

A Model Transfer of Development Rights Ordinance for Virginia Localities



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PREFACE TO VIRGINIA MODEL ORDINANCE PERMITTING THE TRANSFER OF DEVELOPMENT RIGHTS

The Virginia General Assembly first adopted statewide enabling legislation for local zoning ordinances permitting transfers of development rights (“TDRs”) in 2006. ([Ch. 573, 2006 Va. Acts of Assembly](#)). That legislation was amended in the 2007 legislative session to allow TDRs across county-city boundaries with the permission of the local governing bodies and circuit court approval. ([Chs. 363 and 410, 2007 Va. Acts](#)).

Although the original legislation resulted from a negotiated agreement between local government organizations and the development community, neither side moved forward quickly after adoption of the enabling legislation to implement TDR provisions in any Virginia locality. One identified obstacle was the requirement in the original legislation that the severance of development rights from one parcel and attachment of those rights to another parcel occur at the same time.

In an effort to remove that obstacle and make the TDR legislation more attractive to localities and developers, their representatives had intermittent discussions over the ensuing two years, eventually including representatives of realtors, environmental preservation groups and others.

Those talks led to the introduction and eventual adoption in the 2009 session of further amendments to the enabling Code sections. ([Ch. 413, 2009 Va. Acts](#)) In addition to allowing severance of development rights without their immediate reattachment to another property, the 2009 amendments provide for local taxation of the severed rights as a separate property interest during the time they are unattached to a specific land parcel, clarify the procedures for the TDR to occur, and generally attempt to make the enabling statutes easier to use.

In the course of negotiating the 2009 legislative changes, the negotiators recognized that development of a usable model ordinance might also help to spur localities’ adoption of TDR provisions. Accordingly, during the late summer and autumn of 2009, a group of representatives of the various stakeholders has held a series of meetings and produced the model ordinance provisions here being offered.

The work group that produced the model ordinance includes attorneys and lobbyists, planners, developers, appraisers and other real estate

professionals. Collectively the work group has hundreds of years of experience dealing with land use and real property development issues. Special acknowledgement is due to our chairman and facilitator, John G. “Chip” Dicks, of FutureLaw, LLC, who participated as representative of the Virginia Association of Realtors, to Mr. Dicks’ partner Barrie Bowers, who served as our scrivener-in-chief, and to Ted McCormack of the Virginia Association of Counties, who coordinated the local government participation, handled scheduling and logistics, and served as host of our meetings. A full list of the participants and their organizations is attached.

Most members of the work group are generally comfortable with the model ordinance and hope others will find it useful. We encourage Virginia local governments to consider adoption of a TDR ordinance based on the model and the adjoining commentary, but local conditions and concerns obviously may require modifications before adoption. A list of general TDR resources is also included in this document.

We emphasize, however, that the model ordinance is the product of a group effort, that it has not been officially reviewed or endorsed by any of the work group participants or their employers or clients, and that it does not represent the official position or policy of any organization. We have tried to make the model ordinance consistent with the enabling Virginia statutes (Va. Code §§ [15.2-2316.1](#) and [15.2-2316.2](#)) as they became effective on July 1, 2009, but we make no warranties of the model ordinance’s legality or enforceability, and disclaim liability for any deviations from the statutory authority, real or perceived.

Richmond, Virginia
November 2009

SELECTED TDR RESOURCES

Report: The Feasibility of Successful TDR Programs for Maryland's Eastern Shore, prepared by the Eastern Shore Land Conservancy, Inc. (January 2007) <http://agroecol.umd.edu/files/Dehart%20Full%20Report%20HRHCAE%20Pub-2007-01.pdf>

Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges, by Rick Pruetz, FAICP <http://www.beyondtakingsandgivings.com/>

TDR Case Studies by Rick Pruetz, <http://www.beyondtakingsandgivings.com/updates.htm>
Beyond Takings and Givings contains case studies of 142 TDR programs in 134 communities around the nation. Since that book went to press in January 2003, TDR programs have been adopted, discovered or updated in the following communities. Rick Pruetz, who prepares these profiles, runs a consulting practice specializing in TDR workshops, studies and ordinances. Please contact him at arje@attglobal.net with corrections, updates or information on additional programs.

American Planning Association, Model Transfer of Development Rights Ordinance <http://www.planning.org/growingsmart/guidebook/nine02.htm#9401>

Preserving property: Transfer of development rights saves natural and historic sites, (Commercial Investment Real Estate, Mar./Apr. 2006). http://www.ciremagazine.com/article.php?article_id=915

Transfer of development rights, (1000 Friends of Minnesota Fact Sheet #5, June 12, 2003). <http://www.1000fom.org/library/fact-sheets/5>

Transfer of development rights: Fact sheet, (American Farmland Trust - Farmland Information Center, Jan. 2001). <http://www.farmlandinfo.org/> (Go to Farmland Information Center web page and there is an abundance of information including sample regulations.)

