

## **4.6 MODEL TRANSFER OF DEVELOPMENT RIGHTS (TDR) ORDINANCE**

The model ordinance below establishes a general framework for severing development rights involving net density and intensity (through FARs) from a sending parcel and transferring them to a receiving parcel. Section 101 of the ordinance authorizes a transfer of development rights (TDR) for a variety of purposes, including environmental protection, open space preservation, and historic preservation, which are the most typical.

Under Section 104, the local government has two options in setting up the TDR program. The first involves the use of overlay districts, which would zone specific areas as sending and receiving parcels. The second involves identifying which zoning districts would be sending and receiving districts in the text of the ordinance itself, rather than through a separate amendment to the zoning ordinance. In both cases, the designations must be consistent with the comprehensive plan. Section 105 of the ordinance contains a table that shows, by use district, the permitted maximum increases in density and FAR that can be brought about through TDR.

Section 106 outlines a process by which the zoning administrator would determine the specific number of development rights for a sending parcel in terms of dwelling units per net acre or square feet of nonresidential floor area (for commercial and industrial parcels) and issue a certificate to the transferor. Sections 107 and 108 describe the instruments by which the development rights are legally severed from the sending parcel through instruments of transfer and attached to the receiving parcel. Section 107 describes how the applicant for a subdivision or other type of development permit would formally seek the use of development rights in a development project (e.g., a subdivision). Note that the transfer would not apply to rezonings, but only to specific projects where a development permit is going to be issued in order that development may commence.

Commentary to the ordinance describes, in Section 109, a development rights bank, a mechanism by which the local government purchases development rights before they are applied to receiving parcels, retains them permanently in order to prevent development, or sells them as appropriate in order to make a profit or direct development of a certain character to a specific area. Whether this is an appropriate role for local government or should be left to nonprofit organizations (e.g., land trusts) is matter for local discussion and debate. No ordinance language is provided, although the description in the commentary should be sufficient for local government officials to draft language establishing the bank.

Primary Smart Growth Principle Addressed: Preserve open space and farmland

Secondary Smart Growth Principle Addressed: Direct development towards existing communities

### **101. Purposes**

The purposes of this ordinance are to:

- (a) preserve open space, scenic views, 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) retain open areas in which healthful outdoor recreation can occur;
- (e) implement the comprehensive plan;
- (f) ensure that the owners of preserved, conserved, or protected land may make reasonable use of their property rights by transferring their right to develop to eligible zones;
- (g) provide a mechanism whereby development rights may be reliably transferred; and
- (h) ensure that development rights are transferred to properties in areas or districts that have adequate community facilities, including transportation, to accommodate additional development.

**Comment:** *The local government may tailor this list of purposes to its particular planning goals and objectives or leave it with a wide range of purposes and implement the ordinance to achieve specific goals and objectives.*

## **102. Authority**

This ordinance is enacted pursuant to the authority granted by [cite to state statute or local government charter or similar law].

**Comment:** *It is important to determine whether the local government has legal authority to enact a TDR program because not all local governments in all states have identical powers. In addition, enabling legislation for TDR may require that the transfers be done in a certain manner other than is described in this model.*

## **103. Definitions**

As used in this ordinance, the following words and terms shall have the meanings specified herein:

**“Development Rights”** mean the rights of the owner of a parcel of land, under land development regulations, to configure that parcel and the structures thereon to a particular density for residential uses or floor area ratio for nonresidential uses. Development rights exclude the rights to the area of or height of a sign.

**Comment:** *Unless sign area and height are excluded from the definition of “development rights,” it is possible to transfer them to another parcel, resulting in larger or taller signs. In*

*some cases, development rights might extend to impervious surface coverage, and a transfer of such rights would allow more extensive lot coverage.*

**“Density”** or **“Net Density”** means the result of multiplying the net area in acres times 43,560 square feet per acre and then dividing the product by the required minimum number of square feet per dwelling unit required by the zoning ordinance for a specific use district.

“Density” or “Net Density” is expressed as dwelling units per acre or per net acre

**“Floor Area”** means the gross horizontal area of a floor of a building or structure measured from the exterior walls or from the centerline of party walls. “Floor Area” includes the floor area of accessory buildings and structures.

**“Floor Area Ratio”** means the maximum amount of floor area on a lot or parcel expressed as a proportion of the net area of the lot or parcel.

