Transfer of Development Rights

Some call it making money out of thin air. Others think of it as getting what they rightly deserve. Transfer of development rights (TDRs) means shifting the future development potential from one piece of property to another piece of property. Local and regional governments use TDRs to preserve historic structures and to protect agricultural lands, forest lands, and open space.

The fundamental legal issue with TDRs is the claim that they constitute a taking without adequate compensation. Whenever the use of a parcel of land is prohibited or severely restricted, the local government opens itself up to a claim that the land owner has suffered a regulatory taking. A regulatory taking exists when, by some regulation of the property, a government forbids or precludes any and all economically viable use of the property.

The original thinking behind TDR was to mitigate the economic impact of extensive or total restrictions on the owner's use of land. However, the existence of a TDR program does not always prevent takings claims, and the local government must be prepared to respond to such challenges.

TDRs IN THE COURTS

There have been two major cases concerning TDR before the U.S. Supreme Court: *Penn Central Transportation Co. v. City of New York* in 1978, and *Suitum v. Tahoe Regional Planning Agency* in 1997.

In the first case, Penn Central Transportation Co. owned Grand Central Terminal, which was a landmark under the City of New York's Landmarks Preservation Law. Under the ordinance, the city Landmarks Preservation Commission designates landmark buildings and districts, and property owners must keep the exterior features of the building in good repair. The commission must approve any proposal to alter the landmark's exterior architectural features, including improvements. The ordinance also provides that unused development rights can be transferred to lots on the same block or across the street, or to nearby lots under the same ownership.

Penn Central also owned several neighboring hotels and office buildings along Park Avenue, at least eight of which were eligible receive development rights from the Grand Central Terminal under the ordinance. The company was twice denied permission by the Landmarks Commission to build a 50-plus story office building atop the terminal, on the grounds that the skyscraper was incompatible with the turn-of-the-century design of the terminal. The company brought suit, challenging the landmark designation and the denial of permission to build as a taking.

The Court found there was no taking. First and foremost, the "objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal." Second, the company was not denied economically viable use of the property, the Court held, because it was viable as a railway station with leased commercial space. The company's investment-backed

expectations were not thwarted by denial of permission to build the office tower, because their reasonable expectation was in the existing railway station.

Though the Court did not directly address the topic of transferable development rights, because it found there was no taking, the Court said,

...it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal Ö While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

The *Suitum* case involved the Tahoe Regional Planning Agency, which regulates land development for the ecologically sensitive Lake Tahoe region on the California/Nevada border. Every proposed development is subject to the agency's Individual Parcel Evaluation System (IPES) before permission to develop is granted. All parcels in areas carrying runoff water into the Lake Tahoe watershed are off limits to development under IPES. To mitigate these impacts on property owners, development rights may be transferred to other parcels suitable for construction.

Ms. Suitum, the owner of a parcel in a runoff area, was denied the right to construct a residence on her parcel but was granted development rights for use elsewhere. She did not attempt to exercise these rights. Instead, Suitum brought suit against the agency, claiming that it had effected a taking of her property without just compensation.

She argued that she was denied all reasonable use of the parcel she owned, that the TDRs were of little or no value, and that her claim was ripe because it would be futile to try to transfer them. The agency said that the rights were of significant market value (and offered appraisals), that the value of the rights was relevant to the question of whether there was a taking, and that Suitum's claim was not ripe because she had not tried to collect or exercise her development rights.

The Court found that there was a final decision on the use of Suitum's property when the agency declared under IPES that her parcel could not be developed. Also, there was no dispute as to exactly what rights she would receive from the agency. The Supreme Court found that the value of the rights was not essential to determining whether there had been a taking, as the agency had claimed. The Court found the case was ripe and remanded it for further proceedings. The concurrence, written by Justice Scalia and joined by Justice O'Connor, expressly stated what the majority implied-that TDRs were relevant only in setting the amount of compensation, and not in determining whether there was a taking.