Making markets for development rights work: what determines demand?, (Resources for the Future, Oct. 2005). <http://www.rff.org/documents/RFF-DP-05-45.pdf>

Transfer of Development Rights in U.S. Communities: Evaluating Program Design, Implementation, and Outcomes (Resources for the Future, 2007)
<http://www.rff.org/Publications/Pages/PublicationDetails.aspx?PublicationID=9578>

Transfer of Development Rights, Capitol Region Council of Governments Best Practices Manual, Chapter 3
http://www.crcog.org/publications/CommDevDocs/TCSP/Ch03_FactSheet_TDR.pdf

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Transfer of Development Rights (TDR)

Model Ordinance

[COMMENT: This is a model ordinance based upon the TDR enabling legislation (Virginia Code §§ 15.2-2316.1 and 2316.2), and should be adopted as part of the locality's zoning ordinance. The statutes include both mandatory and permissive provisions. This model ordinance specifies which provisions are permissive. It also includes bracketed cross-references to specific provisions within the enabling statutes. Note, however, that the model ordinance does not include all permissive provisions, so localities should refer to the underlying statute to determine the full scope of their authority.]

Section 1 **Short Title**

This ordinance is to be known and may be cited as the "Transfer of Development Rights ("TDR") Program" or the "TDR Program."

Section 2 **Purpose [§ 15.2-2316.2(A)]**

The purposes of this ordinance include, but are not limited to:

- A. Preserve open space, scenic views, and critical and sensitive areas.
- B. Conserve agricultural and forestal uses of land.
- C. Protect lands, resources and structures of aesthetic, architectural, and historic significance.
- D. Conserve and protect water resources and environmentally sensitive lands, waters, and other natural resources.
- E. Assist in shaping the character and direction of the development of the community.
- F. Establish a procedure enabling the [county/city/town] and its landowners to voluntarily sever development rights from a sending property.
- G. Establish a procedure for ownership of development rights that have been severed from a sending property and not yet attached to a receiving property.

- H. Establish a procedure for attaching severed development rights to a receiving property in receiving areas that have adequate community facilities, including transportation, to accommodate additional development.
- I. Establish a procedure for identifying sending areas and receiving areas.
- J. Establish certain incentives, such as bonus density, for attaching development rights to receiving properties.
- K. Establish certain mechanisms for the purchase of severed development rights and conversion of residential development rights into commercial density, and otherwise assist the [county/city/town] in the implementation of its comprehensive plan.
- L. Protect and enhance private property rights by enabling the transfer of development rights.
- M. Improve the quality of life for the citizens of the [county/city/town].
- N. Conserve and promote the public health, safety, and general welfare of the [county/city/town] by establishing procedures, methods, and standards for the transfer of development rights within its jurisdiction.

[COMMENT: Note that this is a voluntary program, and a locality may not require a landowner to sever or accept a transfer of any development rights.]

Section 3 **Definitions [§ 15.2-2316.1]**

As used in this article, the term:

- A. “Development rights” means the permitted uses and density of development that are allowed on the sending property under the zoning ordinance on [date prescribed by the ordinance]. “Development rights” includes “transferable development rights.” Permitted uses and densities that are allowed on a sending property are based on the permitted uses and densities allowable by right on [date prescribed by the ordinance].

[COMMENT: This text addresses the simple issue of development rights based solely on what the zoning ordinance permits by right. Localities may want to address whether they base a sending property’s available development rights on the

property's gross (or "theoretical") development rights or its net (or "provable") development rights. In addition, some localities might wish to allow the transfer of rights based on special legislative approvals existing as of the prescribed date, such as a special permit or special exception. For example, a property might have an approved special exception permitting a 50-unit subdivision that has not been developed, and the locality might now prefer that the property not be developed so intensely. The TDR program could allow the locality to determine, on a case-by-case basis, whether a particular property was suitable as a sending or receiving property. The enabling authority offers no guidance, however, in how to account for conditions—whether proffered as part of a rezoning or imposed as part of a special exception or special permit—attached to the zoning of a particular sending property. If the sending property has already been subdivided in accordance with the rights now sought to be severed, the locality would need to vacate the subdivision, or at least the portion representing the severed density. In addition to the TDR program, localities have a number of different ways to accomplish similar objectives: for example, an upzoning of the sending area, coupled with the right of the sending properties' landowners to transfer bonus density, as long as the transferred density is measured as of the date prescribed in the ordinance. In accordance with subsection 9(K), a transfer of development rights to a receiving property does not alter or waive the development standards otherwise applicable to the receiving property in a particular zoning district.]

- B. "Receiving area" means one or more areas identified by an ordinance and designated by the comprehensive plan as an area authorized to receive development rights transferred from a sending area.
- C. "Receiving property" means a lot or parcel within a receiving area and within which development rights are increased pursuant to a transfer of development rights affixed to the property. A receiving property must be appropriate and suitable for development and must be sufficient, or made to be sufficient, to accommodate the transferable development rights of the sending property. Development rights may not be transferred between receiving properties, except as otherwise approved by the governing body.
- D. "Sending area" means one or more areas identified by an ordinance and designated by the comprehensive plan as an area from which development rights are authorized to be severed and transferred to a receiving area.

