

# **Transfer of Development Rights**

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## **TRANSFER OF DEVELOPMENT RIGHTS**

The transfer of development rights (TDR) provides municipalities in New York State with a very effective and flexible technique for land use control. A legal procedure designed to preserve or protect natural or man-made property resources for the public's benefit, TDR results from a recognition that land ownership has two distinct components, in that the right to develop land is an independent aspect of land ownership.

TDR is a land use regulation technique that can be used to ensure that the open space requirements of the municipality's planning goals are met without causing a financial burden to landowners or restricting needed development. A well thought out and administered TDR program ultimately generates development that is more cost-effective and efficient. The use of TDR reduces the prospect of litigation over preservation policies; it avoids the use of municipal funds to purchase land while helping to ensure preservation goals; importantly, it means that the municipality can increase its tax base, but does not have to settle for less preservation than it really wants.

### **How Does TDR Work?**

In essence, TDR permits all or part of the density potential (established in the local zoning law or ordinance) of one tract of land to be transferred to a noncontiguous parcel or even to land owned by someone else. The development rights become a separate article of property, which can be sold to a landowner whose property is better suited to greater densities. After selling the development rights, a landowner still retains title and all other rights to his land. These other rights permit farming, forestry, some recreational uses, and other nonintensive uses. In addition, the owner may sell or exchange the title to the land just as if the development rights had not been transferred.

TDR involves attaching development rights (the right to develop land) to specified lands desired by the municipality to be kept "undeveloped" and permitting these rights to be transferred from that land, so the development they represent may occur somewhere else. The rights are considered severable for the land ownership so that they may be sold. The "somewhere else" would be lands for which more development and higher density would be acceptable.

The use of the TDR technique is specifically authorized by Town Law § 261-a; Village Law § 7-701; and General City Law § 20-f. These sections were added to the zoning enabling legislation in 1989 and will be discussed in detail below. These statutes define TDR as, "the process by which development rights are transferred from one lot, parcel, or area of land in a sending district to another lot, parcel, or area of land in one or more receiving districts."

An example of how TDR operates is as follows: Land in a "conservation" zoning district is zoned to permit one dwelling per acre. Land somewhere else in the municipality, such as a certain residential district, is zoned to permit one dwelling per quarter-acre. Under TDR, rights to develop 20 dwellings on 20 acres in the conservation district could be transferred to other land. (If it is, then, under the most common TDR model, the 20 acres in the conservation district could not be developed at all – its economic use value would have been realized by sale of the right to develop it.) The 20 dwelling unit density could be added to the density already allowable

in a tract in the specified residential zone. In that district, a 15-acre parcel would permit, under the quarter-acre zoning, 60 dwellings. But with the added development rights acquired from the conservation district (20 dwellings in this example), a total of 80 dwellings could be constructed on the parcel in the residential zone.

TDR can also give owners a way of realizing a greater economic return on property that is occupied by a historic or landmark structure. Compensating owners with transferable development rights is a way of furthering the preservation of historic landmarks and properties. In urban areas, the TDR method is a valuable landmark preservation tool.

Because it permits the transfer of the right to develop land (thus permitting some economic return without actually building on land) the TDR technique may prevent successful challenges to very restrictive zoning controls adopted in pursuit of preservation or environmental protection goals. It could also serve to minimize the chance of use variances being granted in an area zoned for open space uses or other restrictive uses. Application for a use variance would be an alternative to bringing suit to challenge the validity of a restriction felt by the landowner to be confiscatory. One of the tests that must be met by an applicant for a use variance is to show that it is not possible to earn a reasonable economic return under any use permitted by the zoning regulations (Otto v. Steinhilber, 282 NY 71 (1939)). Availability of some economic return through sale of development rights could prevent the owner from meeting this test for a variance.

### **TDR Distinguished from Cluster Development**

As can be seen from the above discussion, TDR involves the transfer of the right to develop land from one parcel to another parcel. The parcels are usually not contiguous and actually could be separated by some distance. Most often they are under different ownership.

