Transfer of Development Rights:
A Brief Discussion Paper for the Envision Skagit 2060 Citizen Committee

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What is TDR?[1]

Transfer of Development Rights (TDR) is a program that facilitates and promotes the voluntary sale of the right to develop some or all of one property (the "sending site") to a party that is thereby eligible to develop another property (the "receiving site") more intensively than would otherwise be allowed.

Sending areas are places that a community determines it wants to conserve, such as privately owned farms, forestland, or wildlife habitat. Receiving areas are places that a community determines are better suited for locating additional growth, often in cities. Receiving areas should have the infrastructure and services to meet the needs of increased growth.

Landowners of sending sites can sell the development potential of their land while retaining ownership and continuing to use the land for other purposes, such as forestry or agriculture. Participating developers gain access to incentives for projects in receiving areas—typically allowing them to build some multiple of the development rights foregone (e.g., two units of additional residential development or 5,000 square feet of additional commercial space for each unit foregone in the sending area).

Three features of a TDR program stand out:

- **It is voluntary.** Transactions take place between willing buyers and sellers. If landowners in sending areas choose not to participate, they are entitled to develop as permitted by current zoning and development regulations. Likewise, in receiving areas, developers not participating in TDR are allowed to build to current zoning. To receive development incentives such as additional density or height, developers must purchase TDR credits.

- **It is market-based.** Individual property owners, developers, or other parties may freely negotiate prices for the purchase and sale of development rights.

- **It is flexible.** Jurisdictions can customize the elements of the program to reflect their conservation and development objectives and the market conditions and growth patterns of their particular area.

As a market-based program, TDR depends on a healthy balance between supply and demand. Demand from developers in receiving areas must be sufficient to support prices that are high enough to induce landowners in sending areas to sell their development rights. This balance partly depends on the real estate market: how much pressure is there to develop in receiving and sending areas? It also depends on the scope of a TDR program (e.g., how big are the sending and receiving areas? Is more than one jurisdiction involved?), the rules established for it (e.g., what incentives are there for purchasing a development right through the program?) and how those rules are administered (e.g., is there a central TDR bank that can purchase rights and facilitate sales?). The very flexibility of TDR makes outreach to landowners, developers, and affected communities crucial to the design of successful programs.

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[1] Much of this introductory section is drawn from Bratton et al (2009).

Experience of Other Jurisdictions

TDR has been used in more than 30 states and Washington, D.C. A report on TDR submitted to Skagit County in 2006 (Heinricht 2006a) focused mostly on the experience of Montgomery County, Maryland, widely seen as one of the most successful TDR programs in the country. In contrast, Bratton et al (2009) focus almost exclusively on experience in Washington State. This discussion paper draws on both of these earlier reports but emphasizes experience in Washington State, including interviews with local practitioners.

In terms of acres protected (141,500) and the number of development rights handled (1,724.5 over the past decade), King County has by far the largest TDR program in Washington State. The City of Redmond also has had a very active program, handling more than 650 development rights between 2000 and 2010. Clallam, Kitsap, Kittitas, Pierce, Snohomish, Thurston and Whatcom counties all have TDR ordinances in place, but none have experienced any transfers[2], in part because of the lack of developer demand during the current down real estate market, which began as many of these programs were starting. (Even King County's program had only one transaction across 2008 and 2009.) The cities of Seattle and Issaquah have used interlocal agreements with King County to receive TDR credits from rural sending areas. The City of Bellevue has entered into such an agreement with King County for a receiving area along Bel-Red Road. The City of Sammamish is in the process of entering such an agreement (the agreement is currently before the King County Council).

In 2010, EPA made an award to a consortium led by the Puget Sound Regional Council (PSRC) for a grant to promote TDR within the four central Puget Sound counties where the PSRC operates (King, Snohomish, Pierce, and Kitsap), in furtherance of the Puget Sound Partnership's Action Agenda. PSRC is working with the four counties and the Washington State Department of Commerce (formerly the Department of Community, Trade, and Economic Development) to implement the grant across 10 cities, in coordination with Cascade Land Conservancy. In addition to help with drafting TDR ordinances and establishing programs, the grant is also supporting the development of subarea plans and/or capital facilities plans for potential receiving areas within the cities. The grant cannot be used in Skagit County, but there may be opportunities for other grants through the State Department of Commerce or EPA in the relatively near future that could be.

Within Skagit County, the City of Mount Vernon has had a TDR program since 1999. The City of Burlington initiated its TDR-related Agricultural Heritage Credit Program in 2010 in coordination with Skagitonians to Preserve Farmland and Skagit County. Mount Vernon's program was established in response to a Growth Management Hearings Board decision concerning two areas of farmland that had been annexed into the city, a 19.8-acre site at the northern end of the city and a 93-acre site at the southwestern end. Both sites are designated sending areas, eligible to sell two development rights per acre. To date, 35 acres in the southern site have been permanently protected from development. Burlington's program allows developers in selected zoning districts to purchase credits that allow for increased density, with proceeds going to the County's Farmland Legacy Program for purchase of development rights within a 2,824-acre area to the west and north of the City. The Burlington City Council approved a set of fees for the credits, which will be revisited in 2011 for potential adjustment.