E. “Sending property” means a lot or parcel within a sending area from which development rights are authorized to be severed.

[COMMENT: The model ordinance, like the enabling statutes, contains definitions both for receiving areas and properties and for sending areas and properties. The locality establishes the boundaries of the sending and receiving areas. The enabling authority does not directly address whether a single property—a large farm, for example—might be a sending or receiving area in and of itself. A locality would do well, therefore, to include multiple properties in any sending or receiving area. At a minimum, if a locality designates a sending property as such, it must also designate that sending property as part of a sending area. There can be one or more sending or receiving areas. Also, a landowner can request that his property be added as a sending or receiving property within a sending or receiving area.]

F. “Severance of development rights” means the process by which development rights from a sending property are severed pursuant to this ordinance.

G. “Transfer of development rights” means the process by which development rights from a sending property are affixed to one or more receiving properties.

H. “Transferable development rights” means all or that portion of development rights that are transferred or are transferable.

Section 4 **Authority**

This ordinance is enacted pursuant to the authority granted by Virginia Code §§ 15.2-2316.1 and 2316.2.

Section 5 **Sending Areas and Sending Properties**

A. The following areas are sending areas:

[Identify designated areas as sending areas, either by GPIN, tax parcel identification number or map.] **[§ 15.2-2316.2(B)(6), § 15.2-2316.2(D)]**

[COMMENT: The enabling authority does not specifically require that a locality include sending and receiving areas (or properties) on its zoning map. Given the legal and practical mandates to monitor TDRs, however, it seems advisable to include such information on the zoning map. (§ 15.2-2316.2(B)(5)) The enabling

authority does require a locality to include sending and receiving areas on a “map or other description of such areas.” (§ 15.2-2316.2(B)(6))]

B. A map of the sending areas identified in subsection 5(A) are shown in a map that is part of the comprehensive plan. [§ 15.2-2316.2(K)]

[COMMENT: The enabling statutes require that the map be incorporated into the comprehensive plan more or less concurrently with the designation or amendment of sending and receiving areas. As a practical matter, a locality should undertake both actions at the same time.]

C. A sending property must contain at least ____ acres, and the minimum reduction in density of the sending property that may be conveyed in a severance or transfer of development rights is ____ (units per acre). [§ 15.2-2316.2(B)(9)]

D. After the severance of development rights, a sending property may be used to generate one or more forms of renewable energy, as defined in Virginia Code § 56-576, subject to the provisions of the zoning ordinance. [§ 15.2-2316.2(C)(7) **(permissive)**]

E. After the severance of development rights, a sending property may be used to produce agricultural or forestal products, as defined in Virginia Code § 15.2-4302. [§ 15.2-2316.2(C)(8) **(permissive)**]

F. Any landowner may request that the [governing body] designate the owner's property as a sending property, within a sending area as otherwise provided in this ordinance. [§ 15.2-2316.2(C)(12) **(permissive)**]

[COMMENT: Although the enabling authority does not prescribe any process (or even the approving body) for such a request, a locality might wish to do so in its ordinance. The ordinance might establish certain minimum submission requirements for a request to be accepted and considered. And despite the silence of the enabling authority on this point, the local governing body should be the approving body for such a request since it has the ultimate authority to designate sending and receiving areas or sending and receiving properties, which must be in a sending or receiving area as otherwise provided in this ordinance. The governing body makes the ultimate decision on this issue for the reasons stated, and for the

additional reason that it will have the final say on adopting the map that is incorporated into the comprehensive plan under Virginia Code § 15.2-2316.2(K).]

G. The development rights severed from the sending areas must be equal to the development rights permitted to be attached in the receiving areas. To ensure such equality, the receiving areas and properties, as a whole, must be sufficient to accommodate all of the development rights permitted to be transferred from the sending areas and properties. [§ 15.2-2316.2(B)(10)]

[COMMENT: Note that the receiving area must have enough capacity to accept at least all of the development rights to be transferred from the sending area. Although Virginia Code § 15.2-2316.2(B)(10) requires equality of rights, a locality may implement the permissive enabling authority in Virginia Code § 15.2-2316.2(C)(5), which allows for an increase in residential density or in the square feet of commercial, industrial, or other permitted uses in the receiving areas. The implementation of Virginia Code § 15.2-2316.2(C)(5) allows the locality to assign relative values to development rights as they exist in a sending area and a receiving area (e.g., 1 dwelling unit in a sending area equals 1.25 dwelling units in a receiving area), as reflected in subsections 6(H) and (I) of this model ordinance. (§ 15.2-2316.2(C)(5) (permissive))]

Section 6 **Receiving Areas and Receiving Properties**

A. The following areas are receiving areas:

[Identify designated areas as receiving areas, either by GPIN, tax parcel identification number or map.] [§ 15.2-2316.2(B)(6), § 15.2-2316.2(D)]

[COMMENT: A [county/city/town] is required to complete an assessment of the infrastructure in the receiving areas that identifies the ability of those areas to accept increases in density or floor area ratio and the plans to provide necessary utility services within any designated receiving area (§ 15.2-2316.2(B)(11)). The enabling authority specifically permits, but does not require, that the receiving areas include any urban development areas established pursuant to Virginia Code § 15.2-2223.1.]
[§ 15.2-2316.2(C)(6) (permissive)]

B. The following properties are specifically excluded from the receiving areas, even though they are otherwise located within the boundaries of a receiving area:

[List names of specific properties designated as properties that are not receiving properties.] [§ 15.2-2316.2(B)(7)]

[COMMENT: This designation may be by specific property, such as GPIN or tax identification number, or by category, such as federal/state-owned lands or religious and educational institutions.]

