



# The transfer of development rights in the midst of the economic crisis: Potential, innovation and limits in Italy

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## ABSTRACT

The paper deals with the transfer of development rights (TDR) in Italy. It presents a comparative analysis of the TDR programs implemented in the twelve capital cities of the Lombardy region in the past decade. After introducing the international debate on TDR and the distinctive features of the transfer of development rights in Italy, the essay analyses the specificity of TDR programs in Lombardy. The spread of this planning mechanism is stressed, and seven relevant characterising aspects of TDR programs in Lombardy are highlighted (with reference to: reasons for TDR adoption, designation of sending and receiving areas, allocation rate, destiny of sending areas, mandatory nature of the transfer, market of development rights and role of the public authority). The analysis identifies internal factors (e.g. related to the design of the program) and external factors (e.g. exogenous to the program, such as the condition of the real estate market) for the success of the transfer of development rights in the Lombardy case. It allows us also to enrich (and partially correct) the international debate on the TDR, by considering the diffusion of this planning tool in Italy and its potential.

## 1. Introduction: the gaps in the research on the transfer of development rights

The concept of Transfer of Development Rights (TDR) has a long history and has been used around the world for several decades. The first applications date back to a New York zoning ordinance of 1916 (Giordano, 1987). However, it was in the 1960s and 1970s that the concept of TDR was comprehensively formulated (Lloyd, 1961; see also Kaplowitz et al., 2008) and debate on its applications gained momentum (see for instance: Carlo and Wright, 1977; Carmichael, 1974; Costonis, 1973; Gale, 1977; Rose, 1975; Woodbury, 1973). In the same years, the ‘first-generation’ TDR programs were implemented in the USA (Kaplowitz et al., 2008; Walls and McConnell, 2007). Following the first US experiences, TDR programs spread to other Western countries, such as France (Renard, 2007), the Netherlands (Janssen-Jansen, 2008), Germany (Henger and Bizer, 2010), Switzerland (Menghini et al., 2015), Canada (Gabriel and Freeman, 1986) and Italy (see Section 2.2), as well as to Eastern countries such as China (Li and Gan, 2013; Wang et al., 2010; Zhu, 2004), South Korea (Cho, 2002), and Taiwan (Jin and Dai, 2010; Shih and Chang, 2016).

Nonetheless, nowadays “TDR is still considered ‘innovative’ and is not widely used” (Nelson et al., 2012, p. 24) and, as sarcastically

underlined by some scholars, over the years the number of articles written on TDR would have exceeded the number of TDR programs (Pizor, 1986). In fact, in many cases, TDR programs did not work properly and were not able to achieve their pre-set objectives (Juergensmeyer et al., 1998; McConnell and Walls, 2009; Renard, 2007).

However, in our opinion, this picture does not fully consider the Italian context, where TDR programs have a relatively long and successful history. In Italy, an early example is the mechanism foreseen by the Turin land use plan of 1959 (Mengoli, 2014), but it is during the past two decades that TDR programs have become common praxis in many municipalities.<sup>1</sup>

Similarly to the US debate, the Italian literature on TDR is well developed and rich (to mention only some contributions: Camagni 2014; Chiodelli 2016; Colavitti and Serra, 2017; De Carli, 2012; Micelli, 2002, 2004, 2011, 2014, 2016; Moroni, 2012, 2014; Stanghellini, 2013). However, it appears to be mainly centred around either single case studies or theoretical contributions which do not aim at an empirical evaluation of programs in force. Against this backdrop, the present paper has a twofold aim: firstly, to fill the gap in the Italian literature through an empirical analysis of multiple case studies which sheds light on their features, limitations and success factors; secondly,

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<sup>1</sup> To be stressed is that, the diffusion of TDR practices across Italy varies, due also to reasons linked with regional planning legislations. At the time of writing, 14 out of 20 Italian regions make provisions for the use of some kind of TDR program.

to contribute to the development of the international TDR debate in light of recent experiences in Italy. For these purposes, the article investigates TDR practices implemented by the twelve provincial capital cities in the Lombardy region, in Northern Italy.

The article is structured as follows: Section 2 deals with the main characteristics of TDR programs as discussed in the international literature and explains the specific features of the Italian context. Section 3 discusses the research design that we employed to conduct our research. Section 4 presents the findings of our research with a focus on the nature, forms, features and specificities of TDR programs implemented in the twelve case studies. Section 5 discusses the findings in relation to both the international and Italian debate. Section 6 concludes.

## 2. Theory and practice of TDR

### 2.1. An overview on the transfer of development rights

In traditional land use planning, development rights are fixed and anchored to a specific land plot. By ‘development right’ we mean the right, granted by a public authority through some form of land regulation, to develop land or add density to already existing development. Unlike traditional zoning, in a TDR program development rights ‘generated’ by a specific plot (*sending area*) can be transferred and ‘consumed’ on a different plot (*receiving area*). In this way, the connection between a particular plot which generates these rights and its transferable development potential is severed (Costonis, 1973).

Johnston and Madison (1997, p. 365) defined TDR as “the sale of one parcel’s development rights to the owner of another parcel, which allows more development on the second parcel while reducing or preventing development on the originating parcel”. Sending areas generally include territorial resources that a community wants to preserve, such as environment and landscape protection areas, agricultural land, open space, and so on. Receiving areas are areas suitable for development, where development rights can be transferred and ‘used’ (for a detailed analysis of the functioning of TDR programs, see for example: Nelson et al., 2012; Walls and McConnell, 2007).