THE STATE COURTS

TDR ordinances have survived challenges state court from several legal directions.. In 1976 in Washington, D.C., a TDR program was upheld against claims that it violated the uniformity requirement of the zoning enabling statute and that it constituted discrimination on the basis of wealth. A TDR ordinance in Los Angeles was

unsuccessfully challenged in 1993 on the basis that it was inconsistent with the concept of zoning in accordance with a comprehensive plan (akin to a "spot zoning" claim).

In Florida, in *Glisson v. Alachua County* in 1990, an appellate court upheld an ordinance that restricted development in an area with both ecological and historic significance on the grounds that protecting the area from development was a legitimate public purpose, and because TDRs (and variances) would allow reasonable use of property.

In the case of *City of Hollywood v. Hollywood, Inc.*, a landowner challenged a TDR program on the basis of substantive due process. A Florida appeals court found that protecting the aesthetic value of an unspoiled beach was a legitimate public purpose, and that the transfer of the right to develop housing units to another portion of the same property was a reasonable means to that end, even though the owner was required to deed several acres outright to the city.

In *Aptos Seascape Corp. v. Santa Cruz County* in 1982, a California appeals court expressly stated that the transfer of development rights should be considered in the analysis of whether there has been a taking and could indeed "preclude a finding that an unconstitutional taking has occurred."

In *Corrigan v. City of Scottsdale* in 1985, an Arizona appeals court struck down a TDR ordinance on the grounds that the Arizona Constitution requires just compensation to be "made in money."

Even though some courts have found that TDRs can negate a takings claim, and must be considered in the takings analysis, there are other takings-related problems with TDR programs. For instance, courts look askance at artificially downzoning a receiving area--zoning that area for a use or density significantly lower than the surrounding areas so that the TDRs are necessary for economically viable development in the receiving area.

EXAMPLES OF TDR PROGRAMS

A survey of 3,500 local governments and review of planning literature in 1997 found 107 TDR programs in 25 states (Pruetz 1997). These vary from rural areas to the largest city in the nation. Some of them are described here.

New York City. The oldest, most well-known transfer of development rights programs was instituted in New York City in 1965 as part of its Landmarks Preservation Ordinance. There is a great incentive for the owners of historic properties to tear them down and replace them with buildings that take advantage of the current legally permitted density, which is greater than the density at which the historic structures were built.

The ordinance created a Landmarks Preservation Commission, which holds hearings to designate landmark buildings and districts. With the focus on guaranteeing that owners of landmark properties receive a "reasonable return" on their investment, the ordinance also provides for the transfer of development rights. Originally, unused development rights could be transferred to adjacent lots on the same block. Amendments in 1968 and 1969 expanded the allowable location of receiving sites.

The TDR portion of the ordinance has been only mildly successful: over a dozen transfers have been made since its enactment. The main problem is that there are other means under New York City zoning laws to obtain increased density (rezonings and density bonus programs) and the process for approving a transfer of development involves the time-consuming approval of a community board, the city planning board, and the city council.

In 1998, New York City established a TDR program for a theater subdistrict on Broadway. There are 44 theaters in the subdistrict subject to regulations for preserving live performances and for preventing the theaters' demolition and conversion to other uses. According to Melanie Meyers of the department of city planning, the TDR program will allow theater owners to transfer their unused development rights to any other property in the subdistrict under a streamlined approval procedure.

The Chicago Plan. This is the common name for a TDR program landmark preservation proposed for adoption by the City of Chicago in the early 1970s. The plan was never fully implemented in Chicago but contributed greatly to the development of the TDR concept.

The plan proposed that areas containing landmark properties would be declared development rights transfer districts. Owners of designated landmarks within a district could transfer the development rights to one or more non-landmark properties in the transfer district, whether or not he or she owned it, and have the property tax valuation of the landmark parcel adjusted to reflect the diminished value. In exchange, the property would become subject to a "preservation restriction," binding the owner and all future owners to maintain the property according to certain standards and to refrain from altering or demolishing the property without city consent. The main benefit to the owner would have been the tax deduction. The city would operate a TDR bank to fund municipal purchase or condemnation of TDRs with proceeds from the sale of TDRs previously purchased or condemned.