- C. A map of the receiving areas identified in subsection 6(A), as well as those properties specifically excluded from receiving areas, are shown in a map that is part of the comprehensive plan.
- D. Any landowner may request that the [governing body] designate the owner's property as a receiving property, within a receiving area as otherwise provided in this ordinance. [§ 15.2-2316.2(C)(4) (permissive)]
- E. Whenever the governing body designates new receiving areas or amends its designations of receiving areas, the development rights permitted to be attached in the receiving areas will be equal to the development rights permitted to be severed in the sending areas.
- F. A receiving property may only use the development rights permitted in accordance with the zoning regulations applicable to the receiving property.

[COMMENT: A locality should be careful to conform its zoning ordinance to its expectations for the implementation of the TDR program. For example, a locality wants to ensure that the permissible uses (as compared to density) from a sending property are not inadvertently transferred to a receiving property.]

- G. The maximum increase in residential density on a receiving property is [*samples below are hypothetical*]:

Zoning District of Receiving Property	Maximum Density in Dwelling Units Per Net Acre	Maximum Density with TDR
R-1	4	8
R-2	8	16
R-3	16	32

[COMMENT: This chart is for illustration purposes only. Each locality will need to determine the appropriate maximum increase in each category.] [§ 15.2-2316.2(B)(8)]

H. The maximum increases in the square feet of commercial, industrial, or other uses in the receiving areas and on receiving properties are as follows [*samples below are hypothetical*]:

Zoning District of Receiving Property	Maximum Floor Area Ratio	Maximum Floor Area Ratio with TDR
C-1	0.2	0.4
C-2	1.0	2.0
C-3	2.0	4.0
C-4	4.0	8.0
I-1	0.75	1.5

[COMMENT: This chart is for illustration purposes only. Each locality will need to determine the appropriate maximum increase in each category.] [§ 15.2-2316.2(B)(8)]

I. Transferred residential density may be converted to bonus density on the receiving property by (i) an increase in the residential density on the receiving property or (ii) an increase in the square feet of commercial, industrial, or other uses on the receiving property, based on the conversion factors below [*samples below are hypothetical*]:

Type of Use on Receiving Property	Each Transferred Dwelling Unit May Be Converted to This Bonus Density
Residential: Single-family and townhouse	1.25 dwelling units
Residential: Multifamily	1.5 dwelling units
Commercial	15,000 square feet
Industrial	10,000 square feet
Institutional	10,500 square feet

[COMMENT: This chart is for illustration purposes only. Each locality will need to determine the appropriate maximum increase in each category.]

Bonus density remains subject to the maximum density provisions in subsections 6(G) and (H). Any development rights converted to such bonus density are automatically retired upon their conversion on the receiving property.

[§ 15.2-2316.2(C)(5) (permissive)]

[COMMENT: In an effort to protect transferred development rights, the enabling authority contains this restriction:

No amendment to the zoning map, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or downzone the uses, or the density of uses permitted in the zoning district applicable to any property to which development rights have been transferred, shall be effective with respect to such property unless there has been mistake, fraud, or a material change in circumstances substantially affecting the public health, safety, or welfare.

(§ 15.2-2316.2(L))

Section 7 Determination of Development Rights

- A. The [county/city/town] will establish and maintain a system for monitoring the severance, ownership, assignment, and transfer of transferable development rights.
- B. The [agent of the planning commission or other agent designated by the governing body] is responsible for determining compliance with this ordinance when a party makes a written request for such a determination. **[§ 15.2-2316.2(C)(9) (permissive)]**
- C. An application for a determination of compliance concerning the number of residential development rights available to be severed from a sending property must include:
 - 1. A completed application form.
 - 2. A tax map, plat or site plan outlining the boundaries of the property for each lot, tract or parcel as described in the deed.
 - 3. A zoning map of the property.
 - 4. A title policy or other title documentation for the sending property including a legal description of the sending parcel.
 - 5. A copy of a survey plat of the proposed sending property prepared by surveyor licensed in the Commonwealth of Virginia.

6. A statement of the number of residential development rights proposed to be transferred from the sending property, and calculations upon which the number is based.
7. All applicable fees.
8. Any additional information required by the [county/city/town] as necessary to determine the number of residential development rights that qualify for severance.

