

THE TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM IN BOULDER COUNTY, COLORADO

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INTRODUCTION:

Boulder County's Transferrable Development Rights program, adopted as part of its Land Use Code, provides one of a number of tools used to preserve open space. The primary purposes of open space preservation in Boulder County, as adopted in its 1978 Comprehensive Plan, include:

1. Urban shaping between or around municipalities or community service areas and buffer zones between residential and non-residential development;
2. Preservation of: critical ecosystems; natural areas; scenic vistas and areas; fish and wildlife habitats; natural resources and landmarks; outdoor recreation areas; cultural, historic and archaeological areas; linkages and trails; access to public lakes, streams and other useable open space lands; and scenic and stream or highway corridors;
3. Conservation of natural resources, including but not limited to forest lands, range lands, agricultural lands, aquifer recharge areas and surface water; and
4. Areas of environmental preservation, designated as areas of concern, generally in multiple ownership, where several different preservation methods (including other governmental bodies' participation or private ownership) may need to be utilized.

The first and third of these are the main purposes which are partially effectuated by TDRs, particularly the preservation of agricultural lands.

Other key elements of the open space preservation program are the acquisition program and the land use regulations, which provide the background which allows the TDR program to function.

PROGRAM BACKGROUND:

Boulder County, Colorado, is located along Colorado's Front Range and within the Denver-Boulder Metropolitan Statistical Area. It contains 753 square miles, the eastern third of which is characterized by high plains, the western two-thirds being the foothills and Rocky Mountains, leading up to the Continental Divide, which forms the western boundary of the County.

Much of the mountainous area is owned by public entities, including the federal government, in the form of Rocky Mountain National Park, Indian Peaks Wilderness Area, Roosevelt National Forest and BLM lands. In addition, the cities of Boulder, Denver and Longmont have large municipal water reservoirs and preserved watershed lands. There are three incorporated towns and many small private landholdings in the mountainous area.

In the eastern one-third of the County, the "high plains" area, there are eight incorporated cities and towns. This portion of Boulder County has for several decades been in the path of suburban development in the northwest corner of the Denver metro area. Over 90% of the County's 260,000 population resides in this part of the County.

In 1978 the Boulder County Comprehensive Plan was adopted and included goals and policies for preserving open space, protecting environmental resources (includes both natural and cultural resources) and developing a county-wide trail system. Areas that citizens thought were most important to be preserved as open space for future generations were shown on a map, which together with the goals and policies formed the open space plan. The designation of "proposed open space" on the map is not a zoning category, and development of any designated area is determined by the applicable zoning. The implementation of the open space plan is based on private cooperation, various land use regulatory tools, and the county's financial ability to acquire an interest in these lands.

In 1993, County voters approved a 0.25% sales and use tax county-wide with revenues earmarked for open space and recreational trails acquisition and trail development. This revenue stream currently produces \$7.8 million. In addition to up to \$4 million in general fund monies annually appropriated for this purpose, this revenue stream pays for all or most of the debt service for \$106 million in revenue bonds which have been approved by the voters in three elections held beginning in 1993. Lottery funds comprise the balance of the funds available for acquisition.

The state distributes these funds monthly to local governments. The amount received varies from year to year, depending on the level of participation in the lottery. Boulder County's share of the lottery in 1997 was approximately \$440,542.

Currently, the county open space program comprises 52,000 acres of preserved land scattered throughout the county, along with 65 miles of trails. Approximately 50% of this acreage is open for public use; the remainder is under agricultural lease or conservation easements which do not include public access. Most of the properties are well-suited to passive recreation, and are limited to such uses.

THE EFFECT OF BOULDER COUNTY'S LAND USE REGULATIONS ON OPEN SPACE PRESERVATION:

The Boulder County Comprehensive Plan (BCCP) is based on the premise that urban-type development -- residential as well as commercial and industrial -- should be directed to the towns and cities so that it can be supported by a full range of urban services. The BCCP, county zoning and county subdivision regulations work together to limit development in the unincorporated area to non-urban uses. How these regulations work and how they relate to open space preservation is described below.

THE "DOWNZONING":

As is so often the case, Boulder County, in the period between the advent of general zoning regulations in 1956 through 1985, had utilized a typical Euclidean pyramid zoning scheme, with the emphasis on providing for future development through land uses more intense and densities greater than were currently extant "on the ground". Some of this was by design, implementing early comprehensive plan visions of a future suburban county, some by speculative upzonings.

