

TRANSFER OF DEVELOPMENT RIGHTS

STEPS IN ESTABLISHING A TDR PROGRAM

Adopting TDR legislation is but one small piece of the effort required to put an effective TDR program in place. The success of a TDR program depends ultimately on the willingness of buyers and sellers to participate in a TDR market; therefore considerable attention must be given to establishing the economic underpinnings of the program. In addition, TDR is a new concept for most landowners and developers, so active support and marketing can be crucial in setting up an effective program.

The following steps are described as discreet steps in setting up a TDR program, but in fact these represent a number of moving pieces which must all work well together for a well-functioning program.

1. Set Goals/Policy Direction

In **setting goals and establishing broad policy direction** for a TDR program, it is critical to involve elected officials early and get input from stakeholders early and often. A citizen's advisory committee – including both technical experts and key stakeholders – can provide an effective sounding board and insure that the program is well-grounded in reality from the start. Key policy options, such as whether downzoning will be considered, should be vetted at the outset. Clear goals, such as which resource lands are targeted for preservation, will provide a strong base for program development.

2. Conduct Market Study

A **market study should be undertaken to assess the feasibility of a proposed TDR program** and provide information critical to designing a TDR market. A real estate appraiser or other real estate professional can determine the value of development rights in sending and receiving areas, providing a basis for determining the appropriate allocation rate in sending areas and exchange rate for projects in TDR receiving areas (see below for discussion of these terms). Assessing the potential supply and demand of TDR's is important both in determining the feasibility of the program but also for determining the appropriate size and location of sending and receiving sites.

Factors to Consider:

- The **value of development rights in potential sending areas** will be easiest to assess where there is a history of conservation easements applied and/or development rights purchased in an area. Otherwise, the appraiser will need to compare land values in the area and make a determination as to the percentage of land value that is attributable to development potential.
- Similarly, the **value of development bonuses in TDR receiving areas** can be determined by comparing sales data for properties in the area with varying development limits. If adequate sales data is not available, an appraiser may need to analyze hypothetical development prototypes to determine the value of TDR bonuses.
- The market study should include an **overall assessment of how many TDR's could be available** for purchase in sending areas vs. how many TDR's might be desired in potential receiving areas. The program needs to achieve a reasonable balance between supply and demand of TDR's.



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3. Designate Sending Areas



A critical early step in designing a TDR program is the **identification and mapping of sending areas from which development rights can be sold**. Typically these areas include prime agricultural lands, working forests and environmentally sensitive sites that a community wants to preserve. Sending areas should be consistent with a jurisdiction's comprehensive plan policies and map.

Factors to consider:

- **Size:** In determining the amount of land to be included in sending areas, attention should be paid to the number of TDR's which are likely to be transferred out of these areas and whether sufficient capacity is available in receiving areas to utilize these credits.
- **Priorities for preservation:** Purchasing development rights from landowners in areas subject to the greatest development pressure will be difficult; these properties will have the highest land values and the most pressure to convert to development. Conversely, more remote properties with less development potential will be more likely to participate in TDR programs because they have fewer options for conversion. Incentives, such as allocating additional development rights in areas of high development pressure, or phasing the availability of sending areas, can be used to "even the playing field" between various parts of the sending area. Similarly, extra development rights may be allocated to sites the public considers most valuable for conservation, to encourage participation from these high priority sending sites.
- **Partial TDR:** Can a landowner sell a portion of the development rights on a sending site, or does the program allow transactions only when all of the rights are sold from a participating site? This question will have to be resolved based on the specific policy objectives of the program.

4. Designate Receiving Areas

Designating viable receiving areas to accept TDR's from sending areas is one of the **most important and sometimes vexing aspects** of creating a TDR program. Many programs strive to designate receiving areas which can accommodate an equal or greater amount of TDR's than the likely supply from sending areas. This ensures that the full potential of the TDR program can be realized.



Receiving areas must be:

- Well served by infrastructure and public services.
- Subject to demand for more intensive development.
- Able to accommodate additional development without undo conflict with the neighborhood character of the receiving area and adjacent neighborhoods.
- Sized to reflect a balance between sending and receiving areas.