According to John Costonis, one of the authors of the plan, it was not implemented in Chicago because of "conservatism" in city hall under Mayor Richard J. Daley and in the legal community. The traditional "police power" zoning approach to protecting landmarks had been tried and judicially approved, and was considered adequate. Moreover, downtown developers could build to market intensities and densities under existing zoning, or by employing incentives, and did not need to purchase TDRs. However, elements of the Chicago Plan were adopted by the Illinois legislature as municipal historic preservation enabling act (see below), and served as a model for enabling statutes in New York and Tennessee

Pine Barrens, New York. The Pine Barrens on Long Island were designated for protection from development by the Long Island Pine Barrens Protection Act of 1997. (Note that it is not the same as the Pinelands of New Jersey, an area that also has a successful TDR program.) The purpose of the act is to preserve natural areas, agricultural and fishing resources, and historic sites in the Pine Barrens-Peconic Bay area.

The act divides by the Central Pine Barrens into a core preservation area and a compatible growth area. The Central Pine Barrens Joint Planning and Policy Commission was created to govern land use in the area, starting with a comprehensive land-use plan. With regard to TDRs, the commission is required to (1) inventory all privately owned land in the core preservation area; (2) calculate the development yield of all such parcels based on measures of area, density, height limitations, and floor-area-ratios; (3) notify the owners of such parcels of its determination; (4) designate receiving areas, both inside and outside the Central Pine Barrens; and (5) consider the fiscal impact of the TDR program it develops.

The Pine Barrens TDR program has been used to a moderate degree. From it's commencement in mid-1995 to August 31, 1998, 228 parcels in the core preservation area were awarded transferable development credits. Out of the 52,500 acres of the core preservation area (and 47,500 acres of the compatible development area), the total area of the sending parcels was 189 acres. Ray Corwin, executive director of the commission, asserts that the TDR program is a success, especially when considered as a voluntary *portion* of the entire Pine Barrens regulatory system. "The prevalence of small parcels using the program is intentional," he says. :The fee structure of the TDR is calculated to reduce the cost to small landowners.

Collier County, Florida. Collier County, on the southeast tip of Florida, includes the growing city of Naples and portions of the Everglades. To preserve coastal areas and the inland wetlands, the county enacted a Special Treatment Overlay Zone in 1974. Within the zone, covering over 80 percent of the county, strict environmental requirements apply to the issuance of all development permits. The ordinance also authorizes the transfer of development rights-one dwelling unit for every two acres-from parcels in the zone to parcels outside the zone, if the sending property is at least two acres. Density on the receiving parcel cannot be increased by more than 20 percent of its zoned density. The owner of the property in the sending area must either deed it outright to the county or sign and record a guarantee that the land will be left in a natural state, with the permissible exception of nature trails, boardwalks, and related uses.

The Collier County TDR program has been a modest success-526 development rights, arising from 325 acres in the zone, have been transferred. However, according to Barbara Cacchione of the Collier County Planning Services Department, the fact that existing zoning provides adequate density without purchasing TDRs means the program has been very rarely employed "in the last 10 years or so." Despite this, nine other south Florida counties in south Florida have followed Collier's lead and enacted TDR ordinances.

Montgomery County, Maryland. Montgomery County enacted a TDR ordinance in 1981 to preserve agricultural uses in the face of expanding residential subdivisions and commercial development.

The rural areas of the county (almost one-third of the county's total area), were downzoned from one dwelling unit for every five acres to one dwelling unit per every 25 acre. Owners also received five transferable rights to build one additional dwelling unit per each 25 acres. The areas designated as receiving areas were adjacent to existing

highway and railway corridors into Washington. For the sake of efficiency, a permit to purchase developments rights is issued concurrently with the subdivision plat approval.