In 1978, when the current Boulder County Comprehensive Plan was adopted, it called for significantly scaled back development in most of the unincorporated area of the County. Most of that area was designated either Agricultural (in the plains area) or Forestry (in the mountains), with minimum lot areas of 35 acres, compared to the suburban residential zoning which had previously covered much of these areas requiring only 1 to 10 acres minimum lot areas. Some speculative commercial use zoned areas were also designated Agricultural.

By 1984, enough public education had occurred that it was time to begin to implement the Comprehensive Plan's call for reduced development. Thus, throughout 1985-86, public hearings were held, and some 4000 parcels were downzoned. All future development above the 35 acre minimum would require some preservation of open space, either through on-site clustering or through some other mechanism.

NONURBAN PLANNED UNIT DEVELOPMENT

County governments in Colorado are not permitted to require any greater minimum acreage than 35 acres per dwelling unit. Thus, in the unincorporated plains area of the county the vast majority of the land is zoned "Agricultural", where the base by-right residential density is one unit per 35 acres.

However, in Boulder County, one incentive for clustering development, and thus realizing service efficiencies as well as preserving agricultural lands in viable-size acreages is the Nonurban Planned Unit Development (NUPUD). This type of subdivision, which permits two units per 35 acres, requires the development occur only on 25% (or 15%, where the Board of County Commissioners finds that the land involved is designated lands of agricultural or environmental importance) of the property and the remaining acreage (the agricultural outlot) is encumbered by a conservation easement. The outlot remains in private ownership, but the conservation easement is deeded to the county.

NONCONTIGUOUS NONURBAN PLANNED UNIT DEVELOPMENT (NCNUPUD)

In 1989 the NUPUD regulations were modified to allow for the assemblage of development units from two or more nonadjacent parcels of land. The development rights appurtenant to the sending parcel(s) are transferred to one or more receiving parcels. Unlike the NUPUD, the Noncontiguous Nonurban Planned Unit Development (NCNUPUD) has as one of its stated objectives the preservation of designated significant lands -- agricultural, open space, environmental and cultural resources.

THE "TDR" PROGRAM:

In deciding whether to proceed with a TDR program as part of the overall regulatory comprehensive development plan implementation, two questions presented themselves. First, what statutory authority exists for such a program, and second, could we legally adopt a mandatory, or combination mandatory and incentive-based voluntary program?

Statutory authority is always the first question for a county, at least in Colorado. Colorado is a Dillon-rule state, requiring express, or necessarily-implied, statutory authority for all actions taken by non-home rule governments. In considering the question of statutory authority, it is useful to consider what a TDR program does. A TDR program provides for the shifting of density, usually residential but sometimes commercial/industrial, from one area of the county to another, based upon a policy determination, preferably backed up by the county's comprehensive plan, that lower density than that otherwise provided by right under the county's zoning regulations is desirable in certain areas, and that in order to achieve such lower density, it is appropriate to allow an increase in density in certain other areas of the county.

A TDR program implicates the most basic of statutorily-granted powers. In §30-28-105, C.R.S., (part of Colorado's adoption of the standard zoning enabling act), county planning commissions are empowered to adopt master plans which provide for the physical development of the county, addressing issues including location and extent of public facilities and infrastructure; the character, location and extent of residential developments, agricultural areas and open space; and a general land use classification system. This master plan is to be adopted based upon

studies which deal with issues including the coordination of future development to promote efficiency and economy in land use, and includes plans for the distribution of population and uses of the land for urbanization, habitation, recreation and agriculture, among others. Specifically included is direction to ensure that future development reduces the waste of resources which comes from "...excessive scattering of populations...." §30-28-107, C.R.S.

In preparation for adoption of a general zoning resolution, planning commissions are authorized to adopt a zoning plan for the county, including text and maps, which recommends regulations governing the density and distribution of population and which provides for areas "...which it deems to be...suitable for for urban development and those (areas) which...it deems suitable for nonurban development", and boards of county commissioners are then authorized to adopt regulations for those purposes. §30-28-113, C.R.S. Other express purposes of such regulations include lessening of congestion in and reducing the waste of excessive amounts of roads, distributing land development and utilization, fostering agriculture, and protecting urban and nonurban development. §30-28-115, C.R.S.