[COMMENT: The enabling statute does not specify what should be included in an application for TDR compliance. This list, and those included in later subsections in this ordinance, are sample recommendations. A locality may have other items it would like to include or remove on its checklists for compliance with the TDR Program. These determinations would also be administrative determinations under Virginia Code § 15.2-2311, and would not be appealable after 30 days.]

- D. All development rights shall be calculated to the nearest whole number. For example, any fractional calculation as to development rights must be converted upward, if one-half or more of a whole unit, or downward, if less than one-half of a whole unit, rounded to the nearest whole unit.

[COMMENT: This subsection provides one possible alternative for addressing fractional units of development rights. A locality may choose some other method of calculating fractional units.]

- E. After receiving and considering a complete application for a determination of compliance, the [agent of the planning commission or other agent designated by the governing body] will provide a written determination stating the number of residential development rights available for severance from the sending property.
[§ 15.2-2316.2(B)(12)]

[COMMENT: The enabling statute allows localities to authorize their planning commissions to determine compliance.] [§ 15.2-2316.2(C)(9) (permissive)]

Section 8 Severance of Development Rights

- A. Any proposed severance of development rights may be initiated only upon application by the property owners of the sending properties or development rights. [§ 15.2-2316.2(E)]
- B. The [county/city/town] may not require property owners to sever development rights as a condition of the development of any property. [§ 15.2-2316.2(F)]
- C. A severance of development rights occurs when the owner of the sending property records a deed of severance, in the land records of the office of the circuit court clerk for the [county/city]. The deed must convey development rights to one or more parties, which may include the grantor, and may, but is not required to, affix development rights to one or more receiving properties. [§ 15.2-2316.2(B)(1)]
- D. The deed of severance must be executed by the property owners of the development rights being severed, and by any lien holders of such property owners. The instruments must identify the development rights being severed, and the sending properties or the receiving properties, as applicable.
[§ 15.2-2316.2(B)(1)]
- E. No deed of severance may be recorded among the land records of the office of the circuit court for the [county/city] under this ordinance unless the deed of severance contains a copy of the written determination of compliance by the [agent of the planning commission or other agent designated by the governing body] indicating the number of residential development rights being severed.
- F. The deed of severance must contain assurance that the prohibitions against the use and development of the sending property will bind the landowner and every successor in interest to the landowner. [§ 15.2-2316.2(B)(2)]

[COMMENT: The work group debated whether the enabling authority permits a locality to upzone a sending property at some point in the future, thus creating new development rights (albeit rights that are limited by a prior severance). Members discussed a range of possible ordinance provisions addressing this point, including requirements for: (1) mandatory conservation easements, permanently restricting development of sending properties; (2) covenants, enforceable by the local governing body, that restrict development either permanently or for a specified period; or (3)

covenants or other restrictions that focus on the permanent severance of development rights, with no stated restriction on the locality's power to upzone the sending property. Rather than choose among these alternatives, the work group simply borrowed language directly from the enabling statutes. A locality should consider adopting language that specifies the manner in which the required "prohibitions against the use and development of the sending property" will be implemented.]

- G. Upon recordation of the deed of severance, the transferable development rights are severed from the sending property. [§ 15.2-2316.2(B)(3)]
- H. The deed of severance must be substantially in accord with the deed of severance attached as an exhibit to this ordinance and must otherwise comply with the requirements of this ordinance, and any changes to the deed attached as an exhibit in a particular case shall be in a form that is approved by the [county/city/town] attorney.

[COMMENT: A locality may adopt a provision that provides that development rights may be retired as a result of the purchase of those development rights. A sample quitclaim deed is attached to the ordinance for this purpose.] [§ 15.2-2316.2 (C)(1) (permissive)]

Section 9 Transfer of Development Rights to Receiving Properties

- A. Any proposed transfer of development rights may be initiated only upon application by the property owners of the sending properties, of the severed development rights, or of the receiving properties. [§ 15.2-2316.2(E)]
- B. The [county/city/town] may not require property owners to transfer, or receive a transfer of development rights as a condition of the development of any property.
- C. An application for a determination of compliance to determine the number of residential development rights available to be transferred and affixed to one or more receiving properties and/or the square feet of commercial, industrial, or other uses to be transferred and affixed to one or more receiving properties in compliance with this ordinance must include:
 - 1. A completed application form.

