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Keeping a Close Watch on the  
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Why Virginia Contractors Should Be Paying Attention  
to the Industry World-Wide

# Transferable Development Rights

Now in  
**Action**  
in Arlington

By Timothy Hughes



Transferable Development Rights (TDRs) offer a mechanism for one property owner to transfer development density to another. This tool, a relatively recent construct under Virginia law, is starting to see actual use in Virginia several years after its statutory authorization. The TDR tool may represent an elegant way of fostering density based development while encouraging less density in surrounding areas.

## The Recent History of TDRs

To understand the current framework, you must understand the “Dillon Rule”. Virginia is a Dillon Rule state which means that power and authority resides with the state legislature rather than local government. Stated conversely, local governments have only those powers which are expressly granted to them by the Virginia General Assembly. Despite some chafing from towns and counties, the Dillon Rule in theory prohibits them from engaging in some creative or innovative means of governing absent express statutory authorization.

TDRs had been discussed and applauded as an effective tool in the land use and planning toolbox of local government for some time across the country. In Virginia, there was no enabling legislation. As a result, the Virginia General Assembly eventually considered and passed a statute in 2006 that authorized localities to adopt rules and procedures governing the implementation of TDRs.

## The State Enabling Statute

The enabling statute is found at Code of Virginia § 15.2-2316.2. The statute provides that localities may allow for transfer of development rights; however, in order to accomplish that result, the locality is re-

quired to adopt a TDR ordinance after notice and a public hearing. The statute lays out certain basic requirements the ordinance must address, such as how the process is to work, how it will be documented, the types of properties subject to sending and receiving the TDRs and the like. There are other parties that the ordinance may include, such as allowing the sending property to apply for tax abatements, to generate renewable energy or to produce agricultural products. The ordinance may allow the flat purchase of such development rights to retire the rights entirely. The ordinance may provide for conversion of residential density to increased residential, commercial, industrial or other use density on the receiving site.

In 2007, the General Assembly added a section allowing any county and an adjacent city to enter in agreements allowing the county to designate eligible receiving areas in the city. In 2009, the statute received a number of edits to make it more flexible, allowing that both the sending and receiving areas could be identified as “one or more areas” rather than a more constricting definition of one area in the original statute. The 2009 edits also included the extensive list of additional matters the ordinance may consider and loosened some procedural and process restrictions in the original structure.

In 2010, the original terms were edited to expressly allow that development rights attached to receiving areas must be equal to or greater than those several from the sending area. In contrast, the original terms defined that the receiving density must be equal to the sending density. In short, while the current statute bears great resemblance to its original adoption, it is clear that the General Assembly has tried to make the statute more flexible, more attractive, and easier for localities to adopt and implement.

## Quick Adoption in Arlington, Slow Elsewhere

Arlington, Virginia rapidly adopted an ordinance to allow for transfer of development rights. Indeed, Arlington actually jumped on analyzing this issue based on another statute, Code of Virginia § 15.2-750, that was passed in 2005 and provided for transfer of development rights in areas with the County Manager form of government. In February 2006, before the adoption of the overall state-wide TDR statute, Arlington had already adopted its own TDR zoning ordinance amendment.

Other localities have been extremely slow to adopt TDR ordinances. A search reveals only a handful of jurisdictions that have seriously studied or adopted TDR measures. Part of the concerns related to the structure of the original ordinance. A group commission studied the original TDR statute and made broad con-

## The Founder's Square Project - A Real Life TDR

Arlington now stands out as an example of not just a jurisdiction that has adopted an ordinance, but also a locality where a TDR has been documented, processed and approved. Founder's Square is a multi-building project located adjacent to Ballston Shopping Mall in Arlington. The project originally included two office buildings, two residential buildings, and a one-story retail building. The project received initial site plan approval in 2008.

In January 2011, Arlington approved a transfer of development rights from Mosaic Park in Ballston to Founder's Square. The transfer allowed additional building height and density on the Founder's Square site through the purchase and sale of TDRs between the Shooshan Company and Arlington County, to the adjacent Mosaic Park that contributed the density. The County's press release regarding the approval described the following changes to the site plan amendment:

- 13-story secure office building, with 82-foot setback for security requirements (same)
- 15-story office building (will now be a 20-story office building)
- 17-story, 198 unit residential building (now 17-story, 257-unit residential building)
- 12-story, 164-unit residential building (now 11-story, 183-unit hotel building)
- One-story retail building (same)
- These changes will result in both higher density and a reallocation of density from the south residential building to the north residential building, and a change of use for the south residential building, from an apartment to a hotel.

Bean Kinney & Korman, P.C., through Jon Kinney and Tad Lunger, represented the Founder's Square project with respect to the land use process generally and the TDR documentation in particular. A number of additional projects are being seen in TDR discussions and the buzz level has increased dramatically in the wake of the Founder's Square project. Not surprisingly, it appears that the Founder's Square project was the first TDR project approved in Arlington, but the prediction is it will not be the last.



Renderings by Interface Multimedia courtesy of The Shooshan Company. Contact Kevin Shooshan at [kgshooshan@shooshancompany.com](mailto:kgshooshan@shooshancompany.com).

sensus based recommendations that resulted in the 2009 amendments, clarifications and easing of some of the process strictures of the original act. Perhaps most importantly, the commission drafted and developed a model local ordinance and some form documents for transfer of rights that would provide local governments the tools to adopt and implement a TDR program.

Even with this laudable group effort, we have not seen a wave of ordinance adoption across the Commonwealth. This is unfortunate, because a healthy TDR market would provide counties and towns another tool to intelligently encourage smart growth and maintain less dense development in less appropriate areas.

Local options to discourage by-right use of approved density are limited. Localities can try to down zone the property. That path can actually perversely encourage more rapid de-

velopment as people try not to lose property value. That path can also result in expensive litigation and loss of community energy in such fights. Eminent domain could be an option in some circumstances, but is limited, cumbersome and expensive. The last option is to just hope for the best, a less than structure form of planning.

## Conclusion

The TDR enabling statute provides an excellent tool to local government to encourage smart development. It also provides a means of limiting development in areas where such density is less appropriate without cumbersome and risky changes to property zonings or expensive property takings.

Localities have been slow on the uptake since the 2006 passage of the statute, but all local governments should consider adoption of a

local ordinance. The tools are in place with the development of the model ordinance. The TDR process is a tool that should definitely be in local government's toolbox in its efforts to plan and manage development into the future.

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