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Transferable Development Rights: An Innovative Concept Faces an Uncertain Future In South Florida

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Abstract

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KEYWORDS: rights, future, faces

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I. Introduction

Once hailed as a novel and exciting land management concept, transferable development rights[1] have met with limited success. The doctrine, which recognizes the severability of development potential from land,[2] has not generally met expectations. Beginning in 1977, several South Florida counties and municipalities implemented TDR zoning ordinances.[3] These regulations[4] were enacted primarily to preserve environmentally sensitive lands.[5] However, only in Collier and Dade Counties have sales of development rights been reported, and only in Collier County have development rights actually been used. Therefore, Florida planners who once recommended the TDR approach as a method of preserving historic landmark sites, land in environmentally sensitive regions, open space, and farmland now speak in more cautious terms. This note will analyze some of the obstacles encountered in im-

1. Transferable development rights will be referred to throughout this note by their common acronym, TDRs.

2. *See generally* J. COSTONIS, SPACE ADRIFT (1974) [hereinafter cited as SPACE ADRIFT]; THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION (J. Rose ed. 1975) [hereinafter cited as TDR]; Merriam, *Making TDR Work*, 56 N.C.L. REV. 77 (1978) [hereinafter cited as *Making TDR Work*].

3. A zoning ordinance in which TDRs are granted to landowners in conjunction with restrictive zoning placed on their properties is the usual mechanism for implementation of a TDR program.

4. Six South Florida regulations have been evaluated: Dade County, Fla., Ordinance 81-122 (Jan. 1, 1982); Palm Beach County, Fla., Ordinance R-81-28-30 (Nov. 23, 1981); Collier County, Fla. Ordinance 82-2 § 9 (Jan. 5, 1982); Pinellas County, Fla., Zoning Reg. § XXXIII-D(1)(d) (Dec. 16, 1980); ST. PETERSBURG, FLA., CODE art. II, § 64.09 (1977); HOLLYWOOD, FLA., ZONING AND LAND DEV. CODE art. 32A (1978).

5. The State of Florida has also employed the concept as a preservation technique but uses a different approach. Florida Statute § 193.501 provides a mechanism whereby the owner of environmentally sensitive land may convey to the state or local government the development right of that parcel or covenant with the government that the "land shall not be used by the owner for any purpose other than outdoor recreational or park purposes." Fla. Stat. § 193.501 (1) (1981). In return, the state agrees to reduce the tax assessment on that property. Fla. Stat. § 193.501 (3) (1981).

plementation of TDR ordinances and will attempt to explain why South Florida regulations have enjoyed only minimal acceptance.

II. Principles of Transferable Development Rights

Land may be viewed as an assemblage or bundle of rights.[6] According to TDR theory, the right to develop one's property may be severed from the land and sold, much in the same way as mineral rights are severed and sold.[7] But while mineral rights do not "leave" the land, TDRs are separated from their land source and re-established on a designated recipient site. The usual vehicle for implementation of a TDR program is a zoning ordinance. Such a regulation empowers the local government entity which has responsibility for zoning to grant TDRs to landowners, along with use restrictions placed on their properties. The restrictions generally dictate that development on the transfer site be kept to a marginal level.

Although several variations of the TDR scheme exist,[8] four basic steps are involved. First, land which the local government wishes to preserve must be identified and placed in a restrictive zoning classification. Second, a determination of the number of rights which will be granted to owners in the preservation area must be made and assigned.[9] Third, recipient sites to which development rights can be transferred must be identified. Fourth, the actual sale and transfer of rights must take place.[10] Additional development is then precluded at the transfer

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6. Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 REAL EST. L.J. 330, 331 (1975).

7. For a discussion of the legal precedents for development rights transfer, *see* Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35 (1974), excerpts *reprinted in* TDR, *supra* note 2, at 27.

8. *See, e.g.*, Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972), excerpts *reprinted in* TDR, *supra* note 2, at 95; J. COSTONIS & R. DEVOY, THE PUERTO RICAN PLAN: ENVIRONMENTAL PROTECTION THROUGH DEVELOPMENT RIGHT TRANSFER (1974), excerpts *reprinted in* TDR, *supra* note 2, at 200 [hereinafter cited as PUERTO RICAN PLAN]; *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972) [hereinafter cited as *New York City*].

9. *See infra* text accompanying notes 81-82. *See, e.g.*, Collier County, Fla., Ordinance 82-2 § 9.1(h)(5) (Jan. 5, 1982) which provides for the assignment of one half of a residential unit per acre of preservation zone land.

10. The rights are treated as an interest in real property and, therefore, must comply with recording statutes. *See, e.g.*, Dade County, Fla., Ordinance 81-122 §§ 4, 5F (Jan. 1, 1982). The landowner may choose to use the rights himself on the recipient

site. This is accomplished by means of a restrictive covenant placed on the preserved land after its development rights have been sold or used by the landowner on a recipient site. Title to preserved land may be retained by its owner or dedicated to the government.[11]

While the South Florida TDR programs evaluated allow rights to be purchased and sold directly on the open market,[12] more elaborate schemes exist. For instance, local government may act in an intermediary capacity for the purchase and sale of rights. The landowner, in the absence of a private purchaser, may sell his rights to the government which maintains a rights "bank."[13] The advantage to the seller is apparent: he has an immediate market for his rights. However, the local government must then expend funds to purchase those rights. Once the rights are sold by government, some commentators maintain that the system operates at no cost to anyone.[14]

Because the property owner is compensated for his inability to develop his property, TDRs have been advocated as an answer to "wipeout."[15] The landowner is wiped out by the economic loss suffered when his property is either downzoned[16] or frozen in a low zoning classification. While payment for downzoning is not required in the absence of a taking,[17] TDRs function to ameliorate the harshness of such regulation.

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site or sell them to another, or he may hold them and not utilize them. Thus far, in South Florida, only Collier and Dade Counties have reported transfers of rights. *See infra* text accompanying notes 111-115.

