

*Managing
Maryland's Growth*
Models and Guidelines

Flexible and innovative Zoning Series

**Transferable
Development Rights**

*This document may not reflect current law
and practice and may be inconsistent
with current regulations.*

The Maryland Economic Growth,
Resource Protection, and Planning Act of 1992

The Maryland Office of Planning

The Maryland Office of Planning

State of Maryland

Parris N. Glendening, *Governor*

Maryland Office of Planning

Ronald M. Kreitner, *Director*

January, 1995



MARYLAND *Office of Planning*

This booklet was written and designed by the Local Planning Assistance and Design Units of the Maryland Office of Planning as a service to local governments and planning officials. The principal author is Robert McNamara. Research and materials were prepared by Pat Gouche and Roland English. Graphic design and production by Ruth Powell. Photography by Mark Praetorius. Word processing and other valuable support services by Betsy Zentz.

Additional copies are available from the Maryland Office of Planning, 301 West Preston Street, Baltimore, Maryland 21201-2365. Phone: (410) 225-4550. FAX: (410) 225-4480.

Publication #95-02

*Managing
Maryland's Growth*

**SMART GROWTH
AND NEIGHBORHOOD
CONSERVATION
INITIATIVES**

The Maryland Office of Planning

Models & Guidelines - Mineral Resource Planning
State of Maryland
Parris N. Glendening, *Governor*

Maryland Office of Planning
Ronald M. Kreitner, *Director*

OTHER PUBLICATIONS AVAILABLE

The Maryland Office of Planning's Series Managing Maryland's Growth

Models and Guidelines

Procedures for Review of Local Construction Projects
Review Checklist, Compliance Schedule, Work Program
#02-13

Procedures for State Project Review Under the Planning Act of 1992
#03-02

Preparing a Sensitive Areas Element for the Comprehensive Plan
#03-04

Regulatory Streamlining
#04-02

Achieving "Consistency" Under the Planning Act of 1992
#04-03

Interjurisdictional Coordination
#04-04

Modeling Future Development on the Design Characteristics of
Maryland's Traditional Settlements
#04-05

Clustering for Resource Protection
#04-10

Other Planning Act
of 1992 Resource
Publications

What You Need to Know About the Planning Act of 1992
#02-07

Economic Growth, Resource Protection, and Planning Commission --
A Membership Guide
#03-07

What is Being Done to Manage Maryland's Growth? (**Brochure**)

Publications may be ordered from the Maryland Office of Planning, 301 West Preston Street, Room 1101, Baltimore, Maryland 21201-2365. Cost is \$2.00 each. (*There is no charge for the Brochure.*)

APPENDIX D:
CONVERSION OF TDRs TO
NON-RESIDENTIAL DEVELOPMENT CREDIT

APPEN DIX C:
TRAN SFER IN STRUMENT FOR TDRs

APPENDIX B: BIBLIOGRAPHY

Planning for Transfer of Development Rights: A Handbook for New Jersey Municipalities by Amanda Jones Gottsegen, Burlington County Board of Chosen Freeholders, Mount Holly, N.J. 1992

Putting Transfer of Development Rights to Work in California, by Rick Pruetz, Solano Press Books, Point Arena, CA, 1993

Transferable Development Rights Programs by Richard J. Roddewig and Cheryl A. Ingram, American Planning Association, Chicago, IL, 1987

Report of the Working Group to Evaluate the Agricultural and Rural Open Space Preservation Programs by Norman L. Christeller, Katherine Hart, Carol Henry, Meg Reissett, Philip J. Tierney and Ralph D. Wilson, Montgomery County Government, Rockville, MD, 1988

Maryland Land Use/Land Cover 1990-2020 Forecast, Maryland Office of Planning, September 1992

Maryland's Land 1973-1990: A Changing Resource, Maryland Office of Planning, October 1991

Maryland Agricultural Land Preservation Foundation Annual Report 1993, Maryland Department of Agriculture

APPENDIX A: TDR CONFERENCE PROGRAM

P r o g r a m

8:30 Registration and coffee

9:00 Welcoming remarks -

Neal Potter, *Montgomery County Executive*
and Ronald M. Kreitner, *Director, Maryland Office of Planning*

9:10 Keynote Speech - TDRs The Next Generation

Speaker: Susan E. Craft, *Director of Planning, Burlington County, New Jersey*

9:45 Panel Discussion - TDRs Where We Are and How We Got There

Moderator: Jack Miller, *Maryland Economic Growth, Resource Protection and Planning Commission*

- Robert Marriott, *Planning Director, Montgomery County*
- Donald Applegate, *Deputy Director, New Jersey Department of Agriculture*
- Steven Kaii-Ziegler, *Planning Director, Queen Anne's County*

10:45 Coffee Break

11:00 Panel Discussion - When to Use TDRs Necessary Conditions and Components of the TDR Process

Moderator: John Colvin, *Maryland Economic Growth, Resource Protection and Planning Commission*

- Richard Hutchison, *farmer, Talbot County*
- Ed Thompson, *American Farmland Trust*
- Bill Hussmann, *Chairman, Montgomery County Planning Board*
- Robert Mitchell, *developer, C-I Mitchell and Best Company*

12:15 Box lunch and bus tour of sending and receiving areas narrated by Montgomery County staff

2:00 Briefing - TDRs Legal Implications

Speaker: Philip Tierney, *attorney for Montgomery County*

2:30 Workshop - Designing the Next Generation of TDRs

Four groups working with facilitators will discuss *TDRs and the Visions, Interjurisdictional Issues and Leveraging TDRs*

3:30 Report of workgroups and Concluding Remarks

Florence Beck Kurlle, *Chairman, Maryland Economic Growth, Resource Protection and Planning Commission*

4:00 Adjournment

TDRs

Continuing Role for PDR

where some jurisdictions are net importers of TDRs and some are net exporters. Politically, large imbalances cannot be tolerated indefinitely so some mechanism for balancing interjurisdictional flows of TDRs would have to be devised.

MALPF would continue to operate PDR programs in counties that had not yet established TDR programs. Counties, for their own reasons, might operate local PDR programs alone or in tandem with TDR programs. However, the establishment of a local or statewide market for transferable development rights may have effect on the PDR program. This is because the market mechanisms that set the price for TDRs (linked to receiving area conditions) are different from those affecting the price of PDRs. This may necessitate a reexamination of the appraisal and selection criteria of PDR programs.

PDRs will continue to play a role because in some cases they are able to achieve public policy objectives better than purely market-driven TDRs. For example, in order to protect a farm with particularly valuable soils, it may be justifiable on public policy grounds to pay a higher price than the prevailing rate for TDRs. Also, PDR selection criteria, such as the USDA Soil Conservation Service's LESA (Land Evaluation and Site Assessment) System, make it easier to guide the pattern of purchase of easements in specific ways to fulfill public objectives. In the TDR system the only criteria governing the timing and location of easement acquisition are that the parcel is in a sending area and that buyer and seller have reached agreement. Whatever criteria are used to guide either State or local PDR programs, these criteria should be consistent with the visions of the Planning Act.

State TDR Bank and the 1992 Planning Act

open rights a TDR bank has the potential to significantly streamline the administration of the local TDR program. In fact, the bulk of the administration of TDR programs could be contracted out to the bank.

A TDR bank would have the ability to overcome one of the greatest handicaps of the current MALPF PDR system - the shortage of funds for easement purchase during economic downturns. Using all available funding the bank would first accumulate a portfolio of TDRs. Then the bank would synchronize its policy to the economic cycle, selling more TDRs than it purchased during periods of economic expansion (when TDR prices peak) and purchasing more than it sold during periods of economic contraction (when TDR prices drop). Thus might the State optimize its easement purchases to preserve the most land with the available funds.

The policies of a State TDR Bank would be required under the 1992 Planning Act to be consistent with the State's growth policy as embodied in the seven "visions." This means that its operations should support local TDR programs only if those programs themselves are consistent with the visions. For example, if a local TDR program does not establish distinct receiving areas so that development is concentrated in areas suitable for growth, then the TDR program is not consistent with the Planning Act and would not receive support from the State. The State TDR Bank might establish minimum criteria that local TDR programs should satisfy before they receive its support. In this way the bank could offer an incentive for local jurisdictions to implement effective and consistent (with the Planning Act) TDR programs.

Expanding the Market for TDRs

A statewide TDR bank has the potential to broaden the market for TDRs and thus increase transfer activity statewide. Suppose that the TDRs purchased by the bank in one jurisdiction could be sold and used in receiving areas in another jurisdiction, or in any other jurisdiction in the State. A large pool of potential sellers and customers for TDRs could make the market more efficient and stimulate more transfers with the result that farmland is preserved at a faster rate. Another result would be that regional differences in the price of TDRs would tend to diminish.

