TRANSFER DEVELOPMENT RIGHTS

Edward H. Ziegler and David F. Kernan

Technical Services Report No. 1
Rocky Mountain Land Use Institute

College of Law
University of Denver

TRANSFER DEVELOPMENT RIGHTS

A Survey of Planning Techniques And Analysis of Legal Issues

Edward H. Ziegler
Executive Director
Rocky Mountain Land Use Institute

David F. Kernan
Research Associate
Rocky Mountain Land Use Institute

Technical Service Report No. 1

ABOUT THE INSTITUTE

The Rocky Mountain Land Use Institute at the University of Denver College of Law engages in a variety of educational and research activities related to public interest aspects of land use and development. In addition to providing educational opportunities for students at the College of Law through internships and research projects, the Institute sponsors workshops and symposia for land use practitioners and citizen groups on specific land use topics. The Institute, working closely with both the public and private sector, also undertakes and supports research and service projects related to land use and development in the Rocky Mountain Region. The Institute operates in affiliation with both regional and national advisory boards, the members of which are among the leading practitioners and academics in the field. The Institute is entirely financially self-sustaining with funds generated by its activities and publications and by gifts from Institute sponsors.

College of Law, University of Denver
1900 Olive Street, Denver, Colorado 80220
Phone (303) 871-6275, Fax (303) 871-6711

THE TRANSFER DEVELOPMENT RIGHTS CONCEPT

Introduction to the TDR Concept

Traditional Euclidean zoning schemes regulating the use and development of land largely focus on the use, height, and bulk of permitted development in relation to a particular tract of land or zoning lot. Parcels of land that are either undeveloped or underdeveloped have, under such an ordinance, unused but ascertainable permitted development rights. These unused development rights , however, are ordinarily not transferable off site since they are linked by unit density and floor area ratio restrictions to particular tracts of land.

A relatively recent innovation in zoning and other land use regulatory programs is the treatment of "development rights" attributable under a zoning ordinance to a particular parcel of land as severable from that tract or zoning lot and transferable to another tract or zoning lot. Borrowing from the metaphor of property as a "bundle of sticks," TDR schemes treat the right to develop as a stick capable of being severed from the surface estate and transferred or sold like a fungible commodity. TDR regulatory schemes thus permit allowed density or floor area attributable to a particular parcel of land to be transferred to and utilized on another tract of land.

The TDR Planning Technique

Various methods of implementing TDR schemes have been discussed in the growing body of literature devoted to this topic.[1] While the details of the various programs vary considerably, transfer of development rights schemes generally are established by the creation of eligible sending sites or zones (upon which the development rights to be transferred are calculated) and the creation of eligible receiving sites or zones (upon which the aforementioned development rights may be

---

[1]See R. Roddewig & C. Inghram, Transferable Development Rights Programs: TDRs and the Real Estate Marketplace (1987) (American Planning Association PAS Rep. No. 401); C. Harr, S. Horowitz, & D. Katz, Transfer of Development Rights: A Primer (1980) (Lincoln Institute of Land Policy); J. Rose, Transfer of Development Rights: A New Technique of Land Use Regulation (1975) (Rutgers University Center for Urban Policy Research); B. Chavooshian & T. Norman, Transferable Development Rights: A New Concept in Land Use Management (1973) (Rutgers University).

And see the following articles: Richard, "Transferable Development Rights: A Corrective, Catastrophe, or Curiosity?" 12 Real Estate L.J. 26 (1983); Levy, "TDRs in the Legal System", Florida Env. & Urban Issues 12 (July 1986); Raymond, "Structuring the Implementation of Transferable Development Rights", Urban Land 19 (July-August 1981); Prizor, "Making TDR Work: A Study of Program Implementation", APA Journal 203 (1986); Merriam, "Making TDR Work", 56 N.C. L.Rev. 114 (1978); Richman, "Transferable Development Rights -A Pragmatic View", Environmental Comment 4 (1978); Bartels, "TDR: No Panacea After All", Planning 23 (December 1976); Delaney, "TDR Redux: A Second Generation of Practical Legal Concerns," 15 Urban Lawyer 593 (1983). For a comprehensive analysis of legal issues related to TDRs, see Ziegler, Rathkopf's The Law of Zoning and Planning Ch. 39 (1994).

transferred and utilized). Parcels of land designated as sending or granting sites are usually, but not always, subject to stringent land development restrictions. Owners of these sending sites may utilize the development rights eligible for transfer from such sites on other eligible receiving sites that they own or they may be able to sell the development rights to another party or even to a development bank created for the purpose of buying and selling these development rights.[2]

TDR programs may be purely voluntary in the sense that development may proceed at a potential sending site in accordance with the maximum allowed zoned density or the owner may exercise the option to transfer development rights from the sending site to an eligible receiving site.[3]

Voluntary programs in some cases provide the incentive for such a transfer by allowing greater density to be transferred from a sending site than would be permitted to be developed on the sending site.[4] TDR programs, however, are usually mandatory, in the sense that development of a sending site is usually severely restricted and development rights accorded a sending site above the maximum allowed density on site must be transferred off site if such rights are to be utilized.[5] In some cases all lands within a designated area are eligible sending and receiving sites for the transfer of development rights and development within that area is subject to an overall pre-established density limit.[6] TDR programs may provide for

---

[2] Establishment of an adequately funded TDR bank for the purpose of establishing and maintaining a market for development rights is thought by many commentators to be an important factor in making TDR programs work. See R. Roddewig & C. Inghram, Transfer Development Rights Programs: TDRs and the Real Estate Marketplace 26-27 (1987) (APA PAS Rep. No. 401). However only a few TDR programs, as in Montgomery County, Maryland, Monterey County California, and the Pinelands in New Jersey have established such a bank.

