

PURCHASE OF DEVELOPMENT RIGHTS

AND

TRANSFER OF DEVELOPMENT RIGHTS

CASE STUDIES

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Montgomery County, Maryland TDR Program

1. BACKGROUND

Montgomery County, Maryland lies immediately northwest of Washington, D.C. between the Potomac and Patuxent Rivers. The southeast portion of the county is enveloped in the greater D.C. metropolitan area and contains the cities of Bethesda, Silver Spring, Wheaton and Rockville. The county's population grew by more than 89,000 people between 1990 and 1999 to 850,000, representing the largest population gain in the state. Yet, despite intense development pressure, the northwest part of the county remains rural and is in active agricultural use. Major commodities include nursery and greenhouse crops, dairy products and horses and ponies. Agricultural sales totaled \$28,563,000 in 1997.

Montgomery County was the first county in Maryland and one of the first counties in the nation to respond to sprawl. It became a desirable place to live in the 1950s because of the easy commute to the nation's capital. Montgomery's population more than doubled between 1950 and 1960 from 164,000 to 340,000, making it the fastest growing county in the state. After witnessing the loss of productive farmland during the 1950s and 1960s in the southeastern part of the county, elected officials decided to protect the remaining farmland in the northwestern section.

In 1969, the County Council adopted a plan called *On Wedges and Corridors*. The plan recommended protecting agricultural land and open space. The wedges represented the rural areas and the corridors represented the developed area in the southeastern section. The goal of the plan was to concentrate future growth in the corridors. In addition, the plan is important because it was the county's first public document to recognize that farmland is necessary for the survival of the agricultural industry.

In 1973, the Montgomery County Council adopted a Rural Zone, which covered approximately one third of the county, to establish a five-acre minimum lot size. This modest downzoning was intended to slow land development, but it actually accelerated conversion. Enough people had enough money and the desire to develop at the lower density so that during the 1970s, the county lost approximately 3,000 acres of farmland a year.

In response, the county appointed a task force to consider tools to stem farmland loss. The task force considered strengthening its zoning, creating a purchase of development rights (PDR) program, and transfer of development rights (TDR) program. Task force members, however, concluded that PDR was too expensive. They also were concerned about adopting restrictive zoning without compensating landowners. As a result, the group recommended a combination of agricultural protection zoning and TDR.

In 1980, the County Council adopted a functional master plan entitled *Preservation of Agriculture and Rural Open Space*. To implement the plan the county designated an 89,000-acre Agricultural Reserve and rezoned this area as the Rural Density Transfer

(RDT) zone. In the reserve, residential development was decreased from one unit per five acres to one unit per 25 acres. The downzoning was based on a county study that found that this was the minimum acreage that could support a farm family on a cash crop, direct market basis.

The Agricultural Reserve became the designated “sending area.” Landowners in the sending area would have the right to sell their development rights for use in designated “receiving areas.”

A lawsuit filed by a group of property owners from the Agricultural Reserve in the early 1980s charged that they had suffered a loss in property value because receiving sites had not been designated prior to the downzoning. A circuit court judge ruled that the downzoning was valid on its own merits and did not depend on the TDR program.

The first transfer was completed in 1983. By 1997, the program had protected 38,251 acres of farmland. Participation dropped off in subsequent years. By the summer of 2000 the program only had protected an additional 2,332 acres to bring the total to 40,583 acres.

2. PURPOSE

The purpose of Montgomery County’s TDR program is to preserve farmland and rural open space in the Agricultural Reserve.

3. ADMINISTRATION

Two public entities play a role in administering the TDR program. The Maryland-National Capital Park and Planning Commission (M-NCPPC) is a bi-county agency that serves as the planning agency for Montgomery and Prince George’s counties. Staff develop master plans for each of the county’s 21 planning areas that identify land for inclusion Agricultural Reserve and / or additional receiving areas; review preliminary subdivision plans and site plans that propose the use of TDRs; monitor the capacity of receiving areas; and enforce the zoning in the RDT. Montgomery County’s TDR program falls under the jurisdiction of the “rural” team within M-NCPPC’s Community-based Planning Division.