It must be understood, however, that it is the receiving areas that are the source of demand for TDRs. Therefore, receiving areas structured to provide the best economic return on investment in TDRs will attract the greatest number of TDRs. Differences among jurisdictions with regard to receiving areas and development pressures could lead to imbalances

From PDR to TDR

Currently the State purchases development rights of agricultural lands under the Maryland Agricultural Land Preservation Foundation (MALPF) PDR program. After purchasing these rights the State makes no further use of them, nor is any future use of the rights contemplated under this program. Funding for the MALPF program comes from the transfer tax levied when agricultural land is sold. Ironically, the State's agricultural preservation program is directly linked to the development of the very land it is charged to preserve due to its dependence on the transfer tax. Furthermore, because of this linkage, the rate of preservation will always lag behind the rate of development of farmland. An additional irony is that during periods of economic downturn, when development rights might be purchased at a lower price, the State is unable to do so because transfer tax revenues fall off during such periods.

Other sources of funding for easement purchase might be developed so that the linkage of farm preservation to suburban sprawl can be broken. Instead of buying development rights and sitting on them, the State could resell them as TDRs to raise money to buy more development rights. A reliable source of funding could allow the State to continue to purchase easements during periods when the easement market is a "buyer's market."

MALPF: PDR & TDR

The existing MALPF PDR program could provide the core around which an effective statewide TDR bank might be constructed. First, legislation would be required which will enable MALPF to treat the PDRs it acquires as marketable commodities, i.e. TDRs. *In counties with an adopted TDR program*, MALPF would be authorized to resell PDRs purchased in a county as TDRs to be used in receiving areas in the same county. Proceeds from the sale may be used by MALPF to purchase additional development rights. MALPF would continue to receive agricultural transfer tax revenues.

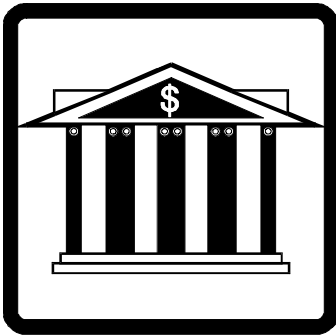
The MALPF in the role of a State TDR bank could receive a one-time capital infusion from the State to form a revolving fund which is drawn down when TDRs are purchased and replenished when TDRs are sold. Since the State TDR bank would operate only in counties with a TDR program, these counties should help fund the bank and be entitled to representation on the governing body of the bank. Local county PDR programs could be merged with the TDR bank in a sort of State/Local consortium. Participation of local governments in the bank would be at their option but the State TDR bank would not operate in a non-participating jurisdiction. By acting as an intermediary in the transfer of devel-

CHAPTER SEVEN :

A NEW APPROACH TO AGRICULTURAL PRESERVATION PROGRAMS IN MARYLAND

As discussed in Chapter Three, Maryland has made modest progress preserving its agricultural land. In fact, the continuance of a strong rural economy in the State is far from assured. Therefore, it is appropriate to consider alternatives to the present preservation programs. Up to now this booklet has focused on actions that local governments could take to institute or improve TDR programs. At this point the focus will shift to actions that the State of Maryland might undertake to enhance farmland preservation and support local TDR programs.

A State PDR/TDR Bank



TDR banks have been established in New Jersey, California and elsewhere. A TDR bank was set up in Montgomery County, Maryland but was not needed because Montgomery's TDR program was so successful. A TDR bank is an institution empowered to purchase TDRs, hold them and resell them. A TDR bank might also loan money using TDRs as collateral. Some of the purposes of a TDR bank that have been mentioned are:

- To intervene in the market to support the price of TDRs in order to lend credibility to the notion of TDRs as compensation for downzoning.
- To stabilize fluctuations in the price of TDRs
- To invigorate local TDR programs by bolstering demand.
- To be a central brokerage for the sale and purchase of TDRs, a source of information about TDR programs, and to promote TDRs
- To mitigate certain hardships faced by rural land owners
- To provide a source of credit to farmers using TDRs as collateral.

A TDR bank is not intended to replace a private market in TDRs but to complement it. A TDR bank can remove some of the doubts that may exist about the value of TDRs and can simplify transaction procedures for buyers and sellers. A TDR bank normally operates under the auspices of government but could be a private enterprise, a joint public/private partnership or an independent non-profit undertaking.

2. The Department of Planning and Zoning shall review the application for conformity to these regulations and shall provide written approval to the applicant to increase the number of dwelling units in the development by the number of development rights proposed for transfer to the property.
3. The Final Record Plat for a subdivision or approved site development plan shall contain a statement setting forth the number of transferable development rights used to qualify for bonus density and the recordation reference of the conveyance required by Section 130B2.



Pristine farm in Alleghany County

1. The legal title holder of property in a sending area may apply to the Department of Planning and Zoning for certification of ownership of transferable development rights. The application shall contain:
 - a. the exact name and address of the legal title holder and a reference to the liber and folio of the Land Records of _____ at which the deed conveying the property to the applicant is recorded.
 - b. a metes and bounds description of the property, a copy of the deed or survey showing the acreage of the property upon which the number of transferable development rights will be calculated.
 - c. the number of development rights proposed to be certified.
 - d. an easement, in a recordable form approved by the Department of Planning and Zoning and conveyed to the Commissioners [or Mayor and Council] of _____, restricting and reducing future subdivision for residential purpose and construction of dwelling on the property by an amount equal to the number of transferable development rights to be certified.
2. After review of the application for conformity to these regulations, the Department of Planning and Zoning will record the easement in the Land Records of _____ and issue to the applicant a certificate of ownership of transferable development rights. The certificate may be sold and a new certificate issued in the name of the new owner.

C. Transfer of Rights to Receiving Area

1. The legal title holder, tenant under a lease having a term of not less than 75 years, or contract purchaser of property in a receiving area, at the time of application for subdivision or site development plan approval, may apply to the Department of Planning and Zoning for approval to use the bonus density provisions of these regulations. The application shall contain:
 - a. the exact name and address of the legal title holder of the property and, if the applicant is not the legal title holder, the written assent to the application signed by the legal title holder.
 - b. the number of development rights proposed to be transferred to the receiving property.
 - c. a sketch plan of the property approved by the Planning Commission for use of bonus density.
 - d. a certificate of ownership of transferable development rights issued to the applicant documenting ownership of at least as many development rights as proposed to be transferred to the receiving property.

- d. the highway plans of the municipality, county and State; and
- e. compatibility of the development with surrounding land uses

After carefully considering the above, the Planning Commission shall approve, approve with modifications and conditions attached, or disapprove the sketch plan stating the reasons for its action.

SECTION 130

TRANSFER OF DEVELOPMENT RIGHTS

A. Eligibility

1. Development rights may be severed from land within a sending area and transferred to land within a receiving area for transferable development rights according to procedure established in these regulations. As it applies here, a sending area is:
 - a. any property within the RSA District with development rights available for transfer, or
 - b. land surrounding a structure listed on the inventory of historic sites of _____ in any zoning district except the RSA District provided that:
 - (1) such land is under the same ownership as the historic structure;
 - (2) no more than fifteen acres adjoining any historic structure shall qualify as a sending area; and
 - (3) development rights shall be assigned as follows

<u>acreage</u>	<u>development rights</u>
15 or more acres	3
≥10 but <15 acres	2
less than 10 acres	1

2. Receiving areas for transferable development rights are those areas within the RRA District which are eligible for bonus density.

B. Certification of Transferable Development Rights

d. units per structure [omitted]

2. The following minimum requirements shall be observed:

a. lot size [omitted]

b. lot width to building restriction line [omitted]

c. building setbacks [omitted]

d. distances between buildings other than single-family detached units [omitted]

e. open space including landscaped areas [omitted]

E. Bonus Density

1. Eligibility - properties within the RRA District are eligible to receive bonus density under the regulations provided that public facilities are adequate to serve the development and that all other requirements of this subsection are met.