11. *See, e.g.*, FLA. STAT. § 193.501 (1981) which provides for retention of the title by its owner.

12. No government rights bank system exists in the six South Florida regions evaluated.

13. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 87 (1973) [hereinafter cited as *An Exploratory Essay*]. *Cf.* PUERTO RICAN PLAN, *supra* note 8, at 208, 209 (buyer is *required* to purchase through government "bank").

14. Shlaes, *Who Pays for Transfer of Development Rights?*, 40 PLAN., July 1974, at 7-9, *reprinted in* TDR, *supra* note 2, at 330, 336 [hereinafter cited as Shlaes]. *But see infra* text accompanying notes 96-97.

15. Hagman, *Windfalls and Wipeouts* in THE GOOD EARTH OF AMERICA, excerpts *reprinted in* TDR, *supra* note 2, at 265, 273. Windfall and wipeout refer to the gains and losses in value of real property its owner incurs as a result of government regulation. For example, a single zoning change could cause appreciation in value in one parcel (windfall) while causing depreciation in another (wipeout).

16. Downzoning refers to the assignment of a lower zoning classification to a parcel which acts to further restrict its use and/or density.

17. *See infra* text accompanying notes 20-24.

Successful uses of TDRs produce numerous benefits: vital land is preserved; the landowner receives compensation for his inability to further develop his property; development is directed toward a more desirable location;[18] and land preservation is accomplished without financial outlay on the part of government.[19] While the TDR concept appears disarmingly simple, the complexity in implementation soon becomes evident.

III. Constitutional Considerations

A. The Taking Issue: Compensatory Aspects of TDRs

A local government's ability to regulate private property derives from its constitutionally implied police power. This power is limited in that any ordinance in which "provisions are clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals, or general welfare"[20] will be declared unconstitutional. When regulation so restricts private property as to deprive its owner of all reasonable beneficial use, a landowner may bring suit in inverse condemnation; the court must then determine if a taking has occurred.[21] The usual judicial remedy for excessive regulation is to invalidate the ordinance rather than to compel compensation to the landowner under the power of eminent domain.[22] Courts generally hesitate to extend the

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18. *See* Wilson, *Precedent Setting Swap in Vermont*, 61 AM. INST. ARCHITECTS J. 51 (1974), *reprinted in* TDR, *supra* note 2, at 256; Lynch, Controlling the Location and Timing of Development by the Distribution of Marketable Development Rights (June, 1973) (unpublished mimeo), *reprinted in* TDR, *supra* note 2, at 259, 260.

19. *See supra* note 14.

20. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

21. *See* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 125, 136 (1978).

Compensation is required if a "taking" has occurred. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . . ." FLA. CONST. art. X, § 6(a).

The federal "taking" clause is applied to the states through the fourteenth amendment to the Constitution which provides "nor shall any State deprive any person of life, liberty, or property without due process of law."

22. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980). The California Supreme Court had held that a landowner could not sue in inverse condemnation when challenging the constitutionality of a zoning ordinance. In the event the ordinance constitutes a taking, the California court ruled that the only remedies available are mandamus and declaratory judgment; damages are not recoverable. *Id.* at 259, 263. On appeal to the

"taking" language of the fifth amendment to include burdensome regulations.[23] Instead, excessive restrictions imposed by zoning regulations have been described by one court as deprivation of property rights without due process of law,[24] a noncompensable violation requiring invalidation of the enactment.

The argument has been made that it is sometimes necessary for government to regulate private property by means of harsh zoning enactments.[25] For example, government may seek to preserve property by placing strict limitations on development.[26] By granting TDRs to the landowner in conjunction with harsh use restrictions on his property, the government body acquires a basis for defending its zoning ordinance against an inverse condemnation challenge.[27] According to this rationale, the landowner is not deprived of all reasonable beneficial use of his property once TDRs are granted.[28]

United States Supreme Court, the Court found that no "taking" had occurred and thus refused to consider what the appropriate remedy for excessive regulation should be. *Id.* at 263.

But see San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981) (inverse condemnation) in which the United States Supreme Court held that since no final judgment had been entered, the taking issue would not be addressed. *Id.* at 630, 633. The *San Diego* dissent, written by Justice Brennan, argued that a final judgment had been entered and, further, that a regulatory taking demands that government pay just compensation for the period during which the taking occurred. *Id.* at 646, 647, 653. Justices Stewart, Marshall, and Powell joined the dissent. Justice Rehnquist, in his concurring opinion, stated that if this were an appeal from a final judgment, he would agree with much of what was said in the dissenting opinion. Arguably, therefore, five of the nine justices believe that just compensation is mandated for a regulatory taking, but the dissent is not yet the law.

23. *See* Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y.2d 587, 593, 594, 350 N.E.2d 381, 384, 385, 385 N.Y.S.2d 5, 8 (1976).

24. *Id.*

25. *See generally* Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, (1975) [hereinafter cited as *"Fair" Compensation*].

26. Noted commentator, John Costonis, has advocated that where government enacts burdensome zoning regulation, the landowner should receive *fair* compensation for his economic injury, a new judicial standard. *Id.* at 1022. Rather than evaluating compensation based on the parcel's highest and best use, a traditional assessment made under eminent domain proceedings, Costonis proposes a standard keyed to a lesser economic return. Fair compensation may be paid in "dollars or by some non-dollar but market worthy alternative." *Id.* Transferable development rights fulfill the requirements for fair compensation. *Id.*

27. *Id.* at 1044, 1045, 1051.

28. *Id.*

The New York Court of Appeals addressed this issue in *Fred F. French Investing Co., Inc. v. City of New York.*[29] In *French*, the mortgagee of a Manhattan residential complex sued to have a New York zoning amendment which applied only to his property declared unconstitutional. The resolution rezoned his private parks, which were part of a residential complex, from a high density residential and office building classification to a "Special Park District,"[30] thus precluding on-site development. The regulation provided the property owner with TDRs usable elsewhere in Manhattan but did not identify a specific parcel as the recipient site. Affirming the decisions of the trial and appellate courts, the New York Court of Appeals held that the zoning amendment was unconstitutional since "it deprive[d] the owner of all his property rights, except the bare title."[31] The court chose to invalidate the ordinance rather than force the city to compensate the land owner.[32] Under the facts of the case, the granting of TDRs was not sufficient to uphold an excessively burdensome zoning ordinance against an inverse condemnation challenge.

