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The transferable development rights (TDR) concept is a relatively recent innovation in the field of land use control. Mr. Schnidman briefly reviews the development of the TDR concept, compares it to similar devices in other fields, and examines a variety of proposals for its application. The author then outlines the varied TDR programs adopted by New York City, Collier County, Florida, and Buckingham Township, Pennsylvania, and sets forth a basic step-by-step procedure for developing a TDR system.

TRANSFERABLE DEVELOPMENT RIGHTS: AN IDEA IN SEARCH OF IMPLEMENTATION*

*Frank Schnidman***

PLANNING for development is both an opportunity and a responsibility. For the past fifty years, local governments have been concerned with both these aspects of planning but emphasis has been on opportunity, and the land

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The main focus of the Windfalls for Wipeouts Project is to search the mythical common culture of CANZEUS (Canada, Australia, New Zealand, England, and the United States) to discover what windfall recapture techniques are being used, or have been utilized, and to describe and evaluate them. Wipeout mitigation techniques are similarly researched. The project will ultimately recommend the best technique or techniques available. Some of the techniques are familiar; others are exotic by American standards but, if politically acceptable anywhere in CANZEUS, may be acceptable in the United States. Transferable Development Rights, in the words of the study's principal investigator, Professor Donald G. Hagman of the University of California, Los Angeles, is a new concept, "exciting, and indigenously American."

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use decisions which have been made reflect a growth oriented perspective. Decisions were influenced by the desire to increase the local tax base and to provide a variety of residential, commercial, and industrial uses.

Recently, many localities—in response to changing citizen attitudes—have begun to reassess the course of land use decisions. More and more, localities are contemplating preservation activities, environmental impact review and even, at the extreme, no-growth postures. A greater emphasis is being placed on the protection of the public (societal) interest in land through regulatory exercises of the police power. Likewise, the growing state and federal influence toward environmental protection is hastening this changing direction of local land use decision-making. The cumulative result is that the resource value of land is being considered in addition to its commodity value.

As attitudes and economic conditions are changing, so too are the administrative interpretations of traditional land use control mechanisms. Comprehensive planning, zoning, subdivision regulation and official mapping are being augmented with easement purchase, land banking, special forms of contract zoning and other newer land management techniques.

In the midst of all this transitional activity a land management device has emerged which is based on the underlying principle that the development potential of privately held land is in part a community asset that government may allocate to enhance the general welfare. This land management device is called Transferable Development Rights (TDR). In effect, TDR severs the development potential from the land and treats it as a marketable item, attempting to mesh the economic forces of the marketplace with the police power authority of government to protect the general welfare. TDR is also viewed, by its proponents, as an equitable means of providing an anticipated return on land investment to property owners whose return otherwise might be lessened by regulatory activity.

I. INTRODUCTION

The planning district which uses TDR establishes conservation zones and transfer zones. The conservation zones are those areas where development will not be allowed and where the development potential of the parcels is to be severed. Transfer zones are the receiving areas for the development potential—thus, transferable density. These transfer zones are areas which are highly suitable for development based on sound planning theory, available facilities and utilities, and overall compatibility with both the built and natural environment, and though they have an allowed maximum density, that density may be exceeded by the purchase of development rights from conservation zone landowners. This transference allows the marketplace to compensate the owner of land where development is restricted by allowing him to sell that density to transfer zone landowners.

II. THE CONCEPT OF DENSITY TRANSFER

The first issue raised in discussing density transfer is from where do development rights come in the first place?

“The traditional American concept is that these rights come from the land itself, ‘up from the bottom’ like minerals or crops.”¹ This attitude has resulted in the view that land use regulations are restrictions upon the landowner. Allowed density is perceived as a limitation rather than a governmental grant of the right to build.

The TDR mechanism involves not only the “up from the bottom” attitude, but also the “down from the top” attitude—an attitude which views government in the prime role of setting overall densities and apportioning them unevenly over the community on the basis of environmental concern and good planning theory.²

1. REILLY, *THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH* 140 (1973).

2. *Id.*

One of the first widespread applications of this "down from the top" theory was the use of cluster subdivision. Under cluster subdivision a 100 acre parcel which is zoned one unit per acre has a variety of potential development patterns. The units could be spread out evenly over the tract; they could be placed two to the acre leaving 50 acres of open space; they could be clustered onto 80 acres leaving 20 acres of open space, etc. What all these options have in common is that overall tract density is the same. Only the placement of units within the subdivision differs. The flexibility allowed by cluster subdivision provides the opportunity to best fit the development to the various physical characteristics of the parcel.

A refinement of this concept is planned unit development (PUD). PUD is similar to cluster subdivision in spirit, but in practice applies to parcels upon which much or all of the housing is townhouses and/or apartments. Higher densities than conventional single-family projects of the same acreage are allowed. In addition to clustering the dwelling units to provide open space, part of the land may be used for non-residential purposes such as shopping centers or employment centers.

The clustering concept has, however, come under criticism. Though open space is generated,

The open space must be generated on the owner's land, and not elsewhere, and may not be useful from a community standpoint at the owner's location, and

There is a limit to the number of acres of open space which may be truly constructive and useful in a metropolitan region.³

The means suggested to alleviate this problem was to allow developers to acquire development rights from one parcel of land and apply them to another,⁴ thereby enabling the muni-

3. Lloyd, *Transferable Density in Connection with Density Zoning*, in *NEW APPROACHES TO RESIDENTIAL DEVELOPMENT* (Urban Land Institute Tech. Bull. No. 40) 136 (1961).

4. *Id.* at 137.

cipality to preserve open space where desired without having to itself bear the acquisition cost of such development rights.⁵

Gerald D. Lloyd, a developer, recommended in 1961 that this concept of transferable density be given "immediate and serious study."⁶ It was a decade before his suggestion was followed.

III. EXISTING CONCEPTS SIMILAR TO TDR

The concept of severing the development potential and allowing its transference to another site is the basis of TDR. Transference of development potential is presently used in at least three other areas—transfer of airspace, sale of water rights, and regulation of oil and gas production.⁷

A. *Transfer of Airspace*

It has become a fairly well established legal principle that airspace is subject to the same principles as other lesser-than-fee interests in land. It can be owned separate and apart from the land, and it can be conveyed, leased and subdivided in approximately the same manner as land.⁸

The history of land ownership in relation to airspace was reflected for centuries in the Latin maxim, *Cujas est solum, ejus est usque ad coelum* (He who owns the land owns the airspace above it to the heavens).⁹ As stated by Blackstone, "Land has an indefinite extent, upwards as well as downwards."¹⁰ It was the advent of aeronautics which finally necessitated a change in this line of thought.

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5. The then-leading work, and still an extremely popular publication, was WHYTE, *SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS* (Urban Land Institute Tech. Bull. No. 36) (1959).
 6. Lloyd, *supra* note 3, at 137.
 7. An excellent discussion of the legal precedents for a development rights system is Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. STATE U.L. REV. 35, 53-99 (1974).
 8. WRIGHT, *THE LAW OF AIRSPACE* 259-60 (1968).
 9. Morris, *Air Rights are "Fertile Soil"*, 1 URBAN LAW 247, 249 (1969). This article traces in detail the historical development of the legal aspects of airspace use.
 10. 2 BLACKSTONE, *COMMENTARIES* 18 (1836).

Mr. Justice Douglas, writing for the U.S. Supreme Court in the 1946 case of *United States v. Causby*,¹¹ an action for damages because of low flying airplanes, rejected the ancient concept of airspace ownership. The Court reasoned that the age of air travel necessitated limiting a landowner's absolute dominion in the space over his land to the amount of airspace he can reasonably be expected to use.

[I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted and even fences could not be run. . . . The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. . . . The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material.¹²

How was the actual extent of ownership to be determined? In fact, such a determination has not been made. In those municipalities which chose to exercise the power to zone, height and bulk restrictions provide the boundary of allowable use. Buildings are limited in number of stories or floor area, or both. In those areas not under such police power regulation, market forces and technology play key roles in deciding the extent of use.

In examining the ways airspace or air rights have been transferred, two major patterns can be distinguished. First, there are those instances in which the landowner has not built anything upon the land and sells his air rights to those who seek to keep the land in open space.¹³ Second, there are those instances where there has been development, but it is of such a nature that additional use of the site's air rights can be made. Prime examples of this are the construction of buildings above railroad lines¹⁴ and above highways.¹⁵

11. 328 U.S. 256.

12. *Id.* at 264.

13. See *WHYTE*, *supra* note 5, and *REILLY*, *supra* note 1.

14. *Morris*, *supra* note 9, at 248.

15. See *REAL ESTATE RESEARCH CORP., AIR RIGHTS AND HIGHWAYS* (Urban Land Institute Tech. Bull. No. 64) (1969).

Transfers of air rights are becoming quite common, and numerous publications have appeared to give guidance to the legal profession,¹⁶ real estate appraisers,¹⁷ and title insurers.¹⁸

B. *Sale of Water Rights*

The allocation of water in an appropriation state (a majority of the West) rests on the fundamental notion of "first in time, first in right"—that is to say, the first person to use water acquires the right to its future use as against later users. As appropriation states approach the point where there is little unappropriated water left, pressure has mounted to reform legal procedures by which water rights are changed or transferred.¹⁹ Restraints on water rights transfer exist to some degree in all Western states; some restraints are of only minor consequence, while others practically prohibit the sale of the right for the benefit of other land.²⁰

Urban and industrial growth, and recently the needs of energy development, have fostered a changing attitude toward transfer.²¹

If these obstacles [to transfer] were removed and the transfer of water rights made more feasible and facile, it would be expected that high-value users, such as cities and industries, would purchase water rights from low-value users, such as some agricultural owners of water rights. This reallocation process, operating in a framework of voluntary action in response to traditional economic incentives, would increase the benefits gained from the use of water and would tend to delay or make unnecessary the construction of new sources of supply. . . .