2. Maximum density permitted - Density may be increased under this subsection up to limits determined for each parcel according to the land use designation of the parcel on the Comprehensive Plan as follows

<u>Comprehensive Plan designation</u>	<u>Maximum Density Permitted</u>
low density	4 units per acre
medium density	8 units per acre
high density	16 units per acre

3. Density may be increased up to the maximum established in Section 12OE. 2. provided that for every additional dwelling unit (bonus unit) awarded under this provision a development right is transferred to the project, pursuant to procedures of Section 130 of these regulations

4. No subdivision plans or site plans for any project involving bonus density will be approved until a sketch plan of the project has been approved by the Planning Commission. The Planning Commission, before acting on the sketch plan, shall give consideration to the following:

a. the Comprehensive Plan for _____;

b. the proposed density of the development;

c. the adequacy of public facilities in the area including, but not limited to, water and sewerage facilities, road and schools;

-
2. Land which is encumbered with easements which entirely restrict the development of the property for residential use and land in public ownership shall not be eligible for transfer of development rights

SECTION 12O

RESIDENTIAL RECEIVING AREA (RRA) DISTRICT

A. Purpose

The purpose of the residential receiving area district is to help implement the goals of the Comprehensive Plan by providing suitable areas where development may be concentrated. To avoid suburban sprawl and preserve agricultural land, this district is intended to provide a preferred location for growth, that might otherwise take place in rural areas, via a transfer of development rights from the RSA District.

B. Uses permitted as a matter of right

1. One single-family detached dwelling unit per lot
2. Single-family attached dwelling units
3. Duplexes
4. Apartments
5. Farming.
6. Government buildings, facilities and uses including public schools and colleges

C. Accessory uses [see regulations for residential districts in any zoning ordinance]

D. Development standards

1. The following maximum limitations shall apply:
 - a. height [omitted]
 - b. lot coverage [omitted]
 - c. density (except as provided in Section 12OE of these regulations for bonus density) 2 units per acre

D. Development standards

1. The following maximum limitations shall apply:
 - a. height [omitted]
 - b. lot coverage [omitted]
 - c. density - overall for residential subdivisions..... 1 unit per 50 acres
2. The following minimum requirements shall be observed:
 - a. lot size 50 acres
 - b. lot width at building restriction line [omitted]
 - c. building setbacks [omitted]

3. Cluster option

For subdivisions for which a cluster sketch plan has been submitted to the Planning Commission for approval, the following less restrictive minimum standards shall apply in lieu of Section 110D.2. a. and b.:

- a. lot size 1 acre
- b. lot width at building restriction line [omitted]

In a cluster subdivision, land not used for residential lots, rights-of-way, or storm water management facilities and not required to be dedicated to the County or State under the provisions of the Subdivision Regulations, shall be placed under a permanent easement restricting its use to agriculture or open space use.

E. Transfer of development rights

1. If development rights are transferred from the RSA District pursuant to Section 130 of these regulations, or if development rights are sold from the RSA District pursuant to a applicable County or State programs for the acquisition of development rights, then the number of development rights eligible for such transfer or sale shall be calculated at the rate of one development right per five gross acres [or a figure corresponding to the density under the prior zoning], minus one development right for each existing dwelling unit and minus the number of development rights previously transferred or sold.

CHAPTER SIX: MODEL ZONING REGULATIONS FOR TRANSFER OF DEVELOPMENT RIGHTS

The model regulations that follow are written for a non-charter county in Maryland. Numerical standards used in the model are for illustration purposes only and some of those not directly related to the TDR concept are omitted.

SECTION 100

DEFINITIONS

Bonus Density: The right to develop property at a higher density/intensity than normally permitted, through compliance with optional procedure established in these regulations

Receiving Area: Any zoning district where optional procedures have been established for additional bonus density through transfer of development rights

Sending Area: Any zoning district where, according to the procedures of Section 13Q owners of property are eligible to obtain certification of ownership of transferable development rights and to transfer such ownership.

Transferable Development Right: The right to create a residential building lot or construct a dwelling unit, which right may be severed from a property in the sending area and transferred to a property in the receiving area in the form of bonus density according to procedure established in these regulations

SECTION 110

RURAL SENDING AREA (RSA) DISTRICT

A. Purpose

The purpose of the RSA district is to preserve agriculture as the preferred land use in the rural area of the County; to protect agricultural land and environmentally sensitive lands from suburban encroachment; to encourage the establishment of rural green belts surrounding municipalities and to help implement the Comprehensive Plan goal of directing growth to existing population centers in rural areas

B. Uses permitted as a matter of right

1. One single-family detached dwelling unit per lot
2. Farming.
3. Agricultural research conducted by college or universities, including their laboratories and related supporting and recreational facilities

C. Accessory uses [see any zoning ordinance with "rural" district regulations]

Guidelines for Drafting Zoning Maps to Implement TDRs Sending Areas

The resource to be protected (e.g., farmland, sensitive natural areas) will have been described and inventoried in an earlier step. This information will now be transferred to the jurisdiction's zoning maps at the appropriate scale and a new zoning district created. Zoning maps are usually drawn on a tax map base because of the relationship of zoning district boundaries to property lines. The boundaries of the sending area zone should follow or be located in a precise relationship to property lines, right-of-way lines or physical features such as the centerlines of water courses. Boundaries defined in relationship to slopes, soils, fences or forest edges and arbitrary lines are less useful for zoning purposes.

Whether to include developed land and subdivided but not yet developed properties in the sending area zone is a question that may come up. Developed properties with additional development capacity (houses on very large lots) should be included and given the opportunity to transfer the remaining development rights. If "paper" subdivisions are included, the downzoning will result in the creation of non-conforming lots. These lots may need variances in order to obtain building permits. This fact might lead the owners of paper subdivisions to transfer development rights instead of attempting to market non-conforming lots.

Receiving Areas



Many of the general comments about drawing zoning boundaries for the sending area zone also apply to the receiving area zone(s). The comprehensive plan will provide a guide as to the location of the receiving areas. Enough land should be included in receiving areas to absorb all the TDRs capable of being produced by the sending areas. The more land put into receiving areas the more demand there will be for TDRs and the more effective the program will be. Undeveloped land with existing public facilities would be the first choice for receiving areas but some developed sites such as sand and gravel pits, junk yards, rail yards and storage yards might also be candidates.

Commercial and Industrial Receiving Areas

Development Standards A base density for development without TDRs should be specified. It should be the lowest density consistent with the comprehensive plan. The higher the base density, the less incentive there is to use TDRs

Bonus Density Provision: To be eligible to obtain bonus density developers must show that they have purchased sufficient TDRs to qualify for the proposed density and that public facilities are adequate or are planned to be adequate for the proposed development. Generally, one TDR should be purchased for each bonus unit granted, above those permitted as a matter of right in the district, or some other ratio may be specified. The maximum density obtainable with TDRs should be stated and this can be tied to the comprehensive plan. For example, "the maximum density permitted under these regulations shall not exceed 4 units per acre for development in areas designated 'low density residential' on the comprehensive plan, 8 units per acre in areas designated 'medium density residential,'..." and so on. For commercial and industrial districts, the additional height, lot coverage, or floor area ratio granted per TDR should be specified.

This section may provide for the Planning Commission to review concept or sketch plans for projects involving TDRs. If so, specific criteria for the Planning Commission to consider during its review should be listed.

The use of TDRs to increase development intensity need not be limited to residential receiving areas. Another way of handling TDRs is to treat them as generic development rights which may be used to increase not only residential development potential but commercial and industrial development potential as well. In designated commercial and industrial receiving areas, TDRs may be converted to additional permitted floor area. Appendix D illustrates how Chesterfield Township, New Jersey has proposed to translate TDRs into specific amounts of commercial and industrial square footage. In Maryland, Ocean City allows TDRs to be used to obtain approval to build additional hotel and motel units. Queen Anne's County grants an additional 200 square feet of floor area and 500 square feet of impervious surface for each TDR transferred to a non-residential parcel. This booklet does not suggest any specific conversion rate between TDRs and non-residential floor area because this will vary according to local economic conditions.

Permitted Uses The list of permitted uses would include farming, single-family detached dwellings and other uses consistent with resource protection at low densities

Development Standards The sending area should have a low density or large minimum lot size for residential development. Densities in the range of one unit per 20 to one per 50 acres should positively affect the preservation of farm land and protection of sensitive environmental areas

Cluster Option: In lieu of a large minimum lot size requirement that consumes an excessive amount of land for residential development, the regulations should provide the option (or requirement) that the unit yield of a parcel be clustered onto smaller, contiguous lots with the remainder dedicated to agricultural or open space use.

