

**BOARD OF SUPERVISORS
TRANSPORTATION AND LAND USE COMMITTEE
INFORMATION ITEM**

SUBJECT: **Response to Board Member Initiative:
Transfer of Development Rights Program**

ELECTION DISTRICT: Countywide

CRITICAL ACTION DATE: At the pleasure of the Committee

STAFF CONTACTS: Randall Farren, AICP, Planning and Zoning
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PURPOSE: To provide the Transportation and Land Use Committee (TLUC) with information regarding the practical and legal parameters of a Transfer of Development Rights (TDR) program, including a discussion of the issues outlined in the December 4, 2018, Board Member Initiative.¹

BACKGROUND: At the Board Business Meeting on December 4, 2018, the Board directed (9-0) staff to research several issues related to the practical and legal parameters of a TDR program and prepare an Information Item for the February 21, 2019, Board Business Meeting. Following discussion at the Board Business Meeting on February 21, 2019, the Board forwarded (6-3: Buona, Letourneau, and Meyer opposed) the item to a future TLUC meeting for further discussion.² This item was deferred from the October 15, 2019, TLUC meeting.

Since the Board's previous discussion on February 21, 2019, the Virginia General Assembly amended the TDR enabling legislation to refine a locality's authority to designate sending and receiving areas. The amended legislation now permits a locality to designate by ordinance specific receiving areas or receiving properties to which development rights may be transferred only from specific sending areas or sending properties.³ In effect, a locality may stipulate that a particular receiving area or property may only receive development rights transferred from a specifically identified sending area or sending property, even if other sending areas are identified on the sending and receiving area map.

¹The [Board Member Initiative item](#) from the December 4, 2018, Business Meeting can be viewed online.

²[Staff's response to the BMI](#) from the February 21, 2019, Business Meeting can be viewed online.

³ Va. Code § 15.2-2316.2(D)

TDR is a market-based growth management and land conservation tool that creates a marketplace to transfer development rights from lower density areas to areas that are planned for higher intensity development.⁴ A basic TDR process includes some variation of the following:

1. The locality identifies areas where development limits are sought (“sending areas”);
2. The locality identifies areas where increased growth and density are desirable (“receiving areas”);
3. Sending area property owners voluntarily seek to detach or “sever” development rights from their property for sale and transfer;
4. Developers or receiving area property owners pay for additional development rights, which are then generally applied to projects as by-right density bonuses;⁵ and
5. Developers compensate sending area property owners for severed rights at a market rate, either through direct market transactions or an intermediary broker ([see Issue 3: TDR Bank](#)).⁶

The General Assembly adopted enabling legislation for local TDR programs in 2006,⁷ and it has amended the Code several times between 2006 and 2019 for clarity and to increase flexibility of program implementation (Attachment 1). In order to implement a TDR program, a locality must first amend its comprehensive plan to provide the policy foundation for a TDR ordinance by, among other things, designating one or more areas from which development rights may be severed and transferred (i.e., sending areas) and one or more areas to which development rights may be transferred from a sending area (i.e., receiving areas). The locality must also amend its zoning ordinance with a map or description identifying the sending and receiving areas.⁸ The enabling legislation identifies other mandatory requirements and considerations that must be provided for in a local TDR ordinance. Those mandatory provisions include the following:⁹

1. The purchase, sale, and/or exchange of transferable development rights after severance and prior to affixing the rights to a receiving property;

⁴Fulton, William et al. *TDRs and Other Market-Based Land Mechanisms: How They Work and Their Role in Shaping Metropolitan Growth*. Brookings Institution Center on Urban and Metropolitan Policy. June 2004.

⁵Some TDR programs allow receiving area developers to retire severed development rights and apply the assumed value of the capital impacts of the retired rights toward mitigating actual capital impacts (e.g., impact fees or capital proffers). Some programs in other states offer non-density incentives for transferred rights, such as increased flexibility in unit size requirements or other development standards.

⁶Lung, Jessica and Michael Killius. *Tools for a Resilient Virginia Coast: Designing a Successful TDR Program for Virginia’s Middle Peninsula*. Virginia Coastal Policy Center at William & Mary Law School. Summer 2016.

⁷Va. Code Ann. §§ 15.2-2316.1 and 15.2-2316.2.

⁸Va. Code § 15.2-2316.2(B)(6)

⁹This is not an exhaustive list of the requirements of the enabling statute. Va. Code § 15.2-2316.2 (B), (E), (F), (H), (I), (J), (K), and (L) delineate the statutory requirements of local TDR programs.

2. Development rights permitted to be attached in the receiving areas must be equal to or greater than development rights permitted to be severed from sending areas;
3. Assurance of binding restrictions on future development of sending area parcels once development rights are detached, through the use of conservation easements, restrictive covenants, or other instruments;
4. The permitted uses and maximum increases in density in receiving areas;
5. Participation must be voluntary and can only be initiated by application of the owners of the sending properties, the severed development rights or the receiving properties; and
6. A locality cannot require property owners to sever or transfer development rights as a condition of development.

The enabling legislation also includes optional provisions that a locality may elect to adopt as part of its ordinance to better cater its TDR program to needs of its community. These optional provisions include:¹⁰

1. The allowance for residential density to be converted into bonus density on the receiving property in the form of an increase in residential density or an increase in the floor area of commercial, industrial, or other uses on the receiving property;
2. A county may coordinate with incorporated towns within the county to transfer development rights from sending areas in the county to receiving areas within the town limits; and¹¹
3. Sending property owners, developers, or other parties may “bank” or hold development rights until needed for a particular project.¹²

ISSUES: The Board Member Initiative (BMI) requested additional information on seven topics. Each is introduced below in bold italics with staff’s discussion following.

