FITCHBURG TDR/PDR ANALYSIS

INTRODUCTION

This report is submitted to the City of Fitchburg Agriculture and Rural Affairs Committee by the consulting team of Kendig Keast Collaborative, Siemon and Larsen, and Economic Stewardship, Inc. Over the past several years, the City has been looking at Transferable Development Rights (TDR) as a tool to assist them in achieving their planning goals. This is the second of the team's reports, which presents an analysis of the City's proposed TDR programs and our recommendations with regard to TDR or PDR (Purchase of Development Rights). We also address a few aspects of current City regulations that adversely affect the potential for TDR. Our recommendations are intended to lead to the best possible program for the City.

The City of Fitchburg draws upon a host of planning techniques to manage growth and preserve a significant part of its rural character and heritage. Mechanisms include requiring developers to contribute to the community's open space holdings, establishing an urban service area, and creating a strict point system to limit development outside the urban service boundary. The City has also been working on its Comprehensive Plan and several neighborhood plans. Although none are completed, preliminary signs suggest that all will call for much denser development within the urban service area. The density increases reflect the City's concern that current development patterns are unsustainable from a fiscal impact perspective. The goal is to ensure that a given land use mix generates revenues to City coffers sufficient to offset the costs of providing it with public services. As a desirable community within the growing Madison metro area, Fitchburg is experiencing steady development pressure.

The City now proposes implementing a TDR program that it intends will fulfill the following objectives:

- Preserve open space and rural character;
- Create a mechanism where those benefiting from new growth opportunities within the urban service area compensate landowners who are foregoing the right to develop their properties with holdings beyond its borders;
- Use the TDR system's market dynamics to put additional brakes on the pace of growth; and
- Create a disincentive to large-scale greenfields development, thus making infill and redevelopment opportunities more attractive and leading to development concentrations that could support transit and offer other infrastructure efficiencies.

This paper presents an analysis of the program proposed by the City.

MARKET DIMENSIONS OF SUCCESSFUL TDR PROGRAMS AND IMPLICATIONS FOR FITCHBURG

As described in the Transferable Development Rights evaluation paper dated August 14, 2008, successful TDR programs balance allocations of development rights to rural landowners (within the "sending area") with the benefits developers gain by purchasing them (for use within the "receiving area"). Programs designed to ensure equilibrium between both groups' interests offer the best hope of achieving an active market where willing buyers and willing sellers can easily reach agreement on price. The smaller the market—the fewer players and TDRs within the system—the more important balancing interests becomes to creating sufficient transaction activity: enough to allow buyers and sellers to participate at will at prices both deem reasonable. Relative to most TDR systems (see the chart in the 8/14 report), Fitchburg is a very small market with very few sending area landholders. Further, a great many landowners have been on the land since the area was settled and are uninterested in selling. This strongly suggests that a TDR bank would be required to ensure that sales can be made on a timely basis.

Most TDRs represent development potential that both sellers and buyers would measure in equivalent units: dwelling units, perhaps, or floor area as translated to market value. The TDR, therefore, represents a straight transfer of development potential from the sending area to the receiving area. The value of the development rights is easily determined by both sellers and buyers because they represent a quantifiable increase in the right to build—and profit from—a known quantity of dwelling units or floor area. Consequently, the TDR is market-based and its price will fluctuate accordingly.

- To pursue the transaction, the buyer must expect to realize an increase in return that exceeds the cost of the development rights.
- If the seller has no way to profit from his/her landholdings other than to participate in the TDR system, then personal circumstances will often drive the decision to participate in a given transaction (but, at least the seller can determine whether the price offered by the buyer is fair). If the regulatory framework allows sending area landholders other options, then the seller must expect to realize better returns than could be achieved via whatever development is allowed.

The ability of both buyers and sellers to quantify exactly what a TDR is worth is essential to how the system functions. Determining how to achieve balance and launch a TDR system usually entails finding the point of parity between buyers and sellers of development rights:

- First, determine the dollar value of the development rights associated with an acre of rural land.
- Second, determine the value of the right to develop in the receiving area.