Calculation of TDR Credits As mentioned earlier, a simple, inexpensive method of calculating TDR credits will provide an incentive for property owners to use the program. One method would be to multiply the surveyed acreage of the area proposed to be placed under restrictive easement by the density in effect under the previous zoning. Or a multiplier could be developed based on the actual densities achieved by subdivisions approved under the previous zoning. The number of existing dwelling units on the property would be subtracted from the number of TDR credits. Land under M ALPF, M ET or other easement programs would not be eligible as a basis for calculating TDR credits

Receiving Area Regulations

There may be one or more different zoning districts established as receiving areas. For example, if the comprehensive plan breaks down residential growth areas into low, medium and high density, then three residential receiving zones may be appropriate. Alternatively, within a single residential receiving zone, the maximum density can be tied to the comprehensive plan. In addition, if TDRs are to be converted to additional commercial and industrial space, then the commercial and industrial zoning regulations will require amendments

Receiving area regulations should take into consideration the following:

Purpose Clause: This will describe the public purpose achieved by concentrating growth in the receiving areas

Permitted Uses Depending on the maximum permitted density (with TDRs), attached units and apartments may be permitted in addition to detached units

purposes of the TDR program with which they will compete. The traditional means of obtaining higher density, filing a rezoning case, will always be available but it is expensive, time-consuming and results are uncertain.

Geographic Restrictions These restrictions stem from a desire to assure that no single election district or other political division becomes the target for growth transferred from other districts. But the comprehensive plan for the community should indicate the appropriate growth areas and these may not be equally apportioned among political subdivisions. It may be necessary to include geographic restrictions to make TDRs politically palatable but these restrictions will make it more difficult to achieve the program's growth management objectives.

One geographic restriction that is practically universal is that TDRs do not cross jurisdictional boundaries. But counties and municipalities in Maryland might consider relaxing this restriction in limited cases where inter-jurisdictional transfers might serve the interests of both parties. For example, a city or town might agree to receive TDRs from the surrounding county if the sending area became a preserved greenbelt surrounding the municipality.

Removing Easements Property owners who have recorded restrictive easements but have not yet sold the TDRs may, because of hardship or other reason, wish to give up the TDRs and remove the restrictions on their property. A local government should have a policy about how such requests are handled. One of the purposes of a TDR bank is to buy TDRs in hardship cases. Funds from a local PDR program might be used to buy TDRs in certain circumstances. As a last resort the local government may agree to the removal of the easement but such cases should be rare. Allowing properties to move in and out of protected status easily is not helpful to program objectives.

Sending Area Regulations

Unless the proposed sending area has an exact correspondence with the geographic limit of some existing zoning district, entirely new sending area district regulations need to be drafted. In any event, the sending area regulations should include the following features:

Purpose Clause: This is a statement of legislative intent in creating the TDR sending area. It should describe the resource to be protected and the public purpose to be achieved by doing so. This paragraph should be drafted carefully because it will be scrutinized by the courts in the event the TDR program is legally challenged.

Other procedural issues are:

- Should there be a public hearing before approval of development projects involving TDRs?
- To what degree should other bonus density programs co-exist in the regulations along with TDRs?
- Should the geographic mobility of TDRs be limited (for example, should development rights be transferred only between sending and receiving areas in the same election district)?
- Should a property owner who obtains a certificate of TDR ownership by recording an easement, but has difficulty selling the TDRs, be permitted to surrender the certificate and remove the easement? If so, under what conditions?

To optimize the effectiveness of the TDR program the questions above should be carefully considered in light of other community objectives

Public Hearing: The public will have a chance to voice its opinions about increased density in receiving areas during the comprehensive plan approval process, in which receiving areas are designated, and again during the process for adoption of the zoning amendments implementing the TDR program. However, a third public hearing for each project involving TDRs would add a measure of uncertainty, risk and delay that would discourage use of the program. Developers may not choose to buy TDRs and design projects using them if they risk having their plans disapproved by public boards swayed by the local opposition to density increases that always arise when such increases are proposed. On the other hand, a purely administrative approval process might overlook some facts relating to the unique situation of a particular parcel. A compromise solution might be to have the planning commission look at the plan at an early stage (sketch or concept plan) and, if necessary, suggest ways to mitigate the effects of increased density as they apply to the particular project under review.

Bonus Density: If the zoning ordinance provides many alternative means of obtaining higher density then there will be less incentive to use the TDR program. Some examples of these alternatives are moderately priced dwelling unit programs, some PUD options and some floating zones. These programs serve useful purposes which must be balanced against the

Procedures for Transfer of Development Rights

Even at the risk of duplicating other sections of the regulations, it is helpful to devote one section of the zoning ordinance to TDRs and in it describe the entire process of the transfer. Some zoning ordinances scatter the TDR regulations in different sections and this makes it difficult for the unfamiliar reader to grasp the whole picture. This section should establish the eligibility of properties to be sending or receiving areas by referencing particular zones. But historic structures, which may be located in any zone, can also be identified as eligible sending areas in this section. This section should establish who is eligible to transfer rights to another property (for example, holders of long term leases and contract purchasers as well as legal title holders may be eligible to transfer rights). This section should specify the plans and documents that must be submitted to planning authorities for approval of a transfer.



The steps in the approval process for transfer of rights must be spelled out. How the recordation of the permanent development restriction on the sending parcel is linked to the approval of bonus density on the receiving parcel must be considered. The procedure could require the simultaneous (or nearly simultaneous) execution of the two actions. This approach is cumbersome and would involve escrows and complicated contingencies. A more flexible approach would be to use an intermediate instrument of transfer. Owners of property in the sending area could obtain transferable certificates of ownership of TDRs from local government authorities by recording restrictive easements on their property. These certificates are sold to property owners in the receiving area who use them to obtain permission to increase density. See Appendix C for an example certificate form.

An advantage of intermediate instruments of transfer is that the sales of the TDRs do not have to be contingent on the approval and recordation of a final subdivision plat using density credits. Likewise the approval of the same subdivision plat is not delayed pending recordation of restrictive easements on the sending parcel. TDRs do not come into existence until the restrictive easements are recorded. Once that is done and the certificate of ownership is issued, the TDRs can be freely traded. If sold to a developer, the seller may receive payment without delay because the sale is not dependent on the fate of the development project. When the developer has his TDR certificate in hand, the approval process can move forward without any further transaction involving the sending parcel. Owners of TDR certificates may hold them as investments, sell them to developers, to TDR banks or other parties, will them to their heirs or offer them as security for loans.

- the mechanism of approval for projects involving TDRs
- the location of proposed receiving areas and the status of public facility planning for them ;
- the types of dwelling units permitted in the receiving zones as well as height, setback, coverage and other requirements
- the rate at which TDRs can be converted to additional density (will one TDR add one more unit to the project or some fraction or multiple thereof?)
- whether TDRs will be convertible to additional commercial square footage or industrial floor area ratio.

The purpose of finding out the value of TDRs to developers is not so that the program can be fine-tuned to exactly match the sales price expectations of sellers in the sending area. The purpose is to see if the TDR program will generate sufficient demand to stimulate significant transfer activity. Ultimately, the price paid for TDRs will be determined through the negotiations of buyers and sellers in the private marketplace.

Guidelines for Drafting the TDR Regulations

Maryland jurisdictions that have adopted TDRs have placed the TDR regulations in the zoning ordinance. There is no requirement that they be made part of the zoning ordinance but it is a logical place to put them. Sections of the zoning ordinance that will be added or amended are: definitions, procedures for transfer of development rights, sending zone regulations, receiving zone regulations and bonus density regulations. The discussion which follows is a narrative description of the TDR regulations. Model or example regulations are offered in Chapter Six of this booklet.

Definitions

If the TDR program will introduce terms of art or terms whose intended meaning is different from the commonly understood meaning, then these terms should be defined. Some new definitions that might be added to the zoning regulations include: transfer of development rights, bonus density, sending area and receiving area.

resource base of 100,000 acres. Suppose the zoning requires a 4-acre minimum lot size and this is downzoned to a density of 1 unit per 50 acres. The number of TDRs that could be generated is $100,000/4$ or 25,000. The maximum number of subdivision lots would be something less than $100,000/50$ or 2,000. The ratio of TDRs to subdivision lots is 12.5:1, which strongly encourages TDRs.

In the example above, the receiving area will have to be able to accommodate 25,000 additional development rights. But it is not likely that this number will come on the market at once and some may never be used. In addition, some development rights might be bought up through purchase of development rights (PDR) program and simply retired.

If TDRs are to be considered equitable compensation for downzoning, then on a given parcel the total market value of the TDRs should be comparable to the price that would be offered for the parcel (prior to downzoning) for development purposes, less its value for agricultural purposes. Analysis of the real estate market in the sending area should produce a general idea of what would be a "fair" price for a TDR. Whether anyone will be willing to pay this price for a TDR, however, has less to do with market conditions in the sending area than the economics of land development in the receiving area. From the TDR buyer's point of view, the marginal revenue generated by increasing density in the receiving area must exceed the marginal cost of acquiring the right to increase density through TDRs. Therefore, prevailing economic and regulatory conditions in the receiving area are the key to the success or failure of the TDR program.