1. ***Frederick County TDR Program*** – ***Frederick County established a voluntary, incentive-based, market-driven land preservation TDR program in 2010 (revised in 2013). The program is currently active. Approximately 80 units have been designated as sending and receiving areas under the program. A number of applications have been received to sever development rights. Applications are currently pending under the program. Frederick County does not provide a TDR bank for the program. Instead, the County keeps a list of all***

¹⁰This is not an exhaustive list of the permissive provisions of the enabling statute. Va. Code § 15.2-2316.2 (C), (D), (G), (M), and (N) comprise the optional features enabled through the statute.

¹¹Va. Code § 15.2-2316.2(M)

¹²Va. Code § 15.2-2316.2(G) and (H)

recorded properties. What is the feasibility of adopting an ordinance/process for Loudoun County that is similar to Frederick County?

Frederick County's TDR program was developed through a deliberate planning process based on the requirements of the Virginia Code and Frederick County's comprehensive plan policy objectives. Similarly, any program adopted in Loudoun County would have to comply with the enabling statute and be developed based on the goals and policies of Loudoun County's comprehensive plan. Several of the issues discussed in this item consider the practical and legal suitability of applying specific elements of the Frederick County TDR program to a hypothetical Loudoun County TDR program. While there are features of Frederick County's program that may be suitable for broader application, any potential Loudoun County TDR program should be uniquely tailored to the community and the Board's various plan and policy objectives at the time of adoption.

- 2. Sending and Receiving Areas – Under a TDR program, development rights are transferred from one parcel to another parcel. These parcels are referred to as a sending property and as a receiving property. The transfer of development rights protects the sending parcel from further development while allowing the receiving parcel to increase density in the form of more building area, more units, or a combination of both. TDRs can apply to residential, industrial, or commercial development. Can a Loudoun County TDR program specifically designate sending and receiving properties to assure that only appropriate parcels are designated as sending properties for preservation and appropriate parcels are designated as receiving properties? What criteria does Frederick County use for sending and receiving properties? What criteria would be appropriate for determining a sending area and a receiving area in Loudoun County?**

The TDR enabling legislation distinguishes between sending and receiving *areas* and sending and receiving *properties*. The relevant definitions included in the enabling statute are as follows:¹³

"Sending area" means one or more areas identified by an ordinance and designated by the comprehensive plan as an area from which development rights are authorized to be severed and transferred to a receiving area.

"Sending property" means a lot or parcel within a sending area from which development rights are authorized to be severed.

"Receiving area" means one or more areas identified by an ordinance and designated by the comprehensive plan as an area authorized to receive development rights transferred from a sending area.

"Receiving property" means a lot or parcel within a receiving area and within which development rights are increased pursuant to a transfer of development rights affixed to

¹³Va. Code § 15.2-2223.1

the property. Receiving property shall be appropriate and suitable for development and shall be sufficient to accommodate the transferable development rights of the sending property. Development rights may be transferred between receiving properties, as otherwise permitted in the ordinance.

According to the enabling statute, a locality must first determine sending and receiving areas in its comprehensive plan and include “a map or other description” of designated sending and receiving areas in its TDR ordinance.¹⁴ The TDR statute requires that the locality provide an analysis of infrastructure in the receiving area that identifies the ability of the area to accept increases in density and its plans to provide necessary utility services in any designated receiving area; the designation of receiving areas is contingent upon such an analysis.¹⁵ Otherwise, the statute allows localities broad discretion in determining their sending and receiving areas in accordance with their comprehensive plans. The enabling statute does not speak to designating individual parcels as sending properties. It does, however, require that localities develop specific criteria to determine the eligibility of specific properties to participate in the program. For example, the TDR ordinance must stipulate the minimum acreage and minimum reduction in density of a sending property in order for rights to be severed and conveyed from the property.¹⁶ The enabling legislation also allows a locality to identify—based on its program criteria and other plan policies—parcels within a receiving area that may be inappropriate as receiving properties.

The TDR enabling statute includes other provisions that could influence the designation of sending or receiving areas. A local ordinance may allow for property owners to request designation as a sending or receiving property.¹⁷ Localities may also designate Urban Development Areas (UDA) or similarly defined areas identified in the comprehensive plan pursuant to Va. Code § 15.2-2223.1 as receiving areas.¹⁸ The County’s current plan does not explicitly designate UDAs; rather, the plan currently specifies that the western edge of the Transition Policy Area constitutes the County’s “growth boundary.”¹⁹ However, the plan could be amended to specifically accommodate this section should the Board wish to pursue this option.

Frederick County’s program requires that sending properties (Attachment 2) meet each of the following criteria:

1. Zoned Rural Agricultural in the Frederick County Zoning Ordinance;
2. Designated for rural uses in the Frederick County Comprehensive Plan;

¹⁴ Va. Code § 15.2-2316.2(B)(6)

¹⁵ Va. Code § 15.2-2316.2(B)(11)

¹⁶ Va. Code § 15.2-2316.2(B)(9)

¹⁷ Va. Code § 15.2-2316.2(C)(4)

¹⁸ Va. Code § 15.2-2316.2(C)(6)

¹⁹ The *Loudoun County 2019 General Plan (2019 GP)* designates new Urban Policy Areas adjacent to planned Metrorail stations. These Urban Policy Areas are a comprehensive planning concept unique to the 2019 GP and are not synonymous with UDAs, which are specifically rooted in the Virginia Code as referenced above.

