



Zoning-integrative and zoning-alternative transferable development rights: Compensation, equity, efficiency



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ABSTRACT

Transferable development rights (TDRs) have been in use for several decades; yet to date they have always had a very specific application, inasmuch as they are adopted as an element in the traditional zoning system. Actually, there is nothing that binds TDRs solely to zoning, and it might therefore be fruitful to find independent outlets for their application: in this case, the transfer of building rights can for instance become a regulatory technique in its own right and stand as an alternative to zoning. From this perspective, the present article compares two different types of TDR programs, termed, respectively, 'zoning-integrative' TDRs and 'zoning-alternative' TDRs, whose features will be dissected and discussed accordingly.

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1. Introduction: orthodox (zoning-integrative) and heterodox (zoning-alternative) forms of transferable development rights

Generally speaking, the development right of a parcel of land is the difference between the 'existing use' of that parcel and its 'potential use' as permitted by law (Pizor, 1986: 203). Normally, development rights are fixed (i.e. inextricably tied to a specific plot of land): a certain development right refers to a specific parcel, and it can be exercised only in that parcel.

The distinctive feature of transferable development rights (TDRs) is that, while they are 'generated' by a specific plot, they can be transferred and 'consumed' elsewhere. In the case of TDRs, the ownership of land is considered as a 'bundle of sticks', a 'bundle of rights' (Woodbury, 1973: 4; Pedowitz, 1984: 604; Stinson, 1996: 324; Frankel, 1999: 827). Some of these rights (e.g. development rights) can be separated from the rest, and transferred to other parcels and other owners. In short, the title to real estate is not a monolithic or unitary right, but a system of rights, each of which may be severed. A TDR therefore breaks the link between a specific plot of land and its *development potential* by allowing

the transfer of that potential somewhere else (Costonis, 1973: 85). Obviously, using TDRs does not intensify development, but simply redistributes it. TDRs eliminate the all-or-nothing effect of traditional land-use plans.

The transfer of development rights is not at all new. It can be traced back to a New York zoning ordinance of 1916. This ordinance allowed the sale and transfer of unused 'air rights' among adjacent lots (Giordano, 1987). TDR programs have been implemented in the U.S. since the 1960s. Today, about 240 TDR programs exist in the U.S. (Nelson et al., 2012), where TDR programs have been traditionally used to preserve agricultural and natural areas, or historic sites, because of the difficulty of pursuing such aims with traditional authoritative planning tools. Since the mid-1970s they have been implemented also in Europe, firstly in France, and subsequently in many other European countries: for instance, in Italy an early example is the mechanism foreseen by the Turin land use plan of 1959 (Mengoli, 2012).¹

While TDRs have been in use for over half a century, to our mind the wide and varied potential of this device remains largely to be explored. By this we do not mean exploration merely from the practical point of view of their direct application, but also at

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¹ See Renard (2007) on France, Micelli (2002) on Italy, Henger and Bizer (2010) on Germany, Janssen-Jansen (2008) on the Netherlands. On Asian countries, see for instance Zhu (2004), Wang et al. (2009) on China, and Cho (2002) on South Korea.

the theoretical level, given that so far only one type of the TDR's various manifestations has been given any thought by theorists. That is to say, discussion has centred on what we will call 'zoning-integrative TDRs', whereby the transfer of development rights is conceived and implemented as one particular zoning mechanism. As Renard (2007: 54) observes, in this case "there is a clear link between zoning and transferable rights. The transferable rights procedure is in itself a zoning instrument since it implies a division into transmitter and receiver zones". The same point is made by Nelson et al. (2012: xxiii): "TDR works with zoning. TDR can help make zoning more effective, and strong zoning is essential for a successful TDR program". See also Pruetz and Pruetz (2007: 3) "TDR operates within a community's zoning code or similar land use regulation".²

This type of application of TDRs has received some criticisms. TDRs have generated "far more discussion than actual land preservation" (Strong et al., 1996: 14). Their "actual impact has been limited" (Renard, 2007: 46). "Frequently, TDR programs have been disappointing" (Juergensmeyer et al., 1998: 455). "Very few TDR programs actually result in a significant number of transfers of development rights" (Bruening, 2008: 424). "Success with TDR programs has not been widespread" (Messer, 2007: 47). "Few TDR programs have been . . . successful at creating active markets as advocates had hoped" (Kopits et al., 2008: 1). "TDR does not always work . . . TDR has not yet lived up to expectations" (Pruetz and Standridge, 2009: 78). In short: "It was estimated that there were more articles on TDR than there were transactions" (Dadder, 1997).³

This conventional 'zoning-integrative' type of TDR is certainly not the only viable application available. From the theoretical point of view, there is no necessary connection between transferable development rights and zoning as such. As we will argue below, TDRs can just as easily be conceived in terms of *alternatives* to zoning (rather than as mere adjuncts), becoming 'zoning-alternative TDRs' and hence a mechanism in their own right. In this case, the transfer of development rights is *per se* a planning instrument independent from zoning. The scope and design of zoning-alternative TDRs are quite distinct from those of zoning-integrative TDRs.