**“Net Area”** means the total area of a site for residential or nonresidential development, excluding street rights-of-way and other publicly dedicated improvements, such as parks, open space, and stormwater detention and retention facilities, and easements, covenants, or deed restrictions, that prohibit the construction of building on any part of the site. “Net area” is expressed in either acres or square feet.

[**“Overlay District”** means a district superimposed over one or more zoning districts or parts of districts that imposes additional requirements to those applicable for the underlying zone.]

**Comment:** *This definition is only necessary if the TDR designation is accomplished via an overlay district.*

**“Receiving District”** means one or more districts in which the development rights of parcels in the sending district may be used.

**“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, directly or by intermediate transfers, from a sending parcel, and on which increased density and/or intensity is allowed by reason of the transfer of development rights;

**“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;

**“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

**“Transfer of Development Rights”** means the procedure prescribed by this ordinance whereby the owner of a parcel in the sending district may convey development rights to the

owner of a parcel in the receiving district or other person or entity, 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 or may be held by the receiving person or entity.

**Comment:** *This definition recognizes that development rights may be sold to an entity (e.g., the local government or a nonprofit organization) that will hold them indefinitely.*

**“Transferee”** means the person or legal entity, including a person or legal entity that owns property in a receiving district, who purchases the development rights.

**“Transferor”** means the landowner of a parcel in a sending district.

#### **104. Establishment of Sending and Receiving Districts.**

*[Alternative 1: Amend the zoning map using overlays]*

(1) The [local legislative body] may establish sending and receiving districts as overlays to the zoning district map by ordinance in the manner of zoning district amendments. The [planning director] shall cause the official zoning district map to be amended by overlay districts to the affected properties. The designation “TDR-S” shall be the title of the overlay for a sending district, and the designation “TDR-R” shall be the title of the overlay for a receiving district.

**Comment:** *When a zoning map is amended, one practice is to list the ordinance number and the enactment date in a box on the map, along with the signatures of the planning director and the clerk of the local legislative body (e.g., the clerk of council). This allows for an easy reference if there should be any later questions about whether the map amendment accurately reflects the legal description in the ordinance.*

(2) Sending and receiving districts established pursuant to Paragraph (1) shall be consistent with the local comprehensive plan.

*[Alternative 2—Specify zoning districts that can serve as sending and receiving districts]*

(1) The following zoning districts shall be sending districts for the purposes of the transfer of development rights program:

*[list names of districts]*

(2) The following zoning districts shall be receiving districts for the purposes of the transfer of development rights program:

*[list names of districts]*

**Comment:** *Since the sending and receiving districts are being established as part of the ordinance rather than through separate overlays, the local government would need to make a declaration of consistency with the comprehensive plan for such districts as part of the enactment of these two paragraphs.*

### **105. Right to Transfer Development Rights**

- (1) Each transferor shall have the right to sever all or a portion of the rights to develop from the parcel in a sending district and to sell, trade, or barter all or a portion of those rights to a transferee consistent with the purposes of Section 101 above .
- (2) The transferee may retire the rights, resell them, or apply them to property in a receiving district in order to obtain approval for development at a density or intensity of use greater than would otherwise be allowed on the land, up to the maximum density or intensity indicated in Table 1.

**Table 1**  
**Maximum Density and Intensity Allowed in Zoning Districts through Transfer of Development Rights (TDR)**

*Note: District names, densities, and intensities are hypothetical examples only.*

Zoning District Title	Maximum Density in Dwelling Units Per Net Acre	Maximum Intensity in Floor Area Ratio	Maximum Density with TDR	Maximum Intensity in Floor Area Ratio with TDR
R-1	4		8	
R-2	8		16	
R-3	16		32	
C-1		0.2		0.4
C-2		1.0		2.0
C-3		2.0		4.0
C-4		4.0		8.0
I-1		0.75		1.5

(3) Any transfer of development rights pursuant to this ordinance authorizes only an increase in maximum density or maximum floor area ratio and shall not alter or waive the development standards of the receiving district, including standards for floodplains, wetlands, and [other environmentally sensitive areas]. Nor shall it allow a use otherwise prohibited in a receiving district.

