

Transfer of Development Rights

Introduction

Transfers of Development Rights (TDRs) are a financial adaptation strategy used to steer development away from areas deemed unsuitable for intensive development, including coastal areas expected to be impacted by rising seas. TDRs operate via markets where development rights that have been separated from parcels in certain “sending areas” can be bought and sold as credits that can then be used to develop in “receiving areas.” These credits can also be used to increase the development density permissible in a receiving area location. TDRs can help foster coastal adaptation, yet they can also help maintain farmland, protect ecologically sensitive areas, preserve historic districts, promote low income housing, and help achieve other planning and preservation objectives.¹

Establishing a TDR market generally follows several steps. First, a local community establishes the bounds of the “sending” and “receiving” areas.² Next, the underlying zoning restrictions of these sending and receiving areas should be identified and evaluated to determine whether they should be amended to incentivize transfers under the new market.³ Finally, certain calculations should be done to make sure the TDR market functions properly, including determining the TDR allocation rate, the density bonus, and other pertinent values.⁴

Tradeoffs

TDRs offer several advantages for the local communities that implement them. For instance, they offer a market-based approach to foster voluntary retreat from the coastline and other areas over the long term. Further, they provide a flexible and legal way to extinguish development rights for areas deemed unsuitable to develop. This characteristic is likely to become increasingly important

as sea levels rise and as areas available for conservation become scarcer.

TDRs can function in tandem with other coastal adaptation strategies. For example, the “sending” areas can be converted into conservation easements after their development rights have been extinguished. Alternatively, sending areas can be downzoned to less intensive uses to bolster the effectiveness of TDR markets. Another advantage of TDRs is that they are an effective planning tool to preserve open spaces and other uses regardless of who owns particular properties. TDRs also offer another tool to mitigate the effects of development.⁵

Despite these strengths, TDRs also pose some potential drawbacks. One weakness is that TDR programs typically do not prompt retreat for parcels already developed.⁶ TDR programs also require functioning markets with voluntary participants. This requirement has been problematic for some areas where TDR schemes have been developed but ignored by their intended audiences.⁷ Additionally, because these programs are voluntary, achieving intended hazard reduction goals might be a challenge. Further, TDR markets can lead to unintended consequences. For instance, they might foster development in areas that would have remained undeveloped but for the TDR markets. This outcome is problematic if these receiving areas should have remained undeveloped for ecological or other reasons. Accordingly, receiving areas should be chosen only after taking these considerations into account, particularly the future needs and goals of conservation in the areas.

There are also practical barriers to implementing TDR markets. For instance, determining the allocation rate

1 CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 588 (35th 2016).

2 RESOURCES FOR THE FUTURE, TRANSFER OF DEVELOPMENT RIGHTS IN U.S. COMMUNITIES 21 (2007).

3 For instance, downzoning the sending area. *Id.*

4 *Id.*

5 CALIFORNIA COASTAL COMMISSION, STAFF REPORT APPLICATION No. 4-09-037 13 (2010), available at <https://documents.coastal.ca.gov/reports/2011/3/W22c-3-2011.pdf> (requiring mitigation that permanently extinguishes development rights in the Santa Monica Mountains Coastal Zone).

6 Instead, these properties and their existing uses will be “grandfathered” in as nonconforming uses. See BARCLAY & GRAY, *supra* note 1, at 586 (defining nonconforming use).

7 TRANSFER OF DEVELOPMENT RIGHTS IN U.S. COMMUNITIES, *supra* note 2, at 18.

can be a challenge.⁸ Further, TDRs are less flexible than competing zoning tools and are potentially more permanent than those tools.⁹

Legal Considerations

TDR programs are most likely to be challenged on the grounds that they impermissibly take property. But the United States Supreme Court has addressed TDRs in numerous cases.¹⁰ Voluntary TDR programs will have a better chance of evading takings concerns than mandatory programs.¹¹

The base zoning requirements will still apply to sending and receiving areas unless they are amended. Care should be taken that these base zoning requirements do not conflict with the TDR program.

Examples

The California Coastal Commission has used TDR markets to retire antiquated subdivision lots in the coastal zone. Specifically, the Commission has granted coastal development permits in exchange for retiring development rights in the coastal zone portion of the Santa Monica Mountains.¹² Malibu's Local Coastal Program includes procedures for transferring development credits to encourage this process.¹³

There are other proposed and existing TDR programs in California. The Tahoe Regional Planning Agency hosts a TDR exchange on their website.¹⁴ The Nature Conservancy and the Center for the Blue Economy have proposed instituting a tradable credit scheme for coastal protection along California's coastline.¹⁵ Under this program, the sending and receiving areas would both be coastal properties, with the aim of reducing armoring along the coastline.

Researchers

Jesse Reiblich, Early Career Law & Policy Fellow: jesselr@stanford.edu
Eric Hartge, Research Development Manager: ehartge@stanford.edu
Cole Sito, Legal Intern

⁸ *Id.* at 21-22.

⁹ Deed restrictions and conservation easements are generally more permanent than zoning regulations. UNIVERSITY OF FLORIDA CONSERVATION CLINIC, TRANSFERABLE DEVELOPMENT RIGHTS AND DENSITY TRANSFERS 3, available at https://www.law.ufl.edu/_pdf/academics/centers-clinics/clinics/conservation/resources/tdrs.pdf.

¹⁰ *See, e.g.*, Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); *see also* Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997).

¹¹ TRANSFERABLE DEVELOPMENT RIGHTS AND DENSITY TRANSFERS, *supra* note 9, at 3.

¹² CALIFORNIA COASTAL COMMISSION, *supra* note 5.

¹³ CITY OF MALIBU LOCAL COASTAL PROGRAM LAND USE PLAN 80 (2002).

¹⁴ *Transferring Development Rights*, TAHOE REGIONAL PLANNING AGENCY, <http://www.trpa.org/permitting/transfer-development-rights/> (last visited Nov. 2, 2017).

¹⁵ *Coastal Marketplaces*, MIDDLEBURY INSTITUTE OF INTERNATIONAL STUDIES AT MONTEREY, CENTER FOR THE BLUE ECONOMY, <http://centerfortheblueeconomy.org/coastal-adaptation-marketplace> (last visited Nov. 2, 2017).



**Stanford
WOODS**
INSTITUTE for the
ENVIRONMENT



**natural
capital**
PROJECT

This research was completed in collaboration with Stanford Law School and the Natural Capital Project with support by the Stanford Woods Institute for the Environment through the Realizing Environmental Innovation Program.