Cluster development, on the other hand, is a land use regulation technique which involves the transfer of allowable development density within a single tract of land which is being developed, thus enabling structures to be located on a site in a manner that does not otherwise comply with the lot size, setback, frontage, or similar requirements of the applicable zoning law. The goal being to “increase dwelling densities on specific locations of a development in order to leave other locations free of dwellings.” (Matter of Ahearn v Zoning Bd. of Appeals of Town of Shawangunk, 158 AD2d 801 (3d Dept, 1990), *leave denied*, 76 NY2d 706 (1990)). There is specific statutory authority for the use of the cluster development power by planning boards when approving subdivision plats in municipalities that have zoning regulations (Town Law § 278; Village Law § 7-738; General City Law § 37). These statutes empower the municipal governing body to authorize the planning board to allow (or to require) the use of the cluster technique by developers seeking approval of subdivision plats.

For example, if a subdivider proposes to develop a 50-acre parcel of land in a single-family residential district with 75 dwellings, under standard zoning and subdivision regulations, these dwellings would be evenly distributed throughout the 50-acre tract, with each dwelling located on a lot meeting the minimum lot size requirements of the zoning law. Under cluster development, the 75 units could be clustered or grouped together onto a small portion of the

developer's 50 acres. Thus, the 75 units might be constructed on 30 acres, leaving the remaining 20 acres as open space. There is no transfer of density to a different parcel as there would be under TDR. The construction is still entirely on the developer's particular parcel. Under a TDR program, the same developer might be able to cluster development not only from its own 50 acres, but from another 20-acre parcel as well, by purchasing the development rights, perhaps leaving the other 20 acres – where the rights were purchased from – as additional open space.

### **Pre-Enactment TDR**

The idea of transferring development rights between properties was first introduced in New York City with the passage of that first American zoning ordinance in 1916. It allowed landowners to sell their unused air rights to adjacent lots, which could then exceed the new height and setback requirements. The modern sense of the TDR technique as a way to preserve certain areas and develop others has been used since New York City included a density transfer mechanism in its landmarks preservation law in 1968. Prior to the State's enactment of the TDR enabling legislation in 1989, two Court of Appeals decisions, one decided in 1976, the other in 1977, provided a legal basis for TDR and gave some indication as to how the courts will view its use.

Fred F. French Investing Co. v. City of New York, 39 NY2d 587 (1976), involved a rezoning of land to public park use, which was accompanied by a grant to its owners of transferable development rights which could be used anywhere within a designated "receiving zone." The Court of Appeals reaffirmed the general rule, stated above, that an owner may not, under the guise of zoning, be deprived of all but a "bare residue" of the economic value of his property. The Court went on to say that, in this case, severance of the development rights did not adequately preserve an economic return for the owner since the market for them was too uncertain and contingent and since their transfer was mandatory.

The Court stated:

" . . . it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action. The acceptance of this contingency-ridden arrangement, however, was mandatory under the amendment."

While the Court invalidated the rezoning, it clearly recognized that development rights could be assigned to property through municipal police power regulation (i.e., zoning) and that such rights may be severed from that property and relocated or transferred elsewhere. This is, of course, the conceptual basis for TDR, and the concept can clearly be said to have support in this Court of Appeals opinion. Moreover, despite the end result that the Court invalidated the TDR approach

before it, there is within the opinion a generally encouraging tone toward other schemes which would be more protective of due process considerations.

The French Investing case left open the door for TDR schemes which would be more protective of the right of an individual to a reasonable economic return. As noted, the Court was bothered by the combination of an uncertain market for the development rights and their mandatory transfer. Thus, it is arguable that absent either element, a TDR approach would be sustainable.

At about the same time, the "Grand Central Terminal" case was introduced.

In Penn Central Transportation Company v. City of New York, 42 NY2d 324 (1977), *aff'd*, 438 US 104 (1978), the designation of Grand Central Terminal as a protected landmark was at issue. The Court of Appeals sustained the designation over claims that the owners of the structure were deprived of a reasonable economic return because of the development restrictions applicable to the landmark. The specific issue affecting TDR concerned a provision of the city regulation which granted to the owner of the landmark the right to transfer the development rights above the terminal to other parcels of land in the vicinity. The Court held that the value of these rights may be considered in determining whether the owners were able to receive a reasonable return on their investment. The US Supreme Court upheld the constitutionality of New York City's regulations.