At first blush, Fitchburg's proposed TDR system appears to use units both sellers and buyers would deem equivalent: developable acres traded at a ratio reflecting relative area within the sending and receiving zones. However, inequivalencies abound:

- Sending zone acres and receiving zone acres are not equal from a value perspective.
- Within the sending zone, not all acres are equivalent. Their values vary, reflecting differences in site-specific characteristics (trees, views, soil quality, improvements, etc.), as well as context (access, adjacent uses, proximity to urban growth boundary, prior plan proposals, etc.).
- On the regulatory side, whether the parcel qualifies, under the point system, as suitable for one or more additional dwelling units also affects value.
- Within the receiving zone, not all acres are equivalent. Their values vary, reflecting similar differences in location and context.
- On the regulatory side, however, is where the greatest influence on value lies. The value will be created by the ultimate zoning represented by what can be built "as of right." Zoning and the future land use map create value; obviously an acre where three dwelling units may be built is worth far less than one where a 20-story office tower is allowed.

With the comprehensive and neighborhood plans still under development, the potential values associated with any given acreage within the receiving zone are unknown… and unknowable. Moreover, fiscal sustainability—a priority as advocated by two members of the committee—adds another complexity. It suggests that any development that "pays its own way" is equally desirable and, so, a per-acre system makes sense. The advocates have advanced the notion that any project that delivers an assessed value of $2 million/acre, or better, to the tax rolls is acceptable. Note: the Swan Creek project achieved values totaling about $1.8 million per acre.

According to this theory—and coupling it with the City proposed TDR Program—development in Fitchburg should proceed if, and only if:

1. Market demand exists for some combination of uses at some density that delivers the assessed value.
2. Developers can obtain the required TDRs from one or more sending area landholder(s).
3. Expected return on investment, which reflects both costs (including acquiring TDRs) and revenues, meets the developer's threshold requirements.

Thus, the ability to pay for TDRs—and, hence, their value to receiving area developers—varies with whatever land use and density is allowed on the land they control, in addition to the usual market forces in play.

And what about the sellers? Rural landowners have already been stripped of most of the development potential associated with their holdings; all that remains is its value in **agricultural** use plus, in some cases, the ability to erect a few additional dwelling units for family members. Switching to a land-based system from a use-based system does not alter the economics.

- On the one hand, any TDR payments could, therefore, be viewed as a windfall.

- On the other hand, much of the land's value relates not to its fungibility[1] but to the landowner's deep emotional ties to the land, which has, in many cases, been handed down through several generations. For these people, selling off TDRs is tantamount to denuding the resource their parents taught them to steward… and raises inter-generational equity issues, as well.
- With the benefit of the long view, landholders also recognize that political winds change and today's off limits land might be the hub of tomorrow's development boom. For some, merely extending the urban growth boundary a short way would change the development potential of their land dramatically.

Thus, the need to sell TDRs—and, hence, the price offered to receiving area developers—varies with personal circumstances and belief in whether, at some future date, development will be allowed on the land they control, in addition to the usual market forces in play.

From a program design perspective, estimating a starting price for the TDRs in the City's proposed TDR program has been extremely subjective and uninformed:

- The buyers' points of view cannot be uniformly represented because the ability to pay depends on two widely varying factors—allowable land uses and densities—which are, themselves, unknown. Setting an assumed value of $2 million/acre does not help because the economics of different land use patterns vary so widely.
- The sellers' points of view cannot be uniformly represented because the willingness to sell depends on two widely varying factors—personal circumstances and political outlook—which cannot be known.

As discussed in later pages, these circumstances together underscore the need to supplant the City's TDR program with a PDR program and a means of prompting developer participation.

ESTABLISHING AN ENTRY PRICE FOR TDRs

As detailed in the preceding section, we cannot determine what the right to build might be worth to a prospective developer without knowing what can be built. We can only determine if developers are likely to be able to pay a price for TDRs (or for the ability to gain urban service area designation and zoning) that satisfies the rural landholders' objective—as opposed to subjective—requirements.

Usually the starting price for TDRs in a new system is driven by market values, represented by the proxy of assessed values. In Wisconsin, however, agricultural land categories (e.g., pasture, crops, etc.) are assigned an assessed value using fixed per-acre figures—established each year

[1] Fungible equates to interchangeable, like a grade of corn – one bushel is just like another. Land is not interchangeable because it physically and emotionally may be very different.

by the Legislature—that have no relationship to market value whatsoever. Other ways to derive a per acre value assumption include:

- ***Cap-Rate Derived*** – Right now, farmers can lease their commodity crop land to other growers for about $300/acre, which is unusually high. A capitalization rate of about seven percent, consistent with historical data, leads to a valuation of about $17,000/typical acre.[2] More typical lease rates would suggest values at about half this level.

- ***Rent as Percent of Value*** – Current data suggests that rent totals about 1.66 percent of value, which suggests a value of about $18,000/typical acre. Again, more typical lease rates would suggest values at about half this level.