2. A tax map, plat or site plan outlining the boundaries of the property for each lot, tract or parcel as described in the deed.
 3. A zoning map of the property.
 4. A title policy or other title documentation for the receiving property including a legal description of the receiving property.
 5. A copy of a survey plat of the proposed receiving parcel prepared by surveyor licensed in the Commonwealth of Virginia.
 6. A statement of the number of residential development rights proposed to transferred and affixed as residential development rights to one or more receiving properties, and calculations upon which the number is based.
 7. A statement of the number of residential development rights proposed to transferred and converted into square feet of commercial, industrial, or other uses and affixed to one or more receiving properties, and calculations upon which the number is based.
 8. All applicable fees.
 9. Any additional information required by the [county/city/town] as necessary to determine the number of residential development rights that qualify for transfer.
- D. The [agent of the planning commission or other agent designated by the governing body] will provide a written determination of compliance stating the number of residential development rights available to be either (1) transferred and affixed to one or more receiving properties or (2) transferred and converted into square feet of commercial, industrial, or other uses and affixed to one or more receiving properties. [§ 15.2-2316.2(B)(12)]

[COMMENT: The enabling statutes allow localities to authorize their planning commissions to determine compliance.] [§15.2-2316.2(C)(9) (permissive)]

- E. A transfer of development rights occurs when the owner of the development rights records a deed of transfer in the land records of the office of the circuit court clerk

for the [county/city]. The deed must convey development rights to one or more parties and may affix development rights to one or more receiving properties.

- F. The deed must be executed by the property owners of the development rights being transferred, and any lien holders of such property owners, and must identify the development rights being severed, and the sending properties or the receiving properties, as applicable.
- G. No deed of transfer may be recorded among the land records of the office of the circuit court for the [county/city] under this ordinance unless the deed of transfer contains a copy of the written determination of compliance by the [agent of the planning commission or other agent designated by the governing body] indicating the number of residential development rights being transferred and affixed to one or more receiving properties and/or the square feet of commercial, industrial, or other uses to one or more receiving properties.
- H. Upon recordation of the deed of transfer, the transferable development rights are conveyed to one or more parties or are affixed to one or more receiving properties stated in the deed of transfer.
- I. The deed of transfer must be substantially in accord with the deed of transfer attached as an exhibit to this ordinance and must otherwise comply with the requirements of this ordinance.
- J. Nothing in this ordinance may be construed to preclude a combination of a deed of severance and deed of transfer, in the event a transfer of development rights transaction includes the severance, transfer and affixation of the development rights. The deed of severance and transfer must be substantially in accord with the deed of severance and transfer attached as an exhibit to this ordinance and must comply otherwise with the requirements of this ordinance.
- K. Any transfer of development rights to a receiving property pursuant to this ordinance only authorizes an increase in maximum residential density or maximum floor area ratio and does not alter or waive the regulations otherwise applicable to the receiving property in a particular zoning district.

[COMMENT: The language below is recommended to be added to the locality's tax ordinance regarding assessments.]

Section 10 Real Estate Tax Assessment

- A. The owner of a sending property from which development rights are severed must provide a copy of the applicable deed, showing the consideration, and the deed book and page number, or instrument number or GPIN, to the [local assessing officer] for the [county/city/town]. [§ 15.2-2316.2(J)]
- B. Development rights severed pursuant to this ordinance are interests in real property and must be considered as such for purposes of conveyance and taxation. Once a deed for transferable development rights, created pursuant to this ordinance, has been recorded in the land records of the office of the circuit court clerk for the [county/city] to reflect the transferable development rights sold, conveyed, or otherwise transferred by the owner of the sending property, the development rights vest in the grantee and may be transferred by the grantee to a successor in interest. Nothing in this ordinance may be construed to prevent the owner of the sending property from recording a deed covenant against the sending property severing the development rights on said property, with the owner of the sending property retaining ownership of the severed development rights. Any transfer of the development rights to a property in a receiving area must be in accordance with the provisions of this ordinance.[§ 15.2-2316.2(H)]

[COMMENT: The designation of a property as a sending or receiving property might result in a change in the tax assessment for that tax parcel, using the Uniform Standards of Appraisal which assessors use to determine the fair market value of real property.]

- C. For the purposes of ad valorem real property taxation, the value of a transferable development right is deemed appurtenant to the sending property until the transferable development right is severed from and recorded as a distinct interest in real property, or the transferable development right is affixed to a receiving property and becomes appurtenant thereto. Once a transferable development right is severed from the sending property, the assessment of the fee interest in the sending property must reflect any change in the fair market value at the time of the next assessment that results from the inability of the owner of the fee interest to use such property for such uses terminated by the severance of the transferable development right. Upon severance from the sending property and recordation as a distinct interest in real property, the transferable development right must be

assessed at its fair market value at the time of the next assessment on a separate real estate tax bill sent to the owner of said development right as taxable real estate in accordance with Article 1 (§§ 58.1-3200 et seq.) of Chapter 32 of Title 58.1 of the Code of Virginia. The development right must be taxed as taxable real estate by the county, city, or town where the sending property is located, until such time as the development right becomes attached to a receiving property, at which time it must be taxed as taxable real estate by the county, city, or town where the receiving property is located at the time of the next assessment. [§ 15.2-2316.2(I)]

[COMMENT: Virginia Code § 15.2-2316.2(M) allows a county and town to cooperate to create all or part of a receiving area of a TDR program in the town. Subsection (N) allows a city and county to do the same. In general, a community – consisting of the town and county it is in or the city and the surrounding county – will be well-served in the long run if the governing bodies work together to encourage development in the city or town. Doing that is entirely consistent with the purposes of a TDR program – to move growth from areas where the rural qualities should be preserved to areas of the community where growth is most natural. In most cases, the city or town will have in place much of the public facilities needed to support higher density growth and commercial development.]

