



# **Strafford Regional Planning Commission**

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*“Planning and action for sustainable development and an improved quality of life”.*

## **Fact Sheet**

### **Transfer of Development Rights and Procedure**

#### **What is the purpose of transfer of development rights (TDR)?**

The purpose of transferring development rights is to protect and conserve valuable resources such as environmental, scenic, and agricultural lands as well as lands containing special interests such as historic, cultural and economic resources.

#### **What is the transfer of development rights?**

The transfer of development rights occurs when a municipality identifies an area within its boundaries, which it would like to see protected from development (the sending zone) and another area where the municipality desires more concentrated town center or downtown type development (the receiving zone). Landowners in the sending zone have a number of development rights, which can be sold. In return for selling their development rights, the landowner in the sending zone agrees to place a permanent conservation easement on his or her land. The purchaser of the development rights can add them to existing development rights within the receiving zone to enable development at a higher density than the zoning ordinance currently permits. Hence, the transfer of development rights does not exchange land ownership, but only exchanges development rights.

#### **What are incentives for the transfer of development rights?**

The landowner in the sending zone is able to sell their development rights, and thereby receive earnings from ownership of their land, without having to give up ownership. However, they are giving up the right to develop on their land. The developer or municipality buying the development rights are able to develop in a receiving zone with a greater density than is currently permitted. It is important to note that the density bonus in the receiving areas must be attractive enough for developers to want to purchase the development rights.

#### **What are the methods of transferring development rights?**

There are two methods of transferring development rights. The most common method is when a TDR program allows a landowner to sell the development rights to a developer who then uses those development rights to increase the density of houses on another piece of property at another location.

The second method allows a local government to establish a TDR Bank to transfer development rights. In this method, developers, who wish to develop at a higher density than current zoning allows, would purchase development rights from the local government. The local government could then use these funds to purchase development rights of properties in areas that it wants to protect from concentrated development. The receiving area could not increase in density higher than some maximum set within the comprehensive land-use plan. The difference between the density with or without the transferable development rights would be the permitted “bonus” that the developer could

realize.

### **Establishment of Sending and Receiving Zones**

The location of sending zones and receiving zones shall be shown on the official zoning map. The sending and receiving zones shall act as overlay zones, such that all of the provisions of the underlying zoning districts shall apply, unless altered by the provisions of the overlay zone.

### **Procedure**

- A. An application for transfer of development rights shall be made out by the landowner of an eligible sending site, it shall be accompanied by a fee established by the Board of Selectmen. The application shall also include the following:
  1. A plot plan, drawn to scale, of the sending site, indicating boundary lines and dimensions, water bodies, 100-year floodplains, zoning district boundaries, and wetlands.
  2. A net residential acreage calculation, in accordance with the definition of net residential acreage in Article 2. The land features determining net residential acreage shall be shown on the above mentioned plot plan.
  3. A copy of the deed of the property.
- B. Based on the submitted plot plan, and after reviewing aerial photos, soil maps, and/or conducting a site visit, the Code Enforcement Officer shall determine a preliminary number of transferable development rights for the sending site.
- C. If the landowner decides to proceed with TDR, they shall submit the following items:
  1. Documentation of a title search on the property, to ensure clear title and marketability of the property.
  2. A draft conservation easement covering the portion of land proportionate to the number of transferable development rights being severed from the land and available for transfer.
  3. A survey of the property, prepared by a licensed surveyor, delineating all features that determine net residential acreage, and the location of the proposed conservation easement.
- D. After the Code Enforcement Officer has approved the language of the conservation easement, and has made a final calculation on the number of transferable development rights based on the survey; the landowner is then able to file the conservation easement in the Strafford County Registry of Deeds.
- E. After receipt of evidence of the filing of the conservation easement in the Registry of Deeds, the Code Enforcement Officer shall issue a TDR Certificate in the name of the landowner for the number of transferable development rights severed from the sending site. The landowner is then able to sell, donate or otherwise transfer all or a portion of the transferable development rights to a landowner in a Receiving Zone, to a developer, or to a third party. Upon evidence of a sale of transferable development rights, the Code Enforcement Officer shall issue a new TDR Certificate in the name of the purchaser for the number of transferable development rights purchased.

- F. A developer may redeem the transferable development rights when the Planning Board has approved a subdivision plan for an eligible receiving site.