16. See, e.g., AIR RIGHTS (PLI Course Handbook No. 103) (1974).

17. See, e.g., Rhodes, *Air Rights, Subsurface Easements, and Other Fractional Interests*, THE APPRAISAL J., April 1974, at 261.

18. See, e.g., Pedowitz, *Transfers of Air Rights and Development Rights*, 9 REAL PROPERTY, PROBATE & TRUST J. 183 (1974).

19. Trelease & Lee, *Priority and Progress—Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 22 (1966).

20. *Id.* at 2.

21. NATIONAL WATER COMM'N, WATER POLICIES FOR THE FUTURE 260-61 (1973).

Sales of water rights which are taking place at present demonstrate that voluntary reallocation of water to more valuable uses will occur when legal and institutional barriers can be overcome.²²

The theory behind the appropriation doctrine is that by granting private property rights to water, the individuals receiving ownership will attempt to achieve the greatest possible benefit for themselves, and that their actions will tend to produce maximum welfare for the state or nation.²³

The history of the regulation of water rights shows, in fact, that the sale of water rights often means the sale of development rights and their transference to another parcel of land. Water is a necessity for almost any type of land use in the arid West, and when the owners of water face the market pressures from a "higher use", the sale price determined is based upon the loss of development potential.²⁴

C. *Regulation of Oil and Gas Production*

Oil and gas commonly occur together in a pool that underlies the land of numerous surface property owners. "Primary recovery" of these resources relies upon naturally existing pressures to force the oil and gas to the surface. When too many wells are drilled into the pool, these pressures are quickly dissipated and expensive "secondary recovery" techniques must be utilized in order to continue production. A history of wasteful competitive practices led to the institution of regulations to prevent the interests of individual landowners from harming others who shared in the development potential of the pool of oil located under their properties.²⁵

The two major types of regulation are pooling and unitization. Pooling relies upon physical data to determine the density of wells necessary to produce a pool fully and efficiently under primary recovery methods. The number

22. *Id.*

23. Trelease & Lee, *supra* note 19, at 4-5.

24. See Trelease, *The Model Water Code, The Wise Administrator and the Goddam Bureaucrat*, 14 NATURAL RESOURCES J. 207, 217-225 (1974).

25. Ely, *The Conservation of Oil*, 51 HARV. L. REV. 1209 (1938).

and spacing of wells is then regulated, in addition to the rate of production for each drilling unit. Profits and losses are apportioned accordingly among the landowners over the pool on the basis of the percentage of the pool under their property. The first pooling acts were municipal ordinances, passed and upheld as exercises of the zoning power. Legislation at the state level soon followed.²⁶

Unitization refers to the voluntary and sometimes forced management of the pool as a unit, without regard to surface ownership. Such agreements are entered into when production techniques must be used that are costly, but that will allow for the most beneficial extraction possible. In order to insure that the benefit of a landowner's investment in secondary recovery techniques will inure to him and not his neighbors, the landowners enter into an agreement to share in the costs and profits of the production of oil.²⁷

Simply then, for the benefit of all landowners over the pool, the right to develop oil and gas is taken from them and granted to the pool operator or to the committee charged with operating the unitized field. Development is viewed as a joint opportunity and a joint responsibility, and for the maximum benefit to be achieved, the curtailment of individual development decisions occurs.

IV. PROPOSED USES OF TDR

A. *Basic Principles*

TDR not only meshes law, equity, and economics, but also brings together the legal principles which have developed in the areas discussed above. As with air rights transfers, water rights sales, and oil and gas production, TDR views the right to development potential as something severable and transferable from one specific parcel of land to another.

TDR is also an expansion of the cluster subdivision and PUD concepts. Rather than just the specific parcel, how-

26. Carmichael, *supra* note 7, at 80. This article provides an excellent discussion of the applicability of oil and gas regulations to Transferable Development Rights in addition to analyzing other possible precedents.

27. *Id.* at 87.

ever, TDR envisions a type of "community cluster" or "community PUD". Overall community density under TDR stays the same; it is the location of that density within the community which changes.

In reviewing the many proposals for the use of TDR, and the existing legislation itself,²⁸ three basic variations emerge. TDR has been proposed and used in preservation of historic buildings, has been proposed and used for agricultural/open space preservation, and has been proposed as an alternative to zoning. Selected specific examples will be discussed in a subsequent section, but before they are, a general discussion of these variations is necessary.

B. Historic Preservation

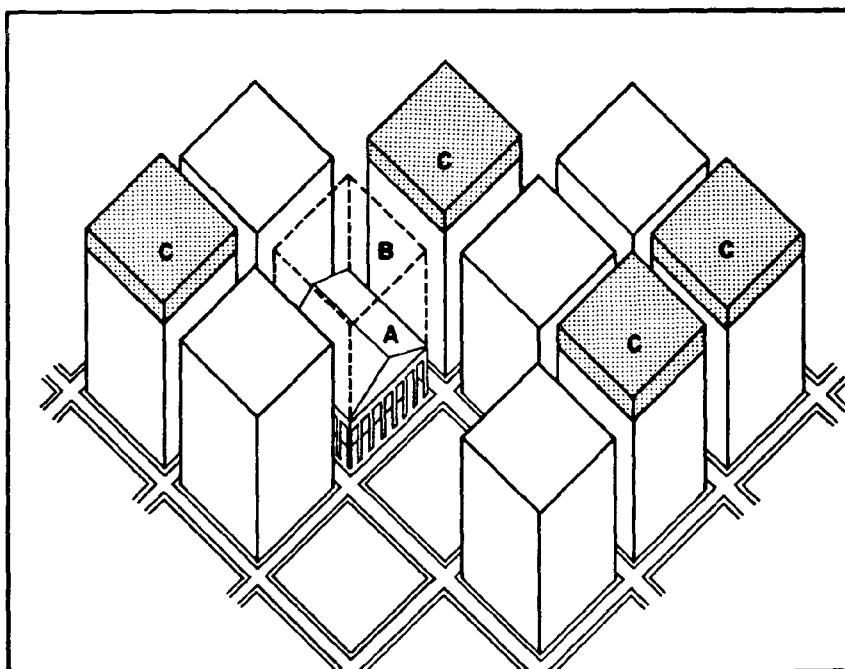
Initial density transfer proposals to preserve historic structures involved the simple transfer of density to contiguous property. It was suggested that the unused floor area from the historic structure be transferred to allow a taller building to be constructed on the adjoining property. This could be accomplished in two ways. Either the owner of the historic structure sold the unused potential and a deed restriction would be recorded, or he would sell the parcel of land along with the structure to the adjoining property owner who would apply the balance of the overall parcel's floor area to the building to be constructed.

An expansion upon this approach is the idea of allowing the unused floor area to be transferred to properties which are not contiguous. A planning district would be established within which both historic sites and transfer sites would be designated. Destruction of the historic structures would be prohibited, but the landowners of the historic sites could sell their unused density to be applied in the construction of one or more buildings, which would then exceed their normally allowed floor area by the amount purchased from the historic site(s).

28. The most extensive listing available is HELB, *TRANSFERABLE DEVELOPMENT RIGHTS BIBLIOGRAPHY* (1975).

Figure 1

Application of Transferable
Development Rights
for Historic Preservation



Source: Costonis, Space Adrift: Landmark Preservation and the Marketplace

The landmark building (A) utilizes only a fraction of the development rights of the site, the remainder of which (B) are transferred to various other sites within a transfer district and appear as additional bulk (C) on neighboring buildings.

Figure 1 shows how a landmark building utilizes only a fraction of the site's development rights, the remainder of which can be transferred to various other sites within the planning district and appear as additional bulk on transfer site buildings.²⁹

29. Figure 1 is from COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE 32 (1974).

C. *Agricultural/Open Space Preservation*

The preservation of prime agricultural land or the preservation of open space can also be accomplished by the use of TDR. Within the planning district where preservation is sought, an in-depth analysis of common planning concerns, such as infrastructure and school capacity, is carried out. Evaluation of the natural characteristics of the district is also made. Based upon these studies, sites to be preserved can be identified as well as sites which have the ecological and present or future infrastructure capacity to handle additional density.

Once these parcels are selected, the designated agricultural/open space land is placed under a conservation zone classification, thereby prohibiting development. The development which would have been permitted can then be sold to the owners of transfer zone land to allow them to build at an increased density. Once again, overall density for the planning district remains the same. The density is, however, clustered in those areas most suited for development.

D. *Alternative to Zoning*

Zoning has not proven to be the solution to community growth and development problems as was forecast in the 1920's. What has resulted is a system with inherent inequitable characteristics, which creates windfalls for some and wipeouts for others, and which, when based upon poor planning, often results in undesirable patterns of development and artificially high land values. It has been suggested that through a sophisticated front-end planning effort, zoning could be augmented or replaced by a TDR system which would alleviate these shortcomings.

