



Statutory Authorization: 24 V.S.A., §§4402, 4423

Type: REGULATORY

Related Topic Areas: Growth Centers; Land Use & Development Regulations; Open Space & Resource Protection Programs & Regulations; Planned Unit Development; Zoning Regulations

Transfer of Development Rights

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Overview

Municipal plans frequently designate areas for higher-density, compact development, such as growth centers, downtowns, villages, and also areas where little or no development is desired, including farm- and forestlands, natural resource protection areas, and open space areas. When communities try to implement plans by restricting development in outlying areas, they're frequently faced with protests from landowners who argue that they're being deprived of the economic value tied to the potential development of their land. Transfer of Development Rights (TDRs) is a tool that may help reconcile community and landowner interests.

Transfers of development rights allow landowners in areas planned for very limited development (sending areas) to sever the development rights from their land and sell them to buyers who want to develop at higher-than-allowed densities in areas designated for growth (receiving

areas). This process is market driven—buyers and sellers voluntarily choose to participate in the process and negotiate a purchase price. Benefits to the community include more development in areas designated for growth and permanent restrictions on development in areas designated for preservation or resource protection.

What Is a Development Right?

An important step is to define exactly what a development right is and how it will be calculated. For example:

- For residential purposes, it is often defined as the right to construct one dwelling unit.
- For nonresidential uses, it is often defined as the right to construct 1,000 square feet of gross floor area.

Application

In Vermont, the transfer of development rights is specifically authorized under Chapter 117 (24 V.S.A. §4423). TDR programs are one of many regulatory tools authorized by Chapter 117 to implement an adopted municipal plan. TDR programs must therefore conform to municipal plan goals and recommendations.

The purchase or transfer of development rights is based on the legal concept that landownership includes title to a bundle of discrete land rights, such as rights of access, cultivation, mineral or water extraction, and development. One or more of these rights can be legally separated, or severed, from a tract of land. The sale of development rights, for example, severs the seller's right to

develop the land. The purchaser holds the right to develop, leaving the landowner free to use the land for other purposes. Under TDR programs, the right to develop on one parcel of land is severed and transferred or sold and used to develop another parcel. As applied, the landowners in sending areas designated for limited or no development sever the development rights from their land and sell them to developers for use in receiving areas designated for more concentrated development.

Creating a TDR program involves several steps:

1. The municipality must first carefully identify and delineate sending areas—those lands it wishes to preserve. Again, these could include farm- or forestland or other open space and natural resource protection areas or, in more urban settings, parks, historic areas, or neighborhoods. Sending areas include those areas from which development rights may be severed and sold for use elsewhere.
2. The municipality must then delineate receiving areas—those areas where development rights may be used. These areas must be able to accommodate additional densities of development associated with the receipt of development rights from sending areas.
3. Finally, the municipality must establish the language in its zoning regulations that authorizes and directs the transfer process. This involves spelling out exactly how transferable development rights will be generated from land in sending areas, for example, one right for every five undeveloped acres. The zoning language must also spell out exactly how transferred rights are

Urban Origins

TDR programs were originally developed for use in urban areas such as New York and Chicago as a tool for historic preservation.

Owners of historic buildings were under pressure to tear them down in order to redevelop at higher densities. As an alternative, owners were allowed to sell the air rights above historic structures for transfer to other higher-density, high-rise districts, thereby allowing their buildings to be preserved. TDR programs are still used in this capacity in many urban areas around the county, though not yet here in Vermont.

to be applied in the receiving area. Typically this is defined as a density bonus that is allowed only for the transfer of development rights. Formal documentation, including deed restrictions or easements, is required to link these two actions. Municipalities with TDR programs are also required by law to maintain a map that shows all lands from which development rights have been severed and notes the location in the land records where each easement associated with transferred rights is filed.

TDR programs can be effective tools for municipalities that have both significant land-based resources that are jeopardized by strong development pressures and also defined growth areas that have the infrastructure necessary to support concentrated, higher-density development.

Considerations

Balancing the potential for generating development rights in the sending area with the capacity to absorb them in the receiving area can be difficult and will never be exact. If the primary objective is to protect land-based resources, the number of transferable rights needed to accomplish this can be estimated from the land area, based on how the rights are defined (for example, in units of development per acre). Receiving areas should be able to accommodate, at minimum, the total number of development rights that will be generated from sending areas. If receiving areas cannot accommodate the higher densities of development associated with these rights—for example if supporting water and wastewater infrastructure aren't adequate—resource preservation objectives cannot be met.

It's also often hard to justify allowing density bonuses in receiving areas. Property owners within these areas may argue that, if higher densities of development can be accommodated, they should be allowed that density

without using transferred rights. Others will argue that current zoning allows as much density as the area can manage—allowing any density bonuses will result in overbuilding. The middle-ground position is that a modest density increase will be accommodated only in exchange for the public benefit of permanently protected land elsewhere in the community. It's important to emphasize that a TDR program is a way of managing the location and density of development, as determined by the community, while equalizing the fiscal costs and benefits to affected landowners.

Even though Vermont first authorized TDR programs in 1986, only a few communities have adopted TDR regulations, and even fewer have experience in their application. Stowe has a TDR program that has been used with some success to control the pattern of development along the Mountain Road (Route 108). Williston has also used TDRs to protect agricultural land, but these are isolated examples.