### **Sending Site Eligibility**

A property in a sending zone shall meet the following criteria in order to be eligible to sell transferable development rights:

- A. Minimum acreage in common ownership: ten (10) acres

- B. Use of the land shall be one or a combination of the following:

1. Active agriculture
2. Forestry
3. Undeveloped land

- C. At least one (1) development credit exists based on the net residential density for the property.

### **Sending Zone Regulations**

The landowner of an eligible sending site has the following development and transfer options:

Option 1: A landowner may develop his or her property in compliance with all applicable provisions of this Ordinance and other Federal, State or local regulations.

Option 2: A landowner may sell or transfer all or part of the transferable development rights associated with the property to the landowner of a property located in a Receiving Zone, to a developer, or to a third party.

1. If the landowner of the Sending Site intends to sell all the transferable development rights, he or she shall retain the title to the property but shall be required to attach a permanent conservation easement to the title prohibiting future development, including all residential, commercial, industrial, or public/institutional development.
2. If the landowner of the Sending Site intends to sell a portion of the transferable development rights, he or she shall retain the title to the property but shall be required to attach a permanent conservation easement to the title prohibiting future development, including all residential, commercial, industrial, or public/institutional development, upon a portion of the parcel. The restricted portion shall be equivalent in size to the land area that would have been necessary to accommodate the sold-off transferable development rights. The remaining unrestricted portion of the parcel may still be developed with the remaining development rights, or the remaining transferable development rights may be sold with the remaining land deed restricted in accordance with the provisions of this article.

### **Calculation of Transferable Development Rights**

- A. For all eligible sending sites, a net residential acreage calculation shall be required to determine the acreage of developable area of the property. This acreage shall then be divided by the applicable TDR Density to determine the total number of transferable development rights on the property. The TDR Density shall be determined as follows:

1. Where the underlying zoning density is 5 acres per residential unit, the TDR Density

- shall be 2 acres per transferable development credit.
- 2. Where the underlying zoning density is 2 acres per residential unit, the TDR Density shall be 1 acre per transferable development credit.

### **Conservation Easement Requirements**

- A. The perpetual conservation easement shall prohibit residential, industrial, and commercial uses (except in connection with agriculture, forestry, and recreation) of the portion of land from which development rights were severed, and shall not be amended to permit such uses.
- B. The conservation easement may be granted to a not-for-profit conservation organization, or a third party.

### **Receiving Zone Regulations**

A property in a receiving zone shall meet the following criteria in order to be eligible to receive transferable development rights:

- A. Minimum acreage in common ownership: ten (10) acres
- B. At least one (1) development right exists based on the net residential density for the property.

The landowner or developer of a property located in a Receiving Zone shall have the following development options:

- A. Option 1: A landowner may develop his or her property in compliance with all applicable provisions of this Ordinance and other Federal, State or local regulations.
- B. Option 2: A landowner may purchase additional development rights from a Sending Site owner or owner of transferable development rights and apply those transferable development rights to the Receiving Site, through subdivision review pursuant to the Strafford Region Subdivision Regulations
  - 1. For each additional transferable development credit purchased, the Receiving Site landowner or developer shall be permitted to build one (1) additional housing unit.
  - 2. However, in no case shall the resulting density of the property, after the addition of the purchased transferable development rights, exceed twice the net residential density of the property
  - 3. Development added to a property in a Receiving Zone through the purchase of development rights shall be:
    - a. Consistent with the list of permitted uses in the underlying zone.
    - b. Compatible with the existing and/or proposed uses on the property.
  - 4. Transfer of Development Rights shall not be used to increase the allowable density of any existing or proposed mobile home parks.
  - 5. The subdivision application shall indicate the Sending Site from which development rights were purchased or obtained.

## Cases & Examples

The *Suitum* case involved the Tahoe Regional Planning Agency, which regulates land development for the ecologically sensitive Lake Tahoe region on the California/Nevada border. Every proposed development is subject to the agency's Individual Parcel Evaluation System (IPES) before permission to develop is granted. All parcels in areas carrying runoff water into the Lake Tahoe watershed are off limits to development under IPES. To mitigate these impacts on property owners, development rights may be transferred to other parcels suitable for construction.

Ms. Suitum, the owner of a parcel in a runoff area, was denied the right to construct a residence on her parcel but was granted development rights for use elsewhere. She did not attempt to exercise these rights. Instead, Suitum brought suit against the agency, claiming that it had effected a taking of her property without just compensation.