The receiving area is the engine that drives the TDR program. Unless TDRs add value to the bottom line of development projects in the receiving area then there will be no demand for them. If there is no demand there will be no transfers from the sending area and no easements recorded to permanently protect the resource. A properly designed receiving area, however, can harness the energy of the private real estate market and use it to invigorate the TDR program. To determine the price that developers would be willing to pay for TDRs it is best to ask developers themselves. But before they could answer they would have to know details about how the receiving area would be structured. Some details that would have to be known are:

- the base density of zones in the receiving area and maximum density that could be obtained through TDRs
- the terms of other density bonus programs that would be available;

Extent of Downsizing

Earlier, this booklet asserted that a one unit per 20 acre density would make conventional subdivision development uneconomical. While generally true, this may not hold for all areas, for all time. The most restrictive rural zones in the State have maximum densities of one unit per 50 acres (Baltimore and Frederick Counties). It is recommended that the sending area be downzoned to a density in the range of one unit per 20 to one unit per 50 acres.

Compensation of Property Owner

If the downzoning is for a valid public purpose and the property owner is left with a reasonable use of his property then no compensation is *legally* required, although it will most certainly be *politically* required. Development rights for transfer should be roughly equivalent to the number of subdivision lots a parcel would have produced under the regulations in force before the downzoning. Unfortunately, there is no fast or inexpensive way to calculate this number. Each parcel is unique in terms of shape, road frontage, slopes, soils and flood plains. Short of hiring an engineer and preparing a final subdivision plat there is no way to know how many lots could have been produced. A sophisticated GIS may be able to estimate the number but it is doubtful that many local governing bodies are ready to give GIS analysis the effect of law. Property owners might not have great faith in machine-generated numbers when large sums of money are at stake. For the sake of simplicity and political acceptance it may be best to devise a simple formula that errs to the benefit of property owners. For example, if a 4 acre minimum lot size was in force before downzoning, then simply divide the surveyed acreage of the parcel by 4 and drop the decimal. The resulting whole number is the number of TDRs available for transfer. Such formulas should more than equitably compensate property owners provided there is a ready market for their TDRs (more about that later).

Incentive for Transfer

To encourage use of TDRs as opposed to development on the site, the number of TDRs credited to a parcel should exceed the number of lots obtainable through subdivision. If the property is downzoned, but the number of TDRs is calculated on the basis of the prior (more intense) zoning, then this condition should obtain. But if the downzoning has not been dramatic, then the difference in the two numbers may not weigh very heavily in favor of TDRs. It is recommended that the number of TDRs should exceed the number of potential subdivision lots by a ratio of 5 to 1.

Returning to the problem of calculating the number of TDRs generated throughout the sending area, consider the example of a county with a

Background Analysis

an incorporated area, may indicate the limits up to which a municipality plans to annex. In any case, its general purpose is to differentiate areas where growth should be supported from areas where growth and public infrastructure investment should be discouraged. Zoning and capital improvement programs may be used to implement the policies represented by the urban growth boundary. TDRs may also support urban growth boundaries if the area inside the boundary is designated a receiving area and the area beyond is made a sending area. Even if a comprehensive plan does not explicitly delineate urban growth boundaries, a TDR program may direct growth away from areas where the plan indicates that growth is not appropriate, and direct it to the areas where the plan says that growth is appropriate.

Before a TDR proposal takes shape some preliminary collection of data and analysis should be done. Fortunately, this preliminary work will most likely already have been done during the preparation of the comprehensive plan. If a long time has transpired since adoption of the comprehensive plan, then information will have to be updated.

The comprehensive plan goals may include preservation or protection of resources such as farm land, historic structures, steep slopes, stream buffers, flood plains, wetland and endangered species habitat. Some of these may already be protected by State or local regulations. For example, steep slopes, stream buffers, flood plains and wetlands, because they should not be built on, are usually set aside as non-buildable areas during the subdivision process. But farm land, historic structures and endangered species habitat are not usually protected from development (unless federal funds are involved) so they are natural candidates for TDR sending areas. The resource to be protected should be inventoried in terms of quantity (acres, numbers) and geographic location. A fairly high degree of geographic precision may be necessary if the resource will later be depicted on a zoning map. Here the application of GIS technology may prove helpful.

Having inventoried the resource to be protected, the next step is to estimate the number of development rights that will be generated. This will depend on the extent to which the sending area will be downzoned, the extent to which property owners will be compensated (through TDRs) for loss of development potential and the strength of the incentive that will be offered to use the TDR option over the option to develop on site. Let us consider each issue in turn.

CHAPTER FIVE: HOW TO PREPARE A LOCAL TDR ORDINANCE

What Kind of TDR Ordinance?

From the previous discussion it is clear that there are a variety of ways a TDR program can be designed. Options range among mandatory and voluntary programs, exclusive and non-exclusive sending areas, strong incentives for transfer and weak incentives, severe downzoning or no downzoning. One need look no further than the State of Maryland to find examples of great diversity in TDR schemes. But if one is serious about implementing the comprehensive plan, achieving the visions of the 1992 Planning Act and preserving our quality of life, then only one type of TDR program is worth considering -- a program as vigorous, strong and effective as can be imagined. Nothing less will stem the advancing tide of urban sprawl that is swallowing up farm land, polluting the Bay and paving over forest and field. Half measures will not work. Therefore, the models and guidelines offered here are not a watered down least common denominator approach. Rather, they are aimed at one objective: effectiveness.

TDRs and the Comprehensive Plan

TDR programs do not exist in a vacuum and they do not stand alone. They are merely tools used to help implement a community's land development and land preservation policies. Until land use policies are developed and adopted as part of a community's comprehensive plan it makes no sense to put TDR programs in place.

Recently adopted or revised comprehensive plans and plans currently under preparation should contain a sensitive area element and should address the seven visions of the 1992 Planning Act. Therefore, even if agricultural preservation is not an appropriate community goal (for an urban jurisdiction, for example), there is a role for TDRs in protecting sensitive natural resources and historic properties, as well as in directing growth to suitable areas.

The comprehensive plans of some municipalities address community character. They may wish to reinforce their identities and distinct communities by creating a sharp transition at their borders from a rural landscape to a more dense town or cityscape. This could be accomplished by establishing a greenbelt area in the surrounding county, providing the county is amenable. An interjurisdictional TDR program could be set up to transfer rights from the greenbelt in the county to receiving areas in the municipality. Although the municipality would be accepting growth that is not "its own," it none the less would enjoy the benefits of a rural greenbelt at its doorstep.

The comprehensive plans of some counties and municipalities delineate an urban growth boundary (also referred to as a municipal expansion limits or urban/rural demarcation line). This boundary, if drawn around

Fig. 7. TDR sending and receiving areas can be established near cities and towns to provide areas for municipal expansion and preserve permanent open spaces nearby. The greenbelt sending area in this illustration helps to preserve and enhance community character and protect the Town's sense of place.

- Likewise, for a developer, purchase of TDRs should be the most attractive option for increasing density. Other methods of increasing density (through rezoning, for example) should not compete directly with TDR programs
- TDR programs should be able to operate where development pressure is weak and where demand for TDRs may fluctuate.
- Base densities permitted in receiving areas (in some cases they exceed market demand) may have to be reduced.
- TDR sales should not affect the ability of the seller to obtain credit for farm operations
- The objections of residents in receiving areas to increased density in the neighborhood must be recognized and addressed.
- The use of TDRs to increase density should not cause an increase in housing costs

How a jurisdiction structures an agricultural preservation program and the particular methods it chooses to emphasize will depend on local conditions including local political realities. The two Maryland counties with the most successful farm land protection programs, however, have a variety of means, including TDRs, with which to work.

Whether the goal is agricultural preservation, growth management, protection of sensitive areas or of historic landmarks, TDRs should be considered because they provide definite advantages. Among these are:

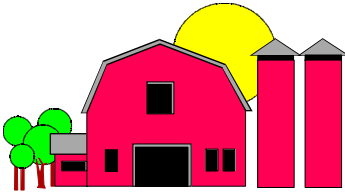
- TDRs are economical. Unlike PDRs, monetary transactions involve only private funds. Administrative overhead is minimal.
- TDRs are permanent. Restrictive zoning may work for a while but only as long as the political will remains strong.
- TDRs are consistent with growth management policy. TDRs can direct growth away from rural and sensitive resource areas while simultaneously directing it toward appropriate growth centers.
- TDRs are fair. There is a mechanism to compensate owners of protected resources for loss of development potential.
- TDRs are simple. Bureaucracies can make anything complicated but TDR administration can be straightforward. Prices are set in the private market.
- TDRs are flexible. They have been used to protect a variety of resources in both urban and rural settings.
- TDRs have history. This is not a radical, new technique. TDRs have been in use for decades and their legality has been upheld by the courts.