[3] New York City's zoning provision allowing for the transfer of development rights between contiguous but separately owned lots through a "zoning lot merger" arrangement has operated in this fashion for many years. See Marcus, "Air Rights in New York City: TDR, Zoning Lot Merger, and the Well-Considered Plan", 50 Brooklyn L. Rev. 867, 870 (1984).

[4]For example, the city of Hollywood, Florida in an attempt to provide the incentive to transfer development rights away from an undeveloped beach area provided a zoning density of 79 single-family units for that area but allowed for that same area, at the developer's option, transfer development rights of 368 multi-family units if these units were transferred to a nearby parcel of land. See *City of Hollywood v. Hollywood Inc.*, 432 S.2d 1332 (Fla.App. 1983) (upholding the validity of the downzoning of land implementing this TDR scheme).

[5] New York City's 1968 zoning resolution providing for the transfer of development rights from buildings designated as historic landmarks generally operates in this fashion. See Marcus, N.3, supra at 878-884.

[6] For example, Marin County, California, has adopted a TDR program for the Nicasio Valley wherein land is zoned at one residential unit for each sixty acres of land, allowing ranchers in the valley to buy or sell development rights from other landowners in the valley. The TDR program does not increase the total density permitted in the valley. See *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1989) (upholding the validity of this TDR program).

a more-or-less automatic or as-of-right transfer of development rights to an eligible receiving site or may provide for a complex and discretionary review process for the approval of such a transfer.[7]

For many years, particularly under planned development ordinances, zoning schemes have promoted or required density transfer and clustering within a designated development site. TDR programs are often distinguished from these cluster provisions by allowing eligible transfer development rights to be sold or used off-site. However, some mandatory and voluntary TDR programs today operate in much the same fashion as planned development site transfers with perhaps some increase or decrease in the transfer densities permitted depending on the nature of the restrictions affecting the land.[8]

Zoning schemes sometimes provide additional density bonuses (either by floor area or units) at a development site based on the developer providing either on-site or off-site improvements or public amenities. TDR programs differ from incentive zoning schemes in that the additional density provided for a development (receiving) site is attributable to the use of development rights transferred from a different, and usually substantially restricted, development site.[9]

PLANNING AND TDR REGULATORY PROGRAMS

An Overview

Types of TDR planning and regulatory schemes can be characterized by their respective intended purpose or function. TDR programs have been enacted in downtown business districts to promote the flexible and efficient use of land in the urban redevelopment process, to promote historic preservation, and to secure the provision of public amenities and low income housing. In outlying areas TDR schemes have been enacted to protect ranching and agricultural lands, to preserve open space and scenic areas and to protect wildlife habitat and sensitive ecological areas. TDR programs implemented to further many of the above described land use regulatory purposes are thought desirable or necessary in order to lessen the negative

---

[7] New York City's zoning provision allowing for the transfer of development rights between contiguous lots is an example of this type of "as-of-right" transfer. See Marcus, N.3 supra, at 875.

[8] *City of Hollywood v. Hollywood Inc.*, 432 So.2d 1332 (Fla.App. 1983); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 188 Cal.Rptr. 191 (App. 1982); *Zerbetz v. Anchorage*, 1993 WL 273442 (Alaska).

[9] Compare *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Commission*, 431 A.2d 560, 562 (D.C. App. 1981)(incentive bonus scheme) with *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Commission*, 355 A.2d 550, 552 (D.C. App. 1976)(TDR scheme).

economic impact on the owners of lands whose development rights are severely restricted in furtherance of these regulatory goals.

Municipal Sale of Development Rights

In some instances, local TDR programs may provide for the sale and transfer of development rights from municipally owned properties. In one case, upheld by the court, proceeds from the $34 million sale of municipally owned development rights were used for the renovation of a convention center, and the provision of low income housing, open space, day-care facilities and transportation improvements.[10]

Urban Redevelopment

To provide for the flexible and efficient use of land in the urban redevelopment process and, in some cases, to assure the provision of public amenities and new development consistent with central business district plans, a number of cities in large urban areas have implemented downtown TDR schemes. New York, Seattle, Los Angeles, Pittsburgh, Portland, and the District of Columbia have enacted TDR schemes for such purposes.[11]

Historic Preservation

A number of cities have enacted TDR programs for the purpose of preserving historic structures and landmarks. New York, Los Angeles, San Diego, San Francisco, Denver, Pittsburgh, and New Orleans have enacted various types of TDR preservation schemes.[12]

---

[10]See *Fur-Lex Realty, Inc. v. Lindsay* 367 N.Y.S.2d 388 (Sup. 1975)(upholding lease and transfer of 100,000 square feet of air rights above city-owned courthouse); *Local and Regional Monitor v. Los Angeles*, 16 Cal. Rptr. 358 (Cal. App. 1993)(upholding the $34 million sale of 695,000 square feet of development rights from a city-owned convention center to a mixed use downtown hotel, office and retail complex).