Beginning with a planning effort that would determine overall community development, specifying and mapping the type of use and density to which land in the planning district would ultimately be put, development rights could be distributed to landowners on the basis of acreage owned or cubic footage allowed, or market value of the land, etc.

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Figures 2 and 3 illustrate how this type of plan can be put into effect.³⁰

Figure 2

THE TRANSFERABLE-DEVELOPMENT RIGHTS IDEA IN OPERATION
A SIMPLE EXAMPLE

OWNER	RESIDENTIAL	COMMERCIAL/ INDUSTRIAL	AGRICULTURE /OPEN (acres)	ROADS, PUBLIC FACILITIES, SCHOOLS, etc. (acres)	TOTAL ACRES OF LAND OWNED	PERCENT OF TOTAL AREA OWNED
PRESENT LAND USE AND OWNERSHIP						
FARMER JONES	2 acres	0 acres	597	1	600	47%
FARMER SMITH	2 acres	0 acres	636	2	640	50%
OTHERS	10 acres	29 acres	0	1	40	3%
FUTURE LAND USE ACCORDING TO COMPREHENSIVE MASTER PLAN:						
FARMER JONES	86 acres	163 acres	199	152	600	
FARMER SMITH	223 acres	0 acres	377	40	640	
OTHERS	10 acres	29 acres	0	1	40	
	319	192	576	193		
NEW DEVELOPMENT REQUIRING DEVELOPMENT RIGHTS ACCORDING TO COMPREHENSIVE MASTER PLAN (for sake of simplicity, one development right yields the right to develop one acre of land):						
FARMER JONES	84 acres	163 acres				
FARMER SMITH	221 acres	0 acres				
OTHERS	0 acres	0 acres				
Total Development	305 acres	163 acres				

DISTRIBUTION OF DEVELOPMENT RIGHTS

(The number each property owner receives is based on the percentage of land he owns):

FARMER JONES	$\left[\begin{array}{l} \text{percent of} \\ \text{land owned} \\ (47\%) \end{array} \right] \times \left[\begin{array}{l} \text{total number of} \\ \text{residential devel-} \\ \text{opment rights} \\ \text{distributed} \\ (305) \end{array} \right] = 143$	$\left[\begin{array}{l} \text{percent of} \\ \text{land owned} \\ (47\%) \end{array} \right] \times \left[\begin{array}{l} \text{total number of} \\ \text{com./ind develop-} \\ \text{ment rights distri-} \\ \text{buted} \\ (163) \end{array} \right] = 77$
FARMER SMITH	$\left[\begin{array}{l} \text{percent of} \\ \text{land owned} \\ (50\%) \end{array} \right] \times \left[\begin{array}{l} \text{total number of} \\ \text{residential devel-} \\ \text{opment rights} \\ \text{distributed} \\ (305) \end{array} \right] = 153$	$\left[\begin{array}{l} \text{percent of} \\ \text{land owned} \\ (50\%) \end{array} \right] \times \left[\begin{array}{l} \text{total number of} \\ \text{com./ind develop-} \\ \text{ment rights distri-} \\ \text{buted} \\ (163) \end{array} \right] = 81$
OTHERS	$\left[\begin{array}{l} \text{percent of} \\ \text{land owned} \\ (3\%) \end{array} \right] \times \left[\begin{array}{l} \text{total number of} \\ \text{residential devel-} \\ \text{opment rights} \\ \text{distributed} \\ (305) \end{array} \right] = 9$	$\left[\begin{array}{l} \text{percent of} \\ \text{land owned} \\ (3\%) \end{array} \right] \times \left[\begin{array}{l} \text{total number of} \\ \text{com./ind develop-} \\ \text{ment rights distri-} \\ \text{buted} \\ (163) \end{array} \right] = 5$

DEVELOPMENT RIGHTS THAT MUST BE BOUGHT OR SOLD TO COMPLETELY DEVELOP THE AREA ACCORDING TO THE COMPREHENSIVE MASTER PLAN:

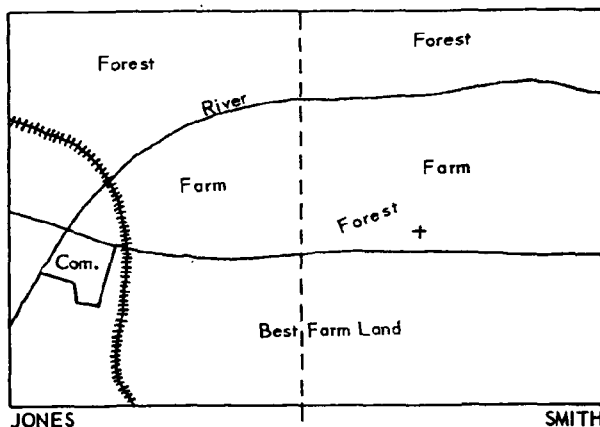
FARMER JONES	has can develop	143 res. dvmt. rts. 81 acres	has can develop	77 com./ind rts. 163 acres
	can sell	59 rights	must buy	86 com./ind rts.
FARMER SMITH	has can develop	153 res. dvmt. rts. 221 acres	has can develop	81 com./ind rts. 0 acres
	must buy	63 res. dvmt. rts.	can sell	81 com./ind rts.
OTHERS	have can develop	9 res. dvmt. rts. 0 acres	have can develop	5 com./ind dvmt. rts. 0 acres
	can sell	9 rights	can sell	5 com./ind dvmt. rts.

Source: Urban Land (Jan. 75).

30. Figures 2 and 3 are taken from Foster, Schnidman & Bailey, *Transferable Development Rights: Are They a Step in the Direction of Better Land Use Management?* URBAN LAND, January 1975, at 33.

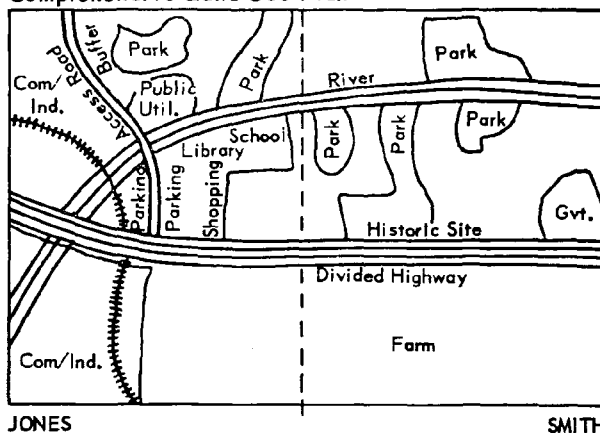
Figure 3
The Transferable-Development Rights Idea in Operation
A Simple Example

Land Use Before Development



- Residential
- Commercial/Industrial
- Agricultural/Open Space
- Other (Roads, Schools, Public Buildings, etc)

Comprehensive Land Use Plan



- Residential 25%
- Commercial/Industrial 15%
- Agricultural/Open Space 45%
- Other (Roads, Schools, Public Buildings, etc.) 15%

Source: Urban Land (Jan. 75).

For simplicity, Figure 2 uses a planning district consisting of two large farms belonging to Farmer Jones and Farmer Smith, plus some scattered tracts of land that Farmer Jones (whose property is closest to the municipality) has previously sold. Each farm was originally 640 acres, but since Farmer Jones has sold off a few parcels, his farm is now only 600 acres. The table at the top of Figure 2 shows present use, future use according to the comprehensive master plan, and new development requiring development rights. In this example one development right is needed in order to develop one acre of land.

According to the comprehensive master plan, 305 additional acres of residential land and 163 acres of commercial/industrial land can be developed. Percentage of the planning district owned is then used to apportion development rights. The allowed transfer of development rights to completely develop the planning district appears at the bottom of Figure 2. Note that though "Others" own completely developed land, they still receive development rights. The rationale for this is that development is a community responsibility and a community opportunity, and that by providing all landowners with development rights they would have an economic motivation to see to it that the comprehensive master plan is not frustrated.³¹

V. SELECTED TDR PROPOSALS AND PROGRAMS

The above discussion outlined in general terms the three major variants of the TDR concept. There have been a number of proposals for the use of each variant, some more feasible than others. This section reviews selected examples of such proposals.

A. *New York City*

The pioneer in the use of transferable development rights is the City of New York. TDR in New York has

31. Other proposals to use TDR as an alternative to zoning, which vary in approach, include S. 254, 1972 Session, Md. Leg. (introduced, read first time, and referred to the Committee on Economic Affairs, January 1972); and CHAVOOSHIAN, NIESWAND & NORMAN, GROWTH MANAGEMENT PROGRAM—A PROPOSED NEW APPROACH TO LOCAL PLANNING AND ZONING (Rutgers—The State University Cooperative Extension Service Leaflet No. 503) (1975).

been used for both landmark and open space preservation.³² The city's use of TDR evolved from a series of amendments to the Zoning Resolution, beginning in 1961.³³ First, the definition of "zoning lot" was changed to allow the merger of two separate but contiguous zoning lots when they came under common ownership.³⁴ This permitted the construction of a taller building by "clustering" the unused development potential of both parcels onto one. Then, in order to solve the dilemma of a landmark structure which was already surrounded by development on all contiguous lot lines, the city permitted unused development rights to be transferred across the street.³⁵ This provided another means by which the city could equitably handle the possible negative economic impact of designations under the Landmarks Preservation Law.³⁶

Adding to the ability of the city to equitably compensate landowners for landmark designation was the 1969 amendment to the Zoning Resolution allowing the transfer of development rights to lots within a chain of common ownership.³⁷ The first transfer of this type was an owner-initiated proposal. The owner of Amster Yard, a 19th Century collection of small residential structures, open spaces and stores in midtown Manhattan, was allowed to transfer a portion of his development rights to a nearby parcel for use in the construction of an office building. As a condition, the city insisted upon a promise to create a \$100,000 trust fund, the income of which would be used for maintenance of the landmark.³⁸

This chain of common ownership was the means sought to entice the owners of the Grand Central Terminal to trans-

32. For an excellent background discussion, see Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972).

33. These amendments are discussed in Marcus, *Development Rights Transfers: The Planning Perspective*, in AIR RIGHTS, *supra* note 16, at 41-78; and in Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUF. L. REV. 77, 89-94 (1974) [hereinafter cited as *Mandatory Development Rights*].