The Montgomery County program has been effective: more than 38,000 acres of the approximately 91,000 rural acres have been preserved. Because of the existing development pressure, the concentrated nature of the receiving areas, and the creation under the ordinance of a TDR bank to act as a "market maker," the market value of TDRs has been high-around $10,000 per right. Montgomery County's program has prompted six other Maryland counties to adopt TDRs as well.

STATE TDR ENABLING STATUTES

Nine states have detailed enabling statutes for TDRs. Arizona includes in its zoning enabling statute a provision authorizing the use of TDRs. The provision requires that any transfers must be with the consent of the owners of the sending and receiving parcels and must be preceded by notice and a hearing.

Connecticut's zoning enabling section includes express authority to create a TDR program and to vary density limits in the receiving areas. Another provision requires that development rights cannot be transferred except upon the joint application of the transferor and the transferee (the owners of the sending and receiving parcels, respectively).

Georgia authorizes counties and municipalities to employ TDR to protect natural land, open space, recreational land, farm land, and "land that has unique aesthetic, architectural, or historic value." As in Arizona, all transfers must be preceded by notice and a hearing and must be with the consent of the owners of both the sending parcel and the receiving parcel.

Illinois authorizes municipalities to designate landmarks and to implement purchase (of full title or of just the development rights) or employment of transferable development rights. The development right is the density permissible under zoning law (the statute recommends using quantifiable measures of density). Property taxes must be adjusted after a transfer of development rights, whether voluntary or by condemnation. The municipality is also authorized to create a development rights bank.

The Kentucky statute authorizes local governments to enact TDR ordinances, and does not limit their use to historic preservation. A TDR ordinance must provide for the voluntary transfer of development rights from one parcel of land to another, the restriction of development on the transferring parcel, and the increase in density or intensity of development on the receiving parcel. Both transferring and receiving areas must be indicated on the zoning map.

New Jersey has created a statewide Transfer of Development Rights Bank within its Department of Agriculture. The bank is authorized to purchase development rights and to provide matching funds up to 80 percent for the purchase of development rights by a municipality or county. It is also authorized to sell the TDRs it obtains.

New York authorizes local governments to enact transferable development rights ordinances "to protect the natural, scenic, or agricultural qualities of open land, to enhance sites and areas of special character or special historical, cultural, aesthetic, or economic interest or value." The statute requires that a TDR ordinance can be enacted only in accordance with a local comprehensive plan, the receiving district must have adequate public facilities to accommodate new development, and the impact of the TDR program on low- and moderate-income housing and the environment must be considered.

North Carolina authorizes the use of "severable development rights" by cities and counties in connection with dedicating a corridor for a street or highway as an alternative to requiring dedication of the corridor as a condition of subdivision plat approval.

Pennsylvania authorizes local governments to enact TDR ordinances, and provides that no transfer of development rights can occur in absence of such an ordinance. Development rights cannot be transferred across municipal lines, except when there is a joint zoning ordinance between the municipalities where the sending and receiving parcels are located.

The Tennessee statute provides that only counties with a metropolitan government can have a TDR program, but TDRs can expressly be used for "historical, agricultural, or environmental" purposes. The area of the designated receiving property must be equal to or greater than the area of the sending parcel. Transfer of development rights to parcels owned by other persons must be allowed, and any transfer of development rights must be voluntary and by contract. The transfer of development rights is not subject to property or income taxation.

Seven states generally authorize local governments to enact TDR ordinances, but provide no standards, conditions, or other regulation of their content. Florida's Private Property Rights Protection Act includes transfer of development rights as one possible mitigation measure when a landowner claims, and the local government agrees, that a particular local regulation or decision "inordinately burdens" the owner's reasonable use of the land. Idaho authorizes TDRs for the preservation of historic properties. Maryland authorizes counties and municipalities, including Baltimore, to establish TDR programs. New Hampshire and Washington both authorize transfer of development rights as part of a package of other innovative land-use controls, such as phased development, planned unit development, cluster development, and impact fees. Rhode Island authorizes TDR programs as part of the standard zoning power of a city or town. South Dakota generally authorizes counties and municipalities to employ TDRs as part of historic preservation ordinances.