The Court recognized that development rights, once transferred to other land, might not be worth as much as on the original site:

"But, that, alone does not mean that the substitution of rights amounts to a deprivation of property without due process of law. Land use regulation often diminishes the value of the property to the landowner. Constitutional standards, however, are offended only when that diminution leaves the owner with no reasonable use of the property.

The situation with transferable development rights is analogous. If the substitute rights received provide reasonable compensation for a landowner forced to relinquish development rights on a landmark site, there has been no deprivation of due process."

The French Investing case was distinguishable, the Court stated, because there the development rights on the original parcel were quite valuable, and the regulations both prevented use of that site for any economic return and left the development rights in a highly contingent status. Hence, there was a deprivation of property without due process. The Court noted that in the Penn Central case, the regulations permitted continued productive use of the property as a railroad terminal and permitted use of the development rights in a less contingent fashion: "These substitute rights are valuable, and provide significant, perhaps 'fair,' compensation for the loss of rights above the Terminal itself."

The Penn Central case is significant both for its recognition of the concept of transferable development rights and for its utilization of their value in determining whether land use restrictions are valid.

### **Statutory Authority for TDR**

General Municipal Law, Article 5-K, which pertains to historic preservation, has, since 1980, authorized municipalities to use TDR to preserve historic or culturally significant properties, but this is a limited purpose authorization. Nevertheless, the absence of specific statutory authority would not likely be a bar to the use of TDR, as the Court of Appeals has interpreted the land use powers of municipalities very broadly in upholding innovative approvals as long as they are undertaken for the zoning purposes set forth in the statutes (*see* Golden v. Planning Board of Ramapo, 30 NY2d 359 (1972)). Indeed, several municipalities have enacted TDR provisions pursuant to their home rule authority to regulate land use.

In 1989 the State Legislature provided specific statutory authority for TDR in New York by amending the Town, Village, and General City Law (General City Law § 20-f; Town Law § 261-a; Village Law § 7-701). These statutes clarified local TDR authority and provided a specific procedure for creating and implementing a TDR program.

The TDR enabling statutes enacted in 1989 (Chapter 40 of the Laws of NY for 1989) specifically provide that the authority they confer is *in addition to* previously existing powers to provide for TDR. This preserves the right of municipalities to use their general zoning powers to provide for TDR, as several had done prior to the enactment of the 1989 statutes. The 1989 statutes neither affect those provisions that may have been enacted prior to 1989, nor do they prevent municipalities from using their general land use powers under the Municipal Home Rule Law as authority to enact TDR. The result is that there really are two separate sources of municipal power to enact TDR provisions: land use regulatory power under municipal home rule and the express statutory authority to enact TDR.

The specific enabling authority for TDR is examined here in some detail, since it provides excellent guidance for municipalities considering the use of the TDR technique. In general, the statutes define key terms used in TDR and contain specific authority to use TDR subject to the conditions contained in the statute (and any additional conditions established by the local governing body).

#### **1. Purposes**

"The purpose of providing for transfer of development rights shall be to protect the natural, scenic or agricultural qualities of open lands, to enhance sites and areas of special character or special historical, cultural, aesthetic or economic interest or value and to enable and encourage flexibility of design and careful management of land in recognition of land as a basic and valuable natural resource." (General City Law § 20-f(2); Town Law § 261-a(2); Village Law § 7-701(2)).

This language is very broad. It embraces almost any conceivable purpose the municipality might wish to use TDR to achieve. The statutes are equally flexible in the conditions that be imposed in designing a TDR program, as the legislative body may establish those that they deem "necessary and appropriate" to achieve the purpose of the TDR program. As noted above, the planning objectives which TDR might be used to achieve are many and varied. They can include preservation of open space, agricultural lands, or areas of particular scenic or environmental concern. In addition, these objectives might also call for protection of developed areas where new development is not desired, such as historic sites, districts or groupings of historic structures or low-rise waterfront development that is part of a community's cultural heritage or is important to the economy of the municipality. The breadth of the statutory purposes would allow the use of TDR to implement a wide range of planning objectives.