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Other factors to consider in designating receiving areas:

- Developers will not be interested in purchasing development rights if they can achieve upzones or development bonuses without TDR. Some jurisdictions have enacted downzones in receiving areas to create an added incentive to participate in the TDR program; however this approach would not be politically acceptable everywhere and may generate legal disputes. At a minimum, jurisdictions should avoid “give-always” where rezoning to allow higher intensity development is approved without TDR provisions.
- The TDR bonus can be applied “by right” with purchase of the necessary rights, or it can be subject to discretionary review through the development permit process. A discretionary review process can help protect existing neighborhood character and insure that adequate infrastructure is in place; however such reviews reduce certainty and add time to the permit review process and may dampen developer interest in TDR.

5. Update Zoning Regulations

Zoning regulations will need to be modified to incorporate the TDR concept. Receiving area zones must offer two options for development: a baseline level which can be achieved without participating in TDR; and a bonus level to be achieved only if a developer purchases the requisite number of TDR's. Development bonuses can take many forms – they can include added height, density, or number of dwelling units, or flexibility in the application of other development standards such as parking requirements or maximum lot coverage. In some cases, jurisdictions allow the developer to choose from a menu of options as to how the bonus is applied on-site so that it provides the maximum benefit to the project.

Sending areas are often located in **unincorporated counties outside designated urban growth areas**, but can also include open space or environmentally sensitive areas within cities. Receiving areas may be located in either unincorporated urban areas or in cities. The type and location of the receiving area has bearing on the process and mechanics of a TDR program. The primary receiving site options include:

- **Unincorporated county receiving sites/no major rezone required:** for these receiving areas, only minor zoning adjustments are needed to specify the increment of additional density allowed with TDR purchase. For example, a residential zone allowing 6 units/acre might be allowed 8 units/acre with TDR. These are conceptually the simplest types of TDR transactions.
- **Unincorporated county sites/major projects:** in these cases, a major project requiring significant zoning and comprehensive plan changes is proposed in the unincorporated area. As part of a comprehensive plan change, the county requires the developer to purchase TDR's or pay a comparable development fee, established through site-specific appraisal. In this way the county can capture some of the significant property value increase that such rezones generally confer. Such projects must be carefully assessed to insure consistency with the county's growth management plan.
- **Incorporated city sites:** receiving sites may be designated in incorporated cities, often requiring an inter-local agreement between the city and county. Such receiving sites offer perhaps the best opportunity to shift development from rural and resource lands to already urbanized areas. However, cities may be reluctant to take on additional growth and density in their communities; incentives such as infrastructure or amenity funding (provided by the county, state or other sources) may be needed to make this option more attractive.



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6. Determine Allocation Rate for Sending Areas

The allocation rate is the number of TDR's a landowner can sell per acre from a sending site. The more TDR's a landowner can sell, the greater the compensation he can expect to receive. Landowners will participate in a TDR transaction only when the amount of compensation they receive from selling their development rights is at least as great as the loss of property value resulting from the permanent reduction in development potential on the site.

Options for allocating TDR's:

- **Allocation can be based solely on the acreage of a site and allowable zoning.** One TDR would be issued for each dwelling unit that is permitted under existing zoning; i.e., if 2 single family houses could be built on a 5 acre parcel, 2 TDR's would be allocated to the site.
- **Allocations can be modified to reflect the development constraints and actual development potential of a particular site.** If the zoning allows 1 house per 2.5 acres, but environmental constraints and regulations would prohibit development on ½ of the site, only 1 TDR would be allocated to the 5-acre site. Note that this approach requires site-specific analysis of each potential sending site, adding expense and complexity to the process and limiting participation, especially by smaller landowners.
- **Extra TDR's may be allocated** to provide an incentive for landowners to participate in the program.
- **If incentives** are provided, the extra **TDR's may be allocated across-the-board** to all sending areas, or may be tailored to reflect the relative preservation value of various areas.

7. Determine the "Exchange Rate" for TDR Transactions

Terminology varies, but many programs refer to a **"transfer ratio" as the relationship between the number of TDR's allocated to a site in the sending area and the amount of development bonus achieved through the purchase of a TDR in receiving areas.** This can be as simple as 1:1 where one house "credit" in a single family sending area translates into one additional house in a nearby single family receiving area.

However, the transfer ratio can become much more complicated when the sending and receiving sites are zoned for different types of development or are subject to very different market conditions. Often the "transfer" is actually a conversion of single family dwelling unit credits into commercial floor area or multi-family units. To encompass these conversions as well as simple transfers, the term "exchange rate" is proposed.

The exchange rate is determined by the allocation rate for TDR's in sending areas and the amount/type of development bonus offered per TDR in receiving areas.