She argued that she was denied all reasonable use of the parcel she owned, that the TDRs were of little or no value, and that her claim was ripe because it would be futile to try to transfer them. The agency said that the rights were of significant market value (and offered appraisals), that the value of the rights was relevant to the question of whether there was a taking, and that Suitum's claim was not ripe because she had not tried to collect or exercise her development rights.

The Court found that there was a final decision on the use of Suitum's property when the agency declared under IPES that her parcel could not be developed. Also, there was no dispute as to exactly what rights she would receive from the agency. The Supreme Court found that the value of the rights was not essential to determining whether there had been a taking, as the agency had claimed. The Court found the case was ripe and remanded it for further proceedings. The concurrence, written by Justice Scalia and joined by Justice O'Connor, expressly stated what the majority implied-that TDRs were relevant only in setting the amount of compensation, and not in determining whether there was a taking.

*Montgomery County, Maryland.* Montgomery County enacted a TDR ordinance in 1981 to preserve agricultural uses in the face of expanding residential subdivisions and commercial development.

The rural areas of the county (almost one-third of the county's total area), were downzoned from one dwelling unit for every five acres to one dwelling unit per every 25 acre. Owners also received five transferable rights to build one additional dwelling unit per each 25 acres. The areas designated as receiving areas were adjacent to existing highway and railway corridors into Washington. For the sake of efficiency, a permit to purchase developments rights is issued concurrently with the subdivision plat approval.

The Montgomery County program has been effective: more than 38,000 acres of the approximately 91,000 rural acres have been preserved. Because of the existing development pressure, the concentrated nature of the receiving areas, and the creation under the ordinance of a TDR bank to act as a "market maker," the market value of TDRs has been high-around \$10,000 per right. Montgomery County's program has prompted six other Maryland counties to adopt TDRs as well.

## **BASIC ELEMENTS OF SUCCESSFUL TDR PROGRAMS**

There are several essential elements to crafting a constitutional and effective TDR program:

- A clear and valid public purpose for applying a TDR program, such as open space preservation, agricultural or forest preservation, or the protection of historic landmarks.
- Clear designation of the sending areas and the receiving areas, preferably on the zoning map.
- Consistency between the location of sending and receiving areas and the policies of the local comprehensive plan, including the future land-use plan map.
- Recording of the development rights as a conservation easement, which will inform future owners of the restrictions and make them enforceable by civil action.
- Uniform standards for what constitutes a development right, preferably based on quantifiable measures like density, area, floor-area-ratio, and height, should be used to determine what development right is being transferred.
- Sufficient pre-planning in the receiving area, including provisions for adequate public facilities.
- Sufficient allowable density in the receiving area to help ensure development is economically viable. If the receiving area is zoned to allow development at market capacity without the TDRs, there will be little demand for the TDRs and their market value will be diminished.

A final, basic question that enabling statutes often do not directly resolve is whether TDR programs should be mandatory or voluntary. Some states require voluntary programs, while others envision mandatory transfer of rights. The advantage of a voluntary system is that all takings challenges are effectively precluded when the transaction is contractual. On the other hand, only a mandatory program will ensure all parcels in the sending area will transfer their development rights. Local governments in the same state may see a need for one or the other approach. Therefore, TDR enabling acts should authorize both voluntary and mandatory programs.

**MODEL ENABLING STATUTE FOR TRANSFER OF DEVELOPMENT RIGHTS (1)** A local government may adopt local land development regulations and amendments that include provisions for the transfer of development rights, in the manner prescribed in this Act.

(2) The purposes of this Act are to:

- (a) preserve open space, critical and sensitive areas, and natural hazard areas;
- (b) conserve agriculture and forestry uses of land;
- (c) protect lands and structures of aesthetic, architectural, and historic significance;
- (d) ensure that the owners of land that is so preserved, conserved, or protected may make reasonable use of their property rights by transferring their right to develop to

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other properties that can make use of it;

(e) provide a mechanism whereby development rights may be reliably transferred;

(f) ensure that development rights are transferred to properties that are in areas or districts that have adequate community facilities, including transportation, to accommodate additional development; and

(g) authorize the local government to create a TDR Bank, where development rights may be purchased and conveyed by the local government, in order to stabilize the market in development rights and to regulate or control the development of property that the local government intends to protect under subparagraphs (a) through (c) above.