[2] In Pierce, Snohomish, and Kittitas counties, TDR credits have been purchased from sending landowners but have not yet been applied to developments in receiving areas.

King County and Redmond both operate websites that provide extensive information about past TDR transactions (see http://www.kingcounty.gov/environment/stewardship/sustainable-building/transfer-development-rights.aspx and http://www.redmond.gov/PlansProjects/ComprehensivePlanning/TransferOfDevelopmentRights/Resources/, respectively). King County's website also includes substantial background on its program, including answers to frequently asked questions and historical charts and other analysis of past transactions. The Washington State Department of Commerce operates a website that serves as a clearinghouse for all TDR programs in the PSRC planning area (see http://www.commerce.wa.gov/site/1308/default.aspx).

TDR programs can be:

- intrajurisdictional, within a city or unincorporated county areas;
- interjurisdictional, between a city and a county; or
- regional (allowing development rights to cross county lines).

The State Legislature authorized a regional TDR program for the four PSRC counties, but mechanisms for the cross-county transfer of rights have not yet been established.

Intrajurisdictional city programs, such as those in Mount Vernon or Redmond, transfer development rights from urban areas that the city does not wish to develop (such as farmland or critical areas) to other parts of the city suited to denser development (e.g., Microsoft has purchased the majority of development rights transferred in Redmond in order to expand within its campus). Intrajurisdictional county programs transfer development rights from farmland, forest land, or areas of high environmental value to unincorporated urban areas or rural areas where increased density is allowed, including fully contained communities, master planned resorts, planned unit developments, and rural cluster subdivisions. Interjurisdictional programs between cities and counties generally meet GMA goals better than intrajurisdictional programs, but they depend on interlocal agreements that may pose political and administrative challenges.[3] City residents and their governments do not always see sufficient value in the protection of sending areas outside city boundaries to justify accepting additional density.

Concerns and Obstacles for TDR Programs

Heinricht (2006a) cited national studies as identifying the following obstacles to establishing a working TDR program:

- Finding communities that will locate receiving areas for higher density development;
- Calibrating values for development rights in sending and receiving areas to insure a market for the rights;
- Creating a program that is simple enough to understand and administer and complex enough to be fair;
- Developing community support to insure the program is used; and
- Avoiding litigation and evasion.

[3] The Department of Commerce has adopted an Interlocal Terms and Conditions Rule that a city or county can adopt by reference in lieu of an interlocal agreement. The rule and template for adoption are on the Commerce TDR web site. Under state law, use of the rule is currently limited to the four PSRC counties and cities within them.

As Heinricht (2006a) notes, the lack of adequate public infrastructure in receiving areas can be a major challenge. City governments generally do not want to accept density that requires major new investments in infrastructure. City residents also often oppose additional density, particularly if it is not accompanied by new infrastructure or amenities that improve the quality of life in affected neighborhoods. With these concerns in mind, SB 5253/HB 1469 in the current state legislative session would offer an additional financing tool for infrastructure to cities with qualifying TDR programs.

Carroll et al (2009) found that TDR programs can have an adverse, neutral, or positive effect on affordable housing and affordable housing programs, depending on how the respective programs are organized. TDR and affordable housing programs can compete for the same developer incentives (i.e., increased density in exchange for providing a certain percentage of affordable units or through the purchase of development rights from sending areas). Developers presumably would choose one program or the other based on which is more profitable.[4] TDR also can be seen as increasing the cost of development if a jurisdiction is perceived as likely to approve increased density regardless, without requiring the purchase of development rights from sending areas.

Heinricht (2006b) found that developers in Skagit County were generally prepared to pay only about one-fourth the market price of development rights in agricultural and rural areas. Heinricht (2006b) suggested this disparity might require mandatory downzoning of rural areas. Such a downzoning could authorize rural landowners to sell the development rights they could no longer use (e.g., an owner of a 20-acre parcel that had been zoned to allow four 5-acre developments but was changed to 20-acre zoning could build only one development on the 20 acres but could sell three development rights for transfer to a receiving area). Montgomery County, Maryland, used such a downzone in its program. Heinricht (2006a and 2006b) found that Montgomery County's program had been more successful in protecting open space than it had working agriculture.

Heinricht (2006b) found that there had been insufficient planning in Skagit County to implement an efficient TDR program. In addition to the concerns above, Heinricht (2006a) suggested that a TDR program might conflict with the County's successful farmland conservation program, which purchases (rather than transfers) development rights from farmland:

> Skagit must determine how it can equalize the values between its PDR [Purchase of Development Rights] and TDR programs, when it appears the potential TDR market will not be able to pay the same per development right that the PDR program has established.