Factors to consider:

- The goal of the exchange rate is to **generate a TDR price** which is attractive to both buyers and sellers. The allocation rate for sending sites and the development bonuses offered on receiving sites need to be carefully calibrated to achieve this goal.
- When receiving areas are diverse (in terms of development type and/or the attractiveness of various sites for development), **establishing exchange rates can be difficult and complex.** Transfer mechanisms that allow for site-specific valuations of development value rather than general formulas may be more appropriate in these instances.



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8. Identify Transaction Types

There are several mechanisms available to accomplish TDR. Programs may allow for any or all of these approaches:

- **Private transactions:** Private transactions are the **core of traditional TDR programs**. With this mechanism, a willing seller arranges to sell TDR's to a willing buyer who proposes to build a project at the "bonus" level. Development approval is contingent upon the developer completing the purchase of development rights and demonstrating that a conservation easement has been placed on the sending site. Buyers and sellers must find each other and the sale/purchase occurs simultaneously.
- **TDR bank:** A bank run by a local jurisdiction, regional government, or non-profit **can be established to buy and sell development rights**. A TDR bank simplifies the transaction process, because buyers and sellers can execute transactions with the bank instead of having to find each other. The bank can help to even out economic cycles, serving as the buyer "of last resort" when a seller is ready to sell development rights, and selling TDR's to a developer in a timely fashion when a development is ready to proceed. TDR purchases and sales are handled independently; they do not need to occur simultaneously.
- **Conservation Fee:** A TDR program can be structured so that **developers pay a fee to achieve the higher densities/ heights allowable with a TDR bonus**. The funds generated through these transactions go to the local jurisdiction or TDR bank, which uses the funds to purchase development rights within sending areas. Conservation fees may be calculated according to a formula which is based on a percentage of property value. Alternatively, for major development sites/ projects, a site-specific appraisal to determine the appropriate development fee is more appropriate.
- **Private Investment Corporation:** This is a variation of the "private transactions" option above. If the TDR program allows development rights to be bought and held, rather than requiring immediate use by a TDR project, **private investors may be interested in buying the rights as an investment**. A private corporation can be formed to purchase and hold development rights as a commodity. Investors can acquire shares in the corporation either through an equity investment or via contribution of their own development rights. The funds raised will be used to purchase additional development rights, which will be held until they can be sold for a profit.



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9. Establish TDR Bank (Option)

Many of the most successful TDR programs in the country have established a **TDR bank to buy, sell and hold development credits**. In some of these programs, private transactions are still allowed, providing flexibility to buyers and sellers of development rights. In other cases, the bank is the only mechanism for buying and selling development rights. In such cases, there is no need to calculate exchange rates in order to create the proper market relationship between sending and receiving area values. The bank can establish formulas to determine what it will pay for TDR's and what it will sell them for under various circumstances. The bank can focus its purchases of development rights in those areas of highest public priority for preservation. To kick-start the program, some jurisdictions provide seed money to the bank for purchasing high priority development sites.

Advantages of a TDR Bank:

- Removes the need for buyers and sellers to find each other, and to execute a simultaneous buy/sell transaction.
- Promotes price stability and predictability.
- Allows for leveraging of public funds provided for PDR (purchase of development rights).
- Avoids the need for complex exchange rates. The bank can rely on real estate appraisals or derived formulas to determine how much to pay for development rights and what is a reasonable sales price.
- In combination with the ability to negotiate direct private transactions, banks provide options to participants in TDR programs. Those looking for a simple "one-stop" approach can go through the bank, while others willing to put in more time and effort to get a more competitive price can negotiate private transactions.

10. Enact Legislation

A TDR ordinance needs to address:

- The identification and mapping of sending and receiving areas;
- TDR allocation rate for sending areas;
- Requirements for development restrictions to be recorded in conservation easements;
- Baseline zoning standards and TDR bonus standards;
- The review process for TDR projects in receiving areas; and
- Transaction mechanics: the types of transactions authorized.

11. Identify staff and other resources needed to administer TDR program

TDR staff – based at the local jurisdiction or TDR bank – will be needed to promote the program, educate landowners and developers, facilitate transactions, ensure proper recording procedures, track TDR's and provide leadership and advocacy. Proper support for the TDR program can make the difference between a program that exists only on paper and one that generates many TDR transactions.

12. Evaluate and Update Program

Changing market conditions can undermine the viability of a TDR program over time. Each program needs a mechanism for **ongoing monitoring and assessment** of how well the program is meeting its goals.

Refining and re-calibrating the program may be needed over time.