- ***Value to Farm*** – A few farmers interviewed for this project suggested willingness to pay about $6,000/acre or more if it was especially advantageous land (e.g. adjacent to other holdings). However, this figure is very anecdotal and based on individual circumstances rather than on the land's intrinsic value.

- ***Recent Experience*** – Recent land sales in the vicinity are few and difficult to confirm, but purportedly range from $12,000/acre for relatively isolated land to $30,000/acre for land in the path of growth.

The above suggests that rural landholder expectations about incremental value associated with development rights will total somewhere between $12,000 and $24,000 per acre. However: Selling TDRs creates capital gains: a taxable event with a widely varying personal impact and, hence, effect on price. As large landholders become increasingly savvy about using trusts to shelter their assets from inheritance and other taxes, they will also become savvier about dictating future generations' allowable activities, including whether to sell TDRs.

Can Developers Pay?

The ability of developers to pay depends, in large part, on the extent to which the extraction system offsets its costs with a speedier and more certain approval process, which reduces carrying costs and associated risk. Exaction systems in urban areas around the country range from about 1.5 to about three percent of construction costs (with exceptions in overheated markets like San Francisco and Boston).

The ideal TDR market is one where all landowners can find a buyer in the receiving zone. **Figure 1, Ideal Market for TDR,** illustrates this with the relationship of the ranges buyers want to offer and sellers expect to receive. The ideal situation has

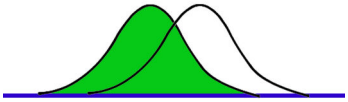

Figure 1
Ideal Market for TDR

[2] This assumes the cash flows enable the owner to keep about one-third of the lease payments after expenses. Further, it makes no market growth assumptions.

buyers willing to pay more (the curve on the right) than sellers want to receive (the curve on the left). The green indicates that every rural landowner would find a buyer for development rights.

Table 1, Equal Sending and Receiving Area Analysis, shows the range of required construction costs, net of land and independent of the quantity of land involved, necessary to ensure that a rural landholder's per acre TDR expectations can be met affordably. In this analysis, the per acre value needed to complete a TDR transaction at one of four prices is determined based on the percent of total value the developer is willing to devote to securing the TDRs. Swan Creek, with a value of $1,800,000 per acre, sets the bar as there is only one development with greater value. If the value is less than $1,800,000, a TDR transaction takes place for the price|construction share combinations shown shaded in green. If more is required for the transaction to occur, the project is unlikely since it exceeds the Swan Creek per acre value, so the price|construction share combination is shaded red. Table 1, with a one to one transfer, has 83 percent of the 24 possible cases meeting this standard and is a fairly good system, but not ideal.

Table 1
Equal Sending and Receiving Area Analysis

TDR price range per acre	Required Supporting Construction Values Percent Construction Costs 0.5%	1.0%	1.5%	2.0%	2.5%	3.0%
$ 6,000	$ 1,200,000	$ 600,000	$ 400,000	$ 300,000	$ 240,000	$ 200,000
$12,000	$ 2,400,000	$1,200,000	$ 800,000	$ 600,000	$ 480,000	$ 400,000
$18,000	$ 3,600,000	$1,800,000	$1,200,000	$ 900,000	$ 720,000	$ 600,000
$24,000	$ 4,800,000	$2,400,000	$1,600,000	$1,200,000	$ 960,000	$ 800,000

Assumptions

Sending Area	1,000 acres
Receiving Area	1,000 acres
Ratio	1.000

NOTE: For residential projects, Fitchburg's open space requirements oblige developers to provide or pay for 2,900 square feet of open space per unit, which, as will be shown, cuts very substantially into this capacity.

At present, the proposed City program has a sending area that possibly includes small residential properties. The receiving area excludes the existing urban service area and the Northeast neighborhood. This results in a ratio of over 3.2 acres of sending area for every acre of receiving area, with **Table 2, City Proposed TDR Sending and Receiving Area Analysis**, revealing the required per acre supporting construction value at this ratio. Attempting to force developers to protect the entire rural area is not viable. Only 25 percent (6 of 24) of the test

cases indicate a likely transaction; the rest require an improbably high per acre construction value. This is a system that will almost certainly fail.