Inevitably, certain challenges must be overcome to make TDRs effective:

- The TDR program must be structured to encourage an active private market in which there is both an adequate supply of development rights and a strong demand for them.
- Among the options available to an owner of agricultural land, sale of TDRs should be the most attractive.

CHAPTER FOUR: THE FUTURE OF TDRS IN MARYLAND

Present programs in Maryland for the preservation of farmland may not be able to ensure a continued, healthy agricultural economy in the State. Residential growth, if not effectively managed, may encroach upon the rural landscape, steadily and inexorably eroding the foundations of agricultural production. If farmland cannot be preserved at the same rate or faster than it is being converted to housing tracts, then farming may become little more than a memory in all but scattered pockets around the State.



Suppose a Statewide goal was established that 30% of the State's land in agricultural use would be protected by permanent easement by the year 2020. How far are we from that goal? As the last column of Figure Five indicates, only 7.1% of the State's agricultural land is presently protected by easement and only two counties, Howard and Montgomery, have met or exceeded the 30% goal. Statewide, an additional 524,000 acres would have to be protected by easement over the next 26 years, or about 20,000 acres per year.

It is interesting to note that Howard and Montgomery, two counties which experienced severe development pressure over the last two decades and which lost agricultural land at the highest rates in the State (more than 3 times the Statewide rate) from 1973 to 1990 are the leaders in permanent protection of farmland. Montgomery has protected 37.2% of its agricultural land with easements, Howard's figure is 30% and the third place county is only half of that figure.

Certainly, high development pressure increased the urgency for strong protective measures. The rapid turnover of high value farmland also generated transfer tax revenues which made possible active purchase of development rights programs. Montgomery and Howard both participate in the M ALPF PDR program, both have certified local PDR programs and both have TDRs. The similarity ends there, however. As of April 1994, Howard County's TDR program has not resulted in any easements, whereas Montgomery County used TDRs to record easements on 32,225 acres. Howard County has relied exclusively on PDRs, while PDRs account for only 15% of Montgomery's protection effort. While it is true that Howard's TDR program is much newer than Montgomery's, there are crucial differences in how the counties have implemented them. As the second column in Figure Two shows, Montgomery substantially downzoned its TDR sending area, Howard did not. Looking at the fourth column one can see that the ratio of development rights obtainable by transfer, as opposed to use on the site, is much higher in Montgomery than in Howard, thus the incentive to use the TDR option is higher. This suggests that Montgomery has made less use of PDRs because its active TDR program made PDRs less of a necessity.



Summer crop in Howard County

corded easements under both State and local programs. Figure Five lists the agricultural land resource base by county in acres and as a percentage of the county's land area. Column three shows the number of acres of this resource protected by easement under the three program and the last column indicates the percentage of the resource in each county that is protected by easement.

As Figure Five shows, Maryland counties have made modest progress toward preserving agricultural land. Meanwhile, in spite of a sluggish economy in recent years, agricultural land is being lost to residential development at a rapid pace. Maryland lost 73,747 acres of agricultural land from 1985 to 1990. According to USDA figures, Maryland lost 2,300 farms during the same period. An additional 232,000 acres of farm land may be lost between 1990 and the year 2020, according to Maryland Office of Planning projections (see Figure 6).

Much of the loss of agricultural land results from the development of residential units on large lots. For example, in 1990 large lot development comprised only about 14 percent of the *number* of improved residential parcels but occupied about 65 percent of improved residential land *area*.

Fig. 6 Maryland Farm Land Loss Trends

Fig. 5. Agricultural Land Use

Fig. 4 Easement Programs

and weak TDR incentive, might become a regional magnet for large-lot rural development. The point is that given Maryland commuting patterns, real estate markets operate regionally and TDR programs must be tailored not only to local conditions but to the regional context.

Fig. 3. Zoning and Right-to-Farm Measures

Depending on one's point of view, TDR programs in Maryland either compete with other easement programs or complement them. These easement programs are the Maryland Agricultural Land Preservation Foundation's purchase of development rights program (MALPF or State PDR program) and local purchase of development rights programs (county PDR programs). Figure Four lists the number of acres in State program agricultural districts and the number of acres that have re-

The third column in Figure Two indicates the number of acres that must be protected in order to earn one development right. In four of the counties this number is the same or nearly the same as the acreage basis for density specified in the zoning ordinance. The others offer an incentive that allows from 2 to 6²/₃ times more development rights if TDRs are used as opposed to conventional development methods (see fourth column of Figure Two).

Whether a TDR program is considered mandatory or voluntary is a matter that requires interpretation. None of the Maryland programs absolutely forbid development in the sending area or require TDR purchase as a condition of development in the receiving areas. Developers and property owners have the option of participating in the program or not. But the density (often expressed as a minimum lot size) in effect in the sending area, considered together with the density incentive offered for transfer may make participation in the TDR program the best economic choice in some cases. For purposes of this analysis, a TDR program will be considered mandatory in effect if the permitted density in the sending area is one unit or less per 20 acres. At densities this low a standard subdivision is generally uneconomical. Another feature of mandatory programs is that the number of development rights obtained by transferring rights is greater than the number of rights available when development takes place on site by a factor of 2 or more. Viewed in this light, six Maryland counties have mandatory TDR programs: Carroll, Charles, Montgomery, Queen Anne's, St. Mary's and Talbot.

Some TDR programs permit transfer from one part of the agricultural area to another. This may involve transfer of development from prime and productive agricultural soils to areas of marginal agricultural value. Whether this practice promotes long-term resource protection goals or not is arguable. In any event, only Montgomery, Queen Anne's and St. Mary's Counties have established receiving areas exclusively in non-agricultural zoning districts.

The Context of TDRs

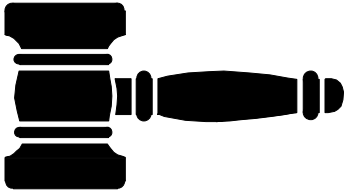
An evaluation of TDR programs in Maryland must be based on an understanding of these programs within the context of zoning and other agricultural and natural resource protection measures undertaken by a county and its neighboring jurisdictions. Figure Three lists not only those counties with TDR programs but also some neighboring counties and compares how they regulate lot sizes in the agricultural area and whether they have adopted right-to-farm legislation. As an example, in central Maryland, Howard County is surrounded by jurisdictions with much more restrictive agricultural zoning (Prince George's excepted). In this context, Howard County, with its relatively small minimum lot area

Overview of Maryland TDR Programs

Presently eleven jurisdictions have some form of TDR program. These are Calvert, Caroline, Carroll, Charles, Harford, Howard, Montgomery, Queen Anne's, St. Mary's and Talbot Counties and Ocean City. It is fair to say that Maryland has made more extensive use of this technique than any other state. The oldest programs in the State belong to Calvert and Montgomery Counties, instituted in 1978 and 1980 respectively. As shown in Figure Two, Calvert has used TDRs to protect 4000 acres of farm land and Montgomery (probably the most active program in the country) has protected 32,225 acres. Carroll County's program is designed to protect mineral resources but it is considering expansion to include agricultural land as well. Seven of the counties have programs which permit land in agricultural areas to both send and receive TDRs. In Ocean City, TDRs are used in conjunction with a building limit line to protect the beach and dune areas from development.

Fig. 2. TDR Programs in Maryland

Legal Issues



CHAPTER THREE: TDR PROGRAMS IN MARYLAND

Only a brief word need to be said about legal issues relating to the use of TDRs by local governments in Maryland. Simply stated, there are no legal impediments to TDRs. Article 66B, Section 11.01. of the Annotated Code of Maryland enables all jurisdictions with planning and zoning authority to establish TDR programs. This section is quoted in its entirety below:

11.01. Power to Establish

In order to encourage the preservation of natural resources and to facilitate orderly growth and development in the State, the legislative body of a county or municipal corporation, including Baltimore City, that exercises authority granted by this article may establish a program for the transfer of development rights

The Montgomery County TDR program has been challenged in the courts. The first challenge, *Dufour, et al v. Montgomery County Council*, Law Nos 56964, 56969, 56970 and 56983 (Circuit Court for Montgomery County, MD 1983), was aimed at the significant downzoning of land in the sending areas, which was an integral part of the County's TDR program. The Circuit Court held that the agricultural zoning did not violate any constitutional or other legal rights and, moreover, that the TDR program was legally unnecessary to support the downzoning. The one unit per 25 acre density in the Rural Density Transfer Zone was found to serve a valid public purpose and was not a confiscation of property rights. The Circuit Court's decision was not reviewed by Maryland appellate courts.