Given the authorization for adoption of regulations for these purposes, it is clear that TDR programs are within the County's traditional zoning powers. In addition, powers for land use regulations set forth in Colorado's Local Government Land Use Control Enabling Act (LUCEA), §29-20-101, *et seq.*, C.R.S., also include authority for TDR programs. Neither of these sources of authority expressly states anything about TDRs, because these statutes are worded as a general authorization for all kinds of regulations which serve the purposes set forth therein. Thus, the only test for a land use regulation's authorization is whether it is intended to and does in fact serve the purposes and goals set forth in these statutes. Since TDR programs are intended to provide for the density and distribution of population within the county, often to allow the sending areas to preserve agriculture or wildlife habitat, and result in location of greater density in receiving areas which are appropriate for urbanization, these programs come within the express authority of the statutes.

The second question mentioned above, legal bases for mandatory versus voluntary programs, has several considerations. For all TDR programs, one issue is the increased density permitted in the receiving areas over that which would otherwise be permitted by comprehensive plan and/or existing zoning regulations. One way to address this is to amend the comprehensive plan to recognize the TDR program's increased density in receiving areas as meeting plan objectives for a functional area which includes both sending and receiving areas; thus, overall density for the general area is not increased. Another way is to use plan objectives for preservation of environmental/agricultural values in the sending areas as a "trump" over limitations on densities for the receiving areas in the plan. Courts have generally approved these purposes for TDR programs against claims concerning the excess receiving area density. See, e.g., Barancik v. County of Marin, 872 F.2d 834 (9th Cir. 1989), cert. den. 493 U.S. 894 (1989); City of Hollywood v. Hollywood, Inc., 432 So.2d 1332 (Fla.D.C.App.4 1983).

Mandatory programs raise a question which voluntary programs do not, i.e., whether the landowner of a mandated sending site has a takings claim due to inability to develop that site, despite receipt of TDR units for sale or use as part of that regulatory program. Although some courts have upheld mandatory TDR regulations as they apply to sending sites, see e.g. Glisson v. Alachua County, 558 So.2d 1030 (Fla.D.C.App.2 1990), Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), these have generally been in situations where TDRs were

usable on contiguous, commonly held property. Even in this limited area of application, another court has held the mandatory TDR program caused a taking, and its provision of TDR units was a violation of constitutional procedural just compensation provisions. See Corrigan v. City of Scottsdale, 720 P.2d 528 (Ariz. App. 1985), aff'd 720 P.2d 513 (Ariz 1986).

More recently, a program of the Tahoe Regional Planning Agency which mandates the preservation of sending sites and requires landowners of such sites to receive TDR units for use on other non-contiguous sites or sale to others for same, came under scrutiny by the US Supreme Court. Suitum v. Tahoe Regional Planning Agency, US , S.Ct. (1997). The Court there found that these regulations on their face represented a final determination of what can be done with the subject property, and therefore remanded the case back to the trial court for a decision on the merits of the takings claim.

Concerns about the legal and political ramifications of mandatory TDR programs led Boulder County in 1995 to adopt a voluntary, incentive-based program. The adopted program provides bonus density beyond that for which the property would be otherwise eligible under any other regulatory program (NUPUD, NC-NUPUD), as an incentive to persuade landowners of properties in the targeted sending areas to participate. Where immediate cash considerations are paramount for some owners, the County occasionally purchases a conservation easement on some or all of the sending site and, sometimes, the County then makes available to the market some TDR units attributable to said site.

The foregoing background sets the stage for the introduction in 1995 of the TDR program. This program uses the standards and criteria set forth in the attached excerpt from the Boulder County Land Use Code. The principle program components are:

- 1) Site-specific sending areas adopted legislatively and designated by map.
- 2) Receiving areas approved upon individual applications according to TDR PUD standards.
- 3) TDR units represented by book ownership-registered certificates.
- 4) Intergovernmental agreements with most plains-area cities to provide utility services to TDR PUDs located adjacent to municipal boundaries, and to accept TDR units for development in newly annexed areas.
- 5) No "banking" of units by the County or other entity.

TDR units are awarded at the NUPUD rate (2 units per 35 acres of conservation easement.) In addition, for agricultural land still in production upon which water rights are held and applied, a 3rd unit per 35 acres is awarded where the developer grants the County an undivided interest in the water rights, and commits in the conservation easement to their continued application to the area covered by the conservation easement.