In evaluating the economic injury to the landowner, the court examined the compensatory aspect of the TDRs granted. Viewing them as a "potentially valuable . . . commodity [which] may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property,"[33] the *French* court said, "in this case, [they] fall short of achieving a fair allocation of economic burden."[34] However, in dicta, the court recognized that where a landowner is able to sell his interests to an existing rights bank and is paid "instantly and in money . . . he is paid just compensation for them in eminent domain."[35] In sum, while acknowledging that development rights are valuable, the *French* court indicated that they are not the equivalent of just compensation in the absence of an immediate dollar

29. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

30. *Id.* at 592, 350 N.E.2d at 384, 385 N.Y.S.2d at 7.

31. *Id.* at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.

32. The *French* court regarded excessive regulation as frustration of property rights without due process of law as opposed to a compensatory taking. Thus, the court regarded invalidation, rather than just compensation, as the appropriate remedy. *Id.* at 593, 594, 350 N.E.2d at 384, 385, 385 N.Y.S.2d at 8. *Cf. supra* note 22 (California Supreme Court's holding that for a regulatory taking, damages are not recoverable).

33. *Fred F. French Investing Co., Inc.*, 39 N.Y.2d at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.

34. *Id.* at 600, 350 N.E.2d at 389, 385 N.Y.S.2d at 13.

35. *Id.* at 598, 599, 350 N.E.2d at 388, 385 N.Y.S.2d at 12.

exchange, and could not, therefore, sustain the excessive zoning regulation.

The United States Supreme Court addressed the concept of transferable development rights in *Penn Central Transportation Co. v. New York City*.[36] Grand Central Terminal, because of its age and architectural features, had been designated a landmark site under New York City's Landmark Preservation Law.[37] According to the law, no exterior structural changes could be made to the building without obtaining the city's permission. The ordinance also provided that owners of landmark sites who had not utilized the maximum density permitted under current zoning laws were allowed to transfer development rights to specified parcels. The rights were equivalent to the difference in square feet between the permitted density, if the site were not a landmark, and the existing density.[38]

Penn Central had contracted to construct a multi-story office building above the terminal, but the city rejected two consecutive plans for aesthetic reasons and denied permission to build. Penn Central brought suit against the City of New York, alleging a taking had occurred.[39] Although Penn Central prevailed in the trial court, that decision was reversed by the Appellate Division. The New York Court of Appeals sustained the ruling in favor of the city, firmly rejecting Penn Central's argument that Grand Central Terminal was not providing a reasonable economic return.[40]

On appeal to the United States Supreme Court, the validity of the New York Landmark Preservation Law was upheld. The Court determined that no taking had occurred in view of Penn Central's concession to the Court that Grand Central Terminal could indeed earn a reasonable return.[41] This had been the focus of intense litigation in the state courts.[42] In essence, Penn Central conceded the taking issue. The

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36. 438 U.S. 104 (1978).

37. New York City adopted its Landmark Preservation Law in 1965. *See* N.Y.C. AD. CODE ch. 8-A § 205-1.0 (1976).

38. For example, if the landmark site contains 75,000 square feet of office space (existing density) and the property, if unrestricted by the landmark law, were zoned for 100,000 square feet, the TDR value would equal 25,000 square feet.

39. *Penn. Central Transportation Co.*, 438 U.S. at 119. Penn Central sought a declaratory judgment, injunctive relief barring the city from using the Landmark Law, and damages. *Id.*

40. *Id.* at 104, 105.

41. *Id.* at 129 n.26, 138 n.36.

42. *Id.*

Court, therefore, avoided determining whether transferable development rights afforded just compensation under the fifth amendment. However, the Court did recognize that the rights were valuable, stating "[w]hile these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and . . . are to be taken into account in considering the impact of regulation."[43]

There are few cases subsequent to *Penn Central* which discuss TDRs; however, the concept was judicially approved in Florida by the Fourth District Court of Appeal in *City of Hollywood v. Hollywood, Inc.*[44] At issue was the validity of a zoning ordinance which contained a TDR provision. Under the ordinance, a narrow strip of undeveloped beachfront was zoned for single family density. The western portion of the land, separated from the beach by a road, was zoned multiple-family. The beachfront area had a transfer of development rights proviso which would have permitted the developer, at his option, to build an additional 368 condominium units to the west[45] in return for dedicating the beachfront to the city.

The trial court invalidated the ordinance, stating that although the regulation was nonconfiscatory, it was arbitrary since (1) its density cap was predicated on an erroneous traffic study and (2) it was unreasonable to assign single-family zoning to beachfront property.[46] Further, it stated that "the transfer of development rights concept as contained within this ordinance is unsupportable in fact or law."[47]

The Fourth District reversed the trial court's ruling, citing additional controlling factors besides the traffic study which were considered when the ordinance was written. Further, the court found the application of the single family zoning classification to the beachfront

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43. *Id.* at 137.

44. 432 So. 2d 1332 (Fla. 4th Dist. Ct. App. 1983).

45. *See infra* text accompanying notes 83-92 where the related issue of density is discussed.

46. *City of Hollywood*, 432 So. 2d at 1334.