Table 2
City Proposed TDR Sending and Receiving Area Analysis

TDR price range per acre	Required Supporting Construction Values Percent Construction Costs 0.5%	1.0%	1.5%	2.0%	2.5%	3.0%
$ 6,000	$ 3,922,674	$ 1,961,337	$ 1,307,558	$ 980,669	$ 784,535	$ 653,779
$12,000	$ 7,845,349	$ 3,922,674	$ 2,615,116	$ 1,961,337	$ 1,569,070	$ 1,307,558
$18,000	$ 11,768,023	$ 5,884,012	$ 3,922,674	$ 2,942,006	$ 2,353,605	$ 1,961,337
$ 24,000	$ 15,690,698	$ 7,845,349	$ 5,230,233	$ 3,922,674	$ 3,138,140	$ 2,615,116

Assumptions

Sending Area	8996 acres - Less Residential land under 5 acres - AX or AT
Receiving Area	2752 acres - Neighborhoods 2-8
Ratio	3.269

The tables above reflect a major shortcoming: they assume that developers will contribute land, cash, or a combination to meet the City's recreation donation requirement and then buy development rights on that land, as well. If Swan Creek is the model, at a density of about 3.75 dwelling units per acre, as seen in **Table 3, City Proposed TDR Sending and Receiving Area Analysis – less recreation donation**, the ratio soars to over 4.3 acres of rural sending area for every acre of receiving area. Adjusting the ratio to reflect the required recreation donation reduces the potential deals to five out of 24 test scenarios or 21 percent. However, two of the options fall within less than $60,000 of the limit; if they are included, the number of viable scenarios falls to 12.5 percent. NOTE: The recreation deduction shown is based on the Swan Creek development at 3.75 dwelling units per acre. Any potential development with a greater density will prompt an even less favorable acreage ratio. This makes for more certain failure.

Table 3
City Proposed TDR Sending and Receiving Area Analysis - less recreation donation

TDR price range per acre	Required Supporting Construction Values Percent Construction Costs 0.5%	1.0%	1.5%	2.0%	2.5%	3.0%
$ 6,000	$ 5,227,832	$ 2,613,916	$1,742,611	$1,306,958	$1,045,566	$ 871,305
$12,000	$10,455,665	$ 5,227,832	$3,485,222	$2,613,916	$2,091,133	$1,742,611
$18,000	$15,683,497	$ 7,841,748	$5,227,832	$3,920,874	$3,136,699	$2,613,916
$24,000	$20,911,329	$10,455,665	$6,970,443	$5,227,832	$4,182,266	$3,485,222

Assumptions

Sending Area	8,996 acres	Less Residential land under 5 acres - AX or AT
Receiving Area	2,065 acres	Neighborhoods 2-8 less Recreation
Ratio	4.357	

The recreation donation represents a very serious threat to the TDR program and points to a need to modify the recreation requirement downward. TDR and recreation are both exactions that have nothing to do with actually building the development and, therefore, must be funded out of the same 0.5 to three percent of total value. If both are required of the developer, less money will remain available to purchase development rights.

PROGRAMS

It is vital to the success of a TDR system that it be designed to work. TDR, as was discussed in the August 14th report, has often failed and much of the reason is due to local governments ignoring the economic constraints and trying to force a specific desired outcome without regard for market forces that apply to a TDR system. The analysis above indicates that the program as previously envisioned is likely to be fatally flawed. Thus, we must explore alternative programs. A PDR program has been considered in the past.

The rigidity of TDR is not present in purchase of development rights (PDR) programs. The reason is simple: the purchaser and seller either negotiate a deal or they do not. A fixed price matched to a developer is not essential. In general, PDR programs are operated by local governments or not-for-profits with fixed amounts of money. They typically devise a formula to prioritize purchases; a second formula may be used to determine whether an asking price is too high. When a bond issue to fund PDRs is contemplated, a defensible estimate of the value of a development right is needed to illustrate to elected officials and citizens how many acres can be protected using the proceeds. With purchase programs, the City must seek to maximize the area protected with limited funds. While PDR can incorporate developer extractions to help finance the purchase of development rights or conservation easements that meet City requirements, they avoid the rigidity TDR imposes by involving the developer directly in the transactions. The developer, unlike the City, will purchase TDR only when it results in a suitable increase in development value.

Impact fees cannot be used to accomplish the City's desired results because farmland preservation does not appear to be eligible under the State legislation. Exactions represent another approach. Development exactions, like impact fees, are a method of mitigating an adverse impact that would otherwise be reason to deny an application for development approval. To be valid, such programs require a direct nexus—in terms of substance and proportion—between the impacts and the exaction. There are some alternative approaches that could be considered. For example, an application to change zoning from AT or AX (as opposed to a condition of doing what is otherwise permitted) to allow development in the urban service boundary could be conditioned on the perpetual preservation of an equal or greater amount of farmland. The applicant could propose that his or her property be allowed into the urban service area and rezoned; either some acreage would be restricted to agricultural use in perpetuity or an in lieu fee would be paid to the City.