3. Located outside of county-designated UDA and Sewer and Water Service Area (SWSA);
4. Within the county-designated sending area;
5. 20 acres or greater in size; and
6. Able to be subdivided under the Frederick County Subdivision Ordinance.

Frederick County's Zoning Ordinance further requires that each sending property retain one development right per existing dwelling unit and an additional one development right per 100 acres of land. Certain constraints may not be counted toward the parcel's acreage when calculating transferable rights, including road and utility easements, submerged land, floodplains, and steep slopes.

Frederick County's program also uses different relative values of severed development rights according to specific sending area criteria. The county has prioritized TDR from Designated Agricultural Districts by providing two transferable development rights for every development right severed in this sending area. Sending area properties located within areas associated with prime agricultural soils also provide a transfer bonus of 1.5 transferable rights per development right severed. The remainder of the sending area provides a simple one-to-one transfer value.

Under the Frederick County TDR ordinance, qualifying receiving properties (Attachment 2) must meet the following criteria:

1. Located in specified residential zoning districts (Residential Performance, Residential Planned Community, or Rural Areas);
2. Designated as Receiving Area on the Receiving Areas Map;
3. Served by public water and sewer;
4. Served by state-maintained roads or able to use private roads in the Residential Performance district;
5. Located within a UDA or Rural Community Center in the Comprehensive Plan; and
6. Identified in the Frederick County Comprehensive Plan for residential uses.

If the Board elected to pursue a TDR program, sending area designations would be a function of the Board's plan policy priorities. The Board may consider designating sending areas where planned land use designations and zoning are intended to limit growth or density. As a practical matter, sending area properties must have transferable rights to be eligible for participation; therefore, the County may specify that eligible sending area properties only include existing subdivided properties with unused development rights and/or properties that may be further

subdivided under existing zoning. Like Frederick County, Loudoun may choose to designate areas associated with prime agricultural soils as sending areas to promote agricultural productivity. The County could also elect to prioritize the conservation of other areas of the County by designating additional sending areas or offering density bonuses if properties meet certain criteria. The County could designate sending areas in certain strategic areas to protect drinking water supplies or groundwater recharge areas.

Receiving area designations will similarly depend on the Board's goals for a TDR program. The areas around planned transit stations may present a logical choice for residential transfers, having been designated as Urban Policy Areas in the *Loudoun 2019 General Plan* (2019 GP). The Board may also wish to explore designating receiving areas in other areas of the County, depending on existing and planned service capacity. Designating receiving areas in the incorporated towns is also one option. This, however, would require substantial coordination between the County and each participating town, as discussed below.

The Board may wish to use the optional provision in the enabling statute that allows localities to convert residential rights severed from the sending areas into additional industrial or commercial floor area in specific receiving areas. Stafford County's program provides for this kind of transfer.²⁰ One potentially useful application of this approach would be to allow additional floor area of industrial or commercial uses. For example, rather than requiring legislative approval for increases in FAR for certain uses, the Zoning Ordinance could be amended to allow limited increases by-right, contingent on the transfer of rights from a sending area. This could be an attractive option for industrial or commercial developers that could achieve their desired intensity of use without the cost and time associated with legislative approvals. As discussed under Issue 5, the primary drawback of such an approach would be the County's inability to accept proffers to offset development impacts.

3. ***TDR Bank*** – ***A TDR bank is an entity operated by a local jurisdiction, regional government, or private nonprofit organization for the purpose of buying, selling, and holding development rights for facilitating private TDR transactions. By providing a single point of contact, a TDR bank can streamline the process for buyers and sellers of development rights. Frederick County operates its program without a TDR bank but keeps a list of all recorded available sending and receiving properties. Is it feasible to create a Loudoun County TDR program that functions without a TDR bank similar to Frederick County? Are there advantages or disadvantages to creating or enabling a TDR bank?***

Following its initial adoption, Virginia amended the TDR enabling statute to provide for the “banking” of development rights, allowing them to be severed, held, or transferred among owners until a receiving property owner is identified.²¹ Severed development rights are considered as “interests in real property” for purposes of taxation and conveyance.²² Once a development right is severed from a sending property and recorded as a distinct interest in real property, the

²⁰Stafford County, Virginia, Code of Ordinances, Chapter 28 – Zoning Ordinance, Article XX, § 28-358 (D) and (E)

²¹Va. Code § 15.2-2316.2(G) and (H)

²²Va. Code § 15.2-2316.2(H)

transferable development right is assessed at its fair market value on a separate real estate tax bill and sent to the owner of said development right as a taxable interest in real estate.²³

The TDR enabling statute does not expressly authorize a locality to establish its own TDR bank; however, such authority may be reasonably implied for certain provisions of the TDR statute and other state law.²⁴ Notwithstanding this apparent authority, no Virginia localities currently operate TDR banks. Under existing state law, the establishment and operation of a TDR bank by a locality would involve certain legal and practical considerations. These include, but are not limited to, the loss of tax revenue while transferable development rights are held by the locality, and the requirement that a locality must conduct a public hearing before it may dispose of any interest in real property.²⁵