[11]See generally T. Lassar, Carrots and Sticks: New Zoning Downtown (1989) (Urban Land Institute). And see D. Alan, "Downtown Growth Control Through Development Rights Transfer," in Zoning in the 1980's:What Hath Euclid Wrought?(1986) (American Bar Association); Masterson, "Using TDRs For More Efficient Land Use," Mort. and Real Estate Exec. Rep. 3 (August 1985); F. James & D. Gale, Zoning for Sale: A Critical Analysis of Transferable Development Rights Programs (1977) (Urban Institute). And see Marcus, "Air Rights In New York City: TDR, Zoning Lot Merger and the Well-Considered Plan," 50 Brooklyn L. Rev. 867 (1984); Bernard, Going Up in New York: The City's Tallest Residential Building", J. of Real Estate Dev. 97-99 (Fall, 1986) (describing the complex process by which the CitiSpire project, the second tallest concrete structure in America, more than doubled its otherwise allowable size by TDRs and bonuses). See also Klusaritz, "TDRs in Washington Promote Retail, Arts, Historic Preservation," The Corridor Real Estate Journal p.A4 (May 4, 1980).

[12] See generally Merriam, "Making TDR Work," 56 N.C. L.Rev. 77, 90-97 (1978); Baker, "Development Rights Transfer and Landmarks Preservation- Providing a Sense Of Orientation," 9 Urban L. Ann. 130 (1975); R. Roddewig & C. Inghram, supra. And see Purdy & Bowes, "An Update on Denver's TDR Ordinances", Real Estate Issues 1 (Spring-Summer 1985).

Agricultural Preservation

Local governments have enacted TDR programs in connection with zoning schemes intended to protect agricultural areas. Montgomery County, Maryland, Buckingham Township, Pennsylvania, Marin County, California, the Pinelands Commission in New Jersey, and other governmental entities, have established various types of TDR agricultural preservation schemes.[13]

Open Space and View Protection

A number of local communities have enacted various forms of open space and view protection zoning schemes that operate in conjunction with TDR programs.[14] For example, in California, Malibu and Monterey County have adopted such programs as have local communities in Florida, New Jersey, Vermont, Montana, and Pennsylvania. Often these TDR programs and zoning schemes embrace the protection of farming or ranching.[15]

Protection of Sensitive Ecological Areas

Regulatory schemes intended to protect wetlands, wildlife habitat, or other sensitive ecological areas may be accompanied by the use of TDR programs. Nantucket, Massachusetts, Island County, Washington, Anchorage, Alaska, Collier County, Florida, the Lake Tahoe Regional Planning Agency, and the New Jersey

---

[13] See generally Merriam, "Making TDR Work," 56 N.C.L.Rev. 77, 103-115 (1978); Strong, "Buying Farmland Development Rights," Land Use Law and Zoning Digest 3 (May 1991); Rigby, "Transferable Development Rights: Preserving Agricultural Land on the Urban Fringe," Land Trusts Exchange 10 (Spring 1988); Washburn, "How to Save Prime Farmlands," American Land Forum 11 (Fall 1985); Thompson, "Purchase of Development Rights: Ultimate Tool for Farmland Preservation" 9 Zon. & Plann. L.Rep. 153 (1989); Duncan, "Toward A Theory of Broad-based Planning for the Preservation of Agricultural Land", 24 Nat. Res.J. 61 (1989).

[14] See generally Merriam, "Making TDR Work," 56 N.C.L.Rev. 77, 101-15 (1978); Rose, "A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space," 51 J. Urban L. 461 (1974); R. Roddewig & C. Inghram, "Transferable Development Rights Programs: TDRs and the Real Estate Marketplace" 80 (1987) (American Planning Association PAS Rep. No. 401).

[15] See Williams, "Transferable Development Credits - A Controversial Land Use Tool," California Waterfront Age 32 (Spring 1987) (describing the Malibu/Santa Monica Mountains TDR program and Monterey County's Scenic Corridor TDR program). Monterey County's Scenic Corridor program is aimed at mitigating the impact of restrictive zoning on landowners along a 60 mile scenic corridor through Big Sur. Potential development is moved from critical "viewhead" properties to sites that cannot be seen from Highway 1. "Where the construction of a house would not be permitted by the land use plan, the landowner will be granted two TDCs, which may used to build two houses on sites not visible from the highway. An open space easement is imposed on the donor parcel, allowing for passive recreational or agricultural use." Id at 36.

Pinelands Commission, among other governmental entities, have implemented these types of TDR programs.[16]

LEGAL ISSUES RELATED TO TDR SCHEMES

General Validity

Courts have long recognized a property owner's right to sell or lease the "air rights" over a parcel of land to another person for the purpose of either developing that airspace or assuring that the airspace remains undeveloped.[17] The private transfer of "development rights" attributable to a specific tract of land under a zoning scheme to another owner for use on a neighboring tract of land has also been upheld by the courts when authorized by the applicable zoning regulations.[18] More recently, courts have recognized and upheld the purchase and sale by local governments of development rights made transferable by zoning or other regulatory schemes.[19] However, the U.S. Supreme Court and most state courts have yet to expressly address a number of the legal issues that may arise as a result of transfer

---

[16] See R. Roddewig & C. Inghram, N.1 supra; Merriam, N.1 supra. And see *Zerbetz v. Anchorage*, 1993 WL 273442 (Alaska); *Gardener v. New Jersey Pinelands Com'n*, 125 N.J. 193, 593 A.2d 251 (1991); *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. App. 1990); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484, 188 Cal.Rptr. 191 (1982); *Deltona Corp v. United States*, 657 F.2d 1184 (Ct.Cl. 1981).