Implementing such a program would require a clearly articulated farmland preservation program that specified the location and amount of farmland to be protected to maintain community character and function. Requests for approval would have to originate with a property owner.

Another approach might entail creating what would be, in effect, a noncontiguous cluster program that would allow a master plan for the development of multiple parcels of land—some for urban use, some for rural development, and still others for preservation. This approach would supplement the City's ongoing effort to purchase conservation easements.

A PDR program, then, might envision that the private sector, via direct purchases or fees in lieu of payments, would acquire roughly one-third of the rural area, leaving two-thirds for the City to purchase through a bond issue or a dedicated revenue stream. This, then, is one alternative approach.

Some goals established for the program by City officials require tools other than TDR or PDR, most notably infill and redevelopment. Infill and redevelopment can be best addressed via the City's zoning and land development regulations, zoning incentives, or fiscal incentives like TIF or other financing mechanisms. Trying to force the TDR program to address these issues simply weakens the ability to design a workable program. It also diminishes the revenue stream available for PDR if it is to be partly financed by development.

Setting a minimum value for development, which reflects City officials' concerns about the fiscal impacts of development, is also affecting the program's viability despite its lack of any relationship to TDR. While a very important consideration, this topic first needs to be studied and documented as a part of the City's comprehensive plan, and then incorporated into the zoning and land development regulations. The Swan Creek development that was used as a surrogate for a zoning- or plan-based option is not enshrined in the City's zoning. This whole concern resulted in fear about using a development-based TDR system. This can be addressed only by zoning. As can be seen in **Figure 2, Property Values**, the $2,000,000 threshold would eliminate most development from the system, as indicated by the top red line. If all development should contribute in a per-acre system, the lowest value would need to be used, as indicated by the lower red line. The triangle illustrates the potential value from purchasing TDRs that would not

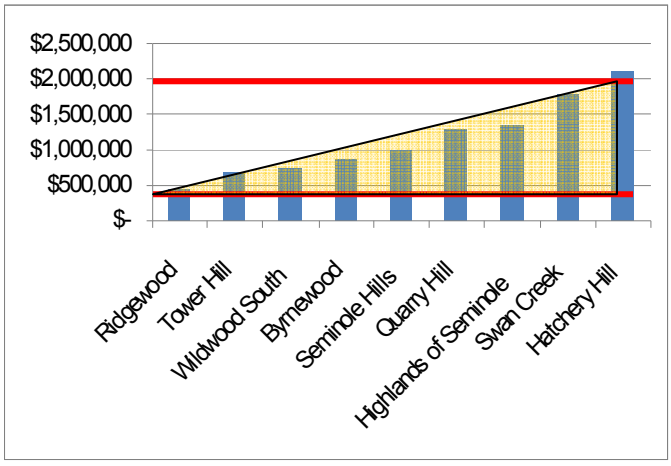

Figure 2
Property Values

be realized. The problem the City has voiced—that it is having trouble getting developers to build as dense as the City wants—is a zoning and market issue. It is possible to use minimums, as well as maximums, in zoning; the fear should not adversely impact TDR or PDR.

A great deal of the problem and controversy around TDR is due to the fact that the City lacks having a comprehensive plan in place that lays the foundation for TDR; nor does the current zoning ordinance achieve a wide range of goals that are being asked of this program.

In a split vote at the August 26th committee meeting, it became evident that the majority of the committee did not want to purchase the land split rights. This adds further confusion because those are development rights. Much of the concern of rural residents has to do with the dual system, exclusive agriculture and the income requirements in combination with the conditional use and its point system. It means that not all rural landowners are actually able to exercise the one house per 35 acres density due to the scoring system. The conditional use process is always seen as arbitrary and is proven to be an inconsistent tool nationally. The problem is best addressed with a zoning change, even though there is interest in an inter-district TDR based on splits.

As a result of our analysis, we believe the four programs below represent different viable approaches to the general concept of TDR and the goals of the draft comprehensive plan.

Modified City Program

The City has recommended a land-based TDR system in which the right being transferred is the right to be in the urban service area, not the right to increased density. As the sole method of protecting the rural area, it will not work. It should be changed to a PDR system, with developers paying an exaction (similar to the recreation requirement) or using a TDR program to supplement the PDR funding. Rural landowners have no intrinsic right to be included in the urban service area. The City controls inclusion within the urban service area by planning and, ultimately, extending services. Because the City controls this action, which grants a windfall to the owners in the urban service area, there is no transfer. As part of the PDR program, the City would draft regulations that require an exaction be paid for entrance into the urban service area. The City would allocate the money to pay for conservation easements on rural land. The exaction cannot be the only source of revenue for a PDR program; bonds or a specific tax levee are required to provide funding for the program.