Several local governments have implemented TDR programs without express authority from a state enabling statute, relying on their general authority to regulate type and density of land use.

BASIC ELEMENTS OF SUCCESSFUL TDR PROGRAMS

There are several essential elements to crafting a constitutional and effective TDR program:

- A clear and valid public purpose for applying a TDR program, such as open space preservation, agricultural or forest preservation, or the protection of historic landmarks.
- Clear designation of the sending areas and the receiving areas, preferably on the zoning map.
- Consistency between the location of sending and receiving areas and the policies of the local comprehensive plan, including the future land-use plan map.
- Recording of the development rights as a conservation easement, which will inform future owners of the restrictions and make them enforceable by civil action.
- Uniform standards for what constitutes a development right, preferably based on quantifiable measures like density, area, floor-area-ratio, and height, should be used to determine what development right is being transferred.
- Sufficient pre-planning in the receiving area, including provisions for adequate public facilities.
- Sufficient allowable density in the receiving area to help ensure development is economically viable. If the receiving area is zoned to allow development at market capacity without the TDRs, there will be little demand for the TDRs and their market value will be diminished.

A final, basic question that enabling statutes often do not directly resolve is whether TDR programs should be mandatory or voluntary. Some states require voluntary programs, while others envision mandatory transfer of rights. The advantage of a voluntary system is that all takings challenges are effectively precluded when the transaction is contractual. On the other hand, only a mandatory program will ensure all parcels in the sending area will transfer their development rights. Local governments in the same state may see a need for one or the other approach. Therefore, TDR enabling acts should authorize both voluntary and mandatory programs.

MODEL ENABLING STATUTE FOR TRANSFER OF DEVELOPMENT RIGHTS[(1)]

(1) A local government may adopt local land development regulations and amendments that include provisions for the transfer of development rights, in the manner prescribed in this Act.

(2) The purposes of this Act are to:

(a) preserve open space, critical and sensitive areas, and natural hazard areas;
(b) conserve agriculture and forestry uses of land;
(c) protect lands and structures of aesthetic, architectural, and historic significance;
(d) ensure that the owners of land that is so preserved, conserved, or protected may make reasonable use of their property rights by transferring their right to develop to other properties that can make use of it;
(e) provide a mechanism whereby development rights may be reliably transferred;

(f) ensure that development rights are transferred to properties that are in areas or districts that have adequate community facilities, including transportation, to accommodate additional development; and
(g) authorize the local government to create a TDR Bank, where development rights may be purchased and conveyed by the local government, in order to stabilize the market in development rights and to regulate or control the development of property that the local government intends to protect under subparagraphs (a) through (c) above.

(3) As used in this Act, and all other statutes where "transfer of development rights" is referred to:

(a) "Development Rights" mean the rights of the owner of a parcel of land, under land development regulations, to place that parcel and the structures thereon to a particular use or to develop that land and the structures thereon to a particular area, density, bulk, or height;
(b) "Receiving District" means one or more districts in which the development rights of parcels in the sending district may be used;
(c) "Receiving Parcel" means a parcel of land in the receiving district that is the subject of a transfer of development rights, where the owner of the parcel is receiving development rights from a sending parcel, and on which increased density and/or intensity is allowed by reason of the transfer of development rights;
(d) "Sending District" means one or more districts in which the development rights of parcels in the district may be designated for use in one or more receiving districts;
(e) "Sending Parcel" means a parcel of land in the sending district that is the subject of a transfer of development rights, where the owner of the parcel is conveying development rights of the parcel, and on which those rights so conveyed are extinguished and may not be used by reason of the transfer of development rights; and
(f) "Transfer of Development Rights" means the procedure prescribed by this Act whereby the owner of a parcel in the sending district may convey development rights to the owner of a parcel in the receiving district, whereby the development rights so conveyed are extinguished on the sending parcel and may be exercised on the receiving parcel in addition to the development rights already existing regarding that parcel.