[17] See. e.g., *Tatt V. Washington Mutual Savings Bank*, 127 Wash. 503, 221 P.604 (1923) (conveyance of air rights over an alley by city of Seattle to a bank); *Pearson V. Matheson*, 102 S.C. 377, 86 S.E. 1063 (1915). And see Merriam, "Making TDR Work," 56 N.C. L. Rev. 77, 86-88 (1978).

[18] See, e.g. *Hotel Taft Associates v. Sommer* 34 Misc.2d 367, 226 N.Y.S.2d 155, aff'd no opinion, 236 N.S.Y.2d 939, 18 A.D.2d 796 (1962) (upholding agreement wherein a landowner transferred to another the unused zoning density of his lot for the purpose of increasing the bulk of the transferee's building as permitted under the city of New York's zoning resolution). And see Marcus, "Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan," 50 Brooklyn L.Rev. 867, 870-875 (1984). And see *Gardner v. New Jersey Pinelands Com'n*, 125 N.J. 193, 593 A.2d 251 (1991)(upholding TDR scheme); *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1989)(same); *City of Hollywood v. Hollywood Inc.*, 432 So.2d 1332 (Fla.App. 1983)(same); *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Commission*, 355 A.2d 550, (D.C.App. 1976) (same); And see *Matlack v. Board of Freeholders of Burlington County*, 191 N.J. Super. 236, 466 A.2d 83 (1982), affirmed, 194 N.J.Super. 359, 476 A.2d. 1262 (1984) (upholding authority of county to purchase conservation easements and incident transfer development rights).

[19] See *Fur-Lex Realty, Inc. v. Lindsay*, 367 N.Y.S. 2d 388(1975)(upholding lease and transfer of 100,000 square feet of air rights above city-owned courthouse for use on adjoining parcel of land in adding ten additional stories to construction of office building thereon); *Local and Regional Monitor v. Los Angeles*, 16 Cal. Rptr.2d 358 (1993)(upholding the $34 million in cash sale of 695,000 square feet of development rights from a city owned convention center to a mixed use downtown hotel, office, and retail complex).

development rights schemes used in connection with local planning and zoning programs.[20]

Court decisions in some cases have rejected statutory uniformity [21] and equal protection[22] claims in connection with zoning schemes utilizing the transfer of development rights. In one such case, a court characterized as essentially "specious" the argument that this type of departure from Euclidean zoning constituted "invidious discrimination based on wealth."[23] Other court decisions involving zoning schemes utilizing the transfer of development rights have held, under the facts of the cases involved, that the transfer of development rights did not "per se" constitute illegal spot zoning [24] and did not necessarily operate inconsistent with the concept of zoning in accordance with a comprehensive plan.[25]

To implement TDR schemes, the downzoning of land at eligible receiving sites may be necessary to create a market for the use of the TDR's.[26] An issue that may arise as a result of implementing such a TDR scheme is the due process validity of the zoning restrictions newly imposed on a receiving site. Presently, any underlying or basic zoning restriction imposed on a receiving site must, in and of itself, satisfy the substantive due process requirement of being reasonably related to furthering some legitimate public purpose. Yet if such a restriction is necessary to promote some specific public purpose (apart from simply enhancing a TDR scheme) how is it, the argument may be made, the restriction (whether on height or unit density) may be permissibly exceeded by the purchase and use of TDR's? Courts have not, as yet, expressly addressed this specific issue in the context of TDR schemes that allow an overall increase in the bulk or density otherwise permitted in a TDR receiving area or zoning district.[27]

---

[20]See generally Delaney, "TDR Redux: A Second Generation of Practical Legal Concerns", 15 Urban Lawyer 593 (1983); Merriam, "Making TDR Work," 56 N.C. L.Rev. 77 (1978).

[21] *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Com'n*, 355 A.2d 550 558 (D.C. 1976).

[22] *Gardner v. New Jersey Pinelands Com'n*, 125 N.J. 193, 593 A.2d 251 (1991).

[23]*Dupont Circle Citizens Ass'n v. District of Columbia Zoning Com'n*, N. 21 supra, at 559-560.

[24] *Fur-Lex Realty, Inc. v. Lindsay*, 367 N.Y.S.2d 388, 392 (1975).

[25] *Local and Regional Monitor v. Los Angeles*, 16 Cal Rptr. 2d 358, 384-85 (1993).

[26]See "The Unconstitutionality of Transferable Development Rights," 84 Yale L.J. 1101, 1112 (1975).

[27] In *City of Hollywood v. Hollywood Inc.*, 432 So.2d 1332 (Fla. App. 1983) the court upheld the due process validity of zoning restrictions imposed on the TDR *sending site*. The due process validity of the base zoning restrictions imposed on the *receiving site* (limiting density to 32.5 units per acre) that could be exceeded (up to 37.4 units per acre) by TDRs adding 368 more units to the receiving site and constituting an

Other issues have arisen in connection with TDR schemes. For example, TDRs have been held to be taxable real property interests the value of which may be assessed upon transfer.[28] Also, a court has held that TDRs are not regulated securities under federal law.[29] Courts have not yet addressed the issue of whether TDR schemes may violate federal anti-trust laws.[30]

Authority for Enactment

Statutes have been enacted in a number of states expressly authorizing the use of TDR's in connection with planning and zoning programs. In the absence of "home rule" authority, such statutes are likely to be held to control the nature and purpose of local TDR programs and implementing procedures.[31]

Whether a state zoning enabling act confers authority for implementation of a TDR scheme as part of a local planning and zoning program is a question as yet unanswered in most states. Given the breadth of the language found in most zoning enabling acts, courts may well find therein authority for the implementation of a variety of forms of TDR zoning schemes. Courts generally have liberally interpreted the scope of the authority delegated by such enabling acts, including sanctioning density transfers and density clustering in planned development and subdivision approvals.