Noncontiguous TDR Program

This option is a variation on the PDR program's development exaction discussed above. It would allow a developer in the urban service area to find a rural partner on a separate property, perhaps miles from the development site, to be part of the planned development in terms of total land area so that the rural parcel offsets the urban service area land. In terms of land preserved, it would protect only about one-third of the rural area.

Mandatory TDR Program

This is a real TDR program where developers would buy development rights from landowners. The value of development rights is $6,000 to $24,000. The existing zoning districts would provide a means of determining the value of a development right to the developer. Most TDR programs tie the actual project density to the purchase of the TDR. The prior analysis indicates that for an area-based TDR program to work, it should have a ratio of about a one acre in the urban service area to one acre or less in the rural area. This has created a situation where the planning objectives of the City to protect all the rural area with TDR will not be met. It is also possible, because the purchase is being made based on urban service area designation, to link the purchase to the zoning district's maximum density. This eliminates the problem of wanting to build less than the district maximum. Depending on the zoning, there is a major difference in the ability to purchase rights. The decision on whether all AT and AX land in the urban service area, or only new neighborhoods, would be required to purchase development rights makes a significant difference in the potential of this program to protect the rural area. It can, however, be designed to function on a willing buyer/willing seller basis. The ability to determine the real value to the developer makes the program more understandable. The consultants believe that tying it to the maximum density of the zoning district would actually improve the amount of land purchased. It would still protect only one-third to one-half of the rural area.

District Transfer Program

One of the major complaints of landowners is the difficulty of exercising their rights at 35 acres per dwelling unit. Under current rules, some can exercise these rights and others cannot.[3] This is fundamentally unfair, and there was talk about clustering and a TDR to address this problem. An inter-district transfer (or A district transfer), a voluntary TDR program, could easily be developed for this type of system and has been widely used. Under such a program, all the landowners would have development rights generally based on the one dwelling per 35 acres regulations. They would be permitted to transfer those rights to any landowner in the rural areas (AX, AT, or RR land), where the purchaser would be permitted one additional dwelling right. To make this work, there would have to be amendments to the AX, AT, and RR districts. The City would also need to demonstrate that there was adequate area into which they could be transferred. While this system provides some equity—for the landowner who is prohibited by the point system from building on his or her land to capture the development potential—it does nothing for the landowner who wants a home on his or her family land. Modifying the point system is still the better approach.

[3] This inequity is inherent with conditional approvals and confusing. The subdivision of farms into 35-acre parcels is undesirable; there is no assurance that farm families can take advantage of the technique, yet it is a critical factor to them.

PROGRAM ANALYSIS

Several problems have come to light during the analysis of TDR-PDR that impact both approaches. The first is the City's recreation exaction. As higher densities are desired, the recreation exaction reduced what the developer can afford to pay for TDRs or contribute to PDRs. The second is the AT and AX point system that, in fact, negates the zoning for many property owners. A third problem is that the City's Comprehensive Plan is unfinished and its zoning ordinance is unrelated to current visions.

The recreation exaction critically impacts the developer's ability to pay. The 2,900 square feet per unit standard is simply too high. The standard translates to nearly 20 acres per 1,000 people, which is higher than is appropriate for a municipal level government. While the City may be justifiably proud of its open spaces, this provision conflicts with the ability of a developer to afford to buy development rights or pay an exaction fee. It should be substantially decreased and provide some sort of credit for wetlands and floodplain or other important resources in the urban service area. Lowering the recreation donation makes more land available for development, improving the developer's ability to pay the fee or buy development rights. For example, if the developer's pro forma suggests that a million dollar project can afford $30,000 for exactions and $25,000 is required for recreation, only $5,000 remains available for rural land.[4] Just adding another $20,000 in development costs for TDR cannot work unless the developer can see that project value will be enhanced enough for this investment to generate compensating returns. Reducing the recreation donation improves the balance of land by increasing the acreage in the urban service boundary that can purchase development rights. It must be understood that a developer has a limited ability to fund exactions; meeting the recreation requirement competes for the same pool of money as TDR. It can be argued that preserving rural land is a legitimate rural open space objective (not available for impact fees) that should be credited.

