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TDR-Less TDR Revisited:

Transfer of Development Rights Innovations and Gunnison County's Residential Density Transfer Program

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Transfer of development rights, or TDR, has preserved more than 400,000 acres of land and is now used in over 200 cities, towns, and counties throughout the country. Despite TDR's ability to save land at minimal public expense, many communities remain reluctant to adopt their own TDR programs.

Perhaps these communities assume they must duplicate the components found in traditional TDR programs, which require potentially contentious decisions about the number of transferable development rights or TDRs to be granted when sending-area landowners record approved easements and the amount of additional density that receiving-area developers will be allowed for each TDR they buy. (The sidebar "Traditional TDR 101" below highlights these and other complexities while providing a refresher course on TDR basics.) But in fact, several communities have been experimenting with new varieties of TDR for years in an effort to create programs that are right for local circumstances.

We begin with a brief review of these innovations before focusing on the Residential Density Transfer program recently adopted by Gunnison County, Colorado, which combines many previously developed concepts with a new mechanism for creating parity between receiving-area developments. We are not claiming that any or all of these techniques are necessarily appropriate for every community. But in many places, the use of some of these features will facilitate the adoption of a successful preservation tool that relies on development proceeds rather than tax dollars.

Evolution of TDR Innovations

Traditional TDR Programs

In traditional programs, the TDR ordinance establishes the number of *transferable development rights*, or TDRs, that a landowner will be issued when an approved easement is recorded on a property in the *sending area*, the area where the community would like less or no development. (For a more complete review of TDR jargon, please see "Traditional TDR 101" below.)

Many communities prefer this straightforward approach, particularly when the sending-area parcels are likely to have relatively similar development value. But in some cities and counties, the sending-area landowners express concerns about the fairness of a single TDR-allocation formula. This concern is most likely to appear in programs with large sending areas, such as those that operate county-wide in the West.

Traditional TDR 101

Transfer of development rights is a process that allows extra development in places that a community wants to grow, called receiving areas, in return for preservation of places that a community wants to save, called sending areas. *Receiving areas* are appropriate for growth because they are typically close to jobs, shopping, schools, infrastructure, public services, and other urban amenities. *Sending areas* could include environmental areas, historic landmarks, farmland, open space, and any other important resources that deserve permanent preservation. *Transferable development rights*, or TDRs, are units of measurement created by traditional TDR ordinances. Traditional TDR ordinances allow developers a specified *density bonus* for each TDR purchased, such as one extra residential dwelling unit above the baseline density limit for each TDR purchased.

In successful TDR programs, developers can exceed baseline density only by buying TDRs. Traditional TDR ordinances also stipulate the TDR *allocation rate* or the number of TDRs per acre that a sending-site owner can sell per acre of land. The sending-area owner is able to sell these

TDRs only after recording a conservation easement that restricts future development and specifies the permitted land uses.

To make the program work, the amount that a developer pays for a TDR must be less than the extra profit resulting from the density bonus allowed by that TDR. Consequently, planners typically enlist land-value experts, such as appraisers, to make projections about the extra profit that is likely to be generated from the density bonus allowed by one TDR. They then assume that developers will be willing to pay some fraction of that amount for each TDR. In the sending areas, enough TDRs must be allocated per acre so that the landowners feel adequately compensated for their forgone development potential.

As a hypothetical example, a traditional TDR program might allow a density bonus of one additional dwelling unit per TDR purchased by receiving-site developers. On average, the ability to build one extra dwelling unit might increase receiving-site value by \$20,000. The planner might target TDRs to sell for \$10,000 each, leaving \$10,000 in extra profit per TDR to receiving-site developers who buy TDRs. The land-value expert may also estimate that sending-area landowners want \$2,000 per acre on average to place their land under permanent easement. If sending-area landowners are allowed to sell one TDR per five acres and developers are willing to buy TDRs at \$10,000 each, transactions should occur.

However, the value added by density bonuses can differ because receiving sites and receiving-site projects are not identical. Similarly, when sending areas are large and diverse, the per-acre development value may vary considerably. Traditional TDR ordinances can attempt to reflect some of those differences. For example, they can specify different density bonuses for different types of receiving areas and receiving-site developments. Likewise, they can create various sending-area categories and allocate TDRs differently to land in each category to reflect development-value differences.

Most communities want to keep their TDR ordinances simple in order to promote public understanding and acceptance. However, as this article shows, there may be some communities in which the need for simplicity is outweighed by concerns that traditional TDR can provide significantly more profit to some developers and landowners than others.

Variations on Traditional TDR

These concerns can sometimes be addressed by creating different TDR allocation formulas for lands with distinctly different development potentials. For example, a county could apply one allocation ratio to remote areas and a higher ratio to lands that are near urbanizing areas. This higher ratio would be particularly appropriate if the community wants the TDR option to be similarly attractive to all sending-area property owners despite differences in development potential. However, in the process of trying to level the playing field, communities must be careful not to create so many permutations that the proposed program is perceived as overly complicated.

Of course, alternative allocation formulas cannot reflect all the factors that account for differences in sending-area development, including location, view, natural resources, access to infrastructure, amenities, and development constraints such as steep slopes, soils, floodplains, and wetlands. The difficulty increases as the size and diversity of the sending area increases. Some communities deal with this issue by allowing developers to comply with cash instead of TDRs and using that revenue to preserve land through site-specific appraisals and negotiations with individual property owners. More on this later.

