

MEMORANDUM

TO: Julia Wyman and Julia Knisel
FROM: Kate Kramer
DATE: December 17, 2010
RE: Coastal Preservation and Transferred Development Rights

INTRODUCTION

As climate change moves the coastline in, public access and rights to public beaches in Massachusetts may conflict with private ownership of land. Additionally, wetlands are threatened, losing wetlands may become extinct habitat, limiting their ability to flourish and contribute to the ecosystem. This memorandum will explore the potential use of transferred development rights programs in Massachusetts as a means for adaptation to climate change. First, this memorandum will explore states' duty to maintain public access to waterfront areas, and how some states are beginning to use transferred development rights to do so. Second, this memorandum will discuss the current and potential uses of transferred development rights in Massachusetts. Lastly, this memorandum will explore whether transferred development rights constitute a taking of property by the government. This memorandum is intended to be read in conjunction with *Massachusetts Transfer of Coastline Development Rights Bylaw*, a model bylaw prepared to demonstrate how an effective transferred development rights bylaw can be incorporated into individual town bylaws.

DISCUSSION

Under the public trust doctrine, a government has a fiduciary duty, as trustee, to maintain public access to water resources and preserve tidelands in their natural state. The doctrine protects these resources both for recreational and ecological value to the public. The doctrine dates back thousands of years and is based on the Institutes and Digest of Justinian and the Institutes and Journal of Gaius. Additionally, in the United States the doctrine has been a recognized state duty since the country's founding. Today, states are in jeopardy of breaching

their fiduciary duties to the public if policies concerning public access to the coast do not change as sea levels rise.

Although it is difficult to evaluate all the potential future impacts of climate change, current increased erosion due to climate change and human impacts are already demonstrating a loss of public beaches. Some former public beaches are becoming submerged and the only access points are privately held land, resulting in the beaches no longer being useable for public recreational purposes such as sunbathing and beach strolling.¹ Even individuals fortunate enough to own beachfront property risk losing their land, and therefore, their financial investment, because as the sea levels rise, coastal erosion and flooding threaten existing development. As the climate continues to change, private landowners will be in jeopardy of losing their land to the sea, or at a minimum, losing their ability to develop their land. One solution Massachusetts should consider implementing to defuse this problem is a Transferred Development Rights (“TDR”) program. A TDR program will help remedy any potential future impacts that climate change and rising sea levels may have on public coastal access and private property rights.

I. THE GENERAL STRUCTURE OF TRANSFERRED DEVELOPMENT RIGHTS PROGRAMS

TDRs are a land use tool that allow private landowners to voluntarily, and with town approval, restrict the use of their land for preservation purposes, such as public use and environmental protection, in exchange for compensation for their development and land use rights.² Land use rights are transferred to a TDR bank system³ and/or are bought by a

¹ See <http://www.coastal.ca.gov/climate/access.html> (last visited Dec. 17, 2010).

² Hanly-Forde, Jason, George Homsy, Katherine Lieberknecht, Remington Stone, Transfer of Development Rights Programs: Using the Market for Compensation and Preservation, 3, <http://www.government.cce.cornell.edu/doc/html> (last visited Dec. 17, 2010).

³ If a bank is used, it does not have to be a financial bank, typically it is just a third party, such as a town, that holds and administers the sale of development rights. Id. at 6.

developer.⁴ In a typical TDR structure, land is designated into one of two areas: receiving areas, where development will have little incremental adverse impact, environmental or otherwise; and sending areas, the critical areas earmarked for protection, such as coastal land.⁵

Municipalities typically implement TDRs to further their goals of protecting critical land within existing zoning law (that may not protect against extreme coastal erosion), to develop and revitalize city centers, and to ensure compensation for private landowners without requiring them to expend funds from presumably limited and constricted town budgets.⁶

Additionally, there are incentives and benefits for both the private landowners in the sending areas and the developers in the receiving areas to participate in a TDR program. Due to the voluntary structure of TDRs, property owners have a choice to sell their land rights or to develop their land within local regulations.⁷ Choosing to sell their rights ensures landowners that they will receive top resale value for their development and land use rights as they currently exist; rights that may otherwise diminish as sea levels rise and the ability to develop the land ceases to exist.

Developers typically enjoy a higher return on their investment and a likelihood that the value of their property will remain strong because receiving areas are usually close to existing development that encourages community growth, such as schools and places of employment. Additionally, TDRs typically include the right to build in a fashion that zoning laws may not otherwise allow, such as upward expansion, lesser lot sizes, and buffer zones.⁸

TDRs promote the preservation of critical land, allow for fair compensation for land use rights, and promote a greater investment return on existing property rights. Therefore, there are

⁴ Id.