---

overall increase in density in the area was not specifically addressed by the court. And see *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1989) (upholding validity of TDR zoning scheme that did not permit overall increase in density otherwise allowed in planning area).

And see Marcus, "Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan," 50 Brooklyn L.Rev. 867, 897 (1984) wherein the author notes: "An overly-wide radius of transferability, however, risks the loss of a rational planning link between the underutilization of the landmark lot and the overbuilding tolerated on the receiving lot. A combination of pragmatism and planning theory will continue to define how far a TDR may travel from its point of origin."

[28] *Mitsui Fudosan v. Los Angeles*, 219 Cal.App. 3d 525, 268 Cal.Rptr. 356 (App. 1990).

[29] *Matlack v. Burlington County Board of Chosen Freeholders*, 292 N.J. Super. 236, 466 A. 2d 83 (1982), affirmed, 194 N.J. Super. 359, 476 A.2d 1262 (1984).

[30] See Delaney, Kominers, and Gordon, "TDR Redux: A Second Generation of Practical Legal Concerns," 15 Urban Lawyer 593, 611-13 (1983); Marcus, N.27 supra at 903.

[31] See *West Montgomery County Citizens Association v. Maryland-National Capital Park and Planning Commission*, 309 Md. 183, 522 A.2d 1328 (1987)(holding TDR program invalid for failure to follow required rezoning procedures in the establishment of the program, noting that the establishment of TDR receiving sites and permitted densities thereon were legislative acts that could not be left solely to the planning process).

And see *Matlock v. Burlington Cty. Freeholder Bd.*, 191 N.J. Super. 236, 466 A.2d 83 (1982) affirmed, 476 A.2d 1262 (1984) (upholding authority of county to purchase conservation easements and incident TDR rights under statute, N.J.S.A. 40 A:12-4(a), authorizing county to purchase any interest in real property).

A case reflective of this view is *Dupont Circle Citizens Association v. District of Columbia Zoning Commission*,[32] wherein the District of Columbia Court of Appeals upheld the decision to approve a planned development application involving the purchase and transfer of development rights between the owners of different buildings within the designated development area, under the authority granted by a zoning enabling statute.

In holding that these statutory provisions granted the authority to approve the development rights transfer involved,[33] the court noted: "This grant of authority is not materially unlike the first three sections of the Standard State Zoning Enabling Act, drafted by the United States Department of Commerce in the early 1920's. It represents a broad grant of authority with an itemization of the main purposes of zoning."[34]

Constitutional Due Process and Taking Claims

Constitutional due process and taking claims made in connection with a rezoning that implements a TDR program will be adjudged under the usual constitutional standards applied for resolution of these claims. A rezoning and supplemental TDR scheme must, both on their face and as applied, be reasonably related to furthering some legitimate public purpose and must allow an owner some economically viable use of his land considered as a whole. Courts generally have rejected due process and taking claims made in court challenges to TDR regulatory schemes.

In a case directly challenging the due process validity of a TDR program, *City of Hollywood v. Hollywood Inc.*[35], a Florida court of Appeals reversed a lower court decision holding that the TDR program involved was unsupportable in fact or in law. The Court of Appeals ruled that the zoning enacted with the TDR provision was reasonably related to protecting the aesthetics of an unspoiled beach area that was part of a development site. Zoning for that beach area allowed for the development of 79 single family dwellings but the TDR provision in question provided for the transfer of 368 additional multifamily units to another part of the development site if the owner dedicated the beach area as open space. The developer challenged the dedication condition which triggered this transfer. In upholding the validity of this TDR scheme the court explained:

---

[32] 355 A.2d 550 (D.C. 1976).

[33] The transfer involved 82,000 square feet of floor space for construction of a twelve story office building.

[34] 355 A.2d at 556.

[35] 432 So.2d 1332 (Fla. App. 1983).

> One of the developer's main objections to this particular TDR is that it requires a dedication of the beach front by deed. As the developer sees it, this actual transfer of title goes too far and is without parallel in the case law. However, we cannot see why an actual conveyance should prove fatal unless the preservation of the open space is somehow only temporary. To us the *quid pro quo* is what should control. If the developer takes advantage of the increased density and builds accordingly, does that not mean the preservation of the open space is forever? We certainly hope so and are suspicious of any motives for keeping a hold on it. Besides, the developer is not required to effect the transfer in this case and may instead elect to build single family residences. The developer argues that this is not really optional and is, in practical result, mandatory. We have already held that single family zoning is compatible with this ocean strip, but even if we had not, we do not find this particular TDR offensive. To be sure, to permit 368 units more in the west in return for open space in the east, smacks of carrot-and-stick. Yet in this age of site plans, impact studies, impact fees, PUDs, land use plans and required approvals, developers and governments play carrot-and-stick with each other all the time. In other words, the game is the same, they have simply changed the name. Accordingly, we reverse the trial judge's holding that the provision is unsupportable in fact or law.[36]

In another case, *Barancik v. County of Marin*,[37] a federal court of appeals rejected constitutional due process and taking claims in upholding a 60 acre per dwelling requirement enacted to protect the Nicasio Valley as a "jewel" in California's "beautiful rural landscape." The restriction sought to preserve ranching and agricultural uses in the valley and the "open spacious feeling" of western Marin County. The zoning scheme permitted ranchers in the valley to sell their development rights to other owners in the valley but allowed no overall increase in the density limits established for the valley. Rejecting a *Nollan* nexus based constitutional claim and upholding the due process constitutionality of the zoning scheme, the court therein stated:

---

[36] 432 So. 2d at 1338.