34. NEW YORK CITY, N.Y., ZONING RESOLUTION § 12-10 (1975).

35. NEW YORK CITY, N.Y., ZONING RESOLUTION § 74-79 (1975).

36. NEW YORK CITY, N.Y., ADMIN. CODE ch. 8-A (1971).

37. NEW YORK CITY, N.Y., ZONING RESOLUTION § 74-70 (1975).

38. *Mandatory Development Rights*, at 92-93.

fer the development rights from the landmark on 42nd Street to various other lots they controlled. In 1967 a proposal by the Penn Central and a British developer to construct a 55-story tower on the roof of the terminal was rejected by the Landmarks Preservation Commission. In 1969 they were again before the commission, this time with a proposal for a 59-story tower requiring demolition of the terminal facade. When this proposal was rejected, Penn Central and its partner sued. The trial court's decision did not question the constitutionality of the Landmarks Preservation Law, but did find its application to the Grand Central Terminal to be an "economic hardship" because it prevented the bankrupt railroad from earning the income it would receive from the office tower. This being the situation, the court invalidated the landmark designation.³⁹

The New York State appellate court, however, recently overturned the trial court, conceding that hardship might be suffered by the Penn Central because of the landmark designation, but stating that "such hardship, in the proper exercise of the city's police power, must be subordinated to the public weal."⁴⁰ The options now open to the plaintiff are either appeal this decision or acquiesce in the landmark designation and seek to transfer the development rights as allowed by the Zoning Resolution. Either way, it appears likely that no construction will be undertaken in the near future, as there is presently a weak market for new office floor space.

The South Street Seaport District⁴¹ is another attempt by the city to use TDR for preservation purposes. The blocks of small 200 year old buildings which surround the Fulton Fish Market in Lower Manhattan were placed in a preservation category, and other parcels within the district were designated as redevelopment areas (the Conservation Zone/Transfer Zone concept discussed above). Under an arrange-

39. Penn Cent. Trans. Co. v. City of New York, ___ Misc.2d ___, ___ N.Y.S.2d ___ (1975). It is interesting to note that the trial was held in the spring of 1972, yet the court's decision was not handed down until January 1975.

40. Penn Cent. Trans. Co. v. City of New York, 50 App. Div. 2d 265, 377 N.Y.S. 2d 20, 29 (1975).

41. NEW YORK CITY, N.Y., ZONING RESOLUTION §§ 88-00 *et seq.* (1975).

ment with the landowners and the city, a consortium of banks, acting as a middleman, purchased the development rights; as the city's urban renewal plan progresses, the development rights will be transferred to specific receiving lots.⁴²

The most far-reaching application of TDR has been the designation of two privately owned parks as passive recreation areas, thereby prohibiting their development. The development rights from these two parks, part of the Tudor City complex, are to be transferred to a commercial area several blocks away. This Special Park District⁴³ allowed the density transfer to occur only within the district, but had no requirement that the lots must be contiguous or in common ownership.

42. *Mandatory Development Rights*, at 93.

43. NEW YORK CITY, N.Y., ZONING RESOLUTION §§ 91-00 *et seq.* (1975). After specifying the requisite transfer ratios for development rights with regard to given districts, the pertinent provisions of the act provide:

9-01 Definitions

* * *

"Granting lot" is a privately owned zoning lot within the Special Park District existing as of July 1, 1972, (a) which is mapped as a park on the City Map, or (b) although not mapped as a park on the City Map is (i) free of all development and containing only trees, grass, benches, walkways and passive recreational facilities including structures incidental thereto; and (ii) if in the form of open space or plaza contiguous to development was not developed as required or integrated space in connection with its adjoining development.

The granting lots are confined within an area bounded by 60th Street, East River, 33rd Street, Hudson River and within a Special P District.

The minimum area of such a granting lot shall be 4,000 square feet with a minimum dimension of 40 feet.

"Receiving lot" is a zoning lot within an area bounded by 60th Street, Third Avenue, 38th Street, and Eighth Avenue, having an area of at least 30,000 square feet all of which lies within a commercial district having a basic floor area ratio of 15 and on which development rights are transferred.

* * *

91-03 Transfer of Development Rights from Granting Lots

Development rights from a granting lot may be conveyed, or otherwise disposed of (i) directly to a receiving lot or (ii) to a person for subsequent disposition to a receiving lot. . . . Any person may convey its interest in all or a portion of such development rights to another person but such development rights may only be used for a development on a receiving lot.

91-04 Addition of Development Rights to Receiving Lots

All or any portion of the development rights from a granting lot may be added to the permitted floor area and rooms of a receiving lot provided that:

(a) The total floor area allowed on such receiving lot shall in no event exceed the maximum floor area ratio limit set forth in Section 33-120.5 plus 10 percent thereof except as provided in Section 91-07 (special permit bulk modifications).

Though at least one "substantial" offer was made to purchase these development rights,⁴⁴ the mortgagor brought suit on an inverse condemnation cause of action. Plaintiff alleged that transferable development rights were not just compensation for the "taking" which had occurred. The city based its defense on police power theory. Since the restriction placed upon the property was for the promotion of public welfare, the city argued that the zoning classification was a police power action requiring no compensation.⁴⁵

The trial court ruled in favor of the plaintiff, but did not embrace the inverse condemnation theory.⁴⁶ Rather, the court found fault with the planning procedure and invali-

The residential portion of a mixed building development, on such lot that complies with the provisions of this Section shall be entitled to the maximum floor area of 12.00. In no event shall the floor area ratio of a residential building or residential portion of a mixed building exceed 12.00; and (b) The development on a receiving lot shall include a covered pedestrian space, through-block arcade or other public amenity which generates floor area bonus and which in the aggregate earns a minimum bonus floor area ratio equivalent to 2.50.

In no event shall the development rights permitted by the provisions of this Chapter be transferred into another Special Purpose District unless permitted by the express provision of such Special Purpose District. In the case of a receiving lot located in a Commercial District indicated with a suffix CR, the transfer of development rights under the provision of this Chapter shall be used solely in connection with a mixed building development.

* * *

91-06 Certification of Transfer of Development Rights by the Commissioner

As a condition to the issuance by the Department of Buildings of a permit for development on a receiving lot which includes development rights transferred from a granting lot pursuant to this Chapter, the Chairman of the City Planning Commission shall certify the appropriateness of a program for continuing maintenance of the granting lot park development meeting the following:

(a) The park shall be maintained in accordance with an approved maintenance plan specifying what such maintenance shall consist of, whose responsibility it shall be, and assuring satisfactory execution thereof.

(b) The park shall be developed and/or maintained as a passive recreational area with lighting, planting, landscaping and sitting areas.

(c) The park shall be open to the public at least from 6:00 A.M. to 10:00 P.M. daily.

* * *

44. *Mandatory Development Rights*, at 84 n.22.

45. An interesting argument has been raised that TDR is neither a police power nor eminent domain action, but is based upon the evolving "accommodation power". See Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975).

46. *Fred F. French Inv. Co. v. City of New York*, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. 1973).

dated the zoning amendment establishing the Special Park District, thereby restoring the zoning classification previously in effect. In its decision, the court found that the uncertain value of the development rights barred them from consideration as compensation.

In responding to this decision, Norman Marcus, Counsel to the New York City Planning Commission, stated:

By mandating that the developer transfer his building rights to other property, the city has not taken his interest in the property; it has regulated his right to build. The transferable development rights need not be measured against just compensation requirements for a "taking." They should be seen as a reasonable development alternative under the regulation of the city's police power, since the developer is left with many valuable development options within Manhattan's most important commercial center.

In a densely urbanized area like Manhattan, the surface of land, in and of itself, has little intrinsic value. The value of this land lies in the profit-making structure that can be built on it. This interest is severable from the land, and a fair redistribution of this interest does not constitute a taking. . . . Professor Sax makes the most direct and succinct statement of this principle: "[W]hatsoever theory [of what constitutes a compensable taking] one follows, it is hard to find a taking if the victim suffered no loss. . . ."⁴⁷

This case has been the biggest legal setback in the city's use of TDR. The case is on appeal, and after the recent reversal of the Grand Central Terminal decision, it is even more difficult to predict the outcome.^{47a} Meanwhile, the city continues to use its other TDR-related techniques⁴⁸ and even to propose new ones.⁴⁹

47. *Mandatory Development Rights*, at 105-06.