The county-wide TDR program in San Luis Obispo County, California, takes a slightly different tack. San Luis Obispo County covers 3,300 square miles and incorporates a vast variety of land from coastal areas to deserts and from isolated ranches to vineyard areas that are popular with tourists and retirees. In this program, an appraisal of easement value is conducted for each sending site offered by its owner. One TDR is issued for each \$20,000 of appraised easement value. The price that developers ultimately pay for these TDRs is not necessarily \$20,000 each but rather is based on negotiations between the buyer and the sending-area landowner. The key aspect of this program is that the landowners got the tailored TDR allocation that was important to them: The number of TDRs assigned to them reflects the value of the easement and therefore incorporates the entire range of factors that create sending-site development value.



San Luis Obispo County, California, grants TDRs based on appraisals of sending-site easements. Photo Rick Pruetz.

Just as sending-area landowners can be concerned about comparable treatment, receiving-area developers in some communities are focused on making sure that the amount they spend to receive bonus development is a reasonable portion of the additional value they gain from that bonus development. In most communities, this concern can be addressed with TDR requirements that correspond with the nature of the bonus development. For example, it is common for one TDR to allow one bonus single-family residential dwelling unit or two bonus multiple-family dwelling units. On occasion, different allowance ratios might be used for each different receiving zoning district. But again, programs should generally avoid a level of complexity that could jeopardize program adoption.

Density Transfer Charge Programs

A growing number of communities address both sending- and receiving-site concerns through an innovation referred to here as *density transfer charges* (DTC). Berthoud, Colorado, is credited with popularizing DTC with its Density Transfer Fee option. In 1999, Berthoud wanted to adopt a preservation tool in advance of an approaching growth wave. A traditional TDR program would have taken too long and would have been very difficult to adopt.

So Berthoud simplified the basic TDR mechanism. It did not designate sending areas or adopt a formula for the allocation of TDRs. In fact, the program does not use or need TDRs. Receiving areas are created when the Town of Berthoud approves an upzoning that has the effect of allowing additional dwelling units. For each additional dwelling unit in excess of the maximum allowed under the prior zoning, a developer can choose between two compliance methods: preserve one acre of significant resource land (as identified in the comprehensive plan) or pay a density-transfer fee of \$3,000 per bonus single-family residence or \$1,500 per bonus multiple-family dwelling unit. The ordinance has many appealing features:

- The compliance mechanism relieves Berthoud of having to calculate, issue, track, and retire actual TDRs.
- Adoption was facilitated by avoiding the potentially controversial process of designating sending and receiving areas.
- It was not necessary to craft TDR allocation ratios for sending areas and create bonus density allowances per TDR because the program does not use TDRs as currency.
- Developers know that they will be able to comply with program requirements at a known price without having to negotiate with landowners (unless they want to).
- Berthoud can leverage the revenue from this program and target high-priority parcels for acquisition.

- Compliance with the density transfer fee requirement is not required until a building permit is requested.

Of the 20 DTC programs known to us, 15 are like Berthoud's in that they give developers a choice of compliance by preserving land, buying TDRs, or paying cash in lieu of TDR. As an advantage, a cash-in-lieu option gives developers maximum flexibility. Those developers who have the personnel and time to negotiate directly with landowners may find it cheaper to buy land, easements, or TDRs rather than make the required cash-in-lieu payment.

Conversely, developers with smaller projects, fewer staff, and fewer resources may find that it's easier and ultimately cheaper to simply sign a check for the cash-in-lieu amount. For example, during a two-year period in Charlotte County, Florida, developers of three projects needing only one or two bonus units via TDR used the cash-in-lieu option while six developers wanting an average of 262 bonus units apiece all chose to transfer actual TDRs rather than make cash-in-lieu payments.

Alternatively, in five of the 20 DTC programs that we know of (including the Gunnison County program highlighted below), developers can achieve bonus development only by making a cash payment. The community benefits from this approach because it maximizes the revenue available for matching grant funds and targeting the highest preservation priorities.

However, DTC programs do not necessarily address the concerns of developers who want the cost of TDR compliance to be proportionate to the amount of additional profit that these bonus units generate. Of the 16 DTC communities that document how their cash payments are calculated, six offer a uniform amount regardless of the nature of the receiving-site development. For example, Warwick Township in Orange County, New York, sets its cash-in-lieu option at a flat rate of \$50,000 per dwelling unit.



In Warwick, New York, developers have the TDR compliance option of a \$50,000 cash-in-lieu payment.
Photo Rick Pruetz



In Clifton Park, New York, a \$20,000 cash-in-lieu payment allows one bonus multiple family dwelling or 1,000 square feet of bonus floor area.
Photo Rick Pruetz

Three programs do make distinctions for major differences in receiving-site development. As mentioned above, in Berthoud, Colorado, the cash-in-lieu option is \$3,000 per bonus single-family residence and \$1,500 per bonus multiple-family residence. Similarly, in Clifton Park, New York, a \$20,000 payment allows one bonus multiple-family residential dwelling unit or 1,000 square feet of bonus office floor area while a \$30,000 payment allows one bonus single-family residence or

1,000 square feet of bonus retail floor area.