⁵ Pruetz, Rick, Beyond Takings and Givings, Chapter 1, Arje Press (2003); Pruetz, Rick: What is TDR?, <http://www.beyondtakingsandgivings.com/tdr.html> (last visited Dec. 17, 2010).

⁶ Hanley-Forde, *supra* note 2 at 8; Pruetz, Rick, Beyond Takings and Givings, Chapter 1, Arje Press (2003).

⁷ Hanley-Forde, *supra* note 2 at 2.

⁸ Id. at 7- 8.

several reasons TDRs should be utilized by municipalities, private landowners in sending areas, and developers.

II. MASSACHUSETTS AND TDR PROGRAMS

In Massachusetts, TDRs have been a tool utilized to: protect natural resources and open space for public use; preserve public access to the coast; and secure land for future municipal uses and growth. In 1984, Falmouth promulgated the first Massachusetts coastal TDR bylaw to protect coastal ponds and public drinking water. In the Falmouth bylaw, which is still effective today, landowners in the sending areas can participate in the TDR program by fulfilling certain minimum requirements, such as obtaining a special building permit, being a contiguous parcel of land that meets minimum acreage requirements, and recording “a covenant . . . prohibiting the construction or placement of structure” with the Registry of Deeds.⁹ To encourage residential developers to buy TDRs in Falmouth, higher density housing developments (ranging from 1.2 to 1.4 times denser than the typical development allowed) are permitted in the receiving area.¹⁰

Massachusetts recommended TDRs as a means to preserve agricultural areas, protect coastal ponds and public drinking water, and develop town centers and cities, all through a development program called Smart Growth. The Smart Growth Program contained ten sustainable development principles designed to achieve its goals:

1. Concentrate development and mix uses in order to revitalize city and town centers by using existing structures rather than building new structures on open land that are compact and conserve land.
2. Advance equity by promoting equitable sharing of benefits and burdens of development to ensure social, economic, and environmental justice for present and future generations.
3. Make efficient decisions through clear, predictable, coordinated, and timely regulatory and permitting processes.
4. Protect land and ecosystems by preserving open spaces.
5. Using natural resources wisely by reducing waste and pollution.
6. Expand housing opportunities for all income levels and household types that are near jobs, transit, and other services.
7. Provide transportation choice to among other things conserve fuel and improve air quality;

⁹ Falmouth, Mass., Zoning Bylaw §§ 6945; 6950 (2); 6960; 6965 (1984).

¹⁰ The same incentive is not offered to development in business and industrial zones. *Id.* at § 6961.

8. Increase job and business opportunity in industry clusters.
9. Promote clean energy to reduce greenhouse gas emissions and consumption of fossil fuels.
10. Plan regionally to develop areas such as downtowns, village centers, brownfield sites, and sites with public transportation and conserve land such as wetlands and areas with rare or endanger species.¹¹

By applying the Smart Growth principles, development plans will be consistent with town preservation needs while ensuring compliance with zoning and other regulations.¹² Additionally, to promote higher density housing and mixed-use development, Massachusetts offers two statewide financial incentives: funding for building a threshold number of units and educational funding for school-age children that move into these districts as a result of the new development.¹³ This demonstrates that Massachusetts favors development in dense areas over open spaces and recognizes that incentivizing developers and towns increases the likelihood of successful land use programs.

Despite all of these virtues, TDR has been met with mixed reviews. Critics charge that private property owners will not want to participate in programs because sea level will not rise enough during their lifetime to impact them personally. Additionally, some property owners believe that it is the government's responsibility to protect their land. Furthermore, skeptics claim that developers will not want to participate in TDR because there is not enough incentive, and towns will not want to participate in TDR because it will cause an increase in population that results in rises in costs for public services (such as law enforcement, wastewater treatment, and education). Additionally, towns may be reluctant to take on the role of "banker," allocating receiving area properties for sending area properties. However, should sea level rise at an accelerated rate, landowners are taking a risk of decreased property value by not participating in TDRs. With continued sea level rise, a potential buyer of a property on the coast, with or

¹¹ Smart Growth, http://www.mass.gov/envir/smart_growth_toolkit/pages/intro-to-SG.html. (last visited Dec. 17, 2010).