**Comment:** *In some cases, it may be desirable to allow the transfer of the right to additional impervious surface coverage on a site. For example, if a certain zoning district limits the amount of surface parking by a maximum impervious surface parking ratio and additional parking is needed, Table 1 should be amended to authorize this.*

**106. Determination of Development Rights; Issuance of Certificate**

(1) The [zoning administrator] shall be responsible for:

- (a) determining, upon application by a transferor, the development rights that may be transferred from a property in a sending district to a property in a receiving district and issuing a transfer of development rights certificate upon application by the transferor.
- (b) maintaining permanent records of all certificates issued, deed restrictions and covenants recorded, and development rights retired or otherwise extinguished, and transferred to specific properties; and
- (c) making available forms on which to apply for a transfer of development rights certificate.

(2) An application for a transfer of development rights certificate shall contain:

- (a) a certificate of title for the sending parcel prepared by an attorney licensed to practice law in the state of [*name of state*];
- (b) [five] copies of a plat of the proposed sending parcel and a legal description of the sending parcel prepared by [licensed *or* registered] land surveyor;
- (c) a statement of the type and number of development rights in terms of density or FAR being transferred from the sending parcel, and calculations showing their determination.
- (d) applicable fees; and
- (e) such additional information required by the [zoning administrator] as necessary to determine the number of development rights that qualify for transfer

**Comment:** *A local government should consult with its law director or other legal counsel to determine the requirements for an application for a TDR. Consequently, this paragraph as well as other Sections of the ordinance may need to be revised to reflect state-specific issues concerning real property law and local conditions.*

(3) A transfer of development rights certificate shall identify:

- (a) the transferor;
- (b) the transferee, if known;
- (c) a legal description of the sending parcel on which the calculation of development rights is based;
- (d) a statement of the number of development rights in either dwelling units per net acre or square feet of nonresidential floor area eligible for transfer;
- (e) if only a portion of the total development rights are being transferred from the sending property, a statement of the number of remaining development rights in either dwelling units per net acre or square feet of nonresidential floor space remaining on the sending property;
- (f) the date of issuance;
- (g) the signature of the [zoning administrator]; and
- (h) a serial number assigned by the [zoning administrator].

(4) No transfer of development rights under this ordinance shall be recognized by the [local government] as valid unless the instrument of original transfer contains the [zoning administrator's] certification.

### **107. Instruments of Transfer**

(1) An instrument of transfer shall conform to the requirements of this Section. An instrument of transfer, other than an instrument of original transfer, need not contain a legal description or plat of the sending parcel.

(2) Any instrument of transfer shall contain:

(a) the names of the transferor and the transferee;

(b) a certificate of title for the rights to be transferred prepared by an attorney licensed to practice law in the state of [name of state];

(c) a covenant the transferor grants and assigns to the transferee and the transferee's heirs, assigns, and successors, and assigns a specific number of development rights from the sending parcel to the receiving parcel;

(d) a covenant by which the transferor acknowledges that he has no further use or right of use with respect to the development rights being transferred; and

(e) [*any other relevant information or covenants*].

(3) An instrument of original transfer is required when a development right is initially separated from a sending parcel. It shall contain the information set forth in paragraph (2) above and the following information:

(a) a legal description and plat of the sending parcel prepared by a licensed surveyor named in the instrument;

(b) the transfer of development rights certificate described in Section 106 (4) above.

(c) a covenant indicating the number of development rights remaining on the sending parcel and stating the sending parcel may not be subdivided or developed to a greater density or intensity than permitted by the remaining development rights;

(d) a covenant that all provisions of the instrument of original transfer shall run with and bind the sending parcel and may be enforced by the [*local government*] and [*list other parties, such as nonprofit conservation organizations*]; and

(e) [*indicate topics of other covenants, as appropriate*].

(4) If the instrument is not an instrument of original transfer, it shall include information set forth in paragraph (2) above and the following information :

- (a) a statement that the transfer is an intermediate transfer of rights derived from a sending parcel described in an instrument of original transfer identified by its date, names of the original transferor and transferee, and the book and the page where it is recorded in the [land records of the county].
- (b) copies and a listing of all previous intermediate instruments of transfer identified by its date, names of the original transferor and transferee, and the book and the page where it is recorded in the [land records of the county].

(5) The local government's [law director] shall review and approve as to the form and legal sufficiency of the following instruments in order to affect a transfer of development rights to a receiving parcel:

- (a) An instrument of original transfer
- (b) An instrument of transfer to the owner of the receiving parcel
- (c) Instrument(s) of transfer between any intervening transferees

Upon such approval, the [law director] shall notify the transferor or his or her agent, who shall record the instruments with the [name of county official responsible for deeds and land records] and shall provide a copy to the [county assessor]. Such instruments shall be recorded prior to release of development permits, including building permits, for the receiving parcel.