The application of TDRs as an alternative to zoning has rarely been put into practice, and frankly not even theorists have given them due attention. The aim of the present article is therefore to launch a conversation on zoning-alternative TDRs, as a means to show how TDRs can assume a far greater variety of forms than have so far been taken into account.

The article is divided into five main sections. In Section 2, we analyze various features typifying the design of a TDR program, with reference to the subdivision into areas, and the development right's 'life-cycle' (creation, transfer, use). In Section 3, we outline the main 'families' of TDRs (zoning-integrative TDRs, and zoning-alternative TDRs) and their respective characteristics. In Section 4, we consider seven important clarifications regarding TDR programs. In Section 5, we discuss three rationales for TDRs

(compensation, equal treatment, efficiency), providing further distinguishing characteristics for each of the two families. Section 6 sets out conclusions suggesting that attention, critical debate and experimentation should be extended to encompass zoning-alternative TDRs as well.

2. A preliminary outlook: different design characteristics of a TDR program

Before analyzing the two families of TDRs, it is helpful to provide a breakdown of the main characteristics that a TDR program may assume. These characteristics concern how the program deals with (i) the 'classification' of the land (Section 2.1), and (ii) the 'life cycle' of a TDR (Section 2.2).

2.1. Two levels of land classification

Within a particular jurisdiction, a TDR program can draw distinctions among different areas. In other words, it can define different 'categories'—'classes'—of land. In this regard, it can focus on (i) different categories and sub-categories, and (ii) different criteria for distinguishing among them.

2.1.1. Categories and sub-categories

We can identify two possible kinds of land classification.

Firstly, in any given administrative area, a TDR program can apply to all the parcels of land, or only to some specific ones. In this latter case a distinction is drawn between *parcels involved* in the program and *parcels not involved*.

Secondly, with reference to the involved parcels, a TDR program can introduce a further distinction between *sending areas* and *receiving areas*. 'Sending areas' are areas where assigned development rights cannot be exercised (i.e. actuated), but can be transferred to 'receiving areas', which have previously been certified as eligible for development. Sending areas are those in which the administration, for some reason, intends to prevent or to limit development. These areas basically 'export' their own development potential to an eligible area within the same jurisdiction. After the sale of the TDRs, the landowner of a sending area can continue to use the parcel for other non-development activities allowed by law (agriculture, camping, etc.). In some cases, land-use rules allow some development in receiving areas even without TDRs. Therefore, TDRs furnish additional development potential.

In the U.S., traditional TDR programs permit developers in receiving areas to build up to the baseline density—the 'threshold'—without acquiring TDRs; in this case TDRs are therefore interpreted only as a kind of 'density bonus' that can grant density above the threshold (Nelson et al., 2012: 88). In other cases, any development on receiving areas requires the 'acquisition' of TDRs. This is the case in some European countries, for instance Italy (Micelli, 2002, 2011). In the U.S. this has happened only in some cases: for instance that of Chesterfield Township (New Jersey), a program adopted in 1998 (Nelson et al., 2012: 149–152).

Nearly all TDR programs implemented around the world are characterized by both these levels of distinction (involved areas vs. non-involved areas, sending areas vs. receiving areas). In other words, they involve only selected areas within a jurisdiction, which are accordingly classed as sending and receiving areas, with different development rights. Note that "by designating these districts, the governing authority is performing the traditional use-restriction aspect of zoning" (Stinson, 1996: 328).

Nevertheless, theoretically speaking, none of the previous differentiating levels is actually necessary. A TDR program can apply whereby no distinction is made between involved areas and non-involved areas (i.e. all areas within the jurisdiction are involved in the program), nor between sending and receiving areas (i.e. each

² See also McConnell and Walls (2009: 290): "most TDR programs are implemented on top of some type of existing zoning system that establishes maximum density limits in different parts of an urban region. Moreover, most jurisdiction establishing TDR programs have a priori ideas about which areas they want to protect from development and which areas they want develop more densely". See, finally, Benn and Infranca (2013), who underscore that a large part of commonly used TDRs programs are certainly not "post-zoning" instruments.

³ See also McConnell and Walls (2009: 298): "Although some TDR programs have succeeded in preserving land from development, the majority of programs have not achieved their goals, or even worse, have not worked at all"; and Thorsnes and Simons (1999: 256–257): "Not surprisingly, the economists who have studied conventional zoning-based TDR programs find little to applaud . . . Supply and demand conditions for development rights are not what planners expect, leading either to the TDR program languishing or to involved and ad hoc attempts to alter the system until it generates some revenue".

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