Heinricht (2006a) found that communities with successful TDR programs generally have "more overall development than Skagit County." In those communities,

> TDR serves as a corrective action to retire zoning capacity that is no longer desired and to promote higher density development as infill or redevelopment. Skagit County lacks the existing urban/suburban element that absorbs the transferred rights.

[4] To avoid this problem, Seattle and Bellevue have structured their TDR incentives in "tiers"—e.g., to get a first level of density increases, a developer must provide a specified level of affordable housing; to get a second level of increases, the developer may use TDR.

Instead, Heinricht (2006a and 2006b) called for possible expansion of Skagit's existing PDR program, better coordination of farmland conservation and support programs, leveraging of existing programs, and other steps.

Ways to Address Concerns and Obstacles

Bratton et al (2009) identify a wide variety of strategies that may be helpful or necessary in designing a successful TDR program, which could potentially address many of the concerns raised by Heinricht. Carroll et al (2009) provide further detail on how TDR programs can be specifically designed to further affordable housing goals. Both reports draw on case studies from Washington State and elsewhere.

Bratton et al (2009) stresses the importance of outreach to sending area landowners, developers, and receiving area communities in designing a successful TDR program. The report further stresses the importance of a market analysis that would examine the supply of development rights in sending areas, the market value of those rights, the market price of increased development rights in receiving areas (taking into account increased per-unit costs that developers might incur developing to greater densities), and appropriate exchange rates (incentives provided to developers in receiving areas to purchase development rights from sending areas). Exchange rates could potentially address the gap between market values of urban and rural development rights identified by Heinricht (2006a), without the downzone Heinricht suggested might be necessary. Skip Swenson, TDR Program Manager for Cascade Land Conservancy, believes that it is possible to create a successful TDR program wherever growth requires significant increases to existing zoning capacity (personal communication). Bratton et al (2009) advise revisiting a TDR market analysis on a regular basis as conditions change.

In a personal communication for this report, Bratton questioned why it would be necessary to "equalize" values of development rights between a TDR and a PDR program. TDR and PDR can be complementary land conservation tools, addressing different parts of the development rights market. TDR, as a voluntary program where developers will seek the lowest price available from landowners in sending areas, generally is best suited to purchasing development rights from properties that are difficult to develop or that are unlikely to develop in the near future—i.e, properties where sending landowners are prepared to accept lower amounts for giving up their development rights. Illustrating this point, the current market price for a transferred rural development right in King County is estimated to be $26,000. At least two additional factors contribute to this perhaps surprisingly low figure. Many selling landowners are "land rich but cash poor," causing them to accept relatively lower amounts for their development rights. Selling landowners also can be primarily motivated by a desire to see their land conserved, seeking some compensation but not a maximum amount.

In contrast, PDR programs can target purchases based more on conservation priorities than sale prices. By law, PDR programs cannot pay more than fair market value, but they can choose to buy development rights that are much more expensive than a developer would choose to pay in a TDR program. Both PDR and TDR programs can lower costs for agriculture or forestry by reducing the price of the underlying land, once development rights have been severed from it.

Heinricht (2006a) and Bratton et al (2009) both note that a TDR bank can be an important component of a successful TDR program. A bank can bridge the time gap between a willing buyer and a willing seller, stabilize a market by providing a steady supply of TDR credits, and reduce transaction costs when developers wish to purchase large numbers of development rights. A bank can also take advantage of market conditions by purchasing development rights at low prices during a down economy. A further benefit of a bank is that it can facilitate interlocal agreements between a county and cities by strategically purchasing TDR credits in places of special conservation interest to a city, for sale to developers in that city's receiving areas (personal communication, Darren Greve, King County TDR Program Manager).

Counties can encourage interjurisdictional TDR programs by helping to pay for infrastructure in city receiving areas. King County has done this with funds from its Conservation Futures program to help pay for pocket parks in cities. King County has also passed through federal funds to help cities pay for transportation or stormwater infrastructure (D. Greve, personal communication). In addition, countywide planning policies can encourage interjurisdictional TDR programs.

Even without a TDR bank, a local jurisdiction can facilitate transactions by maintaining a registry of landowners eligible to sell TDR credits and interested buyers. This same role can be played by private brokers, as is the case for Montgomery County, Maryland.

The state's TDR Policy Advisory Committee recommends biannual evaluations of TDR programs based on a wide variety of criteria, including the number of transactions completed, area of different land types conserved, relative conservation values of land conserved, annual amount of land conversion before and after the TDR program, administrative costs, the amount of development added to receiving areas, and qualitative comments from landowners, developers, and affected communities.

No one should expect that a TDR program alone can achieve all of a community's conservation goals. TDR is simply one tool—albeit potentially a very valuable one—to meet those goals. It will generally work best when accompanied by many other programs, including PDR, zoning, tax incentives, and support for resource industries and ecological restoration.

References

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