In four other programs, the payment amount is intended to approximate the cost of preserving the amount of sending-site land needed to produce one TDR. For example, in Charlotte County, Florida, the Real Estate Services Department establishes the in-lieu payment amount based on recent sales of property that would qualify as a sending site for the subject receiving site. Hatfield Township, Massachusetts, bases its charge on the average assessed land-value difference of all improved land versus all unimproved land in the entire township.



In Hatfield, Massachusetts, the density transfer charge is based on average assessed land values throughout the township.

Photo Rick Pruetz

Finally, two programs establish the DTC as a stated percentage in the land-value increase resulting from approval of increased density. In Pierce County, Washington, the cash-in-lieu option is one-half of the increase in receiving-site land value caused by increased development potential as determined by an appraiser. As further detailed below, Gunnison County allows additional development potential only through its Residential Density Transfer requirement, which is set at 10 percent of the land-value increase resulting from subdivision approval as determined by the county assessor.

Building a Better DTC Program

In all but the last two DTC programs mentioned, the required payments do not address the possibility of variable land-value increases resulting from the approval of additional development potential. Because DTC payments must not consume an unreasonable amount of profit amount, setting a uniform DTC payment necessitates a low amount so as not to unduly burden smaller, more modest developments. This can be problematic.

For example, in such a program a subdivision of million-dollar estates would be subject to the same low DTC payment requirement as a starter-home development of bungalows. Developers of those moderately priced houses might get understandably upset that this payment amount represents a larger portion of the profit margin on their smaller units than the portion paid by the developers of the higher-priced mansions. In addition, by establishing a low DTC payment amount, the community is foregoing revenue needed for the preservation of the sending sites and consequently hobbling its ability to achieve all of its land-use goals.

To date, most communities have imposed uniform requirements, and it is likely that many communities will continue to accept this approach. But we also predict that an increasing number of communities will turn to a value-based DTC requirement for the following reasons:

- Communities will want to maximize their resources for preservation as the need for

protection rises, particularly if funding from alternative sources dwindles.

- Communities will want to create programs that adapt easily to changes in the real estate market.
- Developers in some communities will object to the inequities of a uniform requirement regardless of the style of housing being built.

That is one of the reasons why we joined with Tom Maynard to write the August 2002 *PAS Memo*, "TDR-Less TDR: A Transfer of Development Rights Approach That 'Custom Fits' Transactions." In that eight-year-old article, we pointed out that traditional TDR requires planners to make projections about the average property value changes that are expected to occur in the future when development potential is shifted from sending sites to receiving sites. We pointed out that some stakeholders might question the accuracy of these projections or voice concerns about the way in which this unit of measurement assumes similar profitability when actual receiving-site projects feature different types and scales of development.

The article then sketched an alternative approach in which developers would receive bonus development in receiving areas not by buying a specified number of TDRs or making a uniform DTC payment but by buying easements on sending-area land equal in value to a predetermined percentage of the property value increase resulting from the additional development approved through the TDR process.

The 2002 article pointed out that this approach, which we will continue to call TDR-less TDR, was not necessarily superior to other TDR methods or that it would always facilitate ordinance adoption. But we did predict that TDR-less TDR could be the solution when concerns about variable profitability threaten to scuttle adoption of a traditional TDR program.

The approach presented in the 2002 article was conceptual. But in 2007, Pierce County, Washington, adopted a TDR program with a similar cash-in-lieu option that gives developers the alternative of paying half of the land-value increment estimated for the receiving site as estimated by an appraiser.

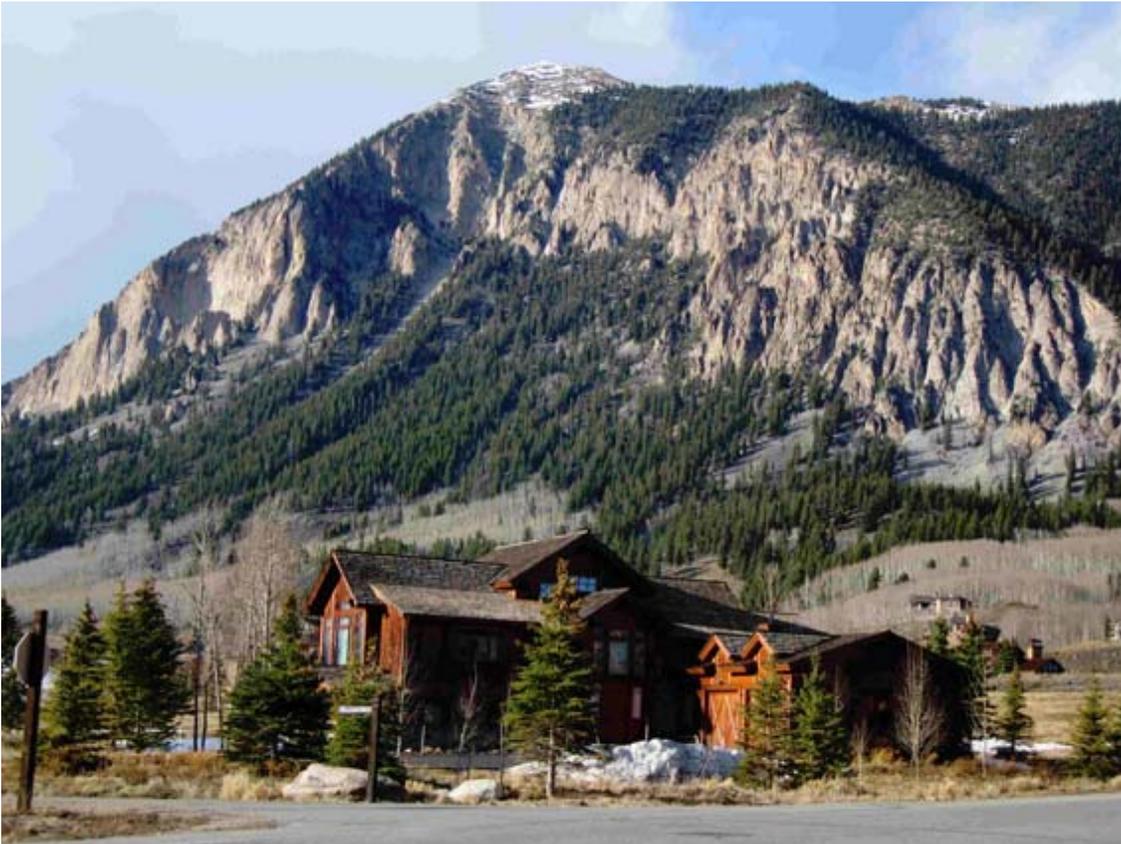
In 2009, Gunnison County, Colorado, adopted a program called Residential Density Transfer, or RDT, that fully incorporates the land-value concept described in the 2002 article. The following sections of this article describe the Gunnison County program and examine the advantages and disadvantages of this approach.