## 2. "Development Rights"

The enabling statute defines the term "development rights" to mean the rights which are allocated to land and which may, under TDR, be transferred. The statute defines the term very broadly, so that essentially any measure of such rights which is deemed by the municipality to be appropriate is allowable, as long as it is used in a reasonable and uniform manner. An efficient TDR program usually establishes some method of valuing the development rights that are transferred. Thus, for example, a local TDR provision may define development rights in units per acre, or in square feet of floor area, or in units of height of structures, among others. It may establish rights in terms of credits that may in turn be sold.

How to define and value development rights may prove difficult for local officials undertaking a TDR program. However, it is important to effectively quantify an appropriate value for the development rights that are to be transferred in order to create a viable market for them in the districts that the local officials wish to be developed. This can be critical not only to the ultimate success of the program, but also to its surviving legal challenges.

## 3. Designating "Sending Districts" and "Receiving Districts"

In almost all cases, TDR will be enacted as part of the municipal zoning regulations. This means that TDR, and the sending and receiving districts, will be established in accordance with a comprehensive planning process (General City Law § 20(25); Town Law § 263; Village Law § 7-704). This is a basic tenet applicable to all zoning, and the TDR enabling statute specifically reaffirms this (General City Law § 20-f(2)(a); Town Law § 261-a(2)(a); Village Law § 7-701(2)(a)). The importance of planning, and of relating the sending and receiving districts to an overall land use policy that is in the best interests of the community is central to the provisions of the TDR statute.

"Sending districts" are defined to mean one or more designated districts or areas of land in which development rights may be designated for use in one or more "receiving districts." In short, they are the areas from which development rights may be transferred. Often, the zoning regulations applicable to the sending districts will be amended to reduce or eliminate further development. The sending district must consist of "natural, scenic, recreational, agricultural or open land, or sites of special historical, cultural, aesthetic or economic values sought to be protected."

(General City Law § 20-f(2)(a); Town Law § 261-a(2)(a); Village Law § 7-701(2)(a)). The statutory language is very broad, allowing the municipality to use TDR to achieve the widest possible range of goals for its sending districts.

There is also guidance in the statute concerning the designation of "receiving districts." These are defined to mean one or more designated districts or areas of land to which development rights generated from sending districts may be transferred, and in which increased development is permitted to occur by reason of the transfer. The receiving districts are the areas to which development rights are transferred, and great care must be taken with their designation for two reasons. First, there should be a market for development rights in the receiving district (this is a basic premise of the whole TDR system). Second, the transfer will necessarily result in an increase in the density or intensity of development in the receiving area, which means that municipal services must be available to support it; consequently, there must be an awareness of the potential impact of such development. The statute recognizes this, providing that:

"Every receiving district . . . shall have been found by the [municipal legislative body], after evaluating the effects of potential increased development which is possible under the transfer of development rights provisions, to contain adequate resources, environmental quality and public facilities including adequate transportation, water supply, waste disposal and fire protection, and that there will be no significant environmentally damaging consequences and such increased development is compatible with the development otherwise permitted by the [municipality] and by the federal, state and county agencies having jurisdiction to approve permissible development within the district." (General City Law § 20-f(2)(a); Town Law § 261-a(2)(a); Village Law § 7-701(2)(a)).

Clearly, a great deal of careful forethought and planning is called for in designating sending and receiving districts. Indeed, the statute underscores the importance of this forethought by requiring that a generic environmental impact statement be prepared for the receiving district prior to its designation or the designation of the sending district.

The sending and receiving districts must be designated and mapped with specificity (just like any other type of zoning district). They need not be coterminous with zoning districts. They may be mapped as overlays, covering all or portions of existing zoning districts.