47a. The New York Court of Appeals recently affirmed the lower court's decision in *Fred F. French Inv. Co. v. City of New York*, *supra* note 46, finding a number of constitutional flaws in the specific ordinance; however, the TDR mechanism itself was found to be constitutional when properly applied. *Fred F. French Inv. Co. v. City of New York*, No. 160 (Ct. App. May 3, 1976).

48. See *Letters to the Editor*, AIP J., Sept. 1975, at 350.

49. A "Natural Area District" has been proposed. See NEW YORK CITY PLAN-

B. *Collier County, Florida*

Collier County is located on the southwest coast of Florida, and is the second largest county in the state. At present it is a largely undeveloped county consisting of mostly sawgrass, sable palms, and everglades. Most of its 52,000 inhabitants live in the coastal area, with about 15,000 in the principal city, Naples.⁵⁰ As with much of south Florida, Collier County has been experiencing an increasing amount of growth.

This growth raised concern for the possible negative impacts on the county's environmentally fragile areas—over 75 percent of the county consists of semi-tropical swamp, marsh, coastal land and islands. In 1973 a series of ordinances were enacted as protective measures. These included:

- building setback limits from the Gulf of Mexico
- a dune protection ordinance
- a tree protection ordinance
- an environmental impact statement ordinance.⁵¹

The county, however, sought additional protection for environmentally sensitive areas and considered a special permit approach with a TDR option. In July of 1974, the Collier County Conservancy, a strong advocate for the preservation of ecologically sensitive lands, arranged a seminar for the city and county officials to discuss their ideas with legal experts. As proposed at the seminar, the special permit approach was thought to be without legal flaws.⁵²

On September 17, 1974, the Board of County Commissioners adopted a Comprehensive Plan and on October 8 adopted a revised Zoning Ordinance. The Zoning Ordinance contained two innovative provisions which were directed at better growth management. First, there was a provision to

NING COMM'N, PRESERVATION OF NATURAL FEATURES AND SCENIC VIEWS IN NEW YORK CITY (1974).

50. *Growth is Controlled in Pristine Collier*, FLORIDA TREND, Dec. 1974, at 53.

51. *Spagna, Can ST Save Collier's Unspoiled Lands?* FLORIDA ENVIRONMENTAL AND URBAN ISSUES, June 1975, at 4, col. 5.

52. The details of this session appear in Drake, *Property Owners, Ecology Protected by New Land Use Plan*, The Naples Star, July 12, 1974, at 81.

discourage "leap-frog" development by requiring a minimum level of community facilities and services before a rezoning would be granted.⁵³ Second, Special Treatment (ST) areas were established where the ecology necessitated a special permit procedure before development would be allowed.⁵⁴ Based upon an extensive data gathering and planning effort,⁵⁵ 84 percent of the land in the county was designated "ST".

Under the ordinance, no "ST" land can be altered without a permit, and the burden of proving no severe ecological damage from development is placed upon the applicant for a rezoning. In the alternative, the owner of "ST" land is allowed to transfer some or all of his residential density to another contiguous property rather than develop the land in conformance with "ST" regulations. Only one such transfer is permitted and it is subject to these conditions:

- The transfer must be to land not designated "ST".
- The transfer must be to land having at least one point of contiguity with the land designated "ST".
- The land designated "ST" must be used in conjunction with the land to which residential density credit is being transferred. The "ST" land may stay in its natural state or be used for limited recreation, open space, surface drainage and spreader waterways, effluent polishing ponds, scenic trails, and protected wildlife habitats.
- The non- "ST" land to which the density transfer is made must be developed under site and development plan approval as set out in these regulations. The transfer area of "ST" land must be clearly shown on the site and development plan and may not thereafter be used for transfer of residential density.
- Each transfer for "ST" land and the approved development plan (for more than 10 gross acres of land or where transfer of density credit is involved) shall be recorded at the owner's expense

53. COLLIER COUNTY, FLA., COMPREHENSIVE ZONING ORDINANCE § 48 (1974).

54. COLLIER COUNTY, FLA., COMPREHENSIVE ZONING ORDINANCE § 9 (1974).

55. Spagna, *supra* note 51, at 5.

in the records of the Clerk of the Circuit Court of Collier County. Also, the owner shall file a covenant on such land so that no future alteration, building or development permit will be issued in the future on such land except as follows:

- * In accordance with the conditions of the approved development permit.
- * In accordance with the conditions of an approved modification of the development permit. The recorded transfer of density credit may not be amended or removed from the public records of the Clerk of the Circuit Court of Collier County except by unanimous vote by the Board.

—The maximum allowable transfer of density use credit from an "ST" parcel of land to a contiguous area not designated "ST" shall be computed on the basis of one acre of "ST" land to one acre of contiguous, non- "ST" land, using the density of the non- "ST" land.

Where a development consists of more "ST" land than non- "ST" land, the residential density of the extra "ST" land may be included in the transfer at the ratio of .2 dwelling units for each additional gross acre of "ST" land in excess of the non- "ST" land.⁵⁶

Though this ordinance was seen as part of "the quiet revolution in land use control,"⁵⁷ no development rights have yet been transferred. The county has discussed transfer with a number of developers, several of which are on the verge of submitting site plans. The lack of TDR use to date is seen by the county as a function of the state of the economy; as conditions improve, developments proposing the use of TDR are expected to be submitted for approval.⁵⁸

56. *Id.* at 5-6.

57. *Collier Shows How on Land Use*, Miami Herald, October 18, 1974 (Editorial), at 18.

58. Correspondence with Neno J. Spagna, Director of Community Development, Collier County, October 17, 1975. Mr. Spagna noted that a suit has been filed challenging a specific ST designation, but not the TDR concept.

C. *Buckingham Township, Pennsylvania*

Buckingham Township, Pennsylvania, shares a common concern with Collier County. Both have a large amount of land to be preserved in relation to the amount of development that the market provides. The focus in Buckingham Township, however, is on the preservation of agricultural lands. Like Collier County, the township has enacted a new zoning ordinance providing for voluntary TDR.⁵⁹ The rationale behind the choice of a voluntary system over a mandatory one was that an adequate market for TDR would not exist and that to create an adequate market would require planning for population levels not expected until well past the year 2000. This was something most of the municipalities in Bucks County and their citizens would not have been willing to accept.⁶⁰

The Zoning Ordinance, passed March 6, 1975, sets up a series of performance standards to be met by all uses and activities allowed under the ordinance.⁶¹ As far as agricultural land is concerned, large open space ratios are required in addition to performance standards; however, the landowner has the option of transferring development rights. This voluntary system met the additional concerns of many who thought that a mandatory system needed state enabling legislation, and would require the establishment of a bank to guarantee marketability; furthermore, the voluntary system met the concerns of those who were skeptical because a TDR program of this type had not proven successful.⁶²

To date, at least one agreement of sale has been signed between a landowner and a builder, at the price of \$1,800 per development certificate for 12 certificates. One farmer presently has approximately 90 certificates on the market with an asking price of \$2,000 per certificate. The market for TDR is beginning to be established, and over time the

59. BUCKINGHAM TOWNSHIP, PA., ZONING ORDINANCE art. VI, §§ 600-609 (1975). See Appendix I for the pertinent sections of the ordinance.

60. Correspondence with Lane H. Kendig, Director, Community Planning, Bucks County, December 9, 1975.

61. BUCKINGHAM TOWNSHIP, PA., ZONING ORDINANCE art. V, § 500 (1975).

62. Kendig, *supra* note 60.

system is seen as becoming a major tool for agricultural preservation.⁶³

D. *New Jersey Assembly Bill 3192*⁶⁴

The topic of TDR cannot be discussed without mention of the activity in the State of New Jersey. For the past few years a research team at the Cooperative Extension Service, Cook College, Rutgers University, headed by B. Budd Chavooshian, has been at work examining the potential uses of TDR and preparing draft legislation. The team's publications⁶⁵ have ignited interest in TDR in countless municipalities around the country, and its legislative drafting activity resulted in Assembly Bill 3192 of the 1975 Session of the New Jersey Legislature—the Municipal Development Rights act.⁶⁶

The Municipal Development Rights Act is proposed state enabling legislation which provides the municipalities of New Jersey with the ability to adopt a TDR ordinance and establishes a uniform, multistep process for the adoption and operation of the ordinance.⁶⁷ On May 5, 1975, the bill passed the General Assembly 49 to 7, and on May 20 the governor identified it as a priority bill of the administration,

63. Mr. Kendig noted that the reason more transactions have not occurred is that most of the township's major developers are involved in litigation against the township on the agricultural zoning designations. *Id.*

64. The author expresses his sincere appreciation for the assistance of John V. Helb, N.J. Division of Legislative Information and Research, in the preparation of this section.

65. The principals in this group are B. Budd Chavooshian, Dr. George H. Nieswand, and Thomas Norman. Their publications include CHAVOOSHIAN, NIESWAND & NORMAN, TRANSFER OF DEVELOPMENT RIGHTS (Rutgers—The State University Cooperative Extension Service Leaflet No. 492-A) (1975); CHAVOOSHIAN, NIESWAND & NORMAN, *supra* note 31; CHAVOOSHIAN, NIESWAND & NORMAN, THE TRANSFER OF DEVELOPMENT RIGHTS GAME (Rutgers—The State University Cooperative Extension Service Leaflet No. 507) (1975). It is also interesting to note that this group, through a project funded by the U.S. Department of Agriculture, has been involved in a TDR simulation study in South Brunswick, New Jersey. As part of the project, the research team has assumed that Assembly Bill 3192 was law and has developed a TDR ordinance in accordance with its provisions.