(3) As used in this Act, and all other statutes where "transfer of development rights" is referred to:

(a) "Development Rights" mean the rights of the owner of a parcel of land, under land development regulations, to place that parcel and the structures thereon to a particular use or to develop that land and the structures thereon to a particular area, density, bulk, or height;

(b) "Receiving District" means one or more districts in which the development rights of parcels in the sending district may be used;

(c) "Receiving Parcel" means a parcel of land in the receiving district that is the subject of a transfer of development rights, where the owner of the parcel is receiving development rights from a sending parcel, and on which increased density and/or intensity is allowed by reason of the transfer of development rights;

(d) "Sending District" means one or more districts in which the development rights of parcels in the district may be designated for use in one or more receiving districts;

(e) "Sending Parcel" means a parcel of land in the sending district that is the subject of a transfer of development rights, where the owner of the parcel is conveying development rights of the parcel, and on which those rights so conveyed are extinguished and may not be used by reason of the transfer of development rights; and

(f) "Transfer of Development Rights" means the procedure prescribed by this Act whereby the owner of a parcel in the sending district may convey development rights to the owner of a parcel in the receiving district, whereby the development rights so conveyed are extinguished on the sending parcel and may be exercised on the receiving parcel in addition to the development rights already existing regarding that parcel.

(4) The legislative body of a local government may adopt a transfer of development rights program only by ordinance, in the manner for land development regulations pursuant to [*relevant state statute*], and an ordinance pursuant to this Act shall:

(a) be adopted by the legislative body only after it has adopted:

1. a local comprehensive plan; and
  2. for a transfer of development rights program concerning critical and sensitive areas, a critical and sensitive areas element within the local comprehensive plan;
  3. for a transfer of development rights program concerning natural hazards, a natural hazards element within the local comprehensive plan;
  4. for a transfer of development rights program concerning agriculture or forest preservation, an agriculture and forest preservation element within the local comprehensive plan; and/or
  5. for a transfer of development rights program concerning historic preservation, an historic preservation element within the local comprehensive plan;
- (b) be adopted by the legislative body only after a public hearing has been held on the proposed ordinance, with notice to all owners of property in the proposed sending and receiving districts. Any purported adoption contrary to this subparagraph shall be void;
- (c) include a citation to enabling authority to adopt and amend the transfer of development rights ordinance;
- (d) include a statement of purpose consistent with the purposes of zoning pursuant to [relevant state statute] and with paragraph (2) above;
- (e) include a statement of consistency with the local comprehensive plan and with the applicable elements thereof, as listed in subparagraph (4)(a) above, that is based on the findings of a detailed comparison of the proposed ordinance with the local comprehensive plan;
- (f) describe in detail both the sending and receiving districts and shall require the designation of both the sending and receiving districts on the zoning map of the local government;
- (g) describe the development rights to be transferred in reasonable detail, preferably in quantifiable terms such as area, building coverage ratio, density, floor area ratio, height, or other forms of measurement;
- (h) require that the owner of a sending parcel execute, and record with the county [*recorder of deeds*], a deed or instrument creating a conservation easement, describing the released development rights in reasonable detail and preferably in quantifiable terms, with the sending parcel as the subservient estate and the local government as the holder of the easement; and require that before any such easement is recorded that the instrument be submitted to the [local planning agency] for its approval;

(i) require that, before any transfer of development rights from a sending parcel to a receiving parcel or parcels may be completed, that the [local planning agency] shall approve the transfer. The only bases for rejecting a proposed transfer are that:

1. the development rights released by the instrument vary significantly from the development rights that the sending parcel is supposed to be releasing pursuant to the transfer of development rights, or there is some other significant error in the instrument;
2. the proposed receiving parcel is not in a receiving district; or
3. the transfer would increase the density or intensity of development on the receiving parcel to a degree that violates one or more of the provisions of paragraph (8) below.

(j) require that, once a transfer is approved, the [local planning agency] issue to the owner of a receiving parcel, and record with the county [*recorder of deeds*], a certificate assigning to the receiving parcel, and all present and future owners thereof, the development rights that the receiving parcel is to receive through the transfer of development rights. Such certificate shall describe the development rights in reasonable detail and refer to the instrument creating the conservation easement, and the certificate shall have a copy of the instrument attached.