Localities in other states have elected to establish TDR banks to allow the locality or another public or private nonprofit entity to act as an active broker in the development rights market. TDR banks can facilitate development right transactions and provide a degree of assurance that there will be a market for severed development rights and that buyers will have access to adequate quantities of readily transferable rights. TDR programs using banks generally require additional resources as compared to programs that rely on simple private market transactions.²⁶ There can be considerable upfront and continuing administrative costs. Initial capitalization introduces an element of risk to the TDR bank if there is no market for transferred rights. In an active market, the TDR bank may recoup these costs through development rights sales and establish a revolving fund that is not possible without a dedicated TDR bank. Overall, TDR banks better facilitate market participation and administration, but require the greatest initial capital outlay and staff resources.²⁷

It may be feasible for Loudoun County to create a TDR program without a dedicated TDR bank. The success of such a program depends on the details of the program itself and its alignment with market demands. In accordance with the enabling statute, the County would have to provide a level of support that ensures the recordation and tracking of development rights transfers and their coordination with the applicable development review processes.²⁸ Because the County would not be actively involved in brokering sales, awareness among local property owners and developers of the program and their eligibility to participate becomes more important to facilitate private market transactions. The relative value of rights severed from the sending area to their application in receiving areas, whether as increased residential density or increased nonresidential floor area, would have to be carefully calibrated to make participation worthwhile for both buyers and sellers.

²³Va. Code § 15.2-2316.2(I)

²⁴For example, the TDR statute requires a locality to establish a system for monitoring the severance, ownership, assignment and transfer of transferable development rights as part of its TDR ordinance. Va. Code § 15.2-2316.2(B)(5). Furthermore, Virginia law permits a locality to acquire and sell or otherwise dispose of “any interests [in] any real property.” Va. Code § 15.2-1800.

²⁵Va. Code § 15.2-1800(B)

²⁶Pruetz, Rick and Erica Pruetz. *Transfer of Development Rights Turns 40*. American Planning Association. June 2007.

²⁷*Ibid.*

²⁸Va. Code § 15.2-2316.2(B)(1)

Overall, the less actively involved the locality is in the market, the more important the design of the program itself in order to be successful.²⁹

4. ***Easement Holder*** – ***When a landowner (sending property) sells TDRs, a permanent open-space easement is placed on the land. Easements could be held by Loudoun County or by designated land trusts (Virginia Outdoors Foundation, the Land Trust of Virginia, or Old Dominion Land Conservancy). A third party holder would allow the County to avoid the cost of monitoring protected properties for compliance with the terms of the easements. The County currently holds conservation easements proffered as a condition of development approvals. The Loudoun County Conservation Easement Stewardship Program, administered by the Loudoun County Office of Mapping, was established to work with owners of property with conservation easements to ensure that the terms of the easements continue to be met. Would the designated land trusts operating in Loudoun be willing to hold these easements? What are the impacts (positive or negative) of holding TDR open-space easements under the current Conservation Easement Stewardship Program?***

The TDR enabling statute does not specify any particular mechanism that must be used to limit development on sending area properties from which rights have been severed. Conservation easements are one means of encumbering such properties.³⁰ The Frederick County TDR program uses restrictive covenants between the county and each sending area property owner to limit development on a sending property when its development rights are severed.

Two state laws govern the authority of different agencies and organizations to hold conservation easements. The Virginia Open-Space Land Act³¹ enables public bodies, such as the County, to acquire or designate easements. The Virginia Outdoors Foundation (VOF), a state agency created to promote easement dedication and encourage private gifts of land or easements to meet the state's overall open space goals, also acquires and holds easements under this authority. A separate enabling statute, the Virginia Conservation Easement Act³², allows charitable corporations or trusts that are tax exempt pursuant to 26 U.S.C. § 501(C)(3), to hold easements as well. These charitable trusts are generally referred to as "land trusts." VOF and a number of private land trusts are active in Loudoun County as sole holders or co-holders of conservation easements, including easements co-held with the County.

Locally active land trusts may be willing to hold easements on sending properties. One complicating factor would be aligning specific conservation easements with the interests of a land trust or other qualified easement holder, such as the VOF. Each land trust or public agency that holds easements has its own criteria for targeting parcels for conservation. Some may have minimum thresholds for parcel size or development rights extinguished. Others may have

²⁹Bratton, Nicholas, et al. *Alternative Transfer of Development Rights Mechanisms*. Cascade Land Conservancy. July 2008.

³⁰For purposes of this item, "conservation easement" shall refer to an easement created pursuant to either Va. Code § 10.1-1700 et seq. or Va. Code § 10.1-1009 et seq.

³¹Va. Code Ann. §§ 10.1-1700 et seq.

³²Va. Code Ann. §§ 10.1-1009 et seq.

particular interests in protecting viewsheds, critical habitats, historic resources, or protecting certain geographic areas. Further, each land trust uses a different easement template that is then catered to each individual property and landowner. Thus, the County would likely need to devise an easement template that is widely acceptable to a range of land trusts.

Assuming each potential easement holder would want to maintain the right to refuse individual easements, this approach may require maintaining a “bench” of potential partners for each easement. Even if the County could determine early in the process which land trust or qualifying agency would best match with an easement, involving the holder in the crafting of each easement would require coordination among County staff, land trust staff, and potential sending property owners. Additionally, because accepting a conservation easement constitutes a perpetual obligation for the easement holder, land trust partners would likely need a source of funding to cover stewardship costs and a legal defense fund for each easement accepted.