Finally, the statute requires the legislative body, in considering the designation of sending and receiving districts, to evaluate the impact of TDR on the potential development of low or moderate income housing which would be lost in the sending districts and gained in receiving districts. The legislative body must find that there is "approximate equivalence" between lost opportunities for such housing in the sending district and gained opportunities in the receiving district, or that the municipality has taken or will take reasonable action to compensate for any negative impact on the availability or potential development of such housing caused by TDR (General City Law § 20-f(2)(f); Town Law § 261-a(2)(f); Village Law § 7-701(2)(f)). Clearly, when land is designated as a sending district, the actual development that could otherwise occur on that land would be severely limited, and possibly even prohibited. On the other hand,

development in the receiving district will likely occur at higher densities due to the development rights being transferred there. The result could be greater opportunities for affordable housing.

#### 4. Land in the Sending District - Conservation Easements

As noted earlier, development rights assigned to land in the sending district may be (or must be, if the regulation so requires) transferred to land in the receiving district. When that happens, there is a need to have some indication, recorded in the chain of title, to notify prospective purchasers of the property that development rights have been transferred.

Accordingly, the statute provides that when development rights have been transferred from property in the sending district, the grantor of those rights must execute a conservation easement. Environmental Conservation Law, Article 49, Title 3 provides for conservation easements. Conservation easements are interests in land which limit the use or development of the land. They are recorded in the chain of title so that subsequent purchasers will be aware of the particular restriction (Environmental Conservation Law § 49-0305(4)). Such easements are enforceable by the municipality under the terms of the TDR statute (General City Law § 20-f(2)(c); Town Law § 261-a(2)(c); Village Law § 7-701(2)(c)) and may be enforceable by other entities if the instrument creating the particular conservation easement so provides (*see* Environmental Conservation Law § 49-0305(3)(a) and (5)).

The municipality must adopt regulations establishing minimum uniform standards for instruments creating conservation easements within a sending district. The statute requires this to be done at the time the sending district is created. In addition, the program must provide for the reassessment, within one year, of the property tax value of any parcel whose development rights have been transferred.

#### 5. Land in the Receiving District

The purpose of TDR is that development rights from the sending districts will be relocated to the receiving districts, thus allowing a municipality to achieve its preservation objectives for the lands in the sending districts. This, of course, means that development in the receiving districts will occur at a greater density than otherwise would be allowed by the zoning, with the increase attributable to the development rights which were transferred from the sending districts.

As previously noted, it is critically important that receiving districts are carefully and thoughtfully designated so that the land included in them can withstand the increased density. The statute also provides procedures to be used when specific development occurs in the receiving district.

The statute provides that review of any action pursuant to the State Environmental Quality Review Act (SEQRA) within a receiving district that uses transferred development rights is limited to information about the project and site where the action will occur, and to review of the environmental impacts of the action which were not adequately reviewed in the generic environmental impact statement that was prepared in connection with the original designation of the receiving district (General City Law § 20-f(2)(b); Town Law § 261-a(2)(b); Village Law §

7-701(2)(b)). This means, essentially, that a substantial review of the environmental impact of future proposed projects will have occurred at the time when the receiving districts are originally designated and general requirements that will apply to development projects using transferred development rights are established. These requirements would usually cover such matters as the amount of density to be allowed using transferred development rights, setbacks, height limitations, landscaping, signs, parking, architectural features, etc. Because they are generally applicable requirements meant to be applied to future projects, they would be part of the generic environmental impact statement that analyzes the acceptability of the receiving district at that particular location. Then, when a specific project using TDR is proposed – possibly some years later – the scope of review of its environmental impact would be narrower, looking only at those concerns not addressed when the generic environmental impact statement was done.

In addition, there is a procedure to place on record the fact that development rights have been acquired. The statute provides that where development rights have been transferred, the municipality is to issue a "certificate of development right" to the transferee or recipient. The certificate must be in a form suitable for recording in the chain of title to particular property (General City Law § 20-f(2)(c); Town Law § 261-a(2)(c); Village Law § 7-701(2)(c)).