The point system creates resentment among the rural landowners and violates a basic rule of ordinance drafting: codes should permit landowners to achieve the stated density. Having one section give back what another prohibits is poor drafting. Further, conditional approvals are clearly poor practice, creating mistrust, confusion, and inconsistency. If the minimum lot size is 35 acres, a person with 150 acres should be able to have four lots. The current situation means some landowners have no ability to capture this value. This inflates the price those landowners expect to get from selling their land rights. It breeds distrust and frustrates the desire of landowners to plan for succession to the next generation and in the maintenance of their land in agriculture. There is a zoning fix and a TDR solution. The zoning solution is the better option.

[4] The analysis of the developer's ability to pay is based on the economic reality that, as a rule of thumb, 75% of the total project value is in the building and its use. The other 25% is in land. That 25% must provide for the purchase and improvement of the land and any exactions the community wants.

Implementing either TDR or PDR is complicated by an unfinished plan and obsolete zoning. This creates many of the obstacles to both TDR and PDR, particularly an unwillingness to address a market-based system. Refusal to consider a use- or value-based system makes TDR far less effective.

The analysis clearly shows that PDR is crucial. TDR or an exaction can provide a significant portion of funding for PDR. The small market means that a development rights bank is essential.

Modified City Program

The City TDR on a land ratio basis is not feasible for many reasons. First, the ability of a land-based system to work based on the ratio of sending to receiving acres is flawed and will not work. Second, no right is actually being transferred, so it cannot really be priced. A third issue is the fear that a TDR program will make it more difficult to get developers to build at the densities the City wants. Fourth is the refusal of the City to consider a system that recognizes that the value of the right to build—and, hence, what developers can afford to pay—varies with real estate product: allowable land uses and densities.

Converting from TDR to a PDR strategy makes the system more viable. First and foremost, no form of TDR can do the job itself. Thus, PDR is essential. Once it is accepted that both public funding and a contribution from developers is required for a workable system, PDR is the obvious choice. Relieved of the burden of trying to make the development community protect the rural area, a rational system is possible. This brings an additional potential advantage—if it is, in part, a publicly funded program, there may be a possibility of getting additional funding from one of the many nonprofits interested in the protection of agricultural or resource land.

What is the value of the exaction being made for permission to rezone in the urban service area? One can argue that a two or two and a half percent charge for value might be a good value upon which to base the exaction. While this is at the upper end of the range, it seems reasonable if the City is willing to decrease the recreation donation. Failure to lower the recreation exaction means a developer can afford to pay less, which again renders the system severely disadvantaged… if not unworkable. This is still an important issue. The City desired to set an exaction cost that the development community can accept as fair. While this sounds completely subjective (and is), it is, nevertheless, viable. There are many examples of this in impact fee ordinances when the cost analysis suggested a fee that could not pass the "straight face" test, even though it reflected actual costs. When faced with this situation, communities have fallen back on the reasonable strategy.

A second deviation from the City's plan is that it is recommended that either the exaction charged or TDR be directly related to the zoning received by the developer. This will result in more revenue to the City for the purchase of conservation easements in the rural area. It is possible to develop a fee schedule based on all current zoning. The planned developments would have to follow an evaluation process to determine their fees based on an appraisal.

There is no rational nexus for using an arbitrary assessed value of $2,000,000 per acre because that value is not tied to either the comprehensive plan or the zoning ordinance. Without a value-based system, the proposed fee must be reducedto the lowest acceptable denominator.

In funding the PDR, the average value for rural land is expected to be in the $15,000-$20,000 range. The PDR part of the program is expected to purchase about 5,900 to 6,000 acres, with the private sector exaction or TDR funding the remainder. If the average price paid for PDR was $18,000, the cost would be just under 110 million dollars. As the City plan is supposed to be 50-year plan, the land acquisition need not occur all at once. Purchasing 1,275 acres at an average price of $18,000 per acre would require a bond issue totaling $22,950,000. Issuance fees and other financing costs makes the total package $24,757,990. Assuming an interest rate of 4.5 percent and a 20-year term, the annual debt service would be $1,903,244. This translates to $157.93 annually on a $200,000 home or an additional .7897 millage given the 2008 tax base.[5]

Noncontiguous TDR

This is an option to the exaction in the PDR program; a noncontiguous TDR could be written to allow TDR as a substitute for the exaction. It could be implemented via a relatively simple code amendment that would allow the developer of land in the urban service area to obtain the equivalent of an exaction on his own. This approach would help achieve the City's goals should government funding of PDR be delayed. Its impact is not anticipated to differ much from the PDR program.