The County could also contract out monitoring and stewardship responsibilities while remaining the easement holder. Under such a partnership, the County would enter into a term contract with a stewardship partner. This approach would leverage the stewardship expertise of local land trusts. This may be more attractive to land trusts, who would not be taking on perpetual obligations. Instead of establishing a costly stewardship fund upfront, stewardship costs would likely be allocated per each contract or contract extension. This may also present less legal risk to the stewardship partner, as the County would bear any potential legal costs were there a challenge regarding the easement terms or enforcement.

The suitability of the County to hold and manage additional easements is a question of stewardship expertise and resource allocation. County ownership and management of easements would require less coordination with outside entities, such as partnering land trusts, and would allow the County full control over easement terms and stewardship. However, depending on the level of participation in a hypothetical TDR program, the County would likely experience a substantial increase in administrative and stewardship responsibilities. The Conservation Easement Stewardship Program in the Office of Mapping and Geographic Information (OMAGI) currently assists the County Attorney’s Office with the management and monitoring of County-held easements. Conservation Easement Stewardship Program responsibilities are generally shared among three staff members and comprise less than 0.5 full-time equivalent (FTE). The appropriateness of designating OMAGI or a separate County office as responsible for management of additional easements sought through a TDR program will be contingent on the Board’s preferred approach to easement terms and stewardship and, therefore, could be more appropriately determined when the framework of a potential program is better established.

- 5. Proffer Impacts – Generally, commercial and residential development attributed to TDRs are able to have monetary proffers reduced by the cost of TDRs. Is this feasible for a Loudoun County TDR program? How would implementation of a TDR program affect the County’s ability to accept proffers in the TDR Receiving Area?**

Frederick County has accepted extinguished TDR rights to offset cash proffer payments for residential development in their receiving area. This is based on the concept that reducing development pressure in rural areas will reduce future county obligations to provide services in areas where they cannot be provided efficiently. Whether or not this approach is feasible for Loudoun County depends on several factors, including the valuation of extinguished TDRs from a sending property in the County's proffer calculations, the assumed cost savings of reduced service needs in sending areas, and the Board's policy priorities regarding growth management and preventing development in the sending areas. Because this approach does not result in a bonus density per se, it would not necessarily achieve additional density in planned growth areas, which is often a foundational concept behind TDR programs. However, it would provide an incentive for developers to seek and extinguish development rights from the sending area, which could help realize other policy goals.

The effects of a TDR program on the County's ability to accept proffers in receiving areas would depend on the details of the TDR program itself. Any proffer policy related to a voluntary rezoning for a parcel that is the recipient of transferred development rights would have to comply with both the TDR enabling statute and the provisions of the applicable proffer statutes.³³ However, owners of TDR-receiving properties may have little or no incentive to pursue rezoning. Under most TDR programs, receiving area properties are initially zoned for some base by-right density, and the TDR ordinance allows a bonus density for dwelling unit rights transferred from the sending area. This allows for a fully administrative process to achieve maximum densities, providing a more streamlined and less costly option than a legislative rezoning and therefore incentivizing the use of TDRs. Under such a system, the County would not receive proffers for development that is permitted through a development rights transfer. In developing a TDR program, the County may need to consider modifications to its capital facilities policies, specifically whether it would provide density credits for transferred development rights in addition to base density, for those cases where a property owner does decide to pursue a voluntary rezoning in addition to purchasing transferable development rights.

Because participation in a TDR program is voluntary for both buyers and sellers, a property's inclusion within a receiving area would not necessarily preclude a developer from seeking to rezone its property to achieve higher density development. Given these options, a developer's preference will likely be a function of the cost of acquiring transferable development rights, anticipated proffer obligations, and the risk and time-cost associated with legislative rezonings.

6. County-City Boundaries – Virginia's statewide enabling legislation was amended in 2007 to allow TDRs to cross county-city boundaries, thereby recognizing the independence between cities and counties. Cross-jurisdictional issues complicated the TDR policy discussion between James City County and the City of Williamsburg and between Albemarle County and the City of Charlottesville. However, Frederick County, which surrounds the City of Winchester, was successfully able to adopt a TDR ordinance. Are cross-jurisdictional issues

³³E.g., Va. Code Ann. §§ 15.2-2303 or 15.2-2303.4 and 15.2-2297.

a concern for a Loudoun County TDR program? How did Frederick County address this issue with the City of Winchester when establishing their ordinance?

The most significant cross-jurisdictional issues would present a concern for a Loudoun County TDR program if the County chose to pursue the designation of receiving areas within one or more incorporated towns.³⁴ Under such an arrangement, the enabling statute requires that a county and each participating town delineate receiving areas in their respective comprehensive plans. Further, each affected town would be required to amend its zoning ordinance to designate these areas as eligible to receive development rights transferred from sending areas within the County. Although not a statutory requirement, policies in the 2019 GP would also call for close coordination with the towns if the County were to pursue the designation of sending and/or receiving areas in the Joint Land Management Areas (JLMA).

The County could avoid cross-jurisdictional issues by restricting sending and receiving areas to areas under sole jurisdiction of the County (i.e., outside of town limits). This is the approach in Frederick County, which designated receiving areas in county-governed areas adjacent to the independent City of Winchester and the incorporated town of Stephens City. According to Frederick County staff, coordination with other jurisdictions within the county was not considered during the development of their TDR program.