As stated, two subsections of the enabling legislation make cooperative agreements possible. Those subsections should be consulted for the specifics of setting up a cooperative agreement. See § 15.2-2316.2(M) & (N).

One technical issue that a city and county may need to address is the tax assessment cycle. If the two have different cycles, the interjurisdictional agreement would need to address that.]

MODEL TDR DEEDS

The TDR Work Group has prepared the following form deeds, to be used in TDR transactions in accordance with the enabling legislation, and the proposed Model TDR Ordinance:

- Deed of Severance
- Deed of Transfer
- Deed of Severance and Transfer
- Quitclaim Deed

As referenced in the commentary to section 8(F) of the Model Ordinance, the Work Group was unable to reach a consensus on the type of legal instrument that would best provide the required “assurance that the prohibitions against the use and development of the sending property shall bind the landowner and every successor in interest to the landowner.” (Virginia Code Section 15.2-2316(B)(2)). We have attempted to capture that requirement somewhat generally in the attached sample deeds. However, a locality may prefer that any specific restrictions on the use or development of the sending property that result from the severance be specifically mentioned in the relevant deeds. Alternatively, a locality may determine that some other type of legal instrument (e.g., a conservation easement) is more appropriate, in which case the language for the deed may need to be amended to reference and incorporate that instrument.

This page is intentionally left blank.

Prepared by:

Tax Parcel ID#: _____
Consideration: \$ _____

DEED OF SEVERANCE

THIS DEED OF SEVERANCE is made as of _____, _____, by and between _____, as Grantor; and _____, as Grantee.

WITNESSETH:

That for and in consideration of the sum of \$ _____, cash in hand paid, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Grantor does hereby quitclaim, release, and convey to the Grantee, all right, title, and interest of the Grantor in _____ development rights (the "Development Rights"), which prior to this conveyance were attached to the following described property located in the [County/City Town] of _____, Virginia (the "Property"):

[Insert Legal Description.]

Grantor has received a written determination of compliance of the Development Rights from the _____ of the [County/City/Town] of _____, indicating the number of residential development rights being severed, a copy of which is attached hereto as Exhibit A, and made a part hereof.

This conveyance hereby severs the Development Rights from the Property, and Grantor acknowledges that it has no further use or right of use of the Property with respect to the severed Development Rights. This severance and the resulting prohibitions and restrictions against the use and development of the Property shall bind Grantor, its successors in interest, and its assigns.

Grantor has received a written determination of compliance of the Development Rights, indicating the number of residential development rights being eligible to be severed from the Sending Property, a copy of which is attached hereto as Exhibit A, and made a part hereof.

[This instrument is exempt from taxation pursuant to section § _____ of the Code of Virginia.]

WITNESS the following signatures and seals:

GRANTOR

_____ (SEAL)

COMMONWEALTH OF VIRGINIA
[CITY] [COUNTY] OF _____

The foregoing instrument was acknowledged before me this ___ day of _____, _____, by _____.

NOTARY PUBLIC

My Commission Expires: _____

Virginia Notary Registration Number: _____

[AFFIX SEAL]

GRANTEE

_____ (SEAL)

COMMONWEALTH OF VIRGINIA
[CITY] [COUNTY] OF _____

The foregoing instrument was acknowledged before me this ___ day of _____, _____, by _____.

NOTARY PUBLIC

My Commission Expires: _____

Virginia Notary Registration Number: _____

[AFFIX SEAL]

Prepared by:

Tax Parcel ID#: _____
Consideration: \$ _____

DEED OF TRANSFER

THIS DEED OF TRANSFER is made as of _____, _____, by and between _____, as Grantor; and _____, as Grantee.

WITNESSETH:

That for and in consideration of the sum of \$ _____, cash in hand paid, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Grantor does hereby quitclaim, release, and convey and transfer to the Grantee, all right, title, and interest of the Grantor in _____ development rights (the "Development Rights"), which Grantor acquired pursuant to that certain Deed of Severance by and between _____ as grantor, and Grantor as grantee, dated _____, and recorded in the Clerk's Office of the County/City/Town of _____, at instrument number _____.

Grantor acknowledges that it has no further use or right of use with respect to the Development Rights. This transfer shall bind Grantor, and its successors and assigns.

Grantor hereby transfers the Development Rights unto Grantee, which shall hereafter be affixed to the following described property located in the [County/City Town] of _____, Virginia (the "Property"):

[Insert Legal Description.]

Grantor has received a written determination of compliance of the Development Rights, indicating the number of residential development rights being eligible to be transferred to the Property, a copy of which is attached hereto as Exhibit A, and made a part hereof.

[This instrument is exempt from taxation pursuant to section § _____ of the Code of Virginia.]

WITNESS the following signatures and seals:

GRANTOR

_____ (SEAL)

COMMONWEALTH OF VIRGINIA
[CITY] [COUNTY] OF _____

The foregoing instrument was acknowledged before me this ____ day of _____, _____, by _____.

