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Transfer of development rights in theory and practice: The restructuring of TDR to incentivize development

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ABSTRACT

In the 2000s, Florida local governments began using transfer of development rights (TDR) to enable a mix of conservation and development rights on large landholdings in rural areas. While the theoretical function of TDR is to facilitate a market for development rights exchanges, these programs envision little or no exchange of development rights, and instead use TDR as part of effectuating new development conditions. Previous research on TDR focuses on program performance, and provides little insight into why TDR programs might differ in theory and practice. In this research, I explore the design and orientation of Florida's emergent rural TDR programs. I argue that these programs restructure TDR primarily as an incentive rather than its theoretical function of enabling a market in support of managed growth. As a result, these programs are biased toward development over conservation. The programs also present an ambiguous treatment of property and development rights. The research raises questions about how well market-based land use strategies deliver "win–win" outcomes that balance economic growth and environmental protection.

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1. Introduction

Transfer of development rights (TDR) emerged in the 1960s as a tool for historic preservation, but today is used by more than 239 communities in the U.S. to serve a sweeping range of planning purposes including promoting affordable housing and protecting environmental resources (Nelson et al., 2012; McConnell and Walls, 2009; Pruetz, 2003). TDR facilitates a marketplace for development rights exchanges between landowners in sending areastargeted for protection and developers who want to build at greater intensities in receiving areas slated for growth (Nelson et al., 2012; McConnell and Walls, 2009; Pruetz and Stanridge, 2008; Pruetz, 2003). TDR has proven to be an enduring and malleable planning tool. It is recognized as an emblematic policy of the contemporary smart growth movement and is being adapted to serve emerging planning objectives such as resiliency and climate change (Chapin, 2012).

The continued popularity of TDR can be explained in part by the shift away from publicly-funded, regulatory, and bureaucratic approaches to planning and toward incentive-driven, entrepreneurial placemaking (Chapin, 2012; Fainstein, 1991; Sagalyn, 2007). In an environment of reduced federal funding, taxpayer revolt, distrust of government, and increased attention to property rights, the planning field has embraced a suite a planning tools that use market exchanges as a replacement for "hierarchical public planning" (Buitelaar and Needham, 2007). These include tax increment financing, expedited development review, development bonuses, and TDR. These tools do not rely on public funds or new taxes, but instead extract value from urban development processes.

A "new generation" of TDR programs are designed to better orient toward the flows of private capital. These programs, which emerged in 1990s, sought to improve the market for transferable rights by designating receiving areas in rural and fringe locations where there are fewer barriers to development (Machemer and Kaplowitz, 2002; Machemer et al., 1999). Linkous and Chapin (2014) show how the new generation approach to TDR has dominated contemporary use of TDR in Florida. They identify an emerging set of programs, dubbed "rural TDR", designed to foster a mix of conservation and compact communities in rural areas. The existing literature offers a very limited set of case studies that recognize and explore the ways individual Florida rural TDR programs arose of out a mix of conservation objectives, threatened property rights litigation, and local government interest in incentive-based alternatives to regulatory land use controls (Chapin and Higgins, 2011; Schwartz, 2012). This study takes a comprehensive look at all of Florida's rural TDR programs, comparing and generalizing from the set of cases to better understand the evolution of TDR as a planning instrument.

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The planning literature on TDR focuses on successful programs, describing program attributes and performance metrics, usually acres preserved. In this paper, I take a different perspective, examining program design to explore the orientation of contemporary TDR programs. Using a framework for assessing TDR design features from Walls and McConnell (2007), I identify program provisions and locate commonalities to understand how these emerging applications of TDR utilize market mechanisms, commodify development entitlements, resolve issues related to property rights, and manage growth. I argue that Florida's rural TDR programs restructure TDR primarily as an incentive rather than its theoretical function of enabling a market. As a result, these programs are biased toward development over conservation. The emergent approaches to TDR raise questions about the commodification of property rights, market-based trading of land uses, appropriate ways to resolve issues of outdated development entitlements, and the challenges of planning for large landholdings.

2. The mechanics and functions of TDR

TDR enables the redistribution of development rights by enabling a private market for rights exchanges. TDR is rooted in the concept of the landowners bundle of rights, which in general includes some right to develop land. TDR programs work off the "concept of a right to develop as separable from other property rights" (Fulton et al., 2004, p. 7). In a typical TDR program, landowners in a sending area targeted for protection can sever and sell the right to develop land to developers who want to build at greater intensities in receiving areas slated for growth (Nelson et al., 2012; McConnell and Walls, 2009; Pruetz and Stanridge, 2008; Pruetz, 2003).