(4) The legislative body of a local government may adopt a transfer of development rights program only by ordinance, in the manner for land development regulations pursuant to [*relevant state statute*], and an ordinance pursuant to this Act shall:

(a) be adopted by the legislative body only after it has adopted:
1. a local comprehensive plan; and
2. for a transfer of development rights program concerning critical and sensitive areas, a critical and sensitive areas element within the local comprehensive plan;
3. for a transfer of development rights program concerning natural hazards, a natural hazards element within the local comprehensive plan;
4. for a transfer of development rights program concerning agriculture or forest preservation, an agriculture and forest preservation element within the local comprehensive plan; and/or

5. for a transfer of development rights program concerning historic preservation, an historic preservation element within the local comprehensive plan;
(b) be adopted by the legislative body only after a public hearing has been held on the proposed ordinance, with notice to all owners of property in the proposed sending and receiving districts. Any purported adoption contrary to this subparagraph shall be void;
(c) include a citation to enabling authority to adopt and amend the transfer of development rights ordinance;
(d) include a statement of purpose consistent with the purposes of zoning pursuant to [relevant state statute] and with paragraph (2) above;
(e) include a statement of consistency with the local comprehensive plan and with the applicable elements thereof, as listed in subparagraph (4)(a) above, that is based on the findings of a detailed comparison of the proposed ordinance with the local comprehensive plan;
(f) describe in detail both the sending and receiving districts and shall require the designation of both the sending and receiving districts on the zoning map of the local government;
(g) describe the development rights to be transferred in reasonable detail, preferably in quantifiable terms such as area, building coverage ratio, density, floor area ratio, height, or other forms of measurement;
(h) require that the owner of a sending parcel execute, and record with the county [*recorder of deeds*], a deed or instrument creating a conservation easement, describing the released development rights in reasonable detail and preferably in quantifiable terms, with the sending parcel as the subservient estate and the local government as the holder of the easement; and require that before any such easement is recorded that the instrument be submitted to the [local planning agency] for its approval;
(i) require that, before any transfer of development rights from a sending parcel to a receiving parcel or parcels may be completed, that the [local planning agency] shall approve the transfer. The only bases for rejecting a proposed transfer are that:
1. the development rights released by the instrument vary significantly from the development rights that the sending parcel is supposed to be releasing pursuant to the transfer of development rights, or there is some other significant error in the instrument;
2. the proposed receiving parcel is not in a receiving district; or
3. the transfer would increase the density or intensity of development on the receiving parcel to a degree that violates one or more of the provisions of paragraph (8) below.
(j) require that, once a transfer is approved, the [local planning agency] issue to the owner of a receiving parcel, and record with the county [*recorder of deeds*], a certificate assigning to the receiving parcel, and all present and future owners thereof, the development rights that the receiving parcel is to receive through the transfer of development rights. Such certificate shall describe the development rights in reasonable detail

and refer to the instrument creating the conservation easement, and the certificate shall have a copy of the instrument attached.

(5) Any instrument purporting to convey a conservation easement pursuant to this Act but that the local government has not indicated its approval on the instrument is void, and shall not be recorded or accepted by the county [*recorder of deeds*] for recording.

(6) No district shall be designated as a receiving district unless the local legislative body finds, before enacting an ordinance authorized by this Act, that the district has or will have adequate community facilities and other resources to accommodate the increased development authorized by the transfer of development rights from the sending district.

(7) No district, or portion of any district, designated as a receiving district, shall be downzoned to the degree that no reasonable use can be made of a parcel of property, either after an ordinance pursuant to this Act has been adopted or before such adoption in anticipation of adoption.

[Note: This paragraph is intended to prevent the takings problem discussed above, whereby, to encourage the use of TDRs in a receiving district, the local government downzones the district to the degree that owners cannot make a reasonable use of their property in the district unless they purchase TDRs.]