47. *Id.* (quoting the trial court). Lack of familiarity with the TDR concept is an ever present problem. In the instant case, the Fourth District noted that both parties had failed to cite in their briefs the Florida statute which provides for transfer of development rights, FLA. STAT. § 193.501 (1981). *See supra* note 5. Perhaps the difficulty arose because the statute appears under "Assessments." The court, in regarding the absence of the statute from the briefs, commented, this "leaves us nothing short of mystified." *Id.* at 1337.

parcel to be "compatible [and] fairly debatable,"[48] i.e., reasonable and not arbitrary. The court then examined the TDR segment of the ordinance and had "no trouble upholding the particular provision employed."[49] Applying the taking criteria set forth in *Penn Central Transportation Co. v. New York City*,[50] the court stated it had "already found the government action to be proper and reasonably related to a valid public purpose."[51] In its assessment of the economic impact of the ordinance on the developer, the court declared that it could not quarrel with a gain of 368 multifamily units against the loss of 79 single family units and upheld the provision. The developer contended that requiring actual transfer of title to the city "goes too far."[52] The *Hollywood* court responded that if the developer accepted the transfer proposal, the court would be "suspicious of any motives for keeping a hold on [the beachfront]."[53] Since the transfer was optional under the terms of the ordinance, the developer was still free to build the seventy-nine units permitted on the beachfront property.[54]

The *French, Penn Central*, and *Hollywood* decisions suggest that, in analyzing the effects of a TDR zoning regulation, courts will initially determine if the regulation is a proper exercise of the police power. The focus will then shift to remaining beneficial uses which exist on the restricted property. As long as no taking has occurred, any transferable development rights granted by the government will be regarded as mitigation or amelioration of financial loss. If the regulation has resulted in a taking, i.e., is held to be excessively restrictive, the courts most commonly will invalidate the ordinance. In the alternative, courts may up-

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48. *Id.*

49. *Id.* at 1337, 1338.

50. *Id.* at 1338. The three "taking" criteria the court applied were (1) character of the government action, (2) whether the land use restriction was related to a valid public purpose, and (3) the economic impact of the regulation on the claimant. *Id.* (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)).

51. *City of Hollywood*, 432 So. 2d at 1338.

52. *Id.*

53. *Id.*

54. Shortly after this case was decided, the City of Hollywood, although having won the appeal, announced it would buy the litigated property. Funds were available from the State of Florida under the "Save Our Coasts" program. Both the transfer site, i.e., the beachfront, and the recipient site, i.e., the westernmost portion of the land across the street from the beach, will be acquired. Thus, the Hollywood TDR regulation is rendered moot since it was specifically implemented for this geographical region. *See* HOLLYWOOD, FLA., ZONING AND LAND DEVELOPMENT CODE art. 32A (1978).

hold the regulation but require just compensation.[55] These cases suggest that in the event just compensation is mandated and transferable development rights have been granted to the landowner under the ordinance, courts must assess the present economic value of the TDRs so as to determine if they constitute just compensation. As the *French* court acknowledged, without the ability to immediately market the TDRs and convert them to dollars, the prospect of judicial recognition of transferable development rights as just compensation is unlikely. In conclusion, the granting of TDRs not susceptible to an immediate dollar exchange is not likely to sustain an excessive zoning regulation.

B. The Uniformity Issue: Do TDRs Violate State Zoning Enabling Acts and Equal Protection?

A TDR ordinance requires recipient sites to accommodate the density transferred from the preservation zone.[56] According to the Standard State Zoning Enabling Act, the act on which state zoning enabling legislation is based, "all zoning regulations shall be uniform for each class or kind of building through each district."[57] Allegations that TDR ordinances violate this uniformity requirement and constitute spot zoning stem from the fact that some buildings in the recipient zone will be afforded greater densities than others due to the acquisition of development rights. Commentators give little weight to this objection, applying the rationale that all property owners in the receiving zone have the same opportunity to purchase rights.[58] In the event landowners in the recipient zone do not have a reasonable opportunity to acquire development rights, the TDR ordinance could fall as violative of the constitutional requirement of equal protection.[59] Since commentators agree that "the statutory requirement of uniformity is simply duplicative of the constitutional requirement of equal protection,"[60]

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55. *See supra* notes 22, 32.

56. *See supra* text accompanying notes 8-11.

57. ADVISORY COMMITTEE ON ZONING, DEPT. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 2 (rev. ed. 1926), *quoted in* SPACE ADRIFT, *supra* note 2, at 158.

58. SPACE ADRIFT, *supra* note 2, at 158, 159. *See also* Marcus, *A Comparative Look at TDR, Subdivision Exactions, and Zoning as Environmental Panaceas: The Search for Dr. Jekyll Without Mr. Hyde*, 20 URB. L. ANN. 3, 45-48 (1980) [hereinafter cited as *A Comparative Look*].

59. SPACE ADRIFT, *supra* note 2, at 158.

60. *Id.*

they are treated as "single in nature."[61] Therefore, assuming no court would invalidate TDR ordinances based on equal protection objections, it is likely that objections based on the uniformity requirement would also be unsuccessful. Further, the claim that TDRs effectuate spot zoning,[62] can, according to one commentator, "be overcome . . . upon a showing that the special treatment accorded the landowner involved is reasonably necessary to further the efforts of the municipality in implementing its comprehensive plan."[63]

IV. Pragmatic Considerations: Problems in Implementing and Administering South Florida TDR Ordinances

While TDR systems have been advocated for many purposes,[64] it is beyond the scope of this article to examine all of their applications. The focus of this section will be limited to the three uses of TDRs in South Florida: preservation of environmentally sensitive land and open space, preservation of farmland, and preservation of historic landmark sites.[65]

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61. *Id.*

62. *A Comparative Look, supra* note 58, at 52.

63. *Id.*

64. *See generally* SPACE ADRIFT, *supra* note 2 (preservation of historic landmark sites); TDR, *supra* note 2 (preserving landmarks, open space and fragile ecological resources; as a primary system of land use regulation; as a method of encouraging low and moderate income housing; as a method of regulating location and timing of community growth); Danels and Magida, *Application of Transfer of Development Rights to Inner City Communities: A Proposed Municipal Land Use Rights Act*, 11 URB. LAW. 124, 129 (1979) (transfer of parking rights, transfer of rights to erect outdoor advertising, transfer of uses permitted by local zoning ordinances but unexercised, transfer of various licenses and easements).