7. Comprehensive Plan – The Virginia enabling statute, Virginia Code § 15.2-2316.1, defines permitted sending and receiving areas as those “areas identified by an ordinance and designated by the comprehensive plan,” suggesting that the sending and receiving areas have to be at least “designated” in the comprehensive plan. In addition to this provision are there any other interactions or requirements between a TDR program and Loudoun’s Comprehensive Plan?

There are no further requirements in the enabling statute related to the comprehensive plan beyond identifying the sending and receiving areas in the plan.³⁵ Frederick County’s and Stafford County’s comprehensive plans include policies supporting the adoption of a TDR ordinance, language describing the purpose of such an ordinance, and a description of the sending and receiving areas and justification for their designation as such. Should Loudoun County choose to pursue a similar program, an amendment to the 2019 GP would help provide the policy foundation for its adoption.

The TDR enabling statute provides for several optional features for local TDR programs, some of which relate to the comprehensive plan. As discussed under Issue 2 above, the County may also designate UDAs identified in the comprehensive plan pursuant to Va. Code § 15.2-2223.1 as receiving areas. This is not currently relevant to Loudoun County, which has not elected to identify UDAs in the comprehensive plan. The County may also identify neighborhood design standards for receiving areas in the comprehensive plan and require that the standards apply to dwelling units or other development facilitated through transferred rights.

³⁴Va. Code § 15.2-2316.2(M)

³⁵Va. Code §§ 15.2-2316.1 and 15.2-2316.2(K)

FISCAL IMPACT: There is no fiscal impact associated with this item.

ATTACHMENTS:

1. TDR Enabling Statute (Va. Code Ann. §§ 15.2-2316.1 and 15.2-2316.2)
2. Frederick County Sending and Receiving Areas Map

§ 15.2-2316.1. Definitions

As used in this article, the term:

"Development rights" means the permitted uses and density of development that are allowed on the sending property under any zoning ordinance of a locality on a date prescribed by the ordinance. "Development rights" includes "transferable development rights."

"Receiving area" means one or more areas identified by an ordinance and designated by the comprehensive plan as an area authorized to receive development rights transferred from a sending area.

"Receiving property" means a lot or parcel within a receiving area and within which development rights are increased pursuant to a transfer of development rights affixed to the property. Receiving property shall be appropriate and suitable for development and shall be sufficient to accommodate the transferable development rights of the sending property. Development rights may be transferred between receiving properties, as otherwise permitted in the ordinance.

"Sending area" means one or more areas identified by an ordinance and designated by the comprehensive plan as an area from which development rights are authorized to be severed and transferred to a receiving area.

"Sending property" means a lot or parcel within a sending area from which development rights are authorized to be severed.

"Severance of development rights" means the process by which development rights from a sending property are severed pursuant to this act.

"Transfer of development rights" means the process by which development rights from a sending property are affixed to one or more receiving properties.

"Transferable development rights" means all or that portion of development rights that are transferred or are transferable.

2006, c. 573;2007, cc. 363, 410;2009, cc. 413, 731.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 15.2-2316.2. Localities may provide for transfer of development rights

A. Pursuant to the provisions of this article, the governing body of any locality by ordinance may, in order to conserve and promote the public health, safety, and general welfare, establish procedures, methods, and standards for the transfer of development rights within its jurisdiction. Any locality adopting or amending any such transfer of development rights ordinance shall give notice and hold a public hearing in accordance with § 15.2-2204 prior to approval by the governing body.

B. In order to implement the provisions of this act, a locality shall adopt an ordinance that shall provide for:

1. The issuance and recordation of the instruments necessary to sever development rights from the sending property, to convey development rights to one or more parties, or to affix development rights to one or more receiving properties. These instruments shall be executed by the property owners of the development rights being transferred, and any lien holders of such property owners. The instruments shall identify the development rights being severed, and the sending properties or the receiving properties, as applicable;
2. Assurance that the prohibitions against the use and development of the sending property shall bind the landowner and every successor in interest to the landowner;
3. The severance of transferable development rights from the sending property;
4. The purchase, sale, exchange, or other conveyance of transferable development rights, after severance, and prior to the rights being affixed to a receiving property;
5. A system for monitoring the severance, ownership, assignment, and transfer of transferable development rights;
6. A map or other description of areas designated as sending and receiving areas for the transfer of development rights between properties;
7. The identification of parcels, if any, within a receiving area that are inappropriate as receiving properties;
8. The permitted uses and the maximum increases in density in the receiving area;
9. The minimum acreage of a sending property and the minimum reduction in density of the sending property that may be conveyed in severance or transfer of development rights;
10. The development rights permitted to be attached in the receiving areas shall be equal to or greater than the development rights permitted to be severed from the sending areas;
11. An assessment of the infrastructure in the receiving area that identifies the ability of the area to accept increases in density and its plans to provide necessary utility services within any designated receiving area; and

12. The application to be deemed approved upon the determination of compliance with the ordinance by the agent of the planning commission, or other agent designated by the locality.