66. See Helb & Reifer, *New Jersey General Assembly Has Passed Enabling Legislation for Use of TDR*, AIP NEWSLETTER, Oct. 1975, at 11. See also *Public Hearings Before the Assembly Municipal Government Committee on Assembly No. 3192*, two volumes (1975). Pertinent portions of this bill appear in Appendix II.

67. Presently Illinois is the only state with TDR enabling legislation. See *Preservation of Historical and Other Special Areas*, ILL. REV. STAT. ch. 24, §§ 11-48.2-1 *et seq.* (1975). It appears, however, that Illinois municipalities have not taken advantage of this opportunity.

asking for its quick passage. On December 15, however, the Senate vote of 16 to 10 failed to meet the requirement of 21 votes for passage. A second attempt to pass the bill on January 8, 1976, also failed. But, Assembly Bill 3192 is not dead yet, as the governor has again identified it as a priority of his administration and it has been re-introduced by the former Speaker of the General Assembly as Assembly Bill 1118.

VI. BASIC STEPS INVOLVED IN USING TDR

Through a review of the many TDR proposals⁶⁸ and evaluative literature,⁶⁹ a number of basic steps necessary for the use of TDR emerge. First, a planning district must be established. Second, the nature and number of rights to be issued must be determined. And, third, with respect to the rights, decisions must be taken on: allocation; issuance and taxation; merger with the transfer zone; release from the transfer zone upon subsequent modification of the property; public retirement of excess development rights; and issuance of additional rights, if and when needed. Each of these steps are discussed in more detail below. And, while a number of important questions remain,⁷⁰ there are answers.

A. *Establishment of the Planning District*

The first decision which must be made is the extent of the planning district to be covered by the TDR ordinance. Will it be just the downtown business district? Will it be determined by natural features of the landscape? Will it encompass the entire municipality? Will it be region-wide or state-wide?

The answer to these questions depends upon what is sought to be accomplished through the use of TDR. The one guiding principle in this area is that the planning district should be of sufficient size to accommodate the transferred

68. See HELB, *supra* note 28.

69. *Id.* See also GALE, A COMPARISON OF TRANSFERABLE DEVELOPMENT RIGHTS MEASURES: SOME EQUITY ISSUES (1976).

70. See Schnidman, *Transfer of Development Rights: Questions and Bibliography*, 3 MANAGEMENT & CONTROL OF GROWTH 127 (1975).

density without putting an undue burden upon the lands surrounding the transfer zone(s).

B. Nature and Number of Rights

Should the TDR program use only residential development rights, or commercial and industrial rights also? How many will be allocated?

Residential development rights could be measured in terms of number of acres of single family dwellings, number of acres of garden apartments, or numbers of acres of high rise apartments. Alternatively they could be measured by the number of dwelling units allowed. Commercial or industrial rights could be measured in terms of acres to be allowed for each, or by the bulk allowed in terms of cubic feet.

C. Allocation of Rights

Who will receive transferable development rights? Specific landowners whose parcels are sought to be preserved? Each taxpaying landowner in the planning district? Government owned or non-profit institution owned land?

Who gets the rights depends upon the type of TDR program used. In historic preservation, only the owners of the designated landmarks receive TDR. When used for agricultural or open space preservation, the landowners of the parcels designated to remain undeveloped receive them. When used as an alternative to zoning, the rights may be apportioned to all landowners in the district on the basis of acreage, or natural characteristics, etc.

D. Issuance and Taxation of Rights

How will potential purchasers know of the legitimate existence of transferable development rights? How will municipalities handle the taxation of TDR before and after transfer?

Rights could, once the nature and number were determined, be evidenced by a certificate similar to a stock cer-

tificate and/or be recorded in the county clerk's office in the same manner that mortgages are recorded. When there was a TDR sale, the transaction could then be recorded with title records in such a manner as to provide the necessary continuity and security.

Taxation of TDR appears to be a fairly simple procedure. Tax bills would carry two items—an amount assessed against the resource value of the land and an amount assessed against the commodity value of the land. When rights were sold, the purchaser would then be the owner of the commodity value of the land and would be taxed accordingly. The seller, of course, would then own only the resource value of the land on which he would be taxed.

E. *Merger*

When rights are sold and used on transfer zone property, what happens to them? When uncommitted rights are applied to the construction of space, they in effect merge with the property. Though legally a separate entity, as long as the structure remains, the TDR cannot be detached.

F. *Release*

If a natural disaster occurs and the structure utilizing TDR is destroyed, what happens to the rights? If renewal is desired, what happens to the rights?

When a structure incorporating TDR is razed, the rights are released for reuse on the site or possible transference to another site. Since the rights were not consumed originally, they simply return to the marketplace.

G. *Retirement*

What happens to rights if transfer zone landowners do not desire to build at the possible higher density? What happens if once transfer zone lands begin to experience the bonus development, public officials realize that more development rights exist than should be used?

In instances where excess rights exist in the marketplace, a mechanism must be used to retire them either temporarily or permanently, to protect both the market for development rights and the integrity of the planning process.

H. *Issuance of Additional Rights*

If it becomes evident that additional development in the transfer zone would be desirable, would "up-zoning" be allowed? If circumstances change or a mistake is made in the original ceiling on community development, how can this be corrected?

The cornerstone of a successful TDR ordinance is that there is but one means of increasing density and that one means is to purchase development rights. If additional development is wanted, new rights could be issued. If the ordinance is for historic or open space preservation, additional landmarks or conservation zones could be designated. If TDR is used as an alternative to zoning, new rights could be issued to landowners of record on the same proportional basis used for initial allocation.

VII. COMMENT ON THE FUTURE OF TDR

Though some are wondering "What ever happened to TDR?" TDR is far from being a faddish flash in the pan. This concept of land management, which mixes law, equity and economics, is still in its gestation period. Although it has been three years since the concept surfaced for general discussion, that is no time at all in the history of land regulation.

For comparison, if one were to examine the history of Planned Unit Development (PUD), a much simpler concept than TDR, he would find that new land use concepts do not spring into being overnight. It has been a decade since the PUD concept caught on, and its use is still quite limited. "What ever happened to PUD?" is a question that can just as well be asked. Let us not be impatient!

APPENDIX I

ZONING ORDINANCE RELATING TO TRANSFERABLE DEVELOPMENT RIGHTS, BUCKINGHAM TOWNSHIP, PA.

ARTICLE VI TRANSFER OF DEVELOPING RIGHTS

Section 600 Purpose

The purpose of this article is to permanently protect a vital natural resource: farmlands and agricultural soils. Recognizing that this cannot be accomplished using traditional large lot zoning techniques, without creating inequities in the valuation of land, Transfer of Development Rights (TDR) is authorized. . . .

Section 601 Certificates of Development Rights

The Township of Buckingham, by the adoption of this Ordinance, creates Certificates of Development Rights. These rights are available to all landowners having more than ten (10) acres in the Agricultural (AG) District. . . .

Section 602 Distribution of Development Rights

Development Certificates shall be held by the Township. They shall be issued only when a landowner in the agricultural district actually requests that his development certificates be transferred to another landowner in Buckingham Township who will immediately attach said certificates to a specific parcel of land located in the Township, owned by the landowner. The number of certificates available to any landowner is established by multiplying the number of acres shown on the tax record for the property by 1.0. (Land encumbered by easements for utilities or other land uses shall not be issued certificates, nor shall land owned by governmental agencies.) This value represents an average of the number of dwelling units which could actually be built under zoning in effect prior to the adoption of this Ordinance which shall be adequate compensation for the loss of the rights of development, in accordance with Section 606, theretofore permitted by this Ordinance. The distribution shall be made to a property owner in Buckingham Township so designated by the landowner upon the submission of the following:

- (a) An agreement of sale for said certificates by the parties.
- (b) The landowner selling said Development Rights filing of record with the Recorder of Deeds, a restrictive covenant

running with the land . . . effecting the parcel of land of said landowner from which the Development Rights have been transferred. . . .

* * *

Upon the sale or transfer of the Development Rights from a designated parcel of land, said land shall then automatically be designated Agricultural Preservation ("AP") and subject to the limitations and restrictions imposed by said designation in this Zoning Ordinance as well as the limitations and restrictions imposed on said land by virtue of any restrictive covenants.

Section 603 Marketability of Certificates of Development Rights

The creation of a market for Certificates of Development Rights is essential if the transfer of such certificates is to be a real alternative to development. Such a market is provided by the following provisions:

- (a) Within the Country Residential (CR) district, Village Residential (VR) district, Village Center (VC) district and Planned Industrial (PI) district, the net density permitted on a property may be increased as specified in Section 502.
- (b) Development at the higher density specified in Section 502 shall be permitted, provided all other provisions of this Ordinance and the subdivision regulations are followed; and where the applicant owns certificates of development rights in an amount equal in number to the increase in dwelling units over that permitted without certificates.
- (c) Within the Planned Industrial (PI) district the floor area ratio or impervious surface ratios may be increased through the purchase of development certificates. Because of the variety of uses permitted in this district, the increase in floor area will be used to determine the number of certificates that must be purchased. Since either floor or impervious surface may be the limiting factor, the developer shall show floor area with and without the bonus. An addition of floor area shall require .35 certificates per 100 square feet.
- (d) Development proposals consistent with the residential density requirements of Section 502 shall be approved without the purchase of development rights. Nothing in this Ordinance, other than the incentive to increase the density on one's property, shall require a landowner to purchase development certificates.