65. The six south Florida regulations evaluated provide for the following purposes: Dade County, Fla., Ordinance 81-122 (Jan. 1, 1982) (preservation of environmentally and ecologically sensitive lands, specifically the East Everglades wetlands); Palm Beach County, Fla., Ordinance R-81-28-30 (Nov. 23, 1981) (preservation of agricultural and environmentally sensitive land); Collier County, Fla., Ordinance 82-2 § 9 (Jan. 5, 1982) (preservation of environmentally sensitive lands and historic sites); Pinellas County, Fla., Zoning Reg. § XXXIII-D(1)(d) (Dec. 16, 1980) (preservation of environmentally sensitive areas and open space); ST. PETERSBURG, FLA., CODE art. II, § 64.09 (1977) (preservation of environmentally and ecologically sensitive land); HOLLYWOOD, FLA., ZONING AND LAND DEV. CODE art. 32A (1978) (preservation of North Beach and West Lake areas, i.e., preservation of environmentally sensitive lands in these specific locations).

A. Identification of Land in the Preservation Zone and Establishment of Program Goals

The first step in any TDR program is the identification of land for preservation coupled with the determination of the goals of the program. If the land identified for preservation is unimproved, the TDR ordinance should allow for some margin of development in order to survive judicial challenge in inverse condemnation actions.[66] Where land is already improved so that a reasonable beneficial use is easily established, courts will be more apt to sustain the ordinance as nonconfiscatory.[67]

When the goal of community planners is preservation of historic landmarks, the regulation necessarily concerns improved property. The owner usually retains the reasonable beneficial use of his property and the regulation should survive a taking challenge. From a conceptual framework, this system is easier to implement than others because it deals with density values that are certain. Since planners know exactly how much development would be allowed on the landmark site under present zoning, they know exactly how much density must be transferred.[68] Moreover, a relatively small number of buildings are involved; under urban TDR ordinances, development occurs in the same general area as the preserved site.[69] In South Florida, only the Collier County ordinance provides for the granting of TDRs to owners of historic landmark sites.[70] Thus far, no rights have been transferred for this purpose.

On the other hand, in South Florida environmental and open space preservation programs, land is usually undeveloped or marginally developed. Where no prior development has taken place, a zoning ordinance which seeks to preserve land by precluding all development on it, thus leaving its owner with no reasonable beneficial use, is likely to be

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66. *See supra* text accompanying notes 29-35. *But see* Just v. Marinette County, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972) (limited use of private property to its "natural use").

67. *See supra* text accompanying notes 36-43.

68. *See supra* note 38.

69. *E.g.*, Elliott and Marcus, *From Euclid to Ramapo: New Directions in Land Development Controls*, 1 HOFSTRA L. REV. 56, 72-78 (1972). Under the New York City Landmark Preservation Law, development rights could only be transferred to contiguous sites. The law was later amended to allow transfer to designated non-contiguous lots within a radius of a few blocks. *Id.* at 72, 73.

70. Collier County, Fla., Ordinance 82-2 § 9.1(a) (Jan. 5, 1982).

deemed confiscatory. This appears to be true regardless of the issuance of TDRs to the regulated landowners.[71] Therefore, when government's preservation goals require *barring* all development on unimproved land, as opposed to simply placing limits on its development, direct government purchase by means of eminent domain actions may prove the better way.[72] Direct purchase eliminates the risks inherent in enacting excessively restrictive zoning regulation, namely, the taking challenge that burdened landowners will surely raise and the possibility that the regulation will be struck down by the courts, thus opening the way for undesirable development. Application of a TDR ordinance to unimproved property should be limited to situations where development is to be restricted rather than precluded altogether.

An added consideration is that in South Florida, typically much of the land designated as environmentally sensitive has poor development potential. Frequently these areas consist of swamp or mangrove or are subject to flooding. Often, other environmental restrictions have already been placed on the land. Implementing a TDR program to preserve land of this kind has met with objection.[73] Existing physical conditions and legal restrictions already minimize development in these areas. Arguably, providing these landowners with TDRs is to accord them development rights for land with no development potential, a result contrary to espoused TDR principles.[74] In essence, such landowners are getting something for nothing. Some community planners fear that developers who bought swampland incapable of development for a small investment will reap a windfall by exchanging it for valuable de-

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71. *See supra* text accompanying notes 29-35, 55.

72. TDRs and condemnation under the power of eminent domain are by no means the only preservation techniques available. *See generally* Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land Use Agreements*, 14 REAL PROP., PROB. TR. J. 541 (1979) (use of easements, covenants and equitable servitudes); Marcus, *A Comparative Look, supra* note 58, at 20, 27 (use of subdivision exactions, natural area zoning); Carlo and Wright, *Transfer of Development Rights: A Remedy for Prior Excessive Subdivision*, 10 U.C.D.L. REV. 1 (1977) [hereinafter cited as Carlo] (use of downzoning, service moratoria); *Making TDR Work, supra* note 2, at 78-80 (use of conventional zoning, density zoning, tax relief); Markham, *Selling Mother Nature*, Miami Herald, July 17, 1983, at H1, col. 1 (use of density and construction techniques to preserve environmentally sensitive area).

73. *See A Comparative Look, supra* note 58, at 44-45.