C. In order to implement the provisions of this act, a locality may provide in its ordinance for:

1. The purchase of all or part of such development rights, which shall retire the development rights so purchased;

2. The severance of development rights from existing zoned or subdivided properties as otherwise provided in subsection E;

3. The owner of such development rights to make application to the locality for a real estate tax abatement for a period up to 25 years, to compensate the owner of such development rights for the fair market value of all or part of the development rights, which shall retire the number of development rights equal to the amount of the tax abatement, and such abatement is transferable with the property;

4. The owner of a property to request designation by the locality of the owner's property as a "sending property" or a "receiving property";

5. The allowance for residential density to be converted to bonus density on the receiving property by (i) an increase in the residential density on the receiving property or (ii) an increase in the square feet of commercial, industrial, or other uses on the receiving property, which upon conversion shall retire the development rights so converted;

6. The receiving areas to include such urban development areas or similarly defined areas in the locality established pursuant to § [15.2-2223.1](#);

7. The sending properties, subsequent to severance of development rights, to generate one or more forms of renewable energy, as defined in § [56-576](#), subject to the provisions of the local zoning ordinance;

8. The sending properties, subsequent to severance of development rights, to produce agricultural products or forestal products, as defined in § [15.2-4302](#), and to include parks, campgrounds and related camping facilities; however, for purposes of this subdivision, "campgrounds" does not include use by travel trailers, motor homes, and similar vehicular type structures;

9. The review of an application by the planning commission to determine whether the application complies with the provisions of the ordinance;

10. Such other provisions as the locality deems necessary to aid in the implementation of the provisions of this act;

11. Approval of an application upon the determination of compliance with the ordinance by the agent of the planning commission; and

12. A requirement that development comply with any locality-adopted neighborhood design standards identified in the comprehensive plan for the receiving area in which the development shall occur, provided such design standard was adopted in the comprehensive plan and applied to the receiving area prior to the transfer of the development right.

D. The locality may, by ordinance, designate receiving areas or receiving properties, add to,

supplement, or amend its designations of receiving areas or receiving properties, or designate receiving areas or receiving properties that shall receive development rights only from certain sending areas or sending properties specified by the locality, so long as the development rights permitted to be attached in the receiving areas are equal to or greater than the development rights permitted to be severed in the sending areas.

E. Any proposed severance or transfer of development rights shall only be initiated upon application by the property owners of the sending properties, development rights, or receiving properties as otherwise provided herein.

F. A locality may not require property owners to sever or transfer development rights as a condition of the development of any property.

G. The owner of a property may sever development rights from the sending property, pursuant to the provisions of this act. An application to transfer development rights to one or more receiving properties, for the purpose of affixing such rights thereto, shall only be initiated upon application by the owner of such development rights and the owners of the receiving properties.

H. Development rights severed pursuant to this article shall be interests in real property and shall be considered as such for purposes of conveyance and taxation. Once a deed for transferable development rights, created pursuant to this act, has been recorded in the land records of the office of the circuit court clerk for the locality to reflect the transferable development rights sold, conveyed, or otherwise transferred by the owner of the sending property, the development rights shall vest in the grantee and may be transferred by such grantee to a successor in interest. Nothing herein shall be construed to prevent the owner of the sending property from recording a deed covenant against the sending property severing the development rights on said property, with the owner of the sending property retaining ownership of the severed development rights. Any transfer of the development rights to a property in a receiving area shall be in accordance with the provisions of the ordinance adopted pursuant to this article.

I. For the purposes of ad valorem real property taxation, the value of a transferable development right shall be deemed appurtenant to the sending property until the transferable development right is severed from and recorded as a distinct interest in real property, or the transferable development right is used at a receiving property and becomes appurtenant thereto. Once a transferable development right is severed from the sending property, the assessment of the fee interest in the sending property shall reflect any change in the fair market value that results from the inability of the owner of the fee interest to use such property for such uses terminated by the severance of the transferable development right. Upon severance from the sending property and recordation as a distinct interest in real property, the transferable development right shall be assessed at its fair market value on a separate real estate tax bill sent to the owner of said development right as taxable real estate in accordance with Article 1 (§ 58.1-3200 et seq.) of Chapter 32 of Title 58.1. The development right shall be taxed as taxable real estate by the local jurisdiction where the sending property is located, until such time as the development right becomes attached to a receiving property, at which time it shall be taxed as taxable real estate by the local jurisdiction where the receiving property is located.

J. The owner of a sending property from which development rights are severed shall provide a copy of the instrument, showing the deed book and page number, or instrument or GPIN, to the real estate tax assessor for the locality.

K. Localities, from time to time as the locality designates sending and receiving areas, shall incorporate the map identified in subdivision B 6 into the comprehensive plan.

L. No amendment to the zoning map, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or downzone the uses, or the density of uses permitted in the zoning district applicable to any property to which development rights have been transferred, shall be effective with respect to such property unless there has been mistake, fraud, or a material change in circumstances substantially affecting the public health, safety, or welfare.

M. A county adopting an ordinance pursuant to this article may designate eligible receiving areas in any incorporated town within such county, if the governing body of the town has also amended its zoning ordinance to designate the same areas as eligible to receive density being transferred from sending areas in the county. The development right shall be taxed as taxable real estate by the local jurisdiction where the sending property is located, until such time as the development right becomes attached to a receiving property, at which time it shall be taxed as taxable real estate by the local jurisdiction where the receiving property is located.

N. Any county and an adjacent city may enter voluntarily into an agreement to permit the county to designate eligible receiving areas in the city if the governing body of the city has also amended its zoning ordinance to designate the same areas as eligible to receive density being transferred from sending areas in the county. The city council shall designate areas it deems suitable as receiving areas and shall designate the maximum increases in density in each such receiving area. However, if any such agreement contains any provision addressing any issue provided for in Chapter 32 (§ 15.2-3200 et seq.), 33 (§ 15.2-3300 et seq.), 36 (§ 15.2-3600 et seq.), 38 (§ 15.2-3800 et seq.), 39 (§ 15.2-3900 et seq.), or 41 (§ 15.2-4100 et seq.), the agreement shall be subject to the review and implementation process established by Chapter 34 (§ 15.2-3400 et seq.). The development right shall be taxed as taxable real estate by the local jurisdiction where the sending property is located, until such time as the development right becomes attached to a receiving property, at which time it shall be taxed as taxable real estate by the local jurisdiction where the receiving property is located.

