FEATURE

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TRANSFERABLE DEVELOPMENT RIGHTS: PLANNING AND PRACTICE IN COLORADO

Introduction

The entitlement to develop land in Colorado granted by local zoning and subdivision regulations is known as development rights and has a market value. A Transferable Development Right (TDR) program can create a market for land development rights by bringing together willing sellers, typically landowners in rural areas, with able buyers such as land developers in urbanizing areas. As development rights are bought and sold, the capacity to develop land in one place is reduced or extinguished and transferred to another location where additional development is preferred.

Colorado municipalities can help to achieve their planning goals by using a TDR program as a land use tool for preserving land and shaping growth by establishing a market for development rights. Landowners in areas where development is not preferred may receive compensation for preserving their land by restricting its development potential; land developers may gain a higher return on investment by developing land at an increased density in areas targeted for growth.

TDR programs are initiated by local government action. Both municipalities and counties in Colorado have statutory authority to adopt TDR programs. Often, but not always, TDR programs are established by intergovernmental agreement between urbanizing cities or towns and the surrounding county. The municipal comprehensive plan also usually precedes a TDR program with public policy objectives that are consistent with creating a TDR program. In all cases, TDR program requirements are institutionalized with amendments to the municipal and county land development codes.

This basic planning context has the potential, but not the guarantee, of facilitating a market for development rights. Many factors are needed to ensure success, not the least of which are political will, private sector acceptance, and favorable economic conditions. This article outlines several technical, policy and legal considerations for structuring a TDR program.

Identifying sending and receiving areas and sites

The determination of appropriate sending and receiving areas is a fundamental step in shaping a TDR program. While sending and receiving areas can be described, maps should be prepared to clearly depict sending and receiving area boundaries, land use categories, zoning districts, and other key features. The future land use map in a master plan or the official zoning map can be an instructive base map.

A sending area is typically land that local planning documents recommend to remain undeveloped, such as prime agricultural land, an open space buffer between growing communities, or an area with significant natural features. Visually significant parcels such as ridgelines, land adjacent to airports, and property with environmental hazards can also serve as sending areas. A sending area can also be land that can accommodate some form of limited development yet is not desirable or feasible for government services or infrastructure, such as rural zoning districts that are experiencing subdivision into 35 acre lots, or property outside of "201" wastewater planning areas.

Receiving areas are typically urban or urbanizing areas either within or adjacent to a municipality that has available infrastructure and services capable of accommodating additional growth. Mixed use redevelopment areas, destabilized neighborhoods with numerous vacant "infill" parcels, sites designated for affordable housing, transit station areas, and land slated for future annexation are also good candidates for receiving areas.

How the TDR program works

A landowner within a sending area decides to voluntarily sell the development rights of his or her eligible sending site at a price privately negotiated by the landowner and a buyer. Alternatively, the landowner may choose to sell those rights through a TDR bank. A TDR bank is a financial mechanism administered by a local government or nonprofit organization that provides a single point of contact for

the purchase and sale of development rights. At the time of the sale, a deed restriction is recorded with the county clerk's office identifying the number of development rights transferred and any associated restrictions on future use of the sending site property. Upon confirmation of the recorded deed restriction, a TDR certificate is issued (either by the local planning office or TDR bank) identifying the number of development rights transferred. Future development of the sending site is limited to the number of dwelling units allowed by the base density of the underlying zoning district, less the number of development rights transferred. Since existing zoning limits the development potential of land within a receiving area to a base density, a developer of a receiving site can only increase density beyond that allowed as base density through the acquisition of one or more development rights identified on a TDR certificate.