Residential Density Transfer: Gunnison County, Colorado

Receiving-Area Requirements and Procedures

In the TDR-less TDR approach we described in 2002, developers wanting to exceed baseline density in a receiving-area project would be required to submit two appraisals of the site's land value: one assuming development at base density, and another assuming development with the bonus density made available through TDR. The increase in the value between the two estimates would be attributed to the TDR density bonus and the developer would be required to pay a predetermined percentage of that increase. Eight years ago, we observed that communities might be somewhat conservative in determining this percentage in order to preserve a reasonable profit motive for developers considering the TDR option and as a means of maintaining competitiveness with communities lacking such a requirement.

In Gunnison County's RDT program, a qualifying receiving-site project can include any residential subdivision that creates five or more residential lots or residences. Developers who choose to participate in the RDT program can reduce the on-site open space requirement from 30 to 15 percent of the total project area. This reduction in the on-site open space requirement provides the incentive to use the RDT option since it expands the usable area of the site by 15 percent, which can increase the number of lots allowable. The Gunnison County assessor provides land values of the project site before and after approval of the proposed subdivision using its standard mass appraisal method. The required RDT payment is 10 percent of this increase in land value.



In Gunnison County, Colorado, the Residential Density Transfer fee is 10 percent of the increase in receiving-site land value.

Photo Rick Pruetz

In Gunnison County, the open space reduction amount and percent of land value change amount were determined after reviewing many scenarios. A model allowing decision makers to see how different values would likely have an impact on existing subdivisions provided strong justification for choosing the appropriate values. The analysis determined that a 10 percent RDT payment amount would maximize revenue for preservation while still making the RDT option much more profitable than conventional development. In other words, a 15 percent increase in the usable area of these subdivisions provided a value increase from the sale of additional lots that typically exceeded the additional expense of the RDT payment.

Not all development projects can benefit from the open space reduction because many properties have unbuildable area that covers more than 30 percent of the property. But for those properties that can get extra lot(s) from the open space reduction, the value generated will usually greatly exceed the RDT fee. This difference provides incentive for developers to participate. See the example below.

RDT Program Example

A 20-acre property with a mass appraisal value of \$213,000 prior to subdivision without the RDT program gets subdivided into 11 one-acre lots with a market value of roughly \$130,000 (\$86,000 mass appraisal value) each, plus just over seven acres of open space and right-of-way.

If the developer utilizes the RDT program, the subdivision would receive an additional lot and have one acre less open space. Financially, the developer gets another \$130,000 for the additional lot and pays the RDT fee of \$81,900 [$10\% \times ((12 \times \$86,000) - \$213,000)$] for net gain to the developer of \$48,100. Local land trusts use the \$81,900 and leverage it against other funding sources (historically at an impressive 1:12 ratio). These funds, plus a possible land owner donation, typically conserve hundreds of agricultural acres, which completes the transfer of residential density.

The calculation excludes mobile homes and lots used exclusively for essential housing (Gunnison County's term for workforce housing). In a mixed use receiving-site project, this calculation is performed only for the residential portion of the development. The receiving-site developer

pledges compliance with the RDT-payment requirement by an agreement with the county executed prior to the recording of the final plat. The total payment requirement is distributed proportionately to each lot and payment is due upon the sale of each lot. However, the developer has the option of paying some or all of the required RDT payment upon final plat recordation. All payments made prior to final plat recordation qualify for a 10 percent early payment discount.

Sending Area Logistics

According to the 2002 *PAS Memo* article, developers wanting bonus density would apply the dollar amount of the requirement (the proportion of the receiving-area land-value increment per the method described above) to the acquisition of easements in the sending area.

In contrast, Gunnison County's RDT program requires the developer to simply pay in cash the requirement associated with bonus density as described above. The county must use the revenues from RDT payments exclusively for purchasing land and conservation easements that permanently preserve parcels with significance as open space, agriculture, habitat, wetlands, or watershed protection. This completes the transfer of residential density in the county's RDT program.