(8) Any other provision of local land development regulations to the contrary, the density or intensity of development of a receiving parcel may be increased by the transfer of development rights so long as the increase in density or intensity:

(a) is consistent with the local comprehensive plan; [and]
(b) is not incompatible with the land uses on neighboring lots or parcels; [and]
[(c) is not more than [20] percent greater than the development rights of the receiving parcel without the transfer of development rights.]

[Note: No increase in density or intensity may contravene the plan or be inconsistent with surrounding land uses. However, some states may prefer a clear, numerical, limitation on the increase, and therefore subparagraph (c) is provided as an option. Note that the 20 percent figure can be altered at the state's preference.]

(9) The local government shall notify the county [*property tax assessor*] of a transfer of development rights within [30] days of:

(a) The issuance of a certificate pursuant to subparagraph (4)(j) above:
(b) the condemnation or purchase of development rights by the local legislative body or the TDR Bank, pursuant to subparagraphs (10)(a) or (b) below;
(c) the receipt by the TDR Bank of a donation of development rights pursuant to subparagraph (10)(e) below; or
(d) the sale or conveyance of development rights by the TDR Bank pursuant to subparagraph (10)(c) below;

and the [*assessor*] shall adjust the valuations for purposes of the real property tax of the sending parcel and of the receiving parcel or parcels, if any, appropriately for the development rights extinguished or received.

(10) The local government may, by ordinance, establish a transfer of development rights bank, otherwise referred to as the "TDR Bank." The TDR Bank may be operated by the [local planning agency] or by any other existing or new agency designated by the ordinance, including a [regional planning agency] or the [state planning agency].

(a) The TDR Bank shall have the power to purchase development rights, subject to the approval of the local legislative body.
(b) The TDR Bank shall have the power to recommend to the local legislative body properties where the local government should acquire development rights by condemnation.
(c) If the local government itself does not have the power under the state eminent domain enabling statute to condemn development rights or a conservation easement (which is the same thing), that statute must be amended to give the local government that power, so that it can then be delegated pursuant to this paragraph.
(d) The TDR Bank shall have the power to sell or convey any development rights it may possess, subject to the approval of the local legislative body.
(e) The TDR Bank may, for conservation or other purposes, hold indefinitely any development rights it possesses.
(f) The TDR Bank may receive donations of development rights from any person or organization, public or private, subject to the approval of the local legislative body.
(g) Except for any funding provided to the TDR Bank from the [general *or other*] fund of the local government treasury, the purchase or condemnation of development rights by the TDR Bank shall be funded from the proceeds of the sale of development rights by the TDR Bank, and a separate account in the local government treasury shall be established for such purpose.

[Note: The local government could simply make an appropriation from the general fund, or it may earmark revenue from a particular tax or fee for the funding of the TDR Bank.]

(11) Two or more local governments may enter into an intergovernmental agreement, pursuant to [*relevant state statute*], whereby transfer of development rights may occur between a sending parcel in one local government and a receiving parcel or parcels in another local government. All relevant provisions and terms in ordinances pursuant to this Act in all local governments that are parties to the agreement shall be substantially identical, and this may be provided by including with the agreement a common ordinance to be adopted by all parties to the agreement.

(12) This Act, or any provision thereof, shall not invalidate any completed transfer of development rights pursuant to any earlier statute, ordinance, or regulation, if said transfer was valid at that time.

[Note: Paragraph (12) is a "savings clause," preserving the validity of earlier transfers of development rights, even if performed contrary to the requirements of this statute, as long as they were legally proper at the time.]

---

1. This model statute was prepared as part of the Growing Smart[SM] project. Growing Smart[SM] is a multi-year initiative of the American Planning Association to develop the next generation of model statutes for planning and land development regulation. The

result of the project will be a *Legislative Guidebook* containing a comprehensive model planning and land use code ready for adoption by state legislatures and including in-depth commentary. Phases I and II (of three eventual phases) of the *Growing Smart*^{SM} *Legislative Guidebook* have already been published and are available through APA. Some of the model Sections in Phases I and II have already been proposed as bills inóand adopted as statutes byóvarious state legislatures.