Documenting the program

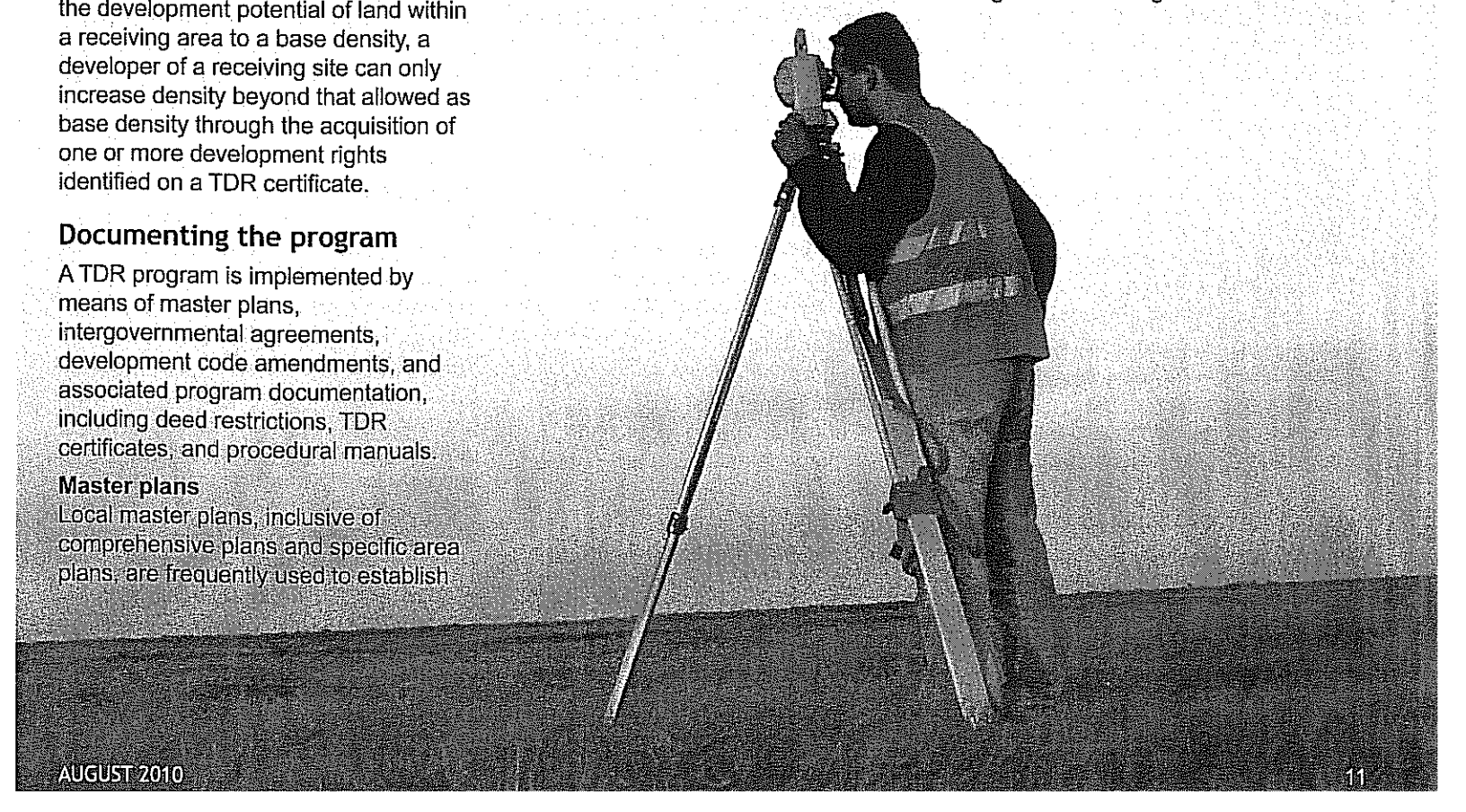
A TDR program is implemented by means of master plans, intergovernmental agreements, development code amendments, and associated program documentation, including deed restrictions, TDR certificates, and procedural manuals.

Master plans

Local master plans, inclusive of comprehensive plans and specific area plans, are frequently used to establish the public policy that forms the basis for a TDR program. The future land use map for a master plan generally depicts a range of land use designations, from very low rural density to very high urban density. The future land use map is supported by policy statements addressing land use, housing, open space, recreation, and other plan elements that may be applicable to a TDR program. The future land use map can be used as the basis for creating sending area and receiving area maps, or simply referencing one or more eligible sending areas for a TDR program. Mapped areas that are in a very low density category, i.e., one dwelling unit per multiple acres, are candidates for consideration as sending areas. Likewise, any areas identified within the master plan that are designated for rezoning to increased density can be identified as potential receiving areas. These typically include mixed use redevelopment and urban village land use designations.

Intergovernmental agreements

TDR programs are often initiated and implemented through interjurisdictional local government cooperative action. This is certainly the case in Colorado. Municipal governments wish to manage growth, and county governments typically are interested in protecting the local agricultural economy. An intergovernmental agreement for a TDR



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program will describe code amendments and procedures each jurisdiction will enact to make the program work.

Intergovernmental agreements are authorized by Title 29, Article 20 of the Colorado Revised Statutes, also known as the Local Government Land Use Control Enabling Act. Specifically, C.R.S. §29-20-105 (2) states that "local governments may provide through intergovernmental agreements for the joint adoption ... of comprehensive development plans for areas within their jurisdictions," and that a "comprehensive development plan may contain master plans, zoning plans ... and other land use standards." A TDR program is one such land use standard. Article XIV, Section 18 of the Colorado Constitution, entitled "Intergovernmental Relationships," provides for the creation of service authorities by counties and municipalities acting together. At subsection (2)(a) this section provides:

> *Nothing in this constitution shall be construed to prohibit the state or any of its political subdivisions from cooperating or contracting with one another or with the government of the United States to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt.* (Emphasis supplied.)

While the constitutional provision is phrased as denying any prohibition on such intergovernmental contracting, it is codified as an expressly delegated power at C.R.S. § 29-1-203(1):

> *Governments may cooperate or contract with one another to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units ...*

The phrase "lawfully authorized to each," which appears in both the constitutional and the statutory provisions, has been held to mean only that each entity must have the authority to perform the subject activity within its own boundaries, not that the level of effort, responsibility, or financial obligation must be equal. *Durango Transp. Inc. v. City of Durango,* 824 P.2d 48 (Colo. App. 1991). In Colorado, both municipalities and counties have broad authority to plan for and regulate the use of land, satisfying this test. Taken together, Colorado Constitution Article XIV Section 18(2)(a), C.R.S. 29-20-105, and C.R.S. 29-1-203 provide ample authority for most intergovernmental agreements between and among counties and municipalities in Colorado. Intergovernmental agreements concerning TDR programs are well within this grant of authority.