Experience elsewhere suggests that there a couple of important conditions or factors for a successful TDR program:

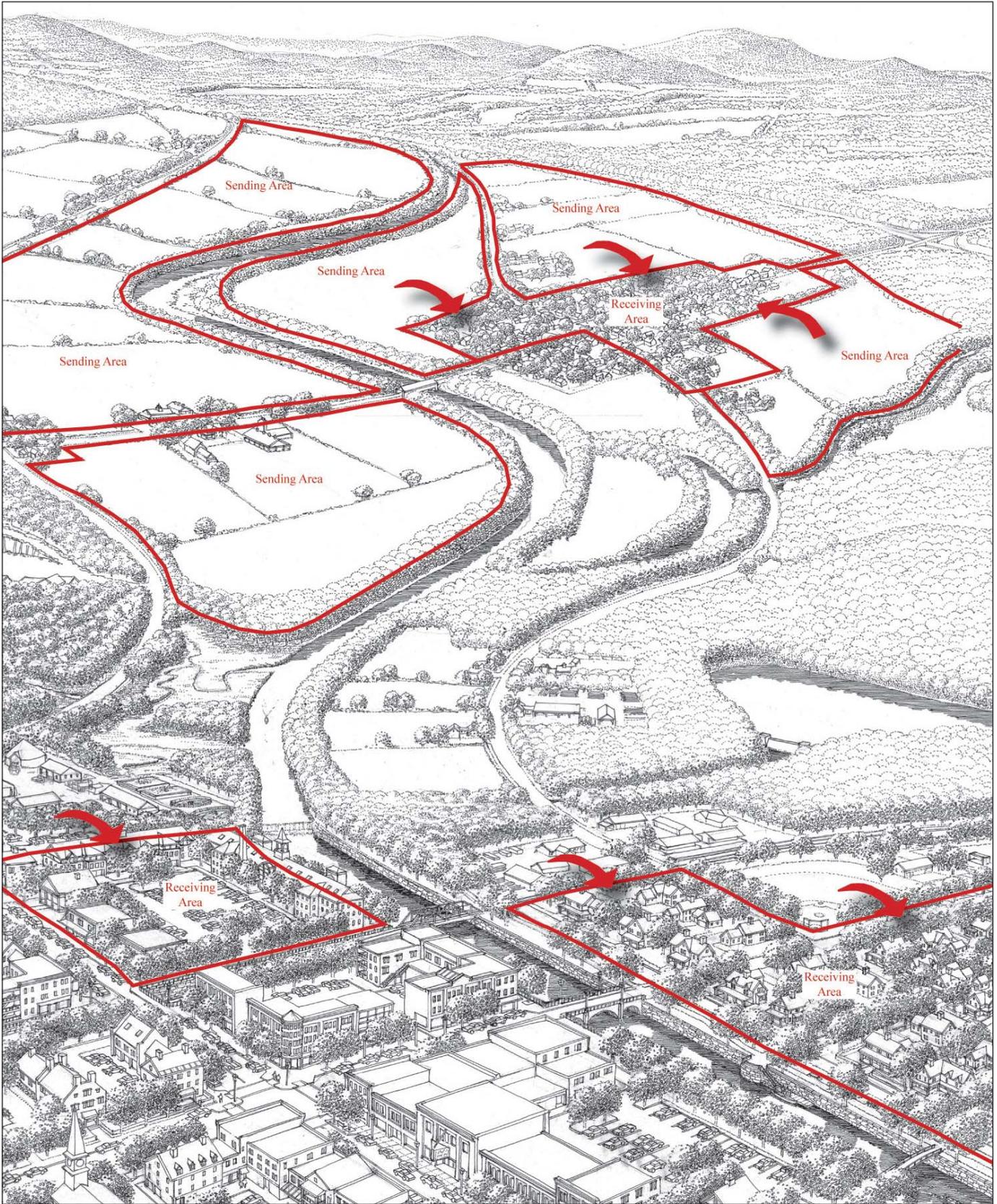
1. There must be sufficient market pressure in sending areas to establish development value and sufficient market demand for development in receiving areas to motivate the purchase of development rights and use of density bonuses.
2. Some administrative mechanism is needed to connect potential buyers and sellers. This is particularly true in small communities where there are few potential buyers and sellers, and there may be no interested buyers when sellers wish to sell, or vice versa. Some form of brokerage or “banking” of development rights—for example through a land banking program or local land trust—can help facilitate this process, but such efforts often require a service area larger than an individual municipality.

An Alternative to TDR: Noncontiguous PUDs

An alternative to a full-blown TDR program can be developed under the Planned Unit Development (PUD) provisions of Chapter 117 (§4417). Municipalities can authorize in their regulations PUDs that include multiple, contiguous, or noncontiguous properties, under single or multiple ownerships. Densities may be shifted among the various portions of the PUD, in effect allowing for the transfer of development rights within the PUD. Examples of this approach have been developed for use in Charlotte, Middlebury, and the city of South Burlington. (See topic paper, Planned Unit Development.)

Though Vermont has little experience with transfer of development right programs, there is considerable experience with the purchase of development rights through such organizations as land trusts. As a result, there is readily available information, including appraisals, on the value of development rights and the value of land from which they've been severed. This information is useful to both buyers and sellers in determining a reasonable price for the purchase of rights involved in a transfer.

Other administrative aspects of TDRs should not be overlooked. As noted, municipalities are required to maintain a map of lands from which development rights have been severed, including reference to the land records where associated easements are filed. The municipality should also establish policies regarding the taxation of land without development rights, as well as the taxation of the unused development rights held by another party. Finally, the municipality should have some form of formal documentation that transferred rights have been attached to a property and used to obtain density bonuses and are therefore no longer available for use elsewhere.



Transfer of Development Rights (TDR) programs create a mechanism for purchasing development rights in areas designated for conservation (sending areas) and selling those rights to allow for higher-density development in areas designated for growth (receiving areas).