Section 604 Taxation

Certificates of development rights, when attached to a specific parcel of land located in the Township, shall be considered as real property and may be transferred only to landowners within Buckingham Township. Upon being issued pursuant to Section 602, certificates shall be recorded in the Bucks County Recorder of Deeds Office and notification must be given to the Bucks County Board of Assessors.

Section 605 Sale of Certificates for Less than An Entire Tax Parcel

When a landowner wishes to sell less than the total number of certificates available to a tax parcel, he may do so provided that:

- (a) The tax parcel be subdivided.
- (b) No new parcel less than 25 acres in extent may be created through such subdivision.
- (c) The plan of subdivision shall specify the agricultural class of all the soils, and designate resource restrictions on the remaining portions of the site.
- (d) The landowner must sell the certificates from the best agricultural lands first. In no event should non-buildable areas of forest, slope or floodplain be issued certificates before all farmland on the tax parcel is first protected.

Section 606 Appeal on Marketability

The Township, recognizing that marketability is essential to the fairness of the system of development rights transfer, will institute special appeal procedures for those whose development rights cannot be marketed under this system at fair market value. The Township believes that it has created a system in which sales between willing buyers and willing sellers will result in owners of development rights being fairly compensated. In order to protect landowners and to give the Township an opportunity to study in detail the impact and effectiveness of Transfer of Development Rights, the following appeal procedure is provided:

- (a) A landowner who claims that his Development Rights are unmarketable, may appeal to the Supervisors. The landowner shall be required to submit evidence regarding asking price, length of sale period, and offers from buyers and their names to the Planning Commission.
- (b) The Township Planning Commission shall introduce evidence of other land or certificate sales, the number of prop-

erties or certificates for sale, an appraisal of the certificates' value by a realtor, and an evaluation of the market conditions compared to the conventional land market for one-acre lots in adjoining municipalities.

- (c) The Planning Commission shall hear all evidence and submit its recommendations to the Supervisors for action.
- (d) The Supervisors, pursuant to a public hearing, upon receiving written recommendations from the Planning Commission, shall evaluate the marketability of the certificates. If it finds that the certificates are unmarketable, then the Supervisors shall:
 - (1) Purchase the certificates and/or the entirety at fair market value; or
 - (2) Make an exception for the individual property; or
 - (3) If the evidence clearly indicates a need, change the allocation of development certificates, or size of development area, or the bonus achieved by using the development certificates, or some combination thereof to make certificates marketable.

Section 607 Bi-Annual Review

With any new concept being applied for the first time, it is to be expected that problems can arise. The Township believes that a bi-annual review is necessary to insure the workability of Transfer of Development Rights. The Planning Commission shall conduct a bi-annual review at an advertised public meeting. . . .

Section 608 Public Ownership of Development Certificates

The Township may raise funds for the acquisition of development certificates or may accept certificates through conditional approval or gift. The Township may cancel such certificates or may sell them. Township sales shall meet the following conditions:

- (a) The Township shall hold a public hearing.
- (b) Evidence must show that there are no certificates available at fair market value, and the only way the developer has to purchase certificates at fair market value is from the Township.
- (c) Two appraisals shall be required to establish fair market value.
- (d) The purchaser shall submit evidence on his inability over a period of time to find a willing seller.

- (e) All funds gained through resale of development rights shall be used for agricultural preservation.

Section 609 Cancellation of Development Certificates

The Township shall cancel development certificates when building permits are issued, or when a landowner or non-profit organization requests cancellation or when a landowner exercises the right to develop his land per Section 502. Where the development option is chosen all certificates shall be cancelled whether used by the development or not.

APPENDIX II

NEW JERSEY ASSEMBLY BILL NO. 3192

ARTICLE I

* * *

3. The legislature declares as a matter of public policy that the preservation by municipalities of certain lands, both improved and unimproved, the prohibition of physical development of lands so preserved, and the transfer of the right to develop such preserved land to other land specifically designated to receive such development, is a public necessity and is required in the interests of the citizens of this State now and in the future.

4. As used in this act unless the context clearly indicates otherwise:

a. "Aesthetic and historic qualities" means those qualities possessed by any building, set of buildings, site, district or zone which, by virtue of its architectural significance, role in an historic event or general appearance, represents a unique quality or feature in the municipality;

b. "Agricultural use" means substantially undeveloped land devoted to the production of plants and animals useful to man, . . .

c. "Aquifer recharge area" means an area where rainfall infiltrates the ground to porous, waterbearing rock formations for retention in underground pools or aquifers;

* * *

f. "Capital facilities" means any substantial physical improvement built or constructed by the municipality to provide necessary services for an extended period, . . .

* * *

h. "Compatible use" means two or more uses of land not in conflict with each other individually or as combined;

i. "Density" means the average number of persons, families or residential dwelling units per unit of area in the case of residential use; and the average number of square feet per unit of area, in the case of industrial, commercial, or any other use;

j. "Developability" means the capability of a parcel or parcels of land to accommodate the uses intended or proposed for it at the density intended or proposed for it, based on its topo-

- graphy, existing use, physical composition, desirability and availability;
- k. "Development potential" means the possible development of a parcel or site based on its developability and the market in which it exists;
 - l. "Development right" means the right to develop land as set forth in sections 12 through 22. of this act;
 - m. "Economic feature" means an economic aspect of the use of a parcel of land which is significant to the economics viability of the municipality;
 - n. "Exercise of development right" means the submission of a development right to the designated municipal official in conjunction with an application for development approval in the transfer zone;
- * * *
- r. "Improvement" means any building, structure or construction on the land, . . .
- * * *
- t. "Market value" means the price property and improved property would command in the open market for such property and improvements;
- * * *
- y. "Preservation zone" means the district or area in which development is discontinued and has such features as are provided in section 13 of this act;
- * * *
- bb. "Transfer zone" means the district or area to which development rights generated by the preservation zone may be transferred and in which increased development is permitted to occur in connection with the possession of such development rights, and which has such features and characteristics as are provided in section 14 of this act;
 - cc. "Use" means the specific purpose for which land is zoned designed or occupied;
- * * *

ARTICLE II

- 5. The governing body of any municipality may, by resolution, establish a commission whose general purpose shall be to deter-

mine, within a time specified in the resolution, the feasibility of the municipality adopting a development rights ordinance, and upon such determination to make a recommendation to the governing body concerning the adoption of the provisions of this act, all as hereinafter provided.

* * *

8. Every commission established pursuant to section 5 of this act shall, upon its organization, cause to be conducted a study to determine the feasibility of the municipality adopting a development rights ordinance which shall include, but not be limited to:
 - a. An analysis of the existing land uses in the municipality, and an identification of any land which might be included within a preservation and a transfer zone. . . .
 - b. An evaluation of the zoning ordinance of the municipality . . . , if one so exists, on the basis of existing and anticipated land uses and development;
 - c. The identification of national, State and regional factors and trends which will have an influence on development in the municipality;
 - d. The identification of the anticipated growth and development the municipality may expect to experience in the next 10 years;
 - e. An assessment of the development potential of all areas of the municipality on the basis of the projected growth of the municipality, the demand for development imposed by the market and the suitability of the land for such development;
 - f. The identification and analysis of capital facilities currently existing in the municipality and those that will be required by virtue of the anticipated development.
9. Upon the completion of the study conducted pursuant to section 8 of this act, the commission shall formulate its recommendation and prepare a report. . . . If it is the recommendation of the commission to adopt a development rights ordinance, the commission shall prepare a report which shall include, but not necessarily be limited to:
 - a. The designation of a proposed preservation zone within the municipality . . . ;
 - b. A plan indicating the existing and permitted uses of the proposed preservation zone accompanied by a statement

detailing the nature and distinguishing features of the zone at present;

- c. A tax map for the proposed preservation zone specifying the assessed value of the parcels contained therein;
 - d. An analysis of the development potential of the land in the proposed preservation zone estimating the market value of the parcels contained therein;
 - e. The designation of a proposed transfer zone in which the development rights generated by the preservation may be utilized;
 - f. A plan indicating the existing uses of the proposed transfer zone and a statement detailing the permitted uses under the existing zone ordinance;
 - g. A tax map for the transfer zone indicating the assessed and market value of the parcels contained therein;
 - h. A plan projecting the land use scheme in the proposed transfer zone with the full transfer of development rights;
 - i. A proposal concerning the identification of the total number of development rights assigned the preservation zone and their distribution among the owners of property in said zone.
10. Upon the formulation of its recommendation and report, the commission shall hold public hearings . . . and within 10 days following the conclusion of the public hearings, shall transmit its recommendation, report and transcript of the public hearings to the governing body of the municipality for its consideration.
11. Within 60 days of the receipt of the documents specified in section 10 of this act, the governing body shall consider the commission's recommendation and report. If the commission recommends the adoption of a development rights ordinance, the governing body may adopt such ordinance by majority vote. If the commission recommends against the adoption of such an ordinance, the governing body may adopt a development rights ordinance by a vote of two-thirds of the full membership of the governing body. . . .