74. *See*, Rose, *The Transfer of Development Rights: An Interim Review of an Evolving Concept, reprinted in* TDR, *supra* note 2, at 14, 15 [hereinafter cited as *An Interim Review*] (Sonoma County, California TDR plan provides that no development rights are granted to land incapable of supporting development).

velopment rights. These fears have been realized in Collier County where mangrove has been exchanged for rights to build residential condominium units.[75] A moratorium on the use of TDRs has been effected in Collier County so as to allow for analysis of the program.[76]

An area where TDR ordinances are purportedly more likely to be successful is in the preservation of agricultural land.[77] Land which is actively farmed provides its owner with a reasonable beneficial use. By locking farmland into an agricultural zoning designation and providing its owner with TDRs, government can accomplish its preservation purpose while compensating the landowner today for loss of speculative profits. At the same time, the farmer is allowed to continue using his land productively. Palm Beach County enacted a TDR ordinance primarily for preservation of agricultural land.[78] However, to date no rights have been transferred. Farmland in Palm Beach County is both expensive and physically capable of supporting development. Where land possesses both of these attributes, owners have expressed reluctance to relinquish development potential. This is due in part to a lack of confidence in the continued existence of the TDR system.[79] Landowners believe that by retaining their rights without using or selling them, they are retaining the development potential of their farmland. They maintain that at some later date the zoning law will change, and development will be permitted to greater intensity.[80]

Transferable development rights solve few preservation problems. South Florida planners must be reasonable in their expectations and realistic in identifying the purposes which such an ordinance might fulfill. The physical characteristics of the preservation zone land and its

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75. *See* Spagna, *Transfer of Development Rights: The Collier County Experience*, FLA. ENVTL. URB. ISSUES. Jan.-Feb., 1979, at 7, 9 (owner of a 70 acre "mangrove island" dedicated the island to the county in exchange for rights to build an additional 353 condominium units on other land he owned).

76. Another factor for consideration is that once land in Collier County is designated as a "special treatment" district, i.e., preservation zone, its tax assessment is greatly reduced which represents a sizeable tax loss to the county. *A Comparative Look, supra* note 58, at 19.

For a detailed discussion of the personal tax consequences of purchase and sale of rights, see Note, *Tax Consequences of Development Rights Transfer: An Exploratory Essay*, 33 TAX LAW. 283 (1979).

77. *See* Richman and Kendig, *Transfer Development Rights - A Pragmatic View*, 9 URB. LAW. 571 (1977) [hereinafter cited as *A Pragmatic View*].

78. Palm Beach County, Fla., Ordinance R-81-28-30 (Nov. 23, 1981).

79. *See infra* text accompanying notes 111-115.

80. *Id.*

level of development will dictate whether application of a TDR ordinance is practicable. Where land is incapable of supporting development, TDRs should not be granted. Where land is physically capable of supporting development, experience teaches that landowners have not supported the program; they will not relinquish potential for development.

B. Calculating Transferable Development Rights, Locating the Recipient Zone and the Density Issue

Once the preservation area has been identified, the number of rights which are to be assigned to the landowner must be calculated. By necessity, potential development rights for urban and rural transfer or preservation sites are computed differently. In the case of the urban landmark site, its TDR value is the difference between that density which presently exists in the landmark structure and the maximum allowed under current zoning if the site were not occupied by a landmark.[81] On the other hand, the formula for determining the TDR value of a rural site is much more complex since rights are not transferred in kind, i.e., square feet are not transferred as square feet.[82] The acreage of preservation zone parcels must be converted into dwelling units or square feet of commercial space transferable to the recipient site.

The ultimate goal, however, is to effect the transfer of development rights without an increase in the overall combined allowable density of the transfer and recipient zones.[83] Thus, a loss of fifty dwelling units from the transfer site should, in theory, result in an increment of no more than fifty dwelling units at the recipient site.[84] While the ex-

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81. *See supra* note 38.

82. Several formulas have been proposed: distribution based on the number of acres of land owned irrespective of value; distribution based on the proportionate value of the owner's land to the total value of all land preserved; assignment of value "factors" to land based on proximity to center of development. *An Interim Review, supra* note 74, at 4. *See also Making TDR Work, supra* note 2, at 115, 116 (calculation of rights based on the difference in value of a parcel with and without development rights; calculation based on the value of land alone).

83. *See An Exploratory Essay, supra* note 13, at 88 n.57; Schnidman, *Transferable Development Rights: An Idea in Search of Implementation*, 11 LAND & WATER L. REV. 339, 348 (1976) [hereinafter cited as Schnidman].

84. Chavooshian, Norman and Nieswand, *Transfer of Development Rights: A New Concept in Land Use Management*, RUTGERS U. COOP. EXTENSION SVCE. (1974), excerpts *reprinted in* TDR, *supra* note 2, at 173 [hereinafter cited as Chavooshian].

pressed goal is maintenance of a constant overall density, the effect of the increased density occurring at the recipient site must be evaluated.

In preservation programs in which density is transferred to moderately developed recipient sites, planning efforts are usually made to accommodate the increased bulk[85] and to avoid conferring hardship on those occupants already in the transfer zone. But, when the recipient zone is located in a highly developed region such as an urban area, even small increments in density can strain the existing infrastructure.[86] Ideally, the recipient site for TDRs should be limited to undeveloped or moderately developed regions in which planning efforts have been made to support the increased bulk.[87]

Planners do not always adhere to espoused TDR principles with regard to density considerations. Disregard of the constant density goal is illustrated in application of the City of Hollywood's TDR ordinance.[88] Under the regulation, an owner-developer was offered the rights to build 368 additional condominium units on the receiving site in exchange for the loss of 79 single family units from the beachfront transfer site.[89] The transfer site was located across the street from the recipient site. The mathematics of this transfer suggest that the number of rights were calculated on the basis of the owner's economic loss rather than in an attempt to keep density constant.

Landowners have objected to using a density per acre formula as a basis for calculating the number of TDRs allocated to the preservation zone when its real estate is recognized as extremely valuable.[90] In an attempt to overcome this objection, some planners have suggested mar-

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But see City of Hollywood v. Hollywood, Inc., 432 So. 2d 1332 (Fla. 4th Dist. Ct. App. 1983) (right to build 79 single family units in preservation zone exchanged for TDRs to build 368 condominium units at recipient site).

85. Schnidman, *supra* note 83, at 350.

Often the bulk established by the zoning ordinances for the recipient site is deliberately reduced so as to allow for an increase through the TDR mechanism. *See* Chavooshian, *supra* note 84, at 173.

86. *New York City, supra* note 8, at 365-367.