The county board of commissioners decides where this money will be spent. As with Gunnison County's long-standing Land Preservation Program, it is anticipated that local private nonprofit land trusts will submit proposals to fund easements using these revenues. Proposals most likely to be awarded funds by the county commissioners will probably contain funding from other sources such as Great Outdoors Colorado (GOCO), a state lottery dedicated partly to open space preservation.

Advantages and Disadvantages

What are the pros and cons of Gunnison County's RDT program?

Ease of Adoption

As discussed above, the stakeholders in some communities may question whether or not the TDR allocation in a proposed traditional TDR ordinance reflects accurate projections of receiving-site profits and sending-site development value. And even if these projections are correct on average, some stakeholders may object to the fact that the one-size-fits-all TDR does not account for inevitable differences. In these communities, the TDR-less TDR option may be easier to adopt than a traditional TDR ordinance.

For example, Gunnison County did not have to estimate the average easement value for all potential sending-area land or evaluate whether different TDR-allocation ratios should be applied to various portions of the sending area to reflect meaningful differences in development value. That's because Gunnison County takes the revenues received when developers use the RDT option and uses it to fund easements offered by individual landowners at prices that are supported by site-specific appraisals of the easements in question.

Alternatively, some communities may find it difficult to agree on the percentage of value increase that developers should pay when they exceed baseline density. The 10 percent requirement adopted by Gunnison County might seem excessive in some communities and deficient in others. Nevertheless, communities may find it easier to make this one policy decision than the multiple decisions needed for a traditional TDR program, which can include sending-area TDR allocations, sending-area easement requirements, and the amount of receiving-area bonus development allowed for each TDR.

In addition to a streamlined compliance requirement, the Gunnison County program facilitates adoption by not designating sending and receiving areas. The designation of receiving areas can be contentious even when receiving areas have already been identified in an adopted comprehensive plan and even if the density allowed via TDR is comparable to that of adjacent neighborhoods. Similarly, the designation of sending areas can delay or even derail TDR program adoption based on which properties are included or excluded. Gunnison County is not unique in refraining from sending and receiving area designation. But we mention the avoidance of sending/receiving area designations here because it can greatly facilitate adoption of a TDR program.

A possible disadvantage to this approach is that it relies on other mechanisms, such as master plans and development codes, to determine where the extra density is granted (receiving sites) or conservation easements (sending areas) are desirable. Bear in mind that these decisions, like all land use decisions, occur within the overall framework of a community's general plan. For example, when the Gunnison County commissioners apply the RDT revenues to the preservation of lands with "value in open space, agriculture, wildlife habitat, wetlands or watershed protection," they will rely heavily on the county's adopted policies and goals. It is our belief, as detailed below, that this approach will achieve improved preservation results. Specifically, the board of county commissioners will decide how these revenues are spent, thereby increasing the likelihood of protecting key open space parcels such as gaps in wildlife corridors or ranchlands contiguous to previously protected open space.

Likewise, the approval of receiving sites occurs within the overall framework of applicable plans, policies, and regulations. This framework guides the location of all development regardless of whether or not RDT is proposed. We recognize that this approach misses an opportunity to establish where RDT versus non-RDT development should occur. But Gunnison County took the position that it was important to adopt a workable preservation tool as soon as possible even though the absence of designated receiving areas may postpone potential controversy from the program approval phase to the project approval phase.

Specifically, residents will not know whether RDT is proposed for a nearby parcel until a developer submits an application. This may increase neighborhood opposition to the proposed project although it may be difficult to determine whether the opposition is focused on the slightly increased development allowed via RDT or the proposed project in general. In other words, by not designating receiving sites in advance, a community may be facilitating adoption of the TDR program but perhaps also increasing the likelihood of opposition when individual projects are proposed that use the TDR option. Each community should consider the relative advantages and disadvantages of receiving area pre-designation when preparing a TDR program.

As a final note, communities may and often do designate sending and receiving sites in the ordinance that creates their DTC programs. In other words, the absence of pre-designated sending and receiving sites is not a defining characteristic of a DTC program. If communities are able to pre-designate sending and receiving sites, we would encourage them to do so because it promotes clarity for developers, residents and the general public. However, in Gunnison County, any attempt to pre-designate sending and receiving sites would have brought the adoption of the RDT mechanism to a halt.

Administrative Complexity

A TDR-less TDR program is easier to administer because TDR-less TDR does not use TDRs as a unit of currency. Consequently, the TDR administrator does not have to issue and track TDRs to ensure that they are properly documented and used only once. When developers propose to exceed baseline density in Gunnison County's RDT program, they simply write a check; consequently, the TDR administrator does not have to confirm the validity of TDRs, as necessary in a traditional program.

On the other hand, TDR-less TDR programs require site-specific evaluations of value changes. At receiving sites, a real estate professional must estimate the increase in value resulting from the additional development potential. The 2002 *PAS Memo* article assumed that this estimate would be performed by an appraiser under contract to the community and noted that San Luis Obispo County, California, uses outside appraisers to determine site-specific easement value, which can be a time-consuming and expensive process. However, not all communities find the use of appraisers burdensome. In fact, Pierce County, Washington, has adopted this approach.