¹² *Id.*

¹³ Mass. Gen. Laws Ch. 40R § 9 (LexisNexis 2010); Mass Gen. Laws Ch. 40S (LexisNexis 2010); Smart Growth, *supra* note 11.

without an existing structure, may foresee a lack of further development potential on the property in the future, and thus, the buyer will offer a lesser price. Landowners who participate in the TDR program maintain the land's resale value, and receive just compensation for the development and land use rights that they bought with the property. Additionally, while there will be landowners who chose not to participate in the TDR program, there will also presumably be landowners that do chose to participate in the program. The likelihood that some landowners will participate ensures that public access and habitats will be preserved on some level, leading to the state fulfilling their trustee duties (such as diligently protecting the trust purpose).

Similarly, developers participating in TDR programs receive economic and business efficiency benefits. Developers are often allowed to build more units per plot of land, and are subjected to less stringent zoning and permitting requirements, leading to faster completion of projects and incremental units to sell, which results in more revenue, less expenses, and more profit for their businesses.¹⁴

The County of Barnstable (“the County”) on Cape Cod, views TDRs as one way to preserve land for various uses, including maintaining public coastal access.¹⁵ As a result, the County created a model bylaw for towns to utilize in developing their own coastal preservation bylaws, that, similar to both Falmouth’s and the Smart Growth initiatives, contains options for developers and landowners to ensure that landowners are being justly compensated and developers are being rewarded for participating in the TDR program.¹⁶

In the County model bylaw, developers can restrict land from future development that is equal in acreage and “quality, character, and development potential” to that land they propose to

¹⁴ Smart Growth, *supra* note 11.

¹⁵ Barnstable County, Mass., Transfer of Development Rights Bylaw/Ordinance, §§ 1.0, 6.0 (1998).

¹⁶ Barnstable County includes the towns of Barnstable, Brewster, Bourne, Chatham, Dennis, Eastham, Falmouth, Harwich, Mashpee, Orleans, Provincetown, Sandwich, Truro, Wellfleet, and Yarmouth.

develop.¹⁷ If a developer chooses this option he is rewarded with a density bonus similar to Falmouth’s incentive program, where higher density housing is permitted.¹⁸ Landowners have the option to: develop a property under existing zoning laws; restrict all or part of a development site through a TDR program; or restrict all or part of a different site that is still within the preservation area that is equal in acreage and “quality, character, and development potential” to the land they propose to develop.¹⁹ Similar to Falmouth’s bylaw, to incentivize developers to buy TDRs in the receiving areas, the County bylaw suggests awarding housing density bonuses of up to 1.5 times the normal density requirements.²⁰

Plymouth enacted a TDR bylaw in 2004 to “foster the fiscal well being” along the coast.²¹ To ensure that the landowner is receiving just and fair compensation for his property, Plymouth compares the cost to develop the lots, unlike Falmouth and the County. In Plymouth, a preliminary plan, prepared by a licensed land surveyor and civil engineer, identifies the number of lots and the costs to develop the lots in both the sending and receiving areas.²² Then, the planning board evaluates the difference between the total projected lot sales and the total projected infrastructure costs (as set forth in the appraisal) and divides it by the average assessed value of a buildable lot located in the Rural Residential District.²³ If the Planning Board approves the transfer, developers are rewarded for participating in the TDR program by the project being exempt from Plymouth’s Building Permit Limitations and Residential Development Phasing provisions.²⁴ This also is an incentive to developers because there are fewer permits and phases to complete, resulting in faster completion of projects, and thus, more

¹⁷ Id. at § 4.1.

¹⁸ Id. at § 3.2.

¹⁹ Id.

²⁰ Id. at §§ 5.1; 6.1.

²¹ Plymouth, Mass., Transfer of Development Rights Bylaw, Article VII § 205-70 (A) (2004).

²² Id. at (D)(3)-(4).

²³ Id. at (D)(5)(i)-(ii).

²⁴ Id. at (D)(6).

profit.

The County bylaw also encourages inter-town transfers. Regional inland towns should participate in TDR programs through inter-town transfers because the programs will help develop their towns and encourage the growth of business, while preserving and protecting coastal resources.²⁵ For a successful regional plan, multiple towns must agree to a TDR program. Some towns may be reluctant to sign on to such a program because they do not perceive benefit to their citizens. However, the benefits for *all* towns include: public access to the coast; development and revitalization of town centers; state funding for education; and property value compensation for owners of coastal land that could eventually be lost as sea levels rise. Additionally, towns will have ample money from additional taxes paid by the additional business and residential development to increase any necessary public infrastructure and services.