**Comment:** *The procedures in paragraph (5) may need to be modified based on the structure of local government in a particular state and the responsibilities of governmental officials for land records and assessments. The important point is that the TDRs must be permanently recorded, and the property of the owner of the sending parcel, the value of which is reduced because of the transfer, should be assessed only on the basis of its remaining value.*

### **108. Application of Development Rights to a Receiving Parcel**

(1) A person who wants to use development rights on a property in a receiving district up to the maximums specified in Table 1 in Section 105 above shall submit an application for the use of such rights on a receiving parcel. The application shall be part of an application for a development permit. In addition to any other information required for the development permit, the application shall be accompanied by:

- (a) an affidavit of intent to transfer development rights to the property; and
- (b) either of the following:

1. a certified copy of a recorded instrument of the original transfer of the development rights proposed to be used and any intermediate instruments of transfer through which the applicant became a transferee of those rights; or

2. a signed written agreement between the applicant and a proposed original transferor, which contains information required by Section 106(2) above and in which the proposed transferor agrees to execute an instrument of such rights on the proposed receiving parcel when the use of those rights, as determined by the issuance of a development permit, is finally approved.

(2) The [local government] may grant preliminary subdivision approval of a proposed development incorporating additional development rights upon proof of ownership of development rights and covenants on the sending parcel being presented to the [local government] as a condition precedent to final subdivision approval.

(3) No final plat of subdivision, including minor subdivisions, shall be approved and no development permits shall be issued for development involving the use of development rights unless the applicant has demonstrated that:

(a) the applicant will be the bona fide owner of all transferred development rights that will be used for the construction of additional dwellings, the creation of additional lots, or the creation of additional nonresidential floor area;

(b) a deed of transfer for each transferred development right has been recorded in the chain of title of the sending parcel and such instrument restricts the use of the parcel in accordance with this ordinance; and

(c) the development rights proposed for the subdivision or development have not been previously used. The applicant shall submit proof in the form of a current title search prepared by an attorney licensed to practice law in the state of [name of state] .

### **109. Development Rights Bank [optional]**

**Comment:** *This section should establish a development rights bank, otherwise referred to as a “TDR Bank.” The local government or any other existing or designated entity may operate the bank. The TDR Bank should:*

- *have the power to purchase and sell or convey development rights, subject to the local legislative body’s approval;*
- *have the power to recommend to the local legislative body property where the local government should acquire development rights by condemnation;*
- *have the power, to hold indefinitely any development rights it possesses for conservation or other purposes;*
- *receive donations of development rights from any person or entity; and*
- *receive funding from the local government, the proceeds from the sale of development rights, or grants or donations from any source.*

*No model ordinance language for the creation of the TDR bank is provided here because the specifics of such must be determined by the operating entity.*

## **References**

Fruita, Colorado, City of. Land Use Code, Chapter 17.09, Transfer of Development Rights/Credits [accessed December 14, 2004]:  
[www.fruita.org/pdf/LUC\\_4\\_2004/Chapter17\\_comp.pdf](http://www.fruita.org/pdf/LUC_4_2004/Chapter17_comp.pdf)

Howard County, Maryland. Zoning Ordinance, Section 106, Density Exchange Option Overlay District [accessed December 14, 2004]:  
<http://www.co.ho.md.us/DPZ/DPZDocs/ClusterDEO070104.pdf>

Redmond, Washington, City of. Community Development Guide, Section 20D.200, Transfer of Development Rights/Purchase of Development Rights Program [accessed December 14, 2004]:  
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Sarasota County, Florida. Zoning Code, Section 4.11, TDR Overlay District Intent Statements and Section 6.12, TDR Overlay District Development Standards, website [accessed December 14, 2004]:  
<http://www.scgov.net/Frame/ScgWebPresence.aspx?AAA498=AFC1BAAFC0A89CB7B9BBBAA7C0A4B273C8B5B3B5C86FBBAAC981B0ABB8A2C2B1C980ADB9C2B9>

St. Mary's County, Maryland. Zoning Ordinance, Chapter 26, Transferable Development Rights [accessed December 14, 2004] <http://www.co.saint-marys.md.us/planzone/docs/TDRammendment.pdf>