Gunnison County avoids this potential burden by using its own county assessor's office to perform this function with value estimates created by the assessor's office using the methods that are also employed to determine property taxes. The assessor's value estimates have a legal stature and a mechanism for dealing with challenges. Assessor values often seem conservative in relation to appraisal values, which helps remove that part of the equation from controversy. The assessor value, in essence, provides a baseline or level playing field. It then becomes easy to set the amount developers actually pay by choosing an appropriate percentage applied to the value change.

Under the TDR-less TDR approach, appraisers will also be called upon to determine the value of the easement being purchased with the TDR program's revenue. If the community retains this function, it would add to administration. However, Gunnison County plans to fund preservation proposals submitted by land trusts that have already obtained an appraisal and negotiated a price with the sending-area landowner.

Incentives

Traditional TDR programs have the potential to offer extra profit to some participants. That's because these programs are built around the TDR unit of measurement, which reflects an average profit per TDR purchase and an average development value per acre of preserved sending area. The use of these averages may tend to make TDR more attractive to developers who are able to achieve greater-than-average profit per TDR purchased and to the owners of sending-area land with lower-than-average development value. However, as a disadvantage, the traditional approach can create a much higher profit margin than is needed to generate participation, which can result in less conservation than would otherwise be possible.

TDR-less TDR is based on site-specific changes in value. Consequently, it does not provide the extraordinary profit that some communities find acceptable in order to generate participation. However, as discussed throughout this article, TDR-less TDR may be preferred when equitable treatment of landowners and developers is likely to be an issue. Logically, concerns should increase with the variability of value changes. Gunnison County, for example, encompasses 3,259 square miles ranging from land surrounding the world-class Crested Butte ski resort to vast stretches of roadless rangeland. The RDT program allowed the county to craft a preservation tool

that puts developers on a level playing field and gives all owners of significant open space property an equal opportunity to receive reasonable compensation for preserving their land.

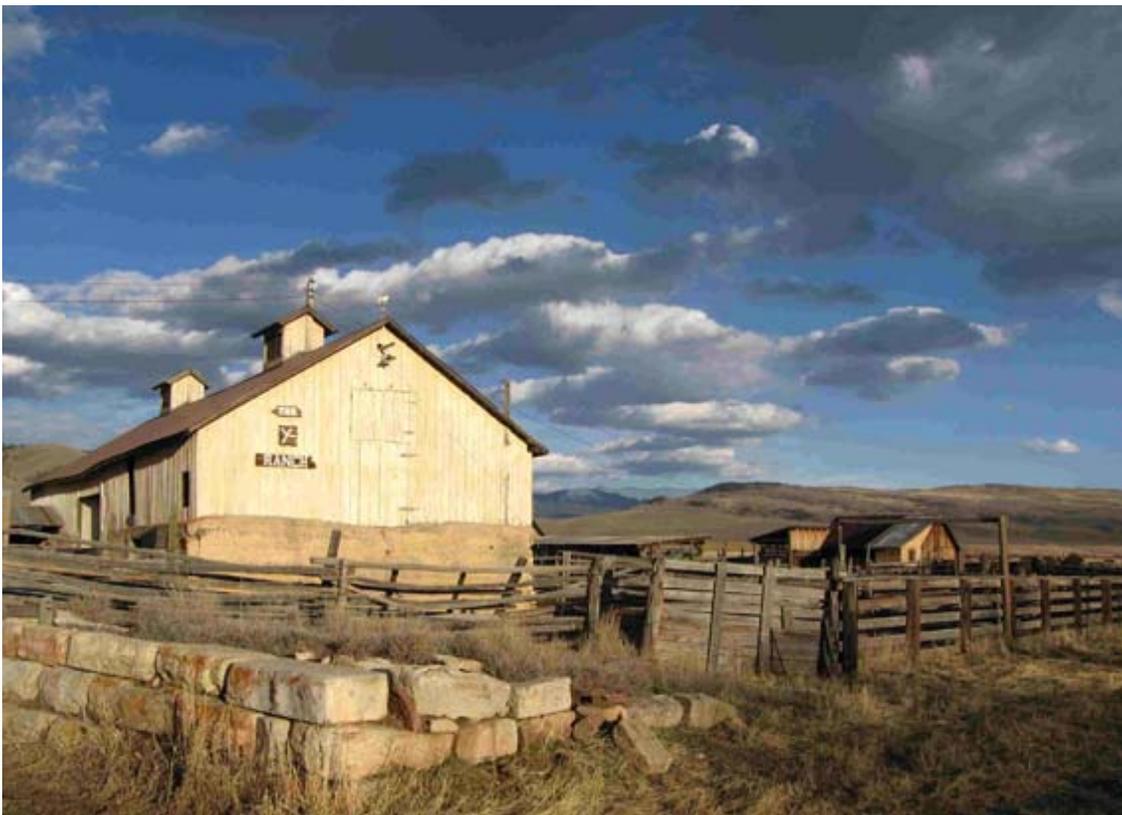
Facilitation

The Gunnison County program makes it relatively easy for landowners and developers to use the RDT option. Landowners do not need to conform to predetermined easement requirements, as in many traditional TDR programs. Instead, these property owners can create funding proposals that maximize certain tax advantages and fashion easements customized to their properties.

