

Transfer of Development Rights in Virginia

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What is TDR?

- TDR is based upon the fact that land ownership consists of a “bundle of rights” that together make up “fee simple” ownership.
 - Example = mineral rights.
- TDR is a regulatory device to:
 - Preserve sensitive lands while compensating the landowner for such protection (restriction); and
 - Concentrate development in suitable areas.



What is TDR?

- A landowner sells the “development rights” and receives reimbursement for permanent restrictions that are then placed on the property.
- The buyer then transfers the “development rights” to another property and enjoys the benefit of increased density and more intensive development.
- Requires active and intense real estate market to be successful.



Road to TDR in Virginia

- Journey of more than 25 years.
- In early effort, Loudoun County used a “density transfer” program:
 - Density bonus if a developer would proffer to acquire permanent easements on land in designated farming areas .
- In 2006 local governments, the development industry, and the agricultural and environmental communities negotiated two pieces of legislation – cluster zoning and TDR.
- TDR was less controversial - not mandated and met the needs of all parties involved.



What's in Virginia's TDR Law?

Section 15.2-2316.1 et seq.
Code of Virginia



Definitions

- “Development rights” – the permitted uses and density of development that are allowed on the sending property under any zoning ordinance on a date prescribed by the ordinance.



Definitions

- “Sending property” – a parcel that a locality decides to limit future development in accordance with the adopted TDR ordinance **or a receiving property that has received development rights from a sending property.** [New Language]



Definitions

- “Receiving property” – a parcel within which development rights (e.g., density) are increased by a transfer of development rights.
 - A receiving property must be (i) appropriate and suitable for proposed development; **and** (ii) sufficient to accommodate the transferable development rights of the sending property.



What is Required of a Local TDR Program in Virginia?

- Amend comprehensive plan to show –
 - TDR sending and receiving areas; and
 - Any parcels in the receiving area inappropriate as receiving properties.
- Adopt a TDR ordinance
 - After advertised public hearing.
 - To establish procedures, methods, and standards for TDR.



What is Required of a Local TDR Program in Virginia?

- Determine the permitted uses and maximum density in the receiving area.
- Determine the minimum size of sending property and minimum reduction in density that may be sold.



What is Required of a Local TDR Program in Virginia?

- Assess the ability of the receiving area to accept increases in density.
- Describe plans to provided needed utility services in any receiving area.
- Establish a process to review, approve and monitor TDR.



Other Statutory Requirements

- Each TDR approval must have a recorded legal document that severs development rights from a sending property and transfers those rights to a receiving property.



Other Statutory Requirements

- Each TDR approval must also have a recorded legal document assuring that the character of the sending property is preserved and that binds the landowner against the use and development of that property in perpetuity.
 - Example: Conservation Easement



Other Statutory Requirements

- Any proposed TDR must be initiated by the property owners of both the sending and receiving properties.
 - "Proceed arm-in-arm to the courthouse."
- TDR cannot be a condition of the development of any property.



Other Statutory Requirements

- Local governments may not change the uses or density permitted in the zoning district of any property where development rights have been transferred except in “extraordinary circumstances.”



Other Statutory Requirements

- Any TDR application is considered approved if determined to be –
 - In compliance with local ordinance; and
 - Instrument transferring the development rights is recorded.



Optional Provisions of Local Program

- May allow for residential development rights to be converted into square footage of commercial, industrial or other uses on a receiving property.
- A county may designate eligible receiving areas within any adjacent town or city by agreement.



Concerns With Current Law

- Creates different definition of vesting than in general vesting statute.
 - Vesting = time when land use approvals permanent and cannot be changed.
 - General statute – i) “significant affirmative governmental act”; ii) landowner “relies in good faith” on that act; and iii) “incurs extensive obligations or substantial expenses.”
 - TDR vests only when approved and recorded.



Concerns With Current Law

- Must negotiate and commit to transfer before receiving governmental approval.
 - Time delay = uncertainty.
 - Difficult to determine accurate price for development rights.
 - Seller cannot add value by obtaining approval of development rights first, then selling to highest bidder.



Concerns With Current Law

- No ability to purchase and “bank” development rights for use at a later time or for larger development.
 - Who can be the bank?
 - Do property taxes need to be paid on the “deposits” held over time?



Concerns With Current Law

- May need incentives to encourage local government adoption.
 - Cannot collect cash proffers on land zoned as receiving area. [Solution? Broad impact fee authority.]
- May need incentives to overcome political liabilities.
 - Prospect of increased density in receiving area may lead to NIMBY problem for elected officials.



For Further Information

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