Until today, the majority of programs have mainly been designed and implemented in the US, and show varying features. For example, they can: distinguish or not between sending and receiving areas; identify only one or several receiving areas; determine higher or lower transferable development rights (TDRs) allocation rates; assign different roles to the public authority (which can be more passive, as in the case of a pure free-market exchange of transferable rights, or more active, as in the case of a TDR bank<sup>2</sup> set up by the public authority).

Regardless of the different specificities, TDR programs have been implemented mainly for reasons of compensation, efficiency and equity (Chioldelli and Moroni, 2016).<sup>3</sup> In fact, several programs have been used as a way to compensate landowners in areas hit by restrictive zoning: “the term transferable development right (TDR) is a generic name that has been used to describe a number of different compensation schemes” (Strugar, 1985, p. 634). Such compensations make it possible to avoid eminent domain-taking deadlock (Richman and Kending, 1977); that is, they are a mitigation for regulatory takings (Linkous, 2016) - and they do this without requiring any disbursement of public funds.<sup>4</sup> In some

<sup>2</sup> The public TDR Bank aims to guarantee landowners a ‘fair price’ for their development rights and favour a TDRs market exchange. To this end, it buys development rights from the landowners of sending areas (when they want to sell them), even if there are no immediate private buyers.

<sup>3</sup> Obviously, TDR programs were introduced also for other reasons. For example, they would reduce incentives to engage in corrupt practices, which are widespread in traditional zoning: “there are all too many documented examples of corruption and bribery of officials involved in zoning. [...] TDR removes the temptation that zoning creates” (Moore, 1975, p. 339; on this issue, see also Chioldelli and Moroni, 2015).

<sup>4</sup> According to some authors (see for instance Linkous, 2016), TDR programs are means for ‘just compensation’ as well. On the contrary, Rick Pruetz (2017, October 17, personal

cases, also efficiency reasons justify the adoption of TDR programs, since, by making use of ‘quasi-market mechanisms’, they would be more efficient than traditional zoning (Juergensmeyer et al., 1998). In addition, equity reasons too are advanced in order to support them: TDR programs would reduce disparities inherent to zoning and its uneven economic impacts on landowners (Clinch and O’Neill, 2010). As Juergensmeyer et al. (1998, p. 444) underline, TDR programs “would allow all landowners to benefit from an area’s development, and require all benefited landowners to pay the costs associated with the preservation and protection of sensitive land in the area.”

Without regard to many and different alternative options and characteristics of TDR programs, many scholars have underlined the limits of the transfer of development rights *per se*. In particular, they have stressed that TDR programs can only work when a number of specific success factors exist (e.g., specific characteristics of receiving areas, few or no alternatives to TDR for achieving extra density, developers’ actual need for extra density, strict development regulations for sending areas and use of incentives, such as increased transfer ratios), which, however, are generally not found in the vast majority of cases (for a detailed analysis of such success factors, see: Pruetz and Pruetz, 2007; Pruetz and Standridge, 2009). Moreover, high transaction costs are associated with TDR programs, which would undermine their implementation and in many cases contribute to making TDR programs an infeasible option (Barrese, 1985; Chomitz, 2004; Micelli, 2002; Nelson et al. 2012).

### 2.2. TDR in Italy

In Italy, TDR programs are known as practices of ‘equalization [*perequazione*]’ and ‘compensation [*compensazione*]’ (Micelli, 2002). In fact, the essential purpose of the transfer of development rights is to ‘equalize’ the public treatment of landowners through an equal allocation of development rights by the municipality, whose parcels would otherwise be designated for different building densities, consequently creating different land values. At the same time, some landowners are compensated with (transferable) development rights for a loss of potential economic value in the case of imposition of building restrictions on their land.

Generally speaking, two types of TDR programs exist in Italy. The first type is the so-called ‘localized transfer of development rights [*perequazione di comparto*]’. In this case, transfers can occur only within a pre-delimited and identified area. All properties within this delimited area receive a unique and identical development ratio, independent of the land use designated for each property by the urban plan. On the basis of the urban plan, some zones are used for public services and facilities (that is, they are sending areas), while some other zones receive the development rights and are designated as developable land (that is, they are receiving areas). Sending areas are then usually relinquished for free to the municipality, to form a public reserve of areas. In this quite simple form of transfer, areas are normally of limited dimensions, and also limited is the number of landowners and properties involved, in order to favour actual implementation of the development plan; therefore, development rights are simply moved spatially, rather than traded (for specific examples, see Micelli, 2000). The second type is the so-called ‘generalized transfer of development rights [*perequazione estesa or generalizzata*]’. In this case, transfers can occur from any sending area to any of the receiving areas as identified by the urban plan. Many sending and receiving areas are involved in programs of this type (as well as many landowners), which can potentially concern all of

(footnote continued)

communication) considers this position not entirely convincing. In fact, in *Penn Central Transportation Co. v. New York City*, the US Supreme Court stated that transferable development rights can mitigate the impact of a regulation, but it has not yet issued an opinion about whether TDRs are ‘just compensation’ in the event that a regulation constitutes a taking.

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