[37] 872 F.2d. 834 (9th Cir. 1989).

> The district court found that the County had a reasonable purpose in zoning as it did and applying the zoning as it did to Loma Alita Ranch. We agree. To prove his case Barancik had to show that the County's zoning was arbitrary and irrational. *Usery v. Turner Elkhorn Mining Co.* 428 U.S. 1, 15, 96 S.Ct. 2892, 49 L.Ed.2d 752 (1975). He attempted to do so by concentrating on the zoning in relation to his own property and arguing that just as many cows would graze there if there were 28 residences as would if there were nine. The argument, of course, is myopic. Zoning is of an area. The planner wants to preserve an area for a given use. Yielding to Barancik's arguments would set a precedent which, followed, would lead to the cumulative destruction of agriculture in Nicasio Valley. The cowboy and the farmer might be friends as the song has it, but not the rancher and the urban commuter, at least not if commuters, with the roads they need and the cars they drive and the tastes they have, begin to predominate in the countryside. Marin's zoning no doubt preserves a bucolic atmosphere for the benefit of a portion of the population at the expense of those who would flow into the county if there was no zoning. The Constitution lets that decision be made by the legislature. The Countywide Plan is a legitimate declaration that there will be a corridor in Marin agricultural in its use. The choice was not irrational the application to Barancik is not arbitrary.[38]

Relation to Constitutional Taking Claims

Land use restrictions imposed on a tract of land designated as a TDR sending site are likely to be held a constitutional taking where the affected owner can demonstrate that the restrictions prohibit any economically viable use of the land.[39] However a number of court decisions have indicated that the economic benefits conferred on an affected owner by the availability of TDRs may properly be

---

[38] 872 F.2d at 836-37. But see *Corrigan v. City of Scottsdale*, 149 Ariz. 553, 720 P.2d 528 (Ariz.App. 1985)(despite existence of TDRs for restricted mountain lands, aesthetic interests were held not sufficient to justify denial of all developmental use on 80% of tract).

[39] See *Lucas v. South Carolina Coastal Council*, ___U.S. ___ ,112 S.Ct. 2886, 120 L.Ed. 2d 798 (1992) (demonstration of denial of any economically viable use constitutes a per se taking unless justified by the prevention of substantial harm under state law nuisance principles).

considered in determining the merits of such a claim.[40] These cases indicate that the economic value of available TDRs should be considered in determining whether an owner is provided with an economically viable use and suggest the possibility that a taking claim might be rejected even where economically viable developmental uses of the particular restricted site are prohibited.[41]

In a case directly on point, *Aptos Seascape Corp v. County of Santa Cruz*,[42] a California Court of Appeals expressly adopted the above analytical framework for analysis of regulatory taking claims in the context of a "split lot" where TDR's were permitted to be transferred from one tract to another. In rejecting a facial taking challenge, the court held that the benefits of available TDRs should be considered on the merits of a regulatory taking claim that is based on the impact of development restrictions imposed on a TDR sending site. The court on this issue stated:

> [W]hen governmental action has divided contiguous property under single ownership into separate zones and has restricted development in one of these zones , a provision allowing some transfer of development rights from the restricted property or awarding compensating densities elsewhere may preclude a finding that an unconstitutional taking has occurred.[43]

Where an owner cannot demonstrate denial of all economically viable use of land designated as a TDR sending site, a benefit-extraction taking claim might still be asserted based on the fundamental fairness involved in the allocation of the regulatory burden. Where this type of taking claim is raised, court decisions have ruled that TDR benefits afforded an owner are properly considered in judicial analysis of the

---

[40] See the following cases all holding that the affected owner had failed to demonstrate denial of any economically viable use in view of uses allowed on the land and the availability of TDR rights. *Zerbetz v. Anchorage*, 1993 WL 273442 (Alaska); *Gardner v. New Jersey Pinelands Com'n*, 125 N.J. 193, 593 A.2d 251 (1991); *Shubert Organization, Inc. v. Landmarks Preservation Com'n*, 570 N.Y.S. 2d 504 (1991); *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990); *Glisson v. Alachua County*, 558 So.2d 1030 (Fla. App. 1990); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App.3d 484, 188 Cal. Rptr. 191 (App. 1982); *American Savings and Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir.1981); *Deltona Corp. v. United States*, 657 F.2d 1184 (Cl.Ct. 1981); *Fifth Avenue Corp. v. Washington County*, 282 Or. 591, 581 P.2d 50 (1978). And see *Dufour v. Montgomery County Council*, No. 56964, slip op. at 15 (Montgomery Cty. Ct. Md. Jan.20, 1983).