## 6. Variations of TDR Programs

There are several different approaches to the TDR idea. Most often, the land desired by the municipality to be kept "undeveloped" (the sending district) is prohibited from utilizing the development rights that it has been assigned since the zoning is usually amended so that development of the sending district is severely restricted. The development rights accorded to land owners in the sending district – above whatever is allowed in the sending district – would have to be transferred or sold in order for the owner to realize an economic return. These are "mandatory" TDR programs.

The zoning restrictions in the sending district can be "complete" or "partial." That is, development may be completely prohibited in the sending district or perhaps, allowable densities simply reduced.

Other variations can be referred to as "optional" or "voluntary" TDR programs. The owner of the land in the sending district in such a program may proceed with development on her land in accordance with allowed zoning or she may elect to transfer development rights to eligible land that she owns in the receiving district or sell the rights to an owner or developer there or even to a development rights bank (discussed below). The municipality does not, necessarily, have to restrict development or allowable density within the sending districts. A purely voluntary TDR program may leave existing zoning within the sending district in place but allow owners the option of detaching development rights from their land and selling or transferring them. Developers in the receiving district may want to buy additional rights for more dense development, and owners in sending districts may be willing to sell their rights and accept a conservation easement on their property.

## 7. Development Rights Bank

The enabling legislation also added a very important feature to the TDR concept in New York: development rights banks.

To be effective, TDR depends upon the existence of a market for the development rights that are to be transferred. If there exists no market in the receiving districts for the development rights, their transfer from the sending districts will not occur. If transfers don't take place, two very unpleasant results may occur. If the TDR system is voluntary, i.e., if it allows transfers but also allows development in the sending district, the lack of a market would mean more development on the owners' land in the sending district. This, of course, would frustrate municipal preservation goals. If the TDR system is mandatory, i.e., if development in the sending district is severely restricted and development rights must be transferred to receiving districts to be utilized, then the lack of a market may result in an overly restrictive regulation of the land in the sending district (*see Fred F. French Investing Co. v. City of New York*, 39 NY2d 587 (1976), *supra*; *see also Suitum v. Tahoe Regional Planning Agency*, 520 US 725 (1997)). In *Suitum*, the Supreme Court held that a regulatory takings claim was ripe for review even where transferring development rights had not been explored by the owner. A development rights bank in these cases may have mitigated the results by providing the owners with immediate and concrete value and economic return.

The development rights bank is a way to ensure that a ready market for development rights will exist at all times. It involves the establishment by the municipality of a "bank" or "account" that acquires and retains development rights when they are sought to be transferred by owners in the sending district. The municipality would purchase or acquire through donation or bequeathment the development rights and hold them until such time as demand develops for their use in the receiving district. At that time, the municipality may sell the development rights for use. Property owners in the receiving districts are eligible to apply for these development rights to increase the densities at which their lands may be developed, and accordingly, may purchase them from the development rights bank. Receipts from the sale must be deposited in a special municipal account "to be applied against expenditures necessitated by the municipal development rights program." (General City Law § 20-f(2)(e); Town Law § 261-a (2)(e); Village Law § 7-701(2)(e)).

Where two or more municipalities have TDR programs or wish to work together on one, authority exists under General Municipal Law Article 5-G for an intermunicipal development rights bank or TDR program. This arraignment could be useful where a municipality wishes to protect certain agricultural lands, for example, but doesn't have a suitable receiving district within its jurisdiction. If a neighboring municipality is seeking a way to incentivize development in a certain area, the two local governments may find it beneficial to collaborate through an intermunicipal agreement on TDR.

## 8. Procedures

The statutes provide that the municipal legislative body, in adopting or amending TDR procedures, must follow the procedure for adopting and amending the zoning ordinance or local law (General City Law § 20-f(3); Town Law § 261-a(3); Village Law § 7-701(3)).

Ordinarily, TDR procedures would be incorporated as a separate section or article of the zoning ordinance or local law, and the designation of sending and receiving districts would be accomplished by amending the zoning map (which is part of the zoning ordinance or local law). Thus, all procedures required for adoption or amendment, as the case may be, of a zoning ordinance or local law, should be scrupulously followed.