Code amendments

TDR program details are institutionalized with amendments to land development codes, primarily zoning regulations. Code amendments should be consistent with the public policy associated with the local master plan and/or inter-governmental agreement establishing the TDR program. A fundamental tenet of creating a market for development rights via the implementation of a TDR program is to restrict base density and create demand for additional density. The key to restricting base density is to limit the ability to rezone land to a higher density, or gain approval of a PUD with increased density, within a receiving area. At a minimum, zoning codes should include a requirement that TDRs be used in order to obtain any increase in density beyond that permitted by the underlying zoning district of a receiving area. Care should also be taken to eliminate or revise existing density bonus provisions that could compete with the TDR program.

A critical feature of any transferable development rights system is that the zoning regulations in the participating jurisdictions provide for the creation of sending and receiving areas for either mandatory or optional transfers of density. In sending areas, the density will be decreased, while it will be increased in receiving areas above that otherwise permitted. All of this is accomplished by means of amendment to the county and municipal zoning regulations and zoning map. Statutory authority for municipalities and counties to enact, adopt, and enforce zoning regulations, which would include these TDR provisions, is primarily found in Title 31, Article 23, C.R.S. (for municipalities) and Title 30, Article 28, C.R.S. (for counties). Other statutes granting land use power to both counties and municipalities serve as further authority for TDR programs, including C.R.S. 24-65.1-101, et seq (Areas and Activities of State Interest) C.R.S. 24-67-101, et seq (Planned Unit Development), and C.R.S. 29-20-101, et seq (Local Government Regulation of Land Use), mentioned above.

Home rule municipalities in Colorado can also rely on their power under

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Article XX of the Colorado Constitution to legislate on "local and municipal matters." Transferable development right programs are, at their heart, land use regulations. The Colorado courts have generally, although not universally, held land use matters to be of exclusively local and municipal concern, and thus within the full protection of Article XX.

TDR certificates

The documentation of a transferred development right is often accomplished through the issuance of one or more TDR certificates. A TDR certificate identifies the number of development rights transferred from an eligible sending site. Land developers obtain TDR certificates and remit them for additional density on an eligible receiving site. A TDR certificate generally should indicate the number of development rights extinguished from a sending site, the tax identification and/or parcel identification number of the sending site, and the "book and page" number of the recorded deed restriction extinguishing the sending site development rights. The certificate is signed by its holder and the appropriate local government officials, dated and subsequently recorded in the county clerk's office.

Deed restrictions and conservation easements

A deed restriction is a legal document recorded with the county clerk that restricts the use of a sending site in exchange for the transfer of a specified number of development rights, and includes an easement for enforcement purposes. A use covenant can also serve a similar function as a deed restriction. A common form of a deed restriction used in Colorado is a conservation easement. The easement holder can be a local government, yet municipalities may consign this responsibility to a conservation organization such as a land trust skilled in managing conserved lands.

TDR manual

A TDR manual provides a comprehensive overview of the TDR program and serves as a user information resource and guide. A TDR manual should introduce the reader to the concept of TDRs and explain how and why the program was developed. Sections on sending areas and receiving areas should provide specific details on how and where landowners and land developers can participate in the TDR program. Illustrations, charts, maps, definitions, examples and sample formats should be provided for ease of use, with reference materials included in an appendix.

A typical outline for a TDR manual includes an introduction with purpose statement, program background and contact information, maps and criteria for sending and receiving areas, procedures for sending site owners and receiving site developers, a list of "frequently asked questions," a glossary of terms, an appendix that may include worksheets for calculating TDRs, and sample copies of a TDR certificate and/or deed restriction.

Addressing the takings question

Both the Colorado Constitution (Article II Section 15) and the U.S. Constitution (Fifth Amendment) prohibit the taking of private property for public use without the payment of just compensation. This "takings" statement has sometimes been used to claim that any zoning or land use restriction, no matter how innocuous, constitutes a "taking" of property. This argument has sometimes been extended to challenge TDR programs.

It is important to remember a takings claimant must prove two things: extreme diminution in value, and compensation not sufficient. Especially in the context of transferable development rights, these two elements are difficult to prove. This is true because TDR programs typically provide an option for the owners in the sending and receiving areas, not a compulsion to participate in the program. Making a TDR program optional addresses the taking issue by allowing property owners in both sending and receiving areas to simply not participate, retain their density, and thus be unaffected. In that circumstance, there is no real or imagined diminution in value, and thus no taking. The standard is that the property owner still realizes some economic return or the land can be used for an economic purpose. In Colorado, there is no right to the "highest and best use," of a property, only to a reasonable use. A properly structured TDR program meets this test.

Conclusion

Transferable development right programs are an innovative and market driven option for municipalities seeking to implement their planning goals. Supported by state constitutional and statutory authority, such programs can be an important part of an overall strategy for preserving community quality of life.