[41] See on this point *Penn Central Transportation Co. v. City of New York*, 42 N.Y.2d 587, 366 N.E.2d 1271, 1278 (1977) affirmed 438 U.S. 104 (1978)(TDR benefits might suffice to provide Penn Central with reasonable return).

[42] 138 Cal.App.3d 484, 188 Cal.Rptr. 191 (App. 1983).

[43] 188 Cal. Rptr. at 197.

basic fairness of the regulatory scheme.[44] In *Penn Central Transportation Co. v. City of New York,*[45] the U.S. Supreme Court held that a landmark designation which effectively prohibited development in the air space above Grand Central Terminal did not constitute a taking of the property based largely on the finding that the owner was afforded an economically viable use of land considered as a whole. Under the landmark ordinance the owner was allowed to transfer development rights in the air space to other nearby parcels of land. The Supreme Court noted that under the regulatory scheme involved these transfer development rights would tend to mitigate whatever financial burdens were imposed on the owner and for that reason should be considered in analysis of the regulation's impact.[46]

As Just Compensation for Constitutional Taking

The problem of assessing the monetary value of TDRs made available to an owner may arise in connection with both "denial of economically viable use" and "benefit-extraction" taking claims. This issue would directly arise in a case where a taking is found and the argument is made that the TDRs available to the affected owner provide "just compensation" for the taking that has occurred. Presumably in such a case, the monetary value of the TDRs would need to be sufficient to provide the affected owner with a "full and perfect equivalent for the property taken."[47] This

---

[44] See *Penn Central Transportation Co. v. City of New York*, N.41, supra, 366 N.E.2d at 1278. And see on this point *Gardner v. New Jersey Pinelands Com'n*, N.40, supra, 593 A.2d at 261 (rejecting benefit-extraction taking claim). See generally Ziegler, Rathkoph's The Law of Zoning and Planning Ch.6 (1993) (discussing benefit-extraction taking analysis).

[45] 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

[46] 438 U.S. 109 at 137. The Supreme Court stated:

> [T]o the extent appellants have been denied their right to build above the terminal, it is not literally accurate say that they have been denied *all* use of even those preexisting air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development rights program is far from ideal, the New York courts here supportably found that, at least in the case of the terminal, the rights afforded are valuable. While these rights may well have not constituted "just compensation" if a taking had occurred, the rights nevertheless undoubtably mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

[47] See *Penn Central Transportation Co. v. City of New York*, N. 45 supra, 438 U.S. at 152 (Rehnquist J., dissenting)(quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312 326 (1893)).

would seem to logically follow from the U.S. Supreme Court's holding that just compensation must be paid where a regulatory taking is found.[48]

In a case directly on point, *Corrigan v. City of Scottsdale*[49] the Arizona Court of Appeals held that TDRs were not a lawful form of just compensation under that state's constitution which provides that just compensation be "made in money."[50] The court found that a regulatory taking had occurred based on the fact that 80 percent of the owner's 4,800 tract was zoned a Conservation Area in which development was prohibited. The ordinance had been enacted to preserve from development slopes of the McDowell Mountains and TDRs were permitted to be transferred from the Conservation Area to the adjoining part of the owner's tract zoned a Development Area. The court ruled that the largely aesthetic interests supporting the ordinance were not sufficient to justify the severity of the impact on the landowner, depriving him of all developmental uses of that parcel of land in the zoned Conservation Area.[51]

In the case *Fred F. French v. City of New York,*[52] the New York Court of Appeals held a Special Park District zoning classification constitutionally invalid based on the finding that the zoning as applied denied the owner any economically

---

[48] *First English Evangelical Lutheren Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

[49] 149 Ariz. 553, 720 P.2d 528 (App. 1985).

[50] 720 P.2d at 540 citing Ariz. Const. art. 2 Section 17. On appeal to the Arizona Supreme Court., that court held, reversing the Court of Appeals, that monetary damages were recoverable once there had been a judicial declaration that a regulatory taking had occurred. The Arizona Supreme Court's opinion expressly avoided comment on the legality or constitutionality of the TDR scheme involved. *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 720 P.2d 513, 514 N.1 (1986).

[51] The Court of Appeals decision did not apply whole parcel reasonable use taking analysis, but instead relied on the possible exception from this analysis noted in several court decisions where governmental regulation divides contiguous property under single ownership into separate zones with different zoning classifications. See *American Savings and Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir, 1981); *Fifth Avenue Corp. v. Washington County*, 282 Or. 591, 581 P.2d 50 (1978). The U.S. Supreme Court has yet to expressly address the validity of this possible exception from whole parcel reasonable use taking analysis. It should be noted that in both of the above cases cited for this possible exception by the Arizona Court of Appeals the courts actually ruled that the availability of transfer development rights should be considered in determining *the merits* of a regulatory taking claim. See *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App.3d 484, 188 Cal.Rptr. 191, 197-98 (1982) (citing and discussing both of the above cited cases). The Arizona Court of Appeals in its decision provided no explanation for its failure to consider the availability of TDRs in adjudging *the merits* of the regulatory taking claim with respect to the restricted TDR sending site.