NOTARY PUBLIC

My Commission Expires: _____

Virginia Notary Registration Number: _____

[AFFIX SEAL]

GRANTEE

_____ (SEAL)

COMMONWEALTH OF VIRGINIA
[CITY] [COUNTY] OF _____

The foregoing instrument was acknowledged before me this ____ day of
_____, _____, by _____.

NOTARY PUBLIC

My Commission Expires: _____

Virginia Notary Registration Number: _____

[AFFIX SEAL]

Prepared by:

Tax Parcel ID#: _____
Consideration: \$ _____

DEED OF SEVERANCE
AND TRANSFER

THIS DEED OF SEVERANCE AND TRANSFER is made as of
_____, _____, by and between _____, as Grantor; and
_____, as Grantee.

WITNESSETH:

That for and in consideration of the sum of \$_____, cash in hand paid, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Grantor does hereby quitclaim, release, and convey and transfer to the Grantee, all right, title, and interest of the Grantor in _____ development rights (the "Development Rights"), which prior to this conveyance were attached to the following described property located in the [County/City Town] of _____, Virginia (the "Sending Property"):

[Insert Legal Description.]

This conveyance hereby severs the Development Rights from the Sending Property, and Grantor acknowledges that it has no further use or right of use of the Sending Property with respect to the severed Development Rights. This severance and the resulting prohibitions and restrictions against the use and development of the Sending Property shall bind Grantor, its successors in interest, and its assigns.

The Development Rights are hereby transferred unto Grantee, and shall hereafter be affixed to the following described property located in the [County/City Town] of _____, Virginia (the "Receiving Property"):

[Insert Legal Description.]

Grantor and Grantee have received a written determination of compliance of the Development Rights, indicating the number of residential development rights being eligible to be severed from the Sending Property and to be transferred to the Receiving Property, a copy of which is attached hereto as Exhibit A, and made a part hereof.

[This instrument is exempt from taxation pursuant to section § _____ of the Code of Virginia.]

WITNESS the following signatures and seals:

GRANTOR

_____ (SEAL)

COMMONWEALTH OF VIRGINIA
[CITY] [COUNTY] OF _____

The foregoing instrument was acknowledged before me this ___ day of _____, _____, by _____.

NOTARY PUBLIC

My Commission Expires: _____

Virginia Notary Registration Number: _____

[AFFIX SEAL]

GRANTEE

_____ (SEAL)

COMMONWEALTH OF VIRGINIA
[CITY] [COUNTY] OF _____

The foregoing instrument was acknowledged before me this ___ day of
_____, _____, by _____.

NOTARY PUBLIC

My Commission Expires: _____

Virginia Notary Registration Number: _____

[AFFIX SEAL]

Prepared by:

Tax Parcel ID#: _____
Consideration: \$ _____

QUITCLAIM DEED AND
EXTINGUISHMENT OF DEVELOPMENT RIGHTS

THIS QUITCLAIM DEED is made as of _____, _____, by and
between _____, as Grantor; and the [County/City/Town] of
_____, as Grantee.

WITNESSETH:

That for and in consideration of the sum of \$ _____, cash in hand paid, and other
good and valuable consideration, the receipt of which is hereby acknowledged, the Grantor does
hereby quitclaim, release, and convey to the Grantee, all right, title, and interest of the Grantor in
_____ development rights (the "Development Rights"), which prior to this conveyance were
attached to the following described property located in the [City] [County] of
_____, Virginia (the "Property"):

[Insert Legal Description.]

Grantor has received a written determination of compliance of the Development Rights from the
_____ of the [County/City/Town] of _____, indicating the
number of residential development rights being severed, a copy of which is attached hereto as
Exhibit A, and made a part hereof.

This conveyance hereby severs the Development Rights from the Property, and Grantor
acknowledges that it has no further use or right of use of the Property with respect to the severed

Development Rights. This severance and the resulting prohibitions and restrictions against the use and development of the Property shall bind Grantor, its successors in interest, and its assigns.

Grantee hereby accepts this conveyance, and agrees that the Development Rights are hereby extinguished, and may not be sold, transferred, or otherwise conveyed to any other party hereafter.

This instrument is exempt from taxation pursuant to section § 58.1-811(A)(3) of the Code of Virginia.

WITNESS the following signatures and seals:

GRANTOR

_____(SEAL)

COMMONWEALTH OF VIRGINIA
[CITY] [COUNTY] OF _____

The foregoing instrument was acknowledged before me this ___ day of _____, _____, by _____.

NOTARY PUBLIC

My Commission Expires: _____

Virginia Notary Registration Number: _____

[AFFIX SEAL]

GRANTEE

_____ (SEAL)

COMMONWEALTH OF VIRGINIA
[CITY] [COUNTY] OF _____

The foregoing instrument was acknowledged before me this ____ day of
_____, _____, by _____.

NOTARY PUBLIC

My Commission Expires: _____

Virginia Notary Registration Number: _____

[AFFIX SEAL]