The Agricultural Services Division is a unit within the county’s Office of Economic Development that administers the county’s farmland protection programs. Division staff educate farmers in the Agricultural Reserve about this farmland protection option and help monitor the effectiveness of the program.

4. PUBLIC EDUCATION

In the early 1980s planning staff held a series of public meetings in both sending area and receiving area communities to educate landowners about the TDR program. The planning board also published *Plowing New Ground*, a series of questions and answers to explain

the county's TDR program. It was revised and reprinted in 1986 **and 1990**. It is still available today. M-NCPPC continues to take the lead in educating the general public about the program. Staff in the rural team of the Community-based Planning Division respond to requests from landowners and the general public. The Agricultural Services Division also works to educate landowners and the general public about the TDR program.

5. PROGRAM PROCEDURES

Transfer Process

Farmland owners sell TDRs or options to buy TDRs to interested buyers. Since the number of TDRs needed for a receiving site project is not certain until the site plan is approved, TDRs in Montgomery County are typically secured under option contracts.

To use TDRs, buyers file preliminary subdivision plans for the receiving site property with the Montgomery County Planning Board (i.e., M-NCPPC). The board must act within 60 days. Once the preliminary plans are approved, applicants file a site plan. The site plan must show the total number of dwelling units including TDRs and affordable housing units. Montgomery County requires site plan approval of receiving site projects to ensure that the transferred density does not overwhelm the receiving site or cause problems for adjacent properties.

Upon site plan approval, the buyer submits a Record Plat of Subdivision to the M-NCPPC for final approval. At this point, sellers typically file a deed of transfer with the county attorney's office to convey the TDRs to the buyer *and* an easement on the farmland in the sending area that limits the development potential of the property the number of rights retained. (See Attachment A for deed of transfer template and Attachment B for easement template). Both the deed of transfer and the easement must be recorded prior to final planning board approval of the record plat.

Sellers may opt to "separate" TDRs from the property earlier in the process. However, once the rights are separated they cannot be reattached to the sending area property. Each TDR is assigned a serial number by the county attorney's office when the TDR easement is approved and recorded. The serial numbers of TDRs used to increase base density must be listed on the record plat.

Once the applicant has received final planning board approval, the record plat is recorded in the Office of Land Records with an extinguishment document that certifies that the TDRs are no longer available for transfer. At this point, the applicant is eligible for a building permit.

The time to process an "application" or proposal for use of the TDRs is comparable to the normal subdivision review process. (See Attachment C for more information on this process.) In addition, the county has priority categories of providing sewer and water service. If a development using TDRs passes an adequate public facilities test and

receives site plan approval from the planning board, it advances to a higher priority category.

Sending areas

Potential sending sites are located in the Rural Density Transfer (RDT) zone. The RDT or Agricultural Reserve was originally 89,000 acres. The boundaries of the reserve followed natural features like stream valleys. Where no natural features existed, developable land immediately outside the reserve was zoned for low-density rural residential use. The reserve has expanded as additional planning areas within the county designated additional acreage as a RDT zone. Today, the RDT or Agricultural Reserve encompasses about 93,000 acres.

In general, the RDT zone limits on site development to one unit per 25 acres. There are two exceptions for lots that are at least 25 acres:

- Tenant houses and mobile homes associated with farming activities; and
- Lots for children of individuals who owned sending sites prior to the RDT zoning.

However, a development right must be reserved for every permanent dwelling on the sending site, regardless of whether the units were built before or after the RDT rezoning.

All lots less than 25 acres that were recorded before the RDT zone are exempt from the RDT regulations. In other words, landowners are permitted to develop their land according to the prior zoning, which allowed one house per five acres. However, in these cases, landowners must reserve a TDR for each dwelling on a lot 10 acres or larger recorded prior to the creation of the RDT zone. After the construction of one home, further development on these pre-RDT lots must comply with the regulations of the RDT zone.