(5) Any instrument purporting to convey a conservation easement pursuant to this Act but that the local government has not indicated its approval on the instrument is void, and shall not be recorded or accepted by the county [*recorder of deeds*] for recording.

(6) No district shall be designated as a receiving district unless the local legislative body finds, before enacting an ordinance authorized by this Act, that the district has or will have adequate community facilities and other resources to accommodate the increased development authorized by the transfer of development rights from the sending district.

(7) No district, or portion of any district, designated as a receiving district, shall be downzoned to the degree that no reasonable use can be made of a parcel of property, either after an ordinance pursuant to this Act has been adopted or before such adoption in anticipation of adoption.

[Note: This paragraph is intended to prevent the takings problem discussed above, whereby, to encourage the use of TDRs in a receiving district, the local government downzones the district to the degree that owners cannot make a reasonable use of their property in the district unless they purchase TDRs.]

(8) Any other provision of local land development regulations to the contrary, the density or intensity of development of a receiving parcel may be increased by the transfer of development rights so long as the increase in density or intensity:

(a) is consistent with the local comprehensive plan; [and]

(b) is not incompatible with the land uses on neighboring lots or parcels; [and]

[(c) is not more than [20] percent greater than the development rights of the receiving parcel without the transfer of development rights.]

[Note: No increase in density or intensity may contravene the plan or be inconsistent with surrounding land uses. However, some states may prefer a clear, numerical, limitation on the increase, and therefore subparagraph (c) is provided as an option. Note that the 20 percent figure can be altered at the state's preference.]

(9) The local government shall notify the county [*property tax assessor*] of a transfer of development rights within [30] days of:

- (a) The issuance of a certificate pursuant to subparagraph (4)(j) above;
- (b) the condemnation or purchase of development rights by the local legislative body or the TDR Bank, pursuant to subparagraphs (10)(a) or (b) below;
- (c) the receipt by the TDR Bank of a donation of development rights pursuant to subparagraph (10)(e) below; or
- (d) the sale or conveyance of development rights by the TDR Bank pursuant to subparagraph (10)(c) below;

and the [*assessor*] shall adjust the valuations for purposes of the real property tax of the sending parcel and of the receiving parcel or parcels, if any, appropriately for the development rights extinguished or received.

(10) The local government may, by ordinance, establish a transfer of development rights bank, otherwise referred to as the "TDR Bank." The TDR Bank may be operated by the [local planning agency] or by any other existing or new agency designated by the ordinance, including a [regional planning agency] or the [state planning agency].

- (a) The TDR Bank shall have the power to purchase development rights, subject to the approval of the local legislative body.
- (b) The TDR Bank shall have the power to recommend to the local legislative body properties where the local government should acquire development rights by condemnation.
- (c) If the local government itself does not have the power under the state eminent domain enabling statute to condemn development rights or a conservation easement (which is the same thing), that statute must be amended to give the local government that power, so that it can then be delegated pursuant to this paragraph.
- (d) The TDR Bank shall have the power to sell or convey any development rights it may possess, subject to the approval of the local legislative body.
- (e) The TDR Bank may, for conservation or other purposes, hold indefinitely any development rights it possesses.
- (f) The TDR Bank may receive donations of development rights from any person or organization, public or private, subject to the approval of the local legislative body.
- (g) Except for any funding provided to the TDR Bank from the [general or other] fund of the local government treasury, the purchase or condemnation of development rights by the TDR Bank shall be funded from the proceeds of the sale of

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development rights by the TDR Bank, and a separate account in the local government treasury shall be established for such purpose.

[Note: The local government could simply make an appropriation from the general fund, or it may earmark revenue from a particular tax or fee for the funding of the TDR Bank.]

(11) Two or more local governments may enter into an intergovernmental agreement, pursuant to [*relevant state statute*], whereby transfer of development rights may occur between a sending parcel in one local government and a receiving parcel or parcels in another local government. All relevant provisions and terms in ordinances pursuant to this Act in all local governments that are parties to the agreement shall be substantially identical, and this may be provided by including with the agreement a common ordinance to be adopted by all parties to the agreement.

(12) This Act, or any provision thereof, shall not invalidate any completed transfer of development rights pursuant to any earlier statute, ordinance, or regulation, if said transfer was valid at that time.

[Note: Paragraph (12) is a "savings clause," preserving the validity of earlier transfers of development rights, even if performed contrary to the requirements of this statute, as long as they were legally proper at the time.]

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