Likewise, developers in Gunnison County do not have to negotiate with landowners and buy actual TDRs at prices that may be hard to estimate when a project is in the early planning stages. Rather, they can make a cash payment based on a known percentage of the increased value resulting from project approval. And, unlike the program in Pierce County, Washington, developers in Gunnison do not have to hire an appraiser because the RDT payment amount is calculated by the county assessor. Finally, developers in Gunnison County have the option of delaying payment of the RDT until the sale of each individual lot. This feature motivates greater use of the RDT option because developers do not have to carry the RDT payment cost during the months or years that might be needed to sell each lot.

Conservation Effectiveness

In traditional TDR programs, the government establishes the boundaries of a sending area but property owners and developers decide which lands within that larger sending-area boundary will actually be preserved. In Gunnison County, landowners submit land-preservation proposals but the county ultimately decides which proposals will be funded by RDT revenues. This allows the county to take multiple objectives into consideration including the significance of the resources at the proposed site, the potential threat to the property given its location, and whether or not the cost is reasonable given the proposed combination of funding sources. In other words, the Gunnison approach allows the county to carefully target the use of RDT revenues.



Gunnison County, Colorado, uses RDT revenues to fund preservation proposals submitted by ranchland owners.
Photo Rick Pruetz

In addition, the Gunnison approach encourages RDT funds to be leveraged against other funding sources including landowner donations. In the past, land trusts working in Gunnison County have been able to attract \$12 for every \$1 they received from the county. It was important to Gunnison County to have a program that had the potential to continue this impressive trend.

Legal Considerations

Traditional TDR programs have been operating in the U.S. for more than 40 years and have withstood numerous legal challenges. The U.S. Supreme Court noted the efficacy of TDR as a mitigation tool in its 1978 decision in *Penn Central Transportation Co. v. New York City*. When establishing a TDR-less TDR program, a community should first determine whether it has authority from the state to adopt a TDR program. This determination can be relatively easy in states that have enabling legislation expressly authorizing local jurisdictions to use TDR. We have found TDR enabling legislation in 23 states.

States with TDR Enabling Legislation

We have identified statutes in 23 states that authorize some or all jurisdictions to use TDR to implement a broad range of land use goals: Arizona, Connecticut, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington State, and West Virginia.

TDR is authorized for limited purposes in three additional states: Illinois, North Carolina, and South Dakota.

In states without TDR-enabling legislation, local governments can nevertheless establish TDR programs using their authority to regulate land use and density unless the locality is in a Dillon Rule state, where all aspects of local regulation must be specifically authorized by the state. It is beyond the scope of this article to address this question on a state-by-state basis. The attorney for each jurisdiction should decide whether that jurisdiction is authorized to use TDR. The State of Colorado does not have TDR-enabling legislation, and we know of 12 TDR programs in operation there. These TDR programs are based on each locality's authority to regulate land use and density.

Assuming that first hurdle is cleared, the locality should then determine whether the mechanism under development is essentially a TDR program even though, as in the case of Gunnison County, it does not use TDRs as its currency. Gunnison County's RDT program is not an impact fee as regulated under the Colorado Revised Statutes (29-20-104.5) and is therefore not subject to the requirements of that section. Gunnison County took the position that the proposed RDT program was well within the land use and police powers impliedly granted to the county by the state. Specifically, even though it uses no TDRs, the RDT program implements the county's land use goals by encouraging and facilitating the preservation of open space funded by monetary payments made by developers who voluntarily choose to use the RDT option in order to achieve greater development opportunity in places that are better suited for it.

Are Nontraditional TDR Approaches Right for Your Community?

Because every community is different, the local context will help determine whether a traditional or a nontraditional TDR approach may be most appropriate in developing a successful program. The following sections provide some guidance to help planners determine what type of TDR approach might be best suited for their community.

Characteristics of Sending Area

While nontraditional TDR programs can work well in communities with various sending area characteristics, their flexibility is particularly helpful in communities with large, diverse sending areas with significant land value variations. For example, Gunnison County compensates sending-site owners with dollars rather than TDRs. This method would be particularly appropriate in communities where stakeholders want all sending-area landowners to be equally motivated to participate.

Traditional, uniform TDR allocation formulas may be appropriate in communities with smaller, homogeneous sending areas, or where stakeholders are willing to accept comparable reimbursement for TDRs that actually represent moderate variations in foregone land value as long as that formula is attractive to enough landowners to make the program successful. In some cases, acceptable allocation can be achieved through a limited number of alternative ratios that grant additional TDRs to land with more significant resources or areas with higher development potential due to location, zoning, or other factors.

Community Preservation Goals

A nontraditional TDR approach may be appropriate if your community wants to target preservation efforts rather than allow property owners and developers to choose which sending-area properties will be preserved. In Gunnison County, for example, the county directs its RDT funds to conservation proposals that best meet a wide range of objectives, including the achievement of specific preservation priorities such as preserving land within an agricultural district or wildlife

corridor. All communities, including Gunnison County, use plans, policies, and regulations to discourage if not prohibit the development of significant lands until the community is able to permanently preserve these lands using various tools including forms of TDR.

Conversely, traditional TDR may be adequate if your community would be satisfied with dispersed preservation anywhere within a designated sending area. Bear in mind that traditional TDR programs can minimize dispersed preservation by reducing the size of the sending area. However, communities sometimes find it difficult to limit sending area size because the uniformity of a larger land area makes it difficult to make distinctions and because landowners sometimes insist on being included in the sending area. In addition, sending areas should be large enough to encompass a sufficient number of potential TDR suppliers to create a healthy TDR market.