### **Examples of TDR In Use**

The Pine Barrens on Long Island were designated for protection from development by the New York State Legislature under the 1993 Long Island Pine Barrens Protection Act. Under the Act, a joint planning commission was created with broad authority over land use review, permitting, and enforcement authority in cooperation with local municipalities. The commission operates a successful TDR program with over 1,000 acres of land preserved by permanent conservation easement.

The Town of Clifton Park adopted, in 2005, the Open Space Incentive Zoning provision to its zoning code, designed to help implement various open space preservation goals. In this TDR program, the potential sending sites include nature preserves, watersheds, environmentally sensitive areas, active farms, trails, and other historic, recreational, and cultural resources and open space. In the town's receiving sites, developers may apply for increased density for residential construction or commercial uses by offering to permanently protect open space or resources within the sending sites.

The Town of Lysander in 2008 adopted a TDR program with the establishment of sending and receiving area overlays that are designed to protect and maintain agricultural uses and preserve open space within the town.

### **Purchase of Development Rights**

The use of public money to purchase development rights to private land has become increasingly popular as a way to preserve agricultural land and open space. The General Municipal Law authorizes municipalities to use public funds to acquire interests or property rights for the preservation of open space or agricultural land (General Municipal Law § 247). The Agriculture and Markets Law provides for a State grant program to help municipalities with approved farmland protection programs purchase development rights on farmland (Agriculture and Markets Law § 325). Increasing numbers of municipalities have created such protection programs to purchase the development rights of lands used in agricultural production or open space from property owners who voluntarily choose to offer them for sale. The fund from which these purchases are made is locally financed by bonds in an amount authorized by the voters in referenda at regular elections.

Purchase of development rights (PDR) involves acquiring the development rights associated with a particular parcel of land. The purchase price is usually determined by appraisal. The price is often the difference between the agricultural or open space value and the development value. For example, if the value of farmland is \$8,000 per acre and a developer would pay \$20,000 to buy the property for development, the value of the development right would be \$12,000 per acre. After a governmental agency or land trust acquires the development rights to a particular property, the development rights are then "retired" through deed restriction.

According to the NY Department of Agriculture and Markets, the State offers grants to fund county and municipal purchase of development rights programs:

"State assistance payments are available to counties or municipalities to cover up to 75% of the total costs for implementation activities to protect viable farmland. These grants are awarded pursuant to a Request for Proposals (RFP). The RFP contains eligibility guidelines and criteria by which all projects are scored and ranked for funding. Since the inception of this program in 1996, the Department has awarded nearly \$80 million to protect approximately 36,000 acres on 200 farms in 18 counties."

"In 2004, a total of 43 municipalities requested more than \$86 million under this highly competitive grants program, and a total of \$12.5 million in Environmental Protection Fund resources were awarded to 15 municipalities to purchase the development rights on 20 farms. This continues a trend of rapidly escalating interest in the use of conservation easements among municipalities and farm owners to protect farmland since this grants program was initiated."

## **Conclusion**

There are three primary benefits of TDR: it permits preservation of lands where further development is undesirable for a variety of reasons; it does so without loss of new development to the community; and it does so without depriving landowners of a reasonable economic return on their property. The great advantage of the TDR approach is that it involves minimal expense to the municipality.

The technique does have certain drawbacks, however. It demands a greater degree of administrative attention than most zoning. TDR must be carefully administered so that the exact status of development rights on all parcels in sending and receiving districts is known at all times. If a development rights bank is used, the status of rights in the bank and the proceeds from their sale must be kept track of. Since the assessed value of real property in sending and receiving districts must reflect any transfer, the assessor must keep track of transactions.

The very nature of TDR as a system for the transfer of the right to develop land in exchange for compensation requires a continuing commitment by the municipal legislative body to its success. Applications for rezoning of individual parcels in either the sending or receiving districts will have to be carefully reviewed to determine their impact on the development rights program.

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