Receiving areas

Montgomery County has identified receiving areas in 15 of the county's 21 planning areas. At first the receiving areas were designated by each community's master plan. However, in 1987, the Maryland Court of Appeals ruled that the designation of TDR receiving sites should appear in the zoning code. As a result, the county adopted a comprehensive zoning ordinance in 1987 that established TDR receiving zones in those communities with TDR receiving areas in their master plans.

Allocation of rights

In general, landowners in the sending area are awarded one development right for every five acres regardless of the physical limitations of the land that might have prevented development.

How rights are applied

TDRs are used to increase residential density in established receiving areas. Zoning districts in receiving areas contain two separate density limits. A baseline limit sets the density maximum for projects in which developers choose not to use TDRs. A higher limit is permitted for projects that use TDRs. The developer is not guaranteed the density allowed by either limit. The actual density may be less than the maximum allowable density due to various site constraints and environmental limitations.

Typically, county planners approve only marginal increases in lot yield. For example, six single family detached dwellings per acre are permitted as opposed to four without TDRs. Still, there has been opposition from neighbors of potential receiving areas. In the late 1980s, a “not in my backyard” (NIMBY) lawsuit halted implementation of the TDR program and necessitated the County Council to reauthorize the program.

Other than through TDR, the only way a developer can exceed the base density of a receiving site is by providing moderately priced dwelling units or MPDUs. The county allows increases in residential density for projects that include a certain percentage of MPDUs. If the project meets this criteria, the allowable density may be increased an additional 20 percent beyond the density allowed under the TDR-only option.

Montgomery County requires the density increase granted to individuals using TDRs to represent at least two-thirds of the maximum allowable increase. This rule was meant to ensure efficient use of designated receiving areas.

TDR values

The private market sets the value of TDRs. Initially, TDRs sold for about \$3,500 apiece or \$700 per acre. The market price of TDRs rose to a peak of \$11,000 in 1996, but has declined to between \$6,500 and \$7,500 in 2000.

The primary reason values rose in the early years was due to the fact that the county began a PDR program in 1988. The average price of TDRs doubled within three years of the inauguration of the PDR program. Notably, Montgomery County uses a formula to determine easement values for purchase instead of relying on appraisals, which would have reflected limitations on development imposed by the current zoning. (See Attachment Q for easement formula.) The PDR program offered landowners another option for receiving compensation and set a floor for TDR prices. However, values have declined as developers determined that it is more profitable to build houses on larger lots than to increase the density with TDRs.

TDR bank

The county created a County Development Rights Fund in 1982 to ensure that landowners in the sending area could sell TDRs or use TDRs as collateral to secure loans. The county ordinance created a Development Rights Fund Board to buy TDRs and to

guarantee loans made by private lending institutions. The fund was intended to be a last resort. Before becoming eligible to submit an application, landowners were required to try to sell their TDRs in the open market or to secure a loan using the TDRs as collateral. The fund was never used and was eliminated by 1990.

6. INCENTIVES FOR PARTICIPATION

Montgomery County's program is often categorized as a "mandatory" TDR program because restrictive zoning was adopted to reduce the amount of residential development allowed in the sending area. To realize the full equity based on the prior zoning, landowners must participate in the TDR program.

In addition, Montgomery County has been careful to make TDR the primary means of exceeding the base zoning of a receiving site. The only alternative is for the development of affordable housing.

As a further incentive, Montgomery County's capital improvements program ensures that sewer, water, transportation and other public services are extended into receiving areas, rather than sending areas where they could subvert the program's goal of farmland preservation.

For buyers, the incentive is that TDRs allow them to build more residential dwelling units. However, more recently, developers have found that it is more lucrative to build fewer houses at lower densities, which has decreased the market for TDRs.