Characteristics of Receiving Areas

Traditional TDR approaches can be challenged by diverse receiving areas that offer a wide variety of development styles and prices. In these communities, developers may object to buying the same number of TDRs for bonuses in modest starter-home developments as they would for mansions. A nontraditional receiving-area approach like Gunnison County's — which imposes a uniform requirement of 10 percent of the increase in land value resulting from subdivision approval — levels the playing field for all developers and assures the county of reasonable preservation payments from all participating developments.

However, the traditional TDR approach can work well in communities with smaller, homogeneous receiving areas. In these programs, receiving-area developments may be sufficiently uniform that developers will accept a single allowance ratio, like one bonus dwelling unit per TDR. Sometimes an equitable solution can be achieved by alternative allowance ratios, such as one TDR for one bonus single-family residential unit or two bonus multiple-family residential units.

Community Attention Span

Some communities are able to keep working on preservation issues indefinitely until they ultimately adopt an effective tool. For example, Chesterfield Township, Burlington County, New Jersey, continued refining its TDR program year after year until it finally had a program that is now regarded as a national model and the winner of many awards, including APA's 2004 National Planning Award for Outstanding Planning for a Program.



Chesterfield Township, New Jersey worked with developers, landowners, and the public for years to adopt what became an award-winning TDR program.
Photo Rick Pruetz

This level of commitment can be necessary in developing a traditional TDR program because of the numerous stakeholder groups and the multiple decisions to be made in advance of ordinance

adoption. These decisions include designating sending and receiving areas, determining the contents of an acceptable easement, and agreeing on TDR allocation ratios in sending areas and TDR allowance ratios in receiving areas, as well as dozens of other administrative and processing options. Planners should honestly assess their communities because TDR programs can easily be sidetracked during a lengthy adoption process. If commitment exists, traditional TDR programs can be adopted, as proven by the fact that there are at least 200 traditional TDR programs in effect in the U.S.

On the other hand, if there are concerns about the ability to wrestle with all the variables needed for a traditional TDR program, a nontraditional alternative might be more suitable. In Gunnison County, for example, the RDT ordinance simply states that developers can achieve a 15 percent reduction in the on-site open space requirement by making a payment of 10 percent of the increase in value resulting from subdivision approval. By eliminating the need for several potentially contentious decisions, TDR-less TDR programs can conceivably be adopted in a fraction of the time needed to adopt traditional TDR programs. Due to the fragile nature of consensus building, this speed can often mean the difference between having a workable preservation tool or not.

Staff Resources

Some communities may have adequate staff to handle the administration needed for a traditional TDR program: certifying the number of TDRs available at a sending site, issuing TDRs and reissuing them when they change hands, tracking TDRs in a registry, linking TDR buyers and sellers in a clearinghouse, verifying the authenticity of TDRs presented by receiving-site developers, and finally ensuring that TDRs are permanently retired after use and that all TDR transactions are properly documented and recorded.

If the staff time needed to perform these functions will be a concern, a TDR-less TDR approach may be more appropriate. In Gunnison County, for example, when developers choose the RDT approach, compliance is in cash. This cash is then combined with other funding sources to buy easements directly from landowners. Receiving-site compliance and sending-site preservation occur separately, and there are no TDRs to issue, track, document, and retire during that interim period.

Leveraging Opportunities

Traditional TDR programs do not facilitate leveraging of preservation funds from other sources. However, in places where additional funding is not available, a program's ability to allow leveraging may not be a meaningful consideration.

However, if opportunities to leverage limited preservation funding exist, certain nontraditional TDR approaches can easily help make that limited funding go farther. In Gunnison County, for example, money from the RDT program can serve as matching funds for preservation grants, including money generated by the state lottery. In its older purchase of development rights program, the county has succeeded in attracting an average of \$12 of outside funding for every \$1 of county money.

Carrying Cost Concerns

In some communities, developers may oppose a traditional TDR program partly because the TDR requirement is imposed prior to final subdivision approval or issuance of building permits. This timing means that the developers must carry the cost of TDRs for the months or years needed to ultimately sell the resulting lots or houses. In contrast, Gunnison County allows developers to sign an agreement with the county pledging to remit the RDT payment when the lot is sold, thereby eliminating this carrying cost as a reason for developers to oppose TDR program adoption.

If the developers in a community are not concerned about delays in reimbursement for RDT payments, the compliance timing found in traditional TDR programs is simpler and generates revenues sooner, allowing the money to be used for preservation sooner as well.

Conclusion

TDR programs do not lend themselves to cookie-cutter approaches. A TDR-less TDR program, like Gunnison County's RDT program, is not necessarily ideal for every community. Each community must evaluate its circumstances and goals and find the right combination of traditional and innovative features.

Some communities may prefer a traditional approach, perhaps because they do not have locally active land trusts and do not want to get into the business of negotiating open space easements. On the other hand, some communities may see a TDR-less TDR approach as the best way for them to quickly adopt a preservation tool that maximizes flexibility, targets the preservation of priority properties, and promotes equitable treatment for sending-area landowners and receiving-area developers — even over a large geographic area with diverse land values and varying styles of development.

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Resources

Berthoud (Colorado), Town of. *Land Development Code*. Section 30-10-111. Density Transfer Fees.

www.berthoud.org/documents/code/Chapter10.pdf

Beyond Takings and Givings (website devoted entirely to TDR)

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