87. *See, e.g.*, Palm Beach County, Fla., Ordinance R-81-28-30 § 1A(4), 1B (Nov. 23, 1981) which allows rights to be transferred to specific recipient zones within the urban service area. *But see* Dade County, Fla. Ordinance 81-122 § 5(B) (Jan. 1, 1982) which allows rights to be transferred to any portion of unincorporated Dade County designated for urban development.

88. HOLLYWOOD, FLA., ZONING AND LAND DEV. CODE art. 32A (1978).

89. City of Hollywood v. Hollywood, Inc., 432 So. 2d 1332, 1338 (Fla. 4th Dist. Ct. App. 1983).

90. *See Making TDR Work, supra* note 2, at 115, 115 n.234, 116.

ket value as an alternative to density for computing the number of rights allocated.[91] To do so, however, would result in a highly objectionable increase in overall density. As previously stated, if zoning law dictates that a developer could build one hundred units on his preservation zone property, under TDR theory, he should be granted rights for no more than one hundred units. However, the developer argues that this does not adequately reflect his financial loss if the recipient site is not as valuable as his transfer site, i.e., his profitability will be less because of its less desirable location. Therefore, it has been suggested that a developer in this situation receive an increment in rights above that density which his preservation zone property could support under present zoning. The effect is to increase the overall combined density of the transfer and recipient sites which is an objectionable result.[92]

Transferable development right ordinances based on economics deserve close public scrutiny. Public acceptance of the TDR concept is not likely when it promises one thing, constant density, but delivers another.

C. Valuation of Rights, Marketability, and Administrative Costs

It is generally recognized that to have a successful TDR program the rights must be readily marketable.[93] In times of an uncertain real estate market and a weak economy, immediate sale of rights is unlikely. Additionally, recognition of development rights as just compensation is judicially doubtful in the absence of a ready purchaser and/or a specific transfer site.[94] In response to these problems, it has been suggested that local government administer a rights bank which would purchase any rights that a preservation zone landowner could not use himself or sell privately.[95] The government would recoup its funds when such rights were sold to developers in the recipient zone.

Several problems are inherent in this approach. The most significant is cost. One of the primary advantages of the TDR concept is that TDRs allow government to preserve land with no financial outlay.[96] To

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91. *Id.* at 115, 116.
92. *Id.* at 115 n.234.
93. *Id.* at 116. *See A Comparative Look, supra* note 58, at 11.
94. *See supra* text accompanying notes 29-35.
95. *See supra* notes 12-13 and accompanying text.
96. Rose, *Psychological, Legal, and Administrative Problems of the Proposal to*

place government in the position of maintaining a bank would divert funds from other needed areas. Government, too, is subject to the uncertainties of the real estate market, and the prospect of holding rights for long periods of time, as well as administering the system, could prove very costly.

A further consideration in assessing the marketability of development rights is the selling price of the rights. The seller, of course, would like to receive the highest price possible, but does not know how to assess the value of his rights.[97] The buyer, however, knows the limitations of his pocketbook. A buyer-developer selling luxury units with presumably greater profitability can afford to pay more for a right than a developer of less expensive units. Since the seller may not know the exact location of the recipient site of his rights or the type of development the buyer has planned, he is uncertain as to what to ask a prospective purchaser.

Although the difficulty in obtaining a purchaser may be circumvented by the use of the government rights bank, ascertaining a fair price remains problematic. If rights are sold by the government at fixed prices, developers of luxury units may be reaping large windfalls. Equating land cost per unit with the cost of a right per unit, it is possible that the luxury developer may be paying considerably less per unit for those obtained through the TDR mechanism than he is for his other units. Although TDRs are advocated as a way around the "windfall-wipeout" dilemma,[98] this arrangement simply shifts the windfall. If rights are sold at variable prices, the seller may not realize fair compensation for his burdened land and the potential for abuse is present.[99] In sum, a rights bank would unquestionably support the TDR system, but, considering costs and administration, it may be seen as replacing one set of problems with another.[100] No South Florida TDR program provides for a rights bank.

D. Rigidity of the System and Potential for Abuse

In order to enjoy support of developers, the TDR system must be

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Use the Transfer of Development Rights As a Technique to Preserve Open Space, 6 URBAN LAW 919 (1974), reprinted in TDR, *supra* note 2, at 293 [hereinafter cited as *Psychological, Legal, and Administrative Problems*]; Shlaes, *supra* note 14, at 336.

97. *See A Comparative Look, supra* note 58, at 17.

98. *See supra* note 15 and accompanying text.

99. *Id.* at 15-17.

100. *Id.*

rigid. If the additional density planned for at the recipient site can readily be obtained by means of a variance or zoning bonus,[101] the market for rights will suffer.[102] Therefore, exceptions to density limits should be granted only in cases of hardship[103] or where planned in conjunction with the sale of TDRs.[104] The public tends to look at zoning ordinances in general and variances in particular with a jaundiced eye.[105] Lack of familiarity with the TDR concept feeds the skepticism which exists,[106] but the potential for abuse is present and is not lightly regarded by the public.[107]

In Dade County where TDRs have been granted to landowners in the flood prone East Everglades area, the first sale of rights has been reported.[108] Prior to this sale of rights, the State of Florida, for purposes of preservation, announced its intention to purchase a portion of the Everglades wetlands.[109] This raises the possibility of the State

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101. A zoning bonus is an increase in density granted to a developer in exchange for his providing an amenity such as a plaza or walkway to the building he is constructing.

102. SPACE ADRIFT, *supra* note 2, at 160.

103. Although "hardship" is recognized as the statutory requirement for granting a variance, it is frequently ignored. *Id. See also* Zaldivar and Lowe, *Zoning Laws Like Putty to Developers, City*, Miami Herald, May 22, 1983, at A1, col. 1 (hardship standard ignored in granting variances; politically appointed zoning board overturned 91% of planning department's recommendations that variances be denied).

104. *Psychological, Legal, and Administrative Problems, supra* note 96, at 298.