7. EASEMENT PROVISIONS

The county has developed a standard easement for TDR transactions. The model easement is significantly different from the model agricultural preservation easement used by the county's PDR program. The standard TDR easement does not address agricultural structures, future subdivision, mining, or the development and implementation of a soil, water and forestry conservation plan. This is because the TDR program was developed primarily to reduce residential density in the sending area. The easement document does not attempt to control other uses and activities. The easement specifies that a residential dwelling may not be constructed, occupied or maintained on the property unless a development right is retained with the property for each home. The easement specifically states "...nothing herein may be construed to convey to the public a right of access or use of the property...."

8. MONITORING AND STEWARDSHIP

The Maryland-National Capital Park and Planning Commission (M-NCPPC) enforces the zoning in the county's sending area. Staff review subdivision plans and check the TDR records prior to granting approval. In addition, the county's permitting entity reviews the TDR records before issuing building permits.

Landowners who have sold TDRs are not required to develop or implement a conservation plan.

9. EASEMENT TERMINATION

The standard easement for TDRs does not provide an administrative process for termination. This is because the development potential still exists and, in most cases, is transferred to another location. In contrast, the model agricultural easement for the Montgomery County PDR program contains an administrative process for terminating the easement after 25 years if the grantee determines that "...conditions on or surrounding the Property have changed so much that it is no longer suitable for the Property to be used for agricultural production...."

10. CURRENT ISSUES

A significant issue confronting the Montgomery County TDR program is the fundamental change in market forces. In general, individuals desire and now are willing to pay for larger lots in both the sending area and the receiving areas.

In the sending area, this trend is evident in the escalating value of the "fifth TDR" While most landowners in the sending area are compelled to transfer four out of five TDRs, the fifth TDR can be reserved for on-site development in the sending area. Individuals are buying these TDRs to build country estates. Once a high-end home is built on the sending area property, it becomes unaffordable for commercial farmers. Also, because there are no siting requirements the "fifth TDR" is fragmenting the land base. In some cases, landowners are opting to build houses in the middle of 25-acre tracts.

The county has considered a number of approaches for dealing with the "fifth TDR." One option is to require mandatory clustering in the sending area, however county officials believe that landowners will be unlikely to support additional restrictions. Plus, clustering may not be a workable solution given septic requirements and the physical constraints of many of the sending area properties. Another idea is to use a county-funded land protection program to buy out the fifth TDR on key properties.

Private groups also have offered solutions. A new land trust was established in the county to encourage landowners to donate the fifth TDRs.

Likewise, in the receiving areas it has become more lucrative for developers to build houses on relatively larger lots (i.e., to build at the base densities). According to Jeremy Criss, Agricultural Services Division Manager with the county's Office of Economic Development, TDR prices have dropped over the past five years and the TDR program has stalled.

Identifying additional, viable receiving areas continues to be an obstacle for the TDR program. A wave of environmental regulations adopted after receiving areas were identified reduced the allowable density. In some cases, the reduction in density due to

environmental requirements fell below the required minimum density increase for developers using TDRs. The planning board has the option to wave the TDR minimum, but the conflict frustrates developers nonetheless. At the same time, civic associations and county residents have objected to new receiving areas in their communities. Finally, identifying receiving areas requires Maryland-National Capital Park and Planning Commission to undertake a lengthy master planning process plus a zoning map amendment. The entire process can take up to five years.

In February, a county TDR task force and advisory group held their first meeting. The group is working with a team of graduate students from the University of Maryland to update the county's status report on the availability of TDRs and viable receiving sites. Once this data is collected the group will recommend ways to reinvigorate the program such as developing a faster process to identify new receiving areas and proposing other uses for TDRs (e.g., additional parking spaces or commercial square footage).

11. RESOURCES

American Farmland Trust, *Saving American Farmland: What Works*, 1997.

American Farmland Trust, Fact Sheet: *Transfer of Development Rights*, January 2000.

Interview with Ed Thompson, former chairman of Montgomery County Agricultural Preservation Board, March 2001.

Interview with Judy Daniel, team leader of Area Seven Rural, Community Based Planning Division, at the Maryland-National Capital Park and Planning Commission, April 2001.

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