Mandatory TDR

A mandatory TDR assumes the TDR would be backed by a PDR program because it cannot preserve all the rural land. The purchase of TDRs from a landowner would generally extinguish the right to split the land. A landowner still would have the option to sell only a portion of their development rights in order to retain one development right for development on his or her land. Under this system, the developer would purchase development rights based on their zoning. The land in the existing or future urban service areas is largely zoned A-T. This is one house per 35 acres. Within the existing urban service area, land is currently marketed at far more than agricultural value. All the A district land is assessed as agriculture. Some land is also zoned R-R in the future urban service area. It is not recommended that any of these smaller properties, less than five acres in area, be given development rights unless they are combined in common ownership with contiguous larger parcels in excess of 20 acres. Granting development rights would add about 712 acres whose additional development rights would have to be acquired. This would increase the amount that a PDR program would have to address. In setting up this program, an analysis of existing and desired zoning categories would have to be undertaken to determine the likely market. The consulting team believes that this type of program would result in a greater degree of protection than exactions. It would still

[5] This calculation includes bond fees, short-term rates, bond interest, and bond fee. It also deducts estimated interest earned during a one-year implementation period.

leave a significant portion of the rural area unprotected. Thus, in the end, it is recommended that there be both a TDR program and a PDR program linked through a bank.

An added refinement could be made to the allocation system. To further address the split issue and provide an additional incentive, each of the approximately 222 splits could be given a right, as well. Thus, a person with 140 acres would get 144 development rights if no splits had previously been made.

A District Transfer

This was not initially considered by the consulting team or the City; it came out of the committee vote that the selling of development rights would still leave the ability to do splits and the fact that rural landowners believe the existing regulations impose a difficult burden on the landowner. We believe the correct approach to this is to change the point system so it only sets priority for where to develop on one's land and does not prohibit the landowner from developing on his or her land. If the City is unwilling to do this, then a transfer within the A districts should be permitted. It is a simple system that would be based completely on the split data. Any owner of land that had potential for additional splits would be eligible. It would be granted on a one house per 35 acre basis. On all land still eligible for splits, there are a total of 222 development rights. The development rights of the splits are 0.0286 dwelling units per acre, which precludes the issuance of fractional development rights.

The fact that all the land is in the same district and will be built on roughly similar acreage eliminates the complexity of a sending and receiving TDR system and determining value. It is a one dwelling for one dwelling transfer. It assumes clustering on small lots (one to three acres per dwelling unit) is required to exercise the split right. Thus, the value to seller and buyer are the same. So, no analysis is required to determine relative values. Further, the density is so low that there is no way to provide an incentive. Note that, with the mandatory TDR system, the refinement of giving an additional TDR for each prospective split would also be good.

RECOMMENDATIONS

In considering the alternative programs, there are two primary choices. First is a PDR program with an exaction or other technique to fund part of the costs. The second option is called mandatory TDR, but, in fact, it needs a similar amount of support from PDR. The approach is the main difference. In addition, the consultant team recommends:

1. Reduce the recreation exaction to the order of ten acres per 1,000 people. This would make more land available to support the preservation. Leaving it at the current level cuts a large portion of the potential receiving land out of the equation.
2. Eliminate the point system. This system is a major problem to rural landowners and would make landowner choices to sell more rational. If that is not possible, adopt an A district TDR and modifications to the zoning.

3. At this point, with the unfinished comprehensive plan and outdated zoning, the PDR system with an exaction to get developers to bear part of the cost is recommended. It is, in part, recommended because of insistence of City representatives that the system be acreage-based.
4. To further address the concern about splits, it is recommended that each remaining split be given an additional development right.
5. Before adopting the system, pass a substantial bond issue to demonstrate the City's commitment to the preservation of the rural resource. In the absence of a referendum, there is a chance that nobody will offer their land for sale because they do not want to be disadvantaged. The City wants to adopt a regulation before the end of the year. We suggest that the regulations be adopted, with the start date being successful approval of a bond issue for PDR.

It is clear to the consulting team that there is little difference in the PDR and TDR choices. The TDR program includes 1, 2, 4, and 5 above. It is not recommended because of the City's desire for an acreage-based system and the fact that it requires more complex analysis to move it forward. Should TDR be preserved, the following recommendations are directed towards that scenario.

1. Along with the PDR, we recommend developing a value-based system for either the exaction or a zoning district based system.
2. Along with a PDR program, there needs to be a carefully crafted approach to getting voters to approve either a fixed revenue stream or a bond issue. Experience has shown that doing a comprehensive job of preparing the rational for and expected results of a referendum are crucial to their success. Open space referendums have one of the highest rates of success.