The concept of TDR builds on the theoretical work for use of market-based instruments in natural resource policy. This work has focused primarily on air and water pollution trading. The existing research indicates that the success of market-based trading programs relies on factors including clear, enforceable goals and a large number of buyers and sellers (Fulton et al., 2004). However, land use markets are unique for several reasons, including the limited nature of land (each property is unique), imperfect information about land markets, the sensitivity of development decisions to timing, and because land markets are "thin"—or dominated by only a few buyers and sellers (Fulton et al., 2004; Nelson et al., 2012).

TDR program performance is usually measured in the number of acres protected in sending areas (Pruetz and Standridge, 2008). Although TDR facilitates a mix of conservation and development, it is often associated primarily with resource protection due to the focus on land preservation in program evaluation. It is important to note that, "TDR is not anti-growth. Rather, it is based on the concept that development should be redirected from areas where it is not appropriate (the Sending Zones) to areas where it is more appropriate (the Receiving Zones)" (Horner et al., 2003; p. 4).

The planning literature identifies three primary functions for TDR: (1) redistributing development rights; (2) offsetting of property rights restrictions; and (3) leveraging private dollars for resource protection (Nelson et al., 2012; Pruetz 2003). TDR is an important tool for growth management because it reinforces the clear separation of areas designated for growth and preservation (Daniels and Lapping, 2005; Linkous and Chapin, 2014). TDR's ability to redistribute development rights supports spatial goals, but also includes economic and political dimensions. Land markets do not always operate efficiently, and, while planning and zoning can be used to address inefficiencies, these tools can also introduce policy and market imperfections. For example, urban areas may benefit from artificially high land prices if positive externalities (such as tax breaks or availability of transit) are capitalized into land values. Rural areas may incur negative externalities from agricultural operations or development restrictions. "A key feature of TDR programs is to internalize externalities caused by imperfect market interactions between land uses, plus imperfections caused by policy itself" (Nelson et al., 2012, p. 7).

This leads to the second key role for TDR, which is to offset property rights restrictions. Regulatory planning programs such as zoning may be seen as infringing on property rights, specifically the right to develop. (Fulton et al., 2004). TDR can be used to offset property rights impacts by providing restricted landowners with the opportunity to sever and sell development rights (Nelson et al., 2012; Pruetz, 2003; Radford, 1999). From a legal perspective, TDR may be seen as either mitigation or compensation for regulatory takings (Pruetz, 2003; Radford, 1999). If sending area land is so heavily regulated as to meet the criteria for a taking and TDR is seen as compensation, the TDRs must provide the equivalent of property taken, or "just compensation". Alternately, if TDR is seen as an economically viable use of the impacted property, TDR may mitigate the local government's liability for a taking (Pruetz, 2003; Radford).

The mitigation function makes TDR especially useful where downzoning is seen as infeasible (Nelson et al., 2012; Pruetz and Standridge, 2008; Radford, 1999). Downzoning, or rezoning to allow less development potential, is one way to protect resource areas such as farmland from sprawl and urban development. However, downzoning reduces a property owner's ability to use land and may decrease property values, which can raise political and legal challenges. TDR can offset property rights impacts where downzoning is applied, or provide a voluntary way to redistribute development rights if downzoning is not politically feasible. In Florida, strong property rights protections limit the ability of local governments to downzone, fostering local government adoption of TDR (Chapin and Higgins, 2011; DeGrove, 2005; Deyle et al., 2007; Jacobs, 1999; Linkous, 2012; Nelson et al., 2012).

Finally, TDR provides an opportunity to preserve land where public funds for conservation are in short supply. Because TDR enables development rights to be bought and sold on the private market, it can help a community protect environmental and agricultural areas without imposing taxes or incurring debt.

2.2. Program design

To understand the orientation of contemporary approaches to TDR, I draw on a framework for identifying TDR program design features developed by Walls and McConnell (2007), shown in Table 1. The framework identifies five critical design features that, "create the rules under which landowners and developers can participate in the market (Walls and McConnell, 2007, p. 9). To simplify the analysis and due to content overlap, I group Walls and McConnell's five features into three areas: (1) designation of sending and receiving areas, (2) TDR allocation rate, and (3) density bonus and TDR requirement in receiving areas.

2.2.1. Theory: designation of sending and receiving areas

A fundamental element of TDR programs is the designation of sending and receiving zones. Sending areas are lands targeted for protection from which development rights can be transferred. Receiving areas are land where intensified development is appropriate to which development rights may be transferred.

As TDR evolved over time, efforts to improve program market viability created a shift in program focus from sending area conservation to receiving area development. Early programs were oriented toward protection of environmental areas and farmland, but mostly failed to generate transfers (Mabbs-Zeno, 1981; Machemer et al., 1999; Pizor, 1986; Schiffman, 2001). Beginning in the 1990s, "new generation" TDR programs sought to improve