The second legal challenge focused on the TDR program itself. In 1987, the Court of Appeals of Maryland in *West Montgomery Citizens Association v. Maryland-National Capital Park and Planning Commission*, 309 Md 183, 522 A.2d 1328 (1987), declared the TDR system invalid because the County Council had not performed "the final step in the planning and zoning process—the amendment of the zoning map, and when necessary, the zoning text to authorize the increased densities of development in receiving areas." Montgomery County had attempted to use the comprehensive plan alone to permit increased density in the receiving areas. The Court ruled that zoning would also have to be used to implement higher densities in receiving areas. Montgomery County subsequently amended its zoning and there have been no more legal challenges.

Recent U.S. Supreme Court cases (e.g., *Lucas, Dolan*) dealing with land use regulation should not affect TDR programs. The high court has not modified the basic theory that public regulation of private property (including downzoning) for a valid public purpose is justified as long as a reasonable use remains to the property owner.

in six jurisdictions and two states TRPA's program is a unique example of a TDR program administered by an interstate agency in which it is possible to transfer development rights across state lines

TRPA strictly controls coverage of land by structures and other impermeable surfaces. One transfer program permits the transfer of coverage rights from more sensitive land to less sensitive lands. The other transfer program allows transfers of development rights. Development rights may be transferred from both developed and undeveloped land in sending areas. If transferred from developed land, structures must be demolished and the site restored to a natural state.

The demand for property in the Lake Tahoe area is very high and any significant building activity requires use of TDRs. Therefore, TDRs are actively transferred at the rate of 25-35 transfers per year.

- Calculation of TDR credits in the sending area using depth to seasonal high water table as a measure of development potential and a geographic information system (GIS) to map and calculate TDR credits
- Establishment of discrete, non-overlapping sending and receiving areas
- Initial downzoning of both sending and receiving areas
- TDR as the sole bonus density option in receiving areas
- An essentially mandatory system - development in the sending area will not be economically feasible, while development in the receiving area will be feasible only with use of TDRs
- A receiving area which, according to the enabling act, "shall be at least sufficient to accommodate at all times all of the development potential of the sending zone." In fact, the proposed receiving area can accommodate about 1½ times the development potential of the sending area.
- Ability to use TDRs to increase commercial and industrial square footage and institutional uses in receiving area.

Chesterfield Township's proposed program includes many features which are intended to correct the weaknesses of previous TDR programs. For this reason it has been termed a "next generation" TDR program.

Tahoe Regional Planning Agency

Lake Tahoe sits astride the California Nevada boundary. It is surrounded by a ring of mountains in both states that form a basin that drains into the lake. Water quality in the lake is affected by development in the basin. Therefore, California and Nevada have formed the Tahoe Regional Planning Agency (TRPA) and charged it to protect and restore natural areas in the Lake Tahoe Basin which covers 207,000 acres of land



Burlington County

- Establish a Pine lands Development Credit Bank at the outset ...lack of a broker-bank has hindered a more active trade in PDCs [TDRs]. Further, because the program encompasses such a large area, demonstration of institutional support (that is, demonstrating that government is behind the program) lends credibility and fosters confidence.

Burlington County is located partly within the New Jersey Pine lands area. Burlington County's municipalities were granted the power to implement transferable development rights by the State Legislature through the Burlington County TDR Demonstration Act. No other jurisdiction in New Jersey is enabled by the State to use TDRs (the Pine lands Planning Commission is a State agency and has its own enabling legislation).

Although no municipality in Burlington County has yet implemented a TDR program, one, Chesterfield Township, has made considerable preparations. Chesterfield Township prepared a TDR master plan that built on the successes and failures of previous TDR programs elsewhere and incorporates state-of-the-art planning techniques. For a thorough account of this proposal the reader is referred to *Planning for Transfer of Development Rights: A Handbook for New Jersey Municipalities*, published by the Burlington County Board of Chosen Freeholders.

Chesterfield Township is a rural community and seventy percent of the land is assessed as farm land. The goal of the proposed TDR program is to preserve agricultural land. Features of the program worth noting are:

- A visual preference survey to obtain citizen input about development standards for the receiving areas and to help define the vision of the suburban/rural landscape that TDRs will help to achieve.
- Community build out maps to graphically show land use patterns which would result from development under conventional zoning as well as under a TDR program that limited new development to a new mixed-use village and allowed moderate expansions of three existing villages.
- Burlington County Transfer of Development Credit Bank to integrate TDR programs with County easement purchase efforts.

New Jersey The New Jersey Pinelands



The New Jersey Pinelands encompass a million acres of cedar and pine forests, swamps, marshes, blueberry and cranberry bogs and other agricultural lands. This area includes all or parts of seven counties and 52 municipalities. In 1979 the New Jersey legislature passed the Pinelands Protection Act which charged the Pinelands Planning Commission to develop a comprehensive management plan. As a result the Pinelands Development Credit program was instituted as a regional, multi-jurisdictional TDR program. In terms of land area, it is the largest TDR program ever implemented. It is also arguably the most complex. Its complexity is due to the complicated formulas used to calculate the number of development rights that are credited to each 39-acre increment of property in the sending area. In addition, each development right extinguished in the sending area converts to four rights that may be used in the receiving area. As the Pinelands TDR system is set up, it is possible for development rights from one jurisdiction to be transferred to another. However, this requires the consent of the receiving jurisdiction.

Transfer of rights began slowly at first, picked up as the program became more widely known, then rose dramatically after 1988 when the Pinelands Development Credit Bank was instituted and began marketing the program. As of September 1994, the total amount of land permanently protected by easement since the program began is 10,600 acres.

In a review of the effectiveness of the Pinelands TDR program the Pinelands Planning Commission staff suggested actions to make the program more successful. As reported in *Transferable Development Rights Programs* (APA 1987) these actions were:

- Simplify the mathematics of the program. A TDR program is difficult enough to communicate to the public without awkward 39-acre units of measurement and single PDCs [TDRs] yielding four dwelling units.
- Launch the program after achieving local zoning compliance. Unrealistic expectations of active trade in PDCs [TDRs] were raised when the commission announced the program. In reality, the framework was not in place, and developer uncertainty delayed the use of the rights.
- Initiate a public education effort to "sell" the program. The concept is a complex one, and land owners, developers and realtors need information about the program to be stimulated to use it.

CHAPTER TWO: TDR PROGRAMS IN OTHER STATES

Although the main emphasis of this report is TDRs in Maryland, it may be useful to consider the experience of TDR programs in other States. The report will briefly look at programs in California, New Jersey and the bi-state Lake Tahoe Region.

California



California is second only to Maryland with respect to use of TDRs by its local governments. Twenty-seven of California's jurisdictions have TDR program accounting for 5% of all jurisdictions (in Maryland, 10 counties and Ocean City have TDRs accounting for 43% of counties and 6% of all jurisdictions). Unlike Maryland, California has no state law enabling its jurisdictions to establish TDR programs. Instead, TDR programs are justified under the general theory of police power.

California jurisdictions use TDRs to protect sensitive natural areas, scenic areas (e.g. Big Sur), agricultural land, historic landmarks, hillside and beachfronts. They are also used as incentives to encourage a mix of residential uses in commercial centers and to encourage redevelopment. The city of Cupertino uses TDRs to control traffic congestion by allowing the transfer of trip-generating potential among properties.

Three California communities, San Luis Obispo County, Monterey County and the city of Morgan Hill have established TDR banks to facilitate transfers, stabilize prices and provide transaction services. These communities report that the TDR bank has significantly contributed to the success of their TDR programs.

A survey was conducted to see why more California communities do not use TDRs (Pruetz, 1993). The most common response was, "we rely primarily on zoning and development restrictions to achieve land use goals." However, the same survey found that less than 20% of the respondents believe that their land use goals will be completely achieved given current funding levels and regulations. Evidently, many respondents have the idea that TDRs are an alternative to zoning and other land use controls rather than a complementary measure.

Readers with an interest in California TDR programs are referred to a recent book titled *Putting Transfer of Development Rights to Work in California* by Rick Pruetz (see Appendix B).