[52] 385 N.Y.S.2d 5, 39 N.Y.2d 587, 350 N.E.2d 381 (1976) cert. denied, 429 U.S. 990 (1976).

viable use of the tract.[53] The downzoning involved permitted passive recreational use of the tract but TDRs attributable to the site were permitted on a number of eligible receiving sites. As to whether the value of the available TDRs provided an adequate remedy for the deprivation of all developmental uses of the sending site in question, the court, noting the absence of a TDR bank that would provide the affected owner with just compensation "instantly and in money,"[54] commented as follows:

> It is recognized that the "value" of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put. Thus, the development rights are an essential component of the value of the underlying property because they constitute some of the economic uses to which the property may be put. As such, they are a potentially valuable and even a transferable commodity and may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property.
>
> The problem with this arraignment, as Mr. Justice Waltemade so wisely observed at Special Term, is that it fails to assure preservation of the very real economic value of the development rights as they existed when still attached to the underlying property (77 Misc.2d 199, 201, 352 N.Y.S. 2d 762, 764). By compelling the owner to enter an unpredictable real estate market to find a suitable receiving lot for the rights, or a purchaser who would then share the same interest in using additional development rights, the amendment renders uncertain and thus severely impairs the value of the development rights before they were severed (see Note, The Unconstitutionality of Transferable Development Rights, 84 Yale L.J. 1101, 1110-1111). Hence, when viewed in relation to both the value of the private parks after the amendment and the value of the development rights detached from the private parks,

---

[53] At the time of the court's decision, the affected owner's claim was treated by the New York court as simply a "due process" claim. Today, as a matter of federal constitutional taking jurisprudence, the claim would be considered as a regulatory taking claim necessarily involving the requirement that just compensation be paid, if a regulatory taking is found. See *First English Luthern Church v. County of Los Angeles*, N. 48 supra.

[54] 350 N.E.2d at 388.

the amendment destroyed the economic value of the property.[55]

Taking Claims and the Nollan Nexus Test

The U.S. Supreme Court in 1987 established the *Nollan* nexus test as a constitutional taking standard for development conditions.[56] This standard requires that a condition imposed on waiver of a development restriction be substantially related to the purpose or justification supporting the restriction waived.[57] Questions related to application of this constitutional taking standard may arise in a number of contexts where TDR schemes are utilized in connection with local planning and zoning programs.

The *Nollan* standard was held satisfied in the context of a dedication requirement triggering TDRs in *Gardner v. New Jersey Pinelands Com'n.*[58] There the New Jersey Supreme Court noted:

> The restriction in *Nollan* was in the nature of a classic easement or servitude. By authorizing physical access to the beach, it sought to advance a goal collateral to the underlying governmental purpose of preserving visual access to the beach. Here the underlying regulation limiting residential development on forty acre tracts restricted predominantly to agriculture directly furthers the central purpose of the Act. The required deed restriction is a constituent part of the regulatory scheme, imposing use limitations substantially identical to the underlying regulation; it does not constitute a burden that is unrelated to the essential purposes of the regulatory scheme.[59]

In another case, the *Nollan* nexus standard was held to be satisfied in the context of waiver of the zoning density limit at a receiving site by the use of TDRs at that site. In *Barancik v. County of Marin,*[60] a federal court of appeals, in rejecting the claim, emphasized that the TDR scheme involved did not permit any increase in allowed density in the overall planning area and simply allowed the flexibility of

---

[55] 350 N.E.2d at 387-88.

[56] *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

[57] 107 S.Ct. at 3148.

[58] 125 N.J. 193, 593 A.2d 251 (1991).

[59] 593 A.2d at 259.

[60] 872 F.2d 834 (9th Cir. 1989).

the market to control the density of actual development sites. The court explained:

> Barancik suggests that at lest by analogy the dictum of the Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 at 3148, 97 L.Ed.2d 677 (1987) has application. The Court pointed out that while California could prohibit shouting "FIRE" in a crowded theater, it could not make such a prohibition and then give dispensations to shout to those willing to contribute $100 to the state treasury. Why it asked, is the County's scheme for Transfer Development Rights different? You can get your development rights if you are willing to pay a price for it. The answer is that you are not being given a dispensation from zoning by payment of a fee to the state. You are being permitted to accumulate development rights in the same area by a price paid to the owner of those rights.
>
> In other words, a finite amount of development is "permitted" in the area. The County is rightly indifferent as to who does the development. It lets the market decide the price. A purchase of Transfer Development Rights does not increase the total amount of development possible in the rural corridor. The regulation permitting the accumulation of transfer rights is rationally related to the overall purpose of preserving agriculture in the area.[61]

Courts have yet to apply the *Nollan* test to the sale of municipally owned TDRs attributable to undeveloped or underdeveloped municipally owned tracts or buildings.[62] Also, TDR schemes that effectively involve waiver of zoning restrictions at a receiving site to further purposes (such as historic preservation or environmental protection) unrelated to the public purposes underlying the restriction waived have yet to be considered under the *Nollan* nexus standard. Such TDR schemes could be held to constitute the cash sale of development rights for purposes unrelated to the restriction waived.[63]

---

[61] 872 F.2d at 837.

[62] See cases cited herein at N. 10, supra.

[63] See as an example of such a scheme *Blagden Alley Ass'n v. Zoning Com'n*, 590 A.2d 139 (D.C.App. 1991) (development approval conditioned on off-site amenities apparently without regard to problems or needs generated by development proposal). For other examples of tenuous linkage TDR and incentive bonus schemes see T. Lassar, Carrots and Sticks: New Zoning Downtown 184-89 (1989) (Urban Law Institute). See generally Ziegler, Rathkopf's The Law of Zoning and Planning Ch 6 at § 6.10 [6][d] (1993).