As the attached table demonstrates, there is a thriving market for TDR units in Boulder County, despite the fact that the program expressly does not provide any backstop for entities possessing such units. Much of this is due to market forces outside the structure of the TDR program, but this market backdrop also depends upon the conditions created by the downzoning and intergovernmental agreements outlined above. Under these circumstances, a TDR program can be an effective weapon in the agricultural preservation/planned growth arsenal.

TDR PUD	Location of Receiving Site (all unincorporated except F)	IGA Area	Approval Status	Sending Acreage and Location	Total Receiving Acreage (1)	% Receiving Area in Conservation Easement	Total Acreage Preserved	Total # Units/ Total # TDRs	Average Lot Size	Water and Sanitation (2)	Average TDR Price
A. Majestic Retreat	Section 20 T3N R69W - north of SH 66	Longmont	Under construction	Between 390 - 507 acres: Sections 9, 10, 17 T3N R69W	103 acres	43% - 43 acres	443 - 550 acres	38 units: TDRs = 33 units	0.6 acres	Water = Longs Peak Water District Sanitation = ISDS	N/A - 20 TDRs from other property owned by applicant
B. Niwot Ridge	Section 32 T2N R69W - SE corner of Niwot community	Defined in Article 6-700 K of the Land Use Code (4)	Final Plat being reviewed	Up to 577 acres from Niwot sending area	153.5 acres	64.4% - 98.9 acres	Up to 676.4 acres	53 units: TDRs = 33 units	0.8 acres	Water = Left Hand Water District Sanitation = Niwot San.	Average = \$50,000
C. White Hawk Ranch	Section 32 T1N R69W - adjacent to Shannon Estates and SH 7	Lafayette	Final Plat being reviewed	Between 583 - 875 acres from Lafayette sending area	110 acres	72% - 80 acres	663 - 955 acres	56 units: TDRs = 50 units	0.5 acres	Out-of-city service from Lafayette	Average = \$50,000

													*Groundwater impacts on Shannon Est
D. Quiet Retreat	Section 29 T2N R69W - east of Niwot on Niwot Road	Prior to Article 6-700 K	Final Plat approved	70 acres from Niwot sending area	7.1 acres	69% - 4.9 acres	74.9 acres	4 units: TDRs = 4 units	0.56 acres	Water = Left Hand Water District Sanitation = Niwot San.	N/A		*Niwot objections ("done deal") *Wetlands
E. Pella Ponds	Sections 25 & 36 T3N R70W - next to Hygiene	Longmont	In Sketch Plan review; following data subject to change	Between 70 - 105 acres from Longmont sending area	56 acres	54% - 30.4 acres	230 - 265 acres	12 units: TDRs = 6 units	1.9 acres	Water = Longs Peak Water District Sanitation = ISDS	N/A		*Density calculations *Historic structures *Hygiene community *Site design
F. Kenosha Farms	Section 12 T1N R69W - south of Kenosha Road	Erie - annexed	N/A	Up to 175 acres from Rural Preservation Area of East Central Boulder County Comprehensive Development Plan IGA	198 acres total; TDR component to be on northerly one-third	47% - 94 acres open space and conservation easements combined	A minimum 269 acres	280 units: TDRs = 10 units of 28 "rural" lots; "urban densities" on 69 acres	Minimum of one acre for the TDR lots	Erie water and sanitation	Average = \$50,000		N/A
TOTALS				1,865 - 2,309 acres	470 acres	Avg. 60% - 260.2 acres	2,155 - 2,599 acres	173 units - TDRs = 136 units	0.8 acres		\$50,000		

1. Acreage variable based on Land Use Code formula of three units/35 acres if an interest in irrigation water is attached to the property and deeded to the County (Article 6-700 H 4). Otherwise the transfer ratio is two units/35 acres.

2. ISDS stands for Individual Sewage Disposal System. Those proposed in this matrix (Majestic Retreat and Pella Ponds) are aerobic systems.

3. These were the main issues from public comments and hearings. The list is not all-inclusive,

4. Niwot is not incorporated, so no intergovernmental agreement could be prepared. Therefore the TDR "arrangement" identifying specific sending and receiving sites (as well as the percentage of TDRs that can be sent off designated parcels based on Niwot's prioritization of the importance of each parcel as open land buffers) is described in the County Land Use Code as Article 6-700 K. Some parcels are eligible for 100% transfers while others only for 70%, 50% or 33% based on their proximity to Niwot.