At the same time that TDRs are directing growth to "suitable areas" or "existing population centers" they can steer it away from "sensitive areas" or "resource areas." By focusing new development in higher density areas served with public facilities (receiving areas) less land will be consumed by wasteful sprawl. TDR programs offer a streamlined method of increasing density in growth areas as an alternative to lengthy and uncertain rezoning procedures. In addition, by operating through private market mechanisms, TDRs do not require a significant expenditure of public funds to achieve the vision. TDRs are not a panacea but they are ideally suited, in certain circumstances, to implementing the vision and any jurisdiction serious about doing the same should consider using them.

Fig. 1. Through TDRs, the rights to develop property are severed from the land and can be directed to appropriate growth areas and away from areas that should not be developed.

TDRs and the Visions

that limited building height to that of the historic building. Pressure for demolition of the historic structure was reduced and income was generated to help pay for restoration. The excess air rights were used at "receiving areas" to increase the permitted height of new buildings

Analogous programs are used to preserve agricultural land resources in Maryland and other states, to protect water quality in the Lake Tahoe Basin, to protect fragile ecosystems in the Everglades and in the New Jersey Pine Barrens. Where resource areas are subjected to "down zoning," TDRs are used to compensate property owners for loss of on-site development potential (Montgomery County, MD is an example).

In other cases, non-mandatory TDR programs were established to give land owners the option of transferring rights among contiguous or nearby properties to maximize use of land better disposed for development in terms of access, topography, or soils, and to increase lot yields and reduce development costs. Harford County's program is an example of this type. Some programs designate the agricultural area as both a sending and receiving area for TDRs. Here the objective is to move development from prime farm or forest land and onto less productive soils. Calvert, Howard and Talbot Counties' programs are examples of this type.

The 1992 Economic Growth, Resource Protection and Planning Act established seven "visions" which are the State of Maryland's growth policy. The 1992 Act also requires that the visions be incorporated into the comprehensive plans of local jurisdictions. The seven visions are:

1. Development is concentrated in suitable areas
2. Sensitive areas are protected;
3. In rural areas, growth is directed to existing population centers and resource areas are protected;
4. Stewardship of the Chesapeake Bay and the land is a universal ethic;
5. Conservation of resources, including a reduction in resource consumption is practiced;
6. To assure the achievement of 1 through 5 above, economic growth is encouraged and regulatory mechanisms are streamlined; and
7. Funding mechanisms are addressed to achieve these visions

TDRs have the potential to be very useful in implementing the visions

How TDR Programs Work

mandatory. In a sense, all TDR programs are voluntary because property owners are not legally compelled to transfer their rights. Under so-called mandatory programs, however, the development rights available for use on the property may be very few, compared with the number of rights available for transfer.

A distinction should be made between TDR programs and "clustering." In a "cluster" subdivision the development rights pertaining to the parent parcel (the original tract being subdivided) are gathered and used in one particular area but never leave the confines of the parent parcel. With TDRs the development rights are completely severed from the parent parcel and moved to a different geographic area. TDRs always cross property lines, whereas "cluster" development rights never leave the site of the parent parcel.

The details of the operation of TDR programs vary from one jurisdiction to the next, but the basic principle is the same. When rights are transferred from a parcel (called the sending parcel) an easement or other notation is recorded in the land records to indicate that the development rights cannot be exercised any longer on that parcel. The parcel to which the development rights are transferred (called the receiving parcel) is now eligible to exercise additional development rights. Proof of eligibility may take the form of a certificate issued to the purchaser of the development rights, a notation on a subdivision plat, a zoning certificate or some other instrument.

The Purpose of TDR Programs

TDR programs are used to preserve agricultural land and historic landmarks, to achieve efficient, concentrated growth patterns, to protect sensitive natural environments, to protect water quality, or simply to provide a convenience to property owners. When TDRs are used to protect a resource, the resource area is officially described (by maps or words) and this becomes a "sending area" where development rights may be transferred to another property in a designated "receiving area." The easements recorded in the sending area when rights are transferred serve to permanently protect the resource from development.

One of the early uses of TDRs was in New York City for the preservation of historic buildings. These buildings, often built much lower than current zoning permitted, were threatened with demolition to make way for taller buildings that could generate more revenue. A TDR program allowed historic building owners to sell excess air rights above the historic structure in exchange for recordation of a permanent easement

CHAPTER ONE: INTRODUCTION

This booklet is the second in a special series of "Models and Guidelines" that will address *Innovative and Flexible Planning and Zoning Techniques*. Models and Guidelines are prepared by the Maryland Office of Planning to assist local governments in achieving the goals of the Economic Growth, Resource Protection and Planning Act of 1992 (the Planning Act). The various Models and Guidelines published to date are listed on the last page of this booklet.

On April 29, 1994 a day-long transferable development rights (TDR) workshop was conducted at the Agricultural History Farm Park in Montgomery County, Maryland. This workshop, organized by the Maryland Office of Planning, gathered together State and local officials, developers, farm preservation advocates and planners from Maryland as well as from out of state to discuss TDRs (see Appendix A for conference program). Workshop participants examined the success and failure of existing TDR programs and discussed what might be done to make the technique more effective as a tool for growth management, agricultural preservation or historic resource protection. As an outgrowth of that conference and the research that preceded it, this Models and Guidelines booklet was prepared to offer practical advice and encouragement to local governments contemplating this technique as a means to achieve community goals.

What TDRs Are

The concept of transferable development rights is not difficult to grasp. But for those completely unfamiliar with TDRs it may be necessary to think about property rights in an unaccustomed way. Ownership of a parcel of land confers upon its owner a number of rights: the right to use the property for one or more purposes, the right to cover a certain percentage of the site with buildings, the right to develop a certain number of dwelling units, as well as mineral, water and air rights. Under certain circumstances it is possible to transfer land development rights to another property. When this occurs it is referred to as a transfer of development rights and the rights themselves are transferable development rights or TDRs.

Owners of property are generally not free to transfer development rights among themselves at will. Normally, the transfer of development rights takes place within the context of a TDR program or system set up by local government. TDR programs have been established by eleven local governments in Maryland and a number of programs exist in other states. They have also been established for bi-state and sub-state regions. TDRs have been transferred across property lines, county lines and even state lines. Some TDR programs are said to be voluntary and others

CHAPTER SIX:
 MODEL ZONING REGULATIONS FOR TRANSFER OF DEVELOPMENT RIGHTS..... 35

CHAPTER SEVEN :
 A NEW APPROACH TO AGRICULTURAL PRESERVATION
 PROGRAMS IN MARYLAND..... 42

- A State PDR/TDR Bank..... 42
- From PDR to TDR 43
- MALPF: PDR & TDR 43
- State TDR Bank and the 1992 Planning Act..... 43
- Expanding the Market for TDRs..... 44
- Continuing Role for PDR..... 45

APPENDIX A:
 TDR CONFERENCE PROGRAM 46

APPENDIX B:
 BIBLIOGRAPHY 47

APPENDIX C:
 TRANSFER INSTRUMENT FOR TDRs 48

APPENDIX D:
 CONVERSION OF TDRS TO NON-RESIDENTIAL DEVELOPMENT CREDIT 49

TABLE OF CONTENTS

CHAPTER ONE:

INTRODUCTION 3

 What TDRs Are 3

 How TDR Programs Work 4

 The Purpose of TDR Programs 4

 TDRs and the Visions..... 5

CHAPTER TWO:

TDR PROGRAMS IN OTHER STATES..... 7

 California 7

 New Jersey..... 8

 The New Jersey Pine lands 8

 Burlington County..... 9

 Tahoe Regional Planning Agency..... 10

CHAPTER THREE:

TDR PROGRAMS IN MARYLAND 12

 Legal Issues..... 12

 Overview of Maryland TDR Programs 13

 The Context of TDRs..... 14

CHAPTER FOUR:

THE FUTURE OF TDRS IN MARYLAND 20

CHAPTER FIVE:

HOW TO PREPARE A LOCAL TDR ORDINANCE 24

 What Kind of TDR Ordinance?..... 24

 TDRs and the Comprehensive Plan 24

 Background Analysis..... 25

 Extent of Downsizing 26

 Compensation of Property Owner..... 26

 Incentive for Transfer 26

 Guidelines for Drafting the TDR Regulations 28

 Definitions..... 28

 Procedures for Transfer of Development Rights..... 29

 Sending Area Regulations 31

 Receiving Area Regulations..... 32

 Commercial and Industrial Receiving Areas 33

 Guidelines for Drafting Zoning Maps to Implement TDRs 34

 Sending Areas..... 34

 Receiving Areas 34