105. *See supra* note 103. *See also* Zaldivar and Lowe, *Miami Zoning: Growing Without a Plan*, Miami Herald, May 22, 1983, at A1, col. 1; May 23, 1983, at A1, col. 1; May 24, 1983, at A1, col. 1; May 25, 1983, at A1, col. 2; May 26, 1983, at A1, col. 2 (five part expose of City of Miami's zoning practices which revealed (1) Zoning Board and City Commission ignore laws in granting exceptions from zoning restrictions, (2) land development industry is largest single source of campaign money for incumbent city commissioners, (3) variances are routinely granted without regard to hardship).

106. *See Psychological, Legal, and Administrative Problems, supra* note 96, at 294, 295.

107. *See generally New York City, supra* note 8, at 361-367 (attempt to amend zoning ordinance to permit builders of high rises to exceed bulk limitations by purchasing development rights which would be assigned to old townhouses); *Id.* at 361 n.124 (attempt by New York to sell air rights belonging to federal government); Meakin v. Steveland, Inc., 68 Cal. App. 3d 490, 137 Cal. Rptr. 359 (1977) (sale by city of public street to developers for purpose of allowing developers to use street's air rights to construct additional bulk on their abutting building sites).

108. *Rights to Use of Land Are Sold*, Miami Herald, Oct. 16, 1983, at H20, col. 3.

109. *Id.*

purchasing land for which development rights have already been sold, an occurrence which is purportedly eliminated when a TDR program is implemented.[110] According to TDR theory, once rights are sold, the land is sufficiently restricted so that direct government purchase is unnecessary. Preservation is accomplished without financial outlay on the part of government. If Florida purchases land for which development rights have already been sold, Dade County residents will be burdened twice: one time when the residents must accommodate the increased density at recipient sites and a second time, when as state taxpayers, they must pay for the acquisition of the title to the preserved land.

E. Permanency of Zoning Classification: Reason for Success or Failure?

Traditionally, the right to develop one's property is integrally related to the land itself. When one purchases land, he purchases location. Conceptually, it is difficult for the landowner to sever development from its earthly source. Such an abstraction is offensive to many and explains in part the lack of acceptance of the TDR concept. More significant, however, is that according to TDR doctrine, once the landowner sells his development rights, he is forever precluded from further development on that parcel.[111] Some TDR provisions are more flexible; rather than preclude development altogether, they severely restrict development on the transfer site.[112] Under either circumstance, it is the element of permanency which prevents many landowners who possess development rights from selling them.

Landowners lack confidence in the continued existence of the TDR system. Many believe it will be abolished in the future, and the landowner who has not sold his rights can once again develop his property to greater intensity than presently permitted. Reluctance to give up potential for development has been cited most frequently as the reason for unwillingness to sell development rights in South Florida.[113]

Where, however, the preservation zone consists of land with questionable development potential, for example, land in the flood prone East Everglades area of Dade County or mangrove areas of Collier

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110. *See supra* text accompanying notes 18-19.

111. *See An Interim Review, supra* note 74, at 9; Carlo, *supra* note 72, at 3.

112. *See, e.g., A Pragmatic View, supra* note 77, at 582, 583.

113. This information was obtained in phone conversations with planning officials in Palm Beach and Pinellas Counties and the City of St. Petersburg.

County, owners have been more willing to actively participate in the TDR system.[114] Presumably, these landowners recognize that the possibility of development is limited at best and are motivated to realize whatever profit they can as quickly as possible. But where land is capable of supporting development, as in the case of Palm Beach farmland, its owners will not part with its potential.[115]

V. Conclusion

A TDR zoning ordinance is a tool used by local government to further its land preservation goals. Development rights are granted to landowners in conjunction with the restrictive zoning regulation imposed. The restrictions limit development of the land; the TDRs granted to the landowner mitigate the economic injury caused by these restrictions. However, the zoning ordinance is only the preliminary step in preserving the regulated property. It is not until after the landowner uses his rights on a recipient site or sells them to another that a restrictive covenant is placed on the land. The property may then be viewed as permanently limited in its development. Therefore, when South Florida landowners refuse to use or sell their rights, the TDR system is in jeopardy. Communities may be forced to abandon this alternative for land preservation.

Drafters of TDR zoning ordinances must allow for some margin of development on the regulated property to survive a judicial challenge in inverse condemnation actions. Case law indicates that TDRs are not the equivalent of just compensation in the absence of an immediate dollar exchange. Therefore, the granting of TDRs will not be sufficient to sustain an excessively burdensome regulation against a taking challenge.

Adherence to TDR principles is essential to realize the goals of the program and develop public confidence. Calculation of rights based on market value of preservation zone land, as in the City of Hollywood's regulation, results in objectionable density increments and violates the

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114. *See supra* notes 75-76 and accompanying text. In Dade County, where TDRs have been granted to landowners in the flood prone East Everglades area, rights to portions of 17,280 acres of land have been bought by the mortgagee of the property. He, in turn, has sold an option to purchase the rights to a major North Dade County motel operator. *Rights to Use of Land Are Sold*, Miami Herald, Oct. 16, 1983, at H20, col. 3.

115. No rights have been transferred in Palm Beach County. Palm Beach County's TDR ordinance is primarily for preservation of agricultural land.

goal of constant density. Government purchase of land for which development rights have been sold is abusive and should be avoided; the State of Florida should not purchase land for preservation which is already restricted by covenant. Transferable development rights should not be granted to land incapable of supporting development. In South Florida, transfers of rights have been effected for properties incapable or marginally capable of supporting development such as mangrove areas in Collier County and the flood prone East Everglades region in Dade County. These landowners are reaping a windfall. Where land is capable of supporting development, planners have seriously overestimated the willingness of property owners to sell their rights; these property owners will not relinquish potential for development.

Legal and administrative problems can be overcome; problems inherent in changing commercial realities are infinitely more difficult. The TDR concept in South Florida has experienced a disappointing past and faces an uncertain future.

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