ARTICLE III

12. Every development rights ordinance adopted pursuant to the provisions of this act shall include:
- a. The specification that the planning board of the municipality shall have the responsibility for implementing the provisions

of any ordinance adopted pursuant to this act; shall hear and review any applications or complaints that may result from the implementation of any such ordinance; and shall make such reports to the governing body as it may require and such recommendations as it shall deem necessary for the successful operation of the ordinance;

- b. The establishment of a method for the review and hearing of applications and complaints . . . ;
- c. The designation and establishment of the preservation and transfer zones as the governing body shall deem necessary and as are consistent with the provisions of this act;
- d. The provision that all construction, erection, demolition and development in the preservation zone not heretofore approved shall be prohibited except as provided in sections 15 and 23 of this act;
- e. Provisions for the total number, allocation and distribution of development rights in the preservation zone; provided, however, that prior to the adoption of any such provisions in the ordinance all owners of property in the preservation zone shall be mailed a notice informing them of the number of development rights to which they will be entitled under the ordinance, the permitted use or uses on the basis of which such development rights are to be allocated in the preservation zone, the conversion schedule by which such development rights may be applied to another use or uses in the transfer zone, and the manner in which the development rights may be transferred, all as hereinafter provided. Such notices shall also contain the time and place the governing body or its designate body shall hold a public hearing on the number, allocation and distribution of development rights. . . .

The governing body of any municipality which adopts a development rights ordinance pursuant to the provisions of this act shall appropriate such funds in such amounts and for such purposes as it shall deem necessary and sufficient for the purposes of implementing the ordinance.

13. In creating and establishing the preservation zone the governing body shall designate a tract in such numbers and of such sizes, shapes and areas as it may deem necessary to carry out the purposes of this act; provided, however, that
 - a. All land in the preservation zone contains one or a combination of the following characteristics:

- (1) Substantially undeveloped or unimproved farmland, woodland, flood plain, swamp, aquifer recharge area, marsh, land of steep slope, recreational or park land;
 - (2) Substantially improved or developed in a manner so as to represent a unique and distinctive aesthetic or historic quality in the municipality;
 - (3) Substantially improved or developed in such a manner so as to represent an integral economic asset in and to the municipality;
- b. The location of the zone is consistent with, and corresponds to, the master plan and zoning ordinance of the municipality if they so exist;
 - c. The aggregate size of the zone bears a reasonable relationship to the present and future patterns of population and physical growth and development as set forth in the study conducted by the commission pursuant to section 8 of this act, and are incorporated in the zoning ordinance and master plan of the municipality if they so exist;
 - d. Any nonconforming use or improvement existing in the preservation zone at the time of adoption thereof may be continued and in the event of partial destruction of such nonconforming use or improvement it may be restored or repaired; provided, however, that such nonconforming use or improvement remains consistent with the nonconforming use or improvement in effect at the time of the adoption of the ordinance; and
 - e. Land within the preservation zone may be subdivided . . . only for the purpose of ascertaining the development potential and for determining the number and allocation of development rights of parcels contained therein, or, where a change, modification, or amendment to the development rights ordinance has been approved and issued pursuant to section 15 of this act, to provide for such change, modification or amendment.
14. In creating and establishing the transfer zone, the governing body may designate a tract or tracts, which may but need not be contiguous, in such numbers and of such sizes, shapes and areas as it may deem necessary to carry out the provisions of this act; provided, however, that
 - a. The density, topography, development and developability of each transfer zone is such that it can adequately accommodate

the transfer of development rights from the preservation zone;

- b. The density of each transfer zone is increased beyond the density otherwise permitted as a matter of right under the zoning ordinance of the municipality, if one so exists;
- c. The result of the increase in the density shall be a zone wherein there is a greater incentive to develop at the higher density with certificates of development rights, than at a lower density without such certificates;
- d. Development at higher densities in each transfer zone shall be permitted only with the utilization of certificates of development rights and that any development in any transfer zone at a density higher than that permitted by the zoning ordinance without such certificates shall be prohibited;
- e. The present capital facilities and municipal services in and for each transfer zone are sufficient to accommodate the increased density of the transfer zone. As used herein "present capital facilities" means those facilities actually in existence and those for which construction contracts have been entered into or which are included in a capital facilities plan adopted by the municipality requiring the construction of such facilities within 5 years of the adoption of such plan; and
- f. The overall developability of land in each transfer zone is such so as to offer the most lucrative site possible and available for the transfer of development rights.

Nothing contained herein shall be construed so as to prevent or prohibit a municipality from increasing the number of tracts in the transfer zone at any time upon or after the adoption of a development rights ordinance, using the same criteria as are contained herein, for the purpose of guaranteeing the greater incentive to develop with certificates of development rights as required pursuant to subsection c. hereof.

15. Any regulations, limitations, and restrictions contained in the development rights ordinance shall not be changed, amended, modified or repealed by the governing body or any other officer or agent of the municipality except where the owner of property can demonstrate that such regulations, limitations and restrictions prevent him from a reasonable use of his land; provided, however, that no such change, amendment, modification or repeal of the development rights ordinance shall be granted where such will destroy, change or otherwise alter the nature and charac-

teristics of the preservation zone and the purposes for which it was established. Any application for a change, amendment, modification or repeal of any of the provisions of the development rights ordinance shall be made to the planning board of the municipality. . . . All actions taken by the planning board on any application submitted pursuant to this section shall be subject to review by the governing body of the municipality. No application for development or for the construction of any improvement shall be made where the development rights for the tract in question have been sold or otherwise transferred for use in the transfer zone.

16. Every development rights ordinance shall provide that the certificates of development rights issued in the preservation zone for one use may only be exercised in the transfer zone for that use unless otherwise converted and approved by the planning board as provided in section 20 of this act.
17. Certificates of development rights shall be allocated to the various portions of the preservation zone on the basis of the uses permitted in each such portion of said zone as a matter of right under the existing zoning ordinance, if any, at the time of the adoption of the development rights ordinance, or, in the event no zoning ordinance is in effect, on the basis of uses contained in the development potential determined by the study conducted by the commission pursuant to section 8 of this act and as approved or amended by the governing body. Each certificate of development rights so allocated shall contain on its face, a statement to the effect that it is allocated on the basis of the specific use or uses cited in the statement, and that it shall be exercised in the transfer zone or zones in a development or developments of such specific use or uses unless converted to another use or uses pursuant to section 20 of this act. The total number of certificates of development rights so allocated shall be equal to and deemed to represent the full and total development potential of all land in the various portions of the preservation zone as a matter of right under the zoning ordinance, if any, existing at the time of the adoption of the development rights ordinance, or on the basis of the development potential of the preservation zone as determined by the study conducted by the commission pursuant to section 8 of this act and as approved or amended by the governing body of the municipality.
18. The total number of certificates of development rights determined pursuant to section 17 of this act shall be distributed to property owners in the various portions of the preservation

zone in accordance with a formula whereby the number of certificates distributed to an individual property owner in each of the various portions of the preservation zone shall equal that percentage of the total number of such certificates allocated to the preservation zone that the assessed value of the property of any such owner is of the total assessed value of all property in the preservation zone.

19. Any owner of property in the preservation zone may appeal any determination concerning the number, allocation and distribution of development rights. . . .
20. The conversion schedule which every development rights ordinance is required to contain pursuant to section 12 of this act shall provide a means by which development rights allocated pursuant to section 17 of this act on the basis of the uses permitted in each portion of the preservation zone may be exercised for another use or uses in the transfer zone.

Such schedule shall be based on the differing market values prevailing in the municipality for development rights for differing uses and shall be annually reviewed by the governing body and amended, modified and changed as necessary. Every application for the conversion of a development rights shall be received and reviewed by the planning board in the same manner prescribed . . . for amending a zoning ordinance; and any such application shall be granted in the manner provided by the schedule if such application is found to be consistent with the provisions of this act and in the best interests of the municipality. . . .

21. Certificates of development rights shall be taxed in the same manner as real property is taxed, and the assessed value of each uncanceled certificate of development right at the time of the adoption of the development rights ordinance shall be equal to the quotient obtained by dividing the aggregate assessed value of all property in that portion of the preservation zone which is zoned for the particular use or uses to which the particular certificate of development rights applies, by the total number of uncanceled certificates of development rights applying to such particular use or uses. Thereafter, such value shall be determined on the basis of current sales of certificates of development rights in the municipality.
22. Land within the preservation zone shall be eligible for assessment at its agricultural value . . . ; provided, however, that cer-

tificates of development rights allocated and distributed to such property shall be taxed pursuant to the provisions of section 21 of this act.

ARTICLE IV

23. Nothing in this act shall be construed to prohibit or prevent the ordinary maintenance or repair of property contained within the preservation zone nor to prevent any structural or environmental change to such property which the building inspector of the municipality shall certify is required. . . .
24. Any two or more municipalities may enter into an agreement . . . to jointly implement the provisions of this act.
25. Nothing in this act shall be construed to prohibit or otherwise prevent a municipality from receiving development rights for municipal property contained within the preservation zone on the same basis as other property owners within said zone, or from buying and selling development rights of other parcels.
26. In implementing any development rights ordinance adopted pursuant to this act, and in fulfilling the requirements of this act, any municipality may establish a Development Rights Bank or other such facility in which development rights acquired by the municipality may be retained and traded in the best interests of the municipality.