provide ongoing information to the general public, as well as staff support and instructional materials to assist TDR buyers and sellers.

4. Building Public Support

A successful TDR program will mean more intense development at receiving sites. The community as a whole needs to understand and accept that this will occur. Community-wide, comprehensive planning efforts are important in developing TDR programs. In the context of a comprehensive plan, the public is encouraged to identify areas where more intense development would be appropriate (i.e., the receiving areas) as well as areas that need to be preserved (i.e., the sending areas). Not surprisingly, the most successful TDR programs are in communities that specifically designed their comprehensive plans to be implemented through TDR.

Just as comprehensive planning can be good for TDR, TDR can be good for comprehensive planning. Communities often face a certain pessimism when confronted with overwhelming problems like urban sprawl. They recognize that they don't have the money needed to buy all of the land that ought to be saved; and they are reluctant to impose significant land use restrictions without compensating property owners for the resulting reduction in property values.

An effective TDR program can add optimism to the planning process by offering a way for compensation to be provided affected property owners without the use of tax dollars. This optimism can encourage the public to establish stronger land use protection goals.

In Monterey County, California, the process of preparing a TDR-based plan helped the community reach a consensus regarding the need to preserve the unique environment of the Big Sur. As a result, “critical viewshed” restrictions were imposed that prohibit any new development that would be visible from the Pacific Coast Highway. To mitigate

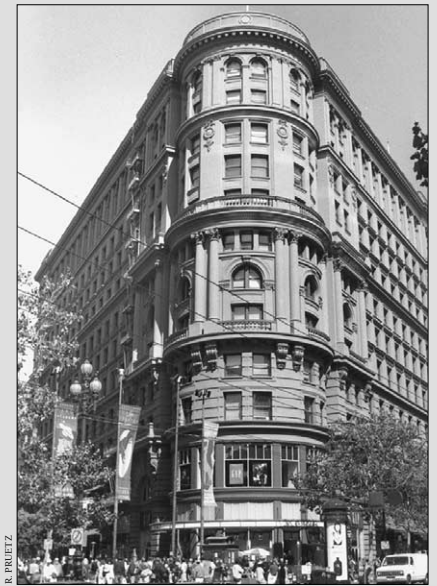
the impact of these restrictions, affected property owners receive development rights, which can be transferred for use elsewhere. The TDR mechanism helped enable the county to move forward with its goal of preserving an outstanding scenic resource.

SUMMING UP:

Transfer of development rights offers communities a way of saving environmentally sensitive areas, farmland, historic landmarks, and other important resources. TDR capitalizes on the ability to separate development rights from other property rights. These development rights can then be moved from properties where development would be detrimental to properties where development would be beneficial.

Just examining the feasibility of a TDR program can often benefit a community. Once people realize they aren't powerless to shape their community's future, they can begin to think seriously about what is really important to them. They start to recognize the significance of surrounding farmlands, natural areas, historic resources — and begin asking questions about how these areas can be best preserved. TDRs may or may not turn out to be part of the answer. But they can help stimulate the discussion. ♦

Rick Pruetz, AICP, is the City Planner for Burbank, California. This article condenses some of the material contained in Pruetz's recently published, Saved By Development: Preserving Environmental Areas, Farmland and Historic Landmarks With Transfer Of Development Rights, a comprehensive guide to TDR programs nationwide. For information on ordering Saved By Development, contact Arje Press, at: 310-305-3568; email: arje@ibm.net.



TDRs have helped preserve architecturally significant buildings in downtown San Francisco.



San Francisco, California

San Francisco is one of several cities using TDRs for historic preservation purposes. While San Francisco's use of TDRs began in the 1960s, it received a boost in 1985 with the adoption of a new downtown plan which designated 253 properties as architecturally significant and 183 other properties as contributing buildings. The new plan also led to the overall lowering of allowable densities downtown, creating a greater incentive for developers to acquire TDRs to achieve the density desired for high-rise offices.

The San Francisco TDR program has several elements that have helped make it work. The owners of potential sending sites are motivated to sell their development rights because it is difficult to get permission to alter or demolish a significant historic building. At the other end of the transfer, developers are interested in acquiring development rights because the demand for new office space is often high. Moreover, TDRs are the only method for exceeding the density otherwise allowed.

In addition, the TDR transfer process is handled administratively by the zoning administrator, and is not likely to subject projects to delay.

The bottom line is that a growing number of historic structures have been permanently preserved and their development rights transferred to other sites.

Transfer of Development Rights

by Peter Buchsbaum, Esq.

Transfer of development rights (TDR) has been part of the planner's arsenal, at least in some jurisdictions, for a number of years. A TDR program can be used in either an urban or a rural setting.

As a tool of open space preservation, it can work as follows. An area with sensitive natural resources is determined by planning and environmental officials to be unsuitable for development. Simply banning development in this area, however, risks the threat of a takings lawsuit. Instead, the jurisdiction has a TDR program in place that provides land owners in the preservation area with credits (i.e., transferable development rights) which can be used to develop other lands in the community that are more suitable for building. The use of these credits means that land owners in the preservation area are being given some compensation for the restrictions on their property. See Note, *The Suitum Case*.

However, TDRs need not be the only such compensation. Some right to develop may be left in the preservation area, albeit at a reduced density consistent with preservation objectives. Thus, the

For a more detailed discussion of TDR programs, see "Putting Growth in its Place with Transfer of Development Rights," on pages 14-19 of this issue.

preservation area would be significantly down-zoned in order to protect the land, with additional development credits being awarded to the land owner who may sell them to a developer who wishes to build elsewhere.

TDRs can also be used as an urban preservation tool. In the classic *Penn Central* case, decided by the United States Supreme Court in 1978 (438 U.S. 104), Penn Central was barred from using air rights over Grand Central Terminal to develop an office building. However, New York City provided Penn Central with development credits for its air rights. These credits could, in turn, be employed in nearby areas. In this way, preservation of the historic landmark occurred while Penn Central received some compensation for the loss of its ability to build over the terminal.

For TDR programs to work, the densities permitted in the sending zone must be set sufficiently low so that developers are, in fact, discouraged from building. In the receiving zone, the credits must pack a sufficient density wallop to attract the interest of land owners who wish to develop.

This means there must be public support for the higher densities allowed in the receiving zone once the credits are transferred (and added to the as-of-right densities). For example, if a developer can build at four units per acre in the receiving zone without development credits, but knows that there will be substantial resistance to development at seven units per acre with the credits, the developer will probably not be interested in purchasing any development rights.

In developing a TDR program, realize that you may well encounter strong

opposition in designating receiving areas, where higher densities would result from the use of the development rights. Moreover, the usefulness of the development rights depends on the existence of sewer and water infrastructure in the receiving areas. TDR programs are also most likely to work best if supplemented with other preservation policies, such as an active program of public open space acquisition. Finally, be aware that your state's laws may have a bearing on how you can structure a TDR program, and what you may need to take into account. ♦

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The Suitum Case

Planners should be alert to a future U.S. Supreme Court ruling in *Suitum v. Lake Tahoe Regional Planning Agency*. The Supreme Court may decide whether providing TDRs to property owners can be used to defeat a takings claim, or whether TDRs can only be considered in reducing the monetary liability for a taking—two very different outcomes. More information on the *Suitum* case is available at the PCJ's PlannersWeb site: www.plannersweb.com/tldr.html