The proposed Massachusetts Coastal TDR bylaw, *Massachusetts Transfer of Coastline Development Rights Bylaw*, calls for towns to designate overlay districts to a town's standard zoning map showing the areas that are particularly sensitive to impact public access to the coast (sending area) and the intended development areas (receiving area).²⁶ Additionally, similar to Plymouth, the proposed bylaw requires that a licensed civil engineer and land surveyor assist a developer in determining the number of lots available in the sending area and developing plans for the receiving area.²⁷ Also, similar to Plymouth, the proposed bylaw calls for the sender to enter into a permanent conservation restriction that is held in trust by the town for the benefit of the public.²⁸ Therefore, the proposed bylaw will promote concentrated development in city and

²⁵ *Id.* at § 8.1.

²⁶ Smart Growth, http://www.mass.gov/envir/smart_growth_toolkit/pages/intro-to-SG.html (last visited Dec. 17, 2010).

²⁷ Plymouth, Mass., Transfer of Development Rights Bylaw, Article VII § 205-70 (D)(6).

²⁸ Plymouth, Mass., Transfer of Development Rights Bylaw, Article VII § 205-70 (D)(3)-(4).

town centers, equitable sharing of benefits and burdens of development and regional planning, protection of open spaces and public access to the coast, and increased job and housing opportunities where transit and other services are present.²⁹

Similar to Falmouth, to encourage developers to utilize TDRs, the proposed bylaw has a density incentive of up to 1.5 times the number of developable lots.³⁰ To promote landowners to participate in the TDR, the proposed bylaw has a safeguard of allowing a town's planning board to review the transfer and offer right of refusal if the transfer does not represent fair compensation for the development and land use rights, ensuring just compensation to the landowner.

Therefore, coastal TDRs will further the ten Smart Growth principles, protect coastal public access to the coastline for present and future generations, promote the development of dense land in community centers, and ensure economic benefits for landowners and developers.

III. TDRs DO NOT RISE TO THE LEVEL OF A TAKING

A central debate with TDR has centered on whether a property taking occurs in the sending area. Under the Fifth Amendment of the United States Constitution, a taking occurs if the government's actual or effective acquisition of private property occurs without just compensation to the landowner.³¹ However, a TDR is not a taking because landowners are justly compensated with land and landowner privileges determined to be equitable to the land they are retreating from. Furthermore, private property and landowner privileges are shifted to another, more long-term suitable area, creating a more sustainable ownership.³²

The United States Supreme Court has ruled that excessive regulation may constitute a taking if it is so burdensome to the landowner that it has the same effect as if there was an actual

²⁹ Id.

³⁰ Falmouth, Mass., Zoning Bylaw § 6961.

³¹ U.S. Const. amend. V; Black's Law Dictionary, 700 (3rd Pocket Ed. 2006).

³² Id.

physical taking.³³ This can occur when there is a total loss of property use and a landowner is denied any economically viable use of his land, or when there is a failure to advance a legitimate governmental interest in the governmental acquisition of the property.³⁴ Likewise, in Suitum v. Tahoe Regional Planning Agency, the Court recognized that TDRs are useful and implied that TDRs are not a taking because they do not effectively render the land rights useless because the rights are transferred to another location for use.³⁵

Just compensation is fulfilled when a landowner receives the fair market value³⁶ of the land taken and when any financial burden on a property owner is mitigated. In Penn Central Transportation v. New York City, the Court found that TDRs do not mitigate the financial burden on the property owner if the allocated uses are not reasonably “a full and perfect equivalent for the property taken.”³⁷ Furthermore the Court, in Penn Central Transportation, implied that TDR credits have value; and therefore, are compensation for a property transfer.³⁸ Thus, TDRs do not constitute a taking when credits are a full and perfect equivalent of property taken.³⁹ Likewise, in Suitum, Justice Scalia, in a concurring opinion, declares that TDRs are of value.⁴⁰ Thus, the Supreme Court is receptive to TDR programs and has implied on more than one occasion that TDRs do not constitute a taking.

CONCLUSION

Thus, this model bylaw will fulfill the state’s fiduciary duty to preserve and protect public access to the coast while ensuring compensation for landowners and promoting the Smart Growth principles of developing town and city centers to create jobs and increase economic

³³ Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Penn. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

³⁴ Id.

³⁵ Suitum v. Tahoe Reg’l Planning Agency, 520 U.S. 725, 747 (1997).

³⁶ Fair market value does not include such things as emotional value and attachment to the land.

³⁷ Penn. Central Transp. v. New York City, 438 U.S. 104, 137 (1978).

³⁸ Id.

³⁹ Id.

⁴⁰ Suitum, 520 U.S. at 750.

growth.⁴¹

⁴¹ U.S. Const. amend. V; Suitum, 520 U.S. at 747; Smart Growth, http://www.mass.gov/envir/smart_growth_toolkit/pages/intro-to-SG.html (last visited Dec. 17, 2010)