1. The terms and conditions of the density transfer agreement as provided in this subsection shall be determined by the affected localities and shall be approved by the governing body of each locality participating in the agreement, provided the governing body of each such locality first holds a public hearing, which shall be advertised once a week for two successive weeks in a newspaper of general circulation in the locality.

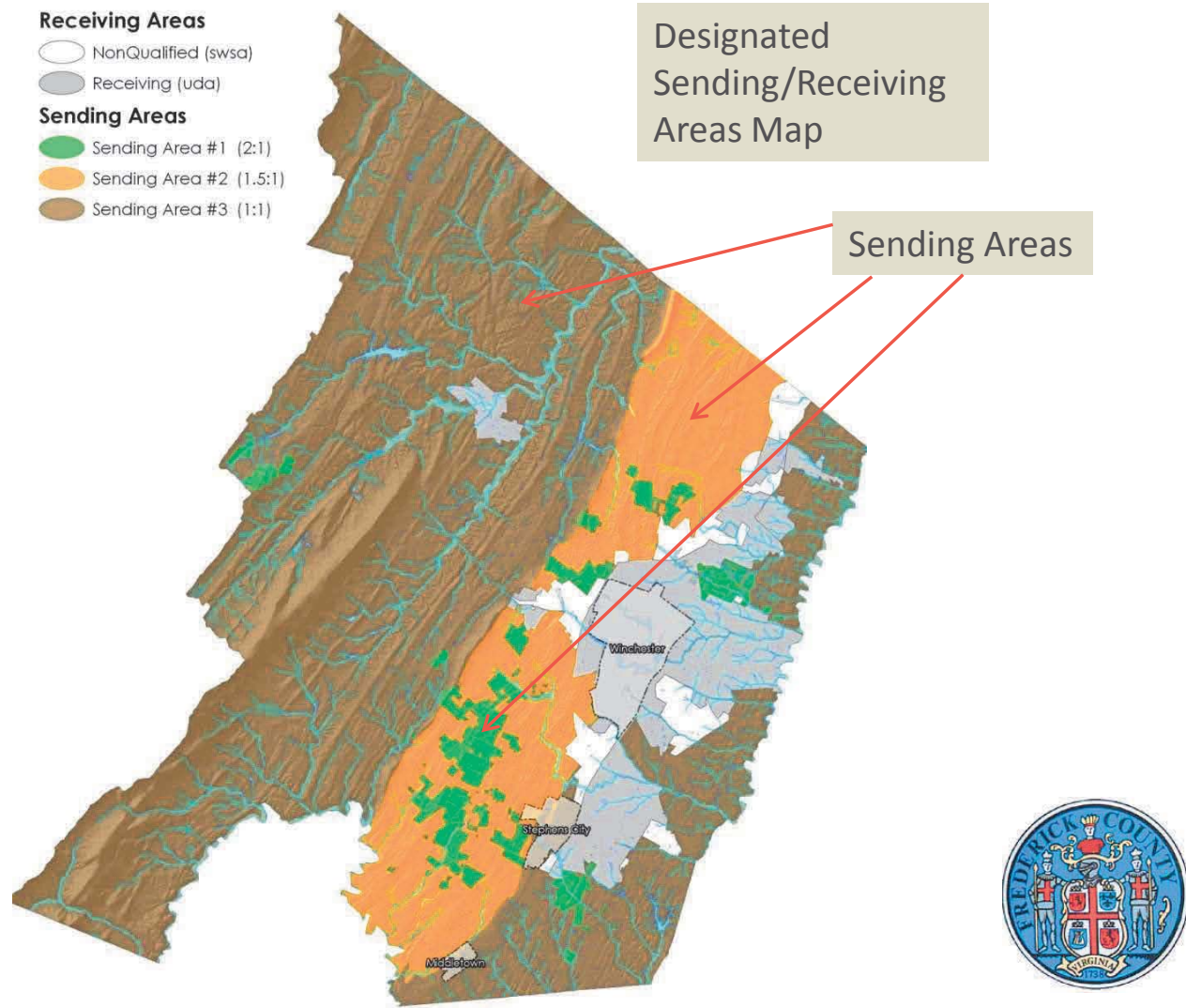
2. The governing bodies shall petition a circuit court having jurisdiction in one or more of the localities for an order affirming the proposed agreement. The circuit court shall be limited in its decision to either affirming or denying the agreement and shall have no authority, without the express approval of each local governing body, to amend or change the terms or conditions of the agreement, but shall have the authority to validate the agreement and give it full force and effect. The circuit court shall affirm the agreement unless the court finds either that the agreement is contrary to the best interests of the Commonwealth or that it is not in the best interests of each of the parties thereto.

3. The agreement shall not become binding on the localities until affirmed by the court under this subsection. Once approved by the circuit court, the agreement shall also bind future local governing bodies of the localities.

2006, c. 573;2007, cc. 363, 410;2009, cc. 413, 731;2010, c. 239;2012, c. 512;2014, c. 527;2019, c. 701.

The chapters of the acts of assembly referenced in the historical citation at the end of this section may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Sending/Receiving Area Map



Attachment 2