

Transfer of development right zoning gets boost from Legislature

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Amendments to the Zoning Act (G.L. c. 40A) aren't usually included in legislation authorizing the sale of general obligation bonds by the state. Nevertheless, that happened this year when the Legislature amended the Zoning Act to promote the greater use of "transfer development rights" zoning. The amendments were hidden deep within the 103 sections of a \$2.4 billion environmental bond bill signed into law by Gov. Baker last August. *See* St. 2018, c. 209, §§ 15, 16.

What is transfer of development rights zoning?

The American Planning Association defines transfer of development rights ("TDR") zoning as "the yielding of some or all of the right to develop or use one parcel of land in exchange for a right or use another parcel of land more intensively." Municipalities generally use TDRs when they seek to preserve land in an undeveloped or less-developed state without financially compensating property owners. Instead, municipalities will allow property owners higher densities or more intensive uses elsewhere in the community. Because property owners are granted the ability to transfer their right to develop that land to another parcel, they technically have not suffered a taking of land without compensation, even if the use of one parcel of land is forbidden.

History of TDR Zoning

The Supreme Court first recognized the use of transfer of development rights zoning when it upheld New York City's Landmarks Preservation Law, which sought to protect historic buildings such as Grand Central Terminal. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *See also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997).

TDR zoning is not a new concept in Massachusetts. Communities such as the City of Northampton and the Town of Groton have long provided for the transfer of land development rights

between adjacent parcels acting pursuant to their “home rule” authority under the state Constitution. Explicit authority to adopt local zoning ordinances or bylaws that authorize the transfer of development rights of land within or between districts by special permit was granted to municipalities by the Legislature in 2002. *See* St. 2002, c. 197. The zoning bylaws of the towns of Acton and Townsend are good examples of TRD zoning adopted pursuant to that amendment to the Zoning Act.

Community interests and planning

Throughout the nation, local and regional governments are using TDRs to promote and preserve a variety of community interests. Northampton’s ordinance is an example of how transfer of development rights zoning can be used to preserve local farming without depriving farmers of the potential development value of their land. That city’s ordinance permits the planning board to grant an owner of land in the Farms, Forests and Rivers District a special permit to transfer the right to develop residential units from that district to the Planned Village District. *See* City of Northampton Ordinance, c. 350, §17.3.

In Northampton, the transfer of development rights is contingent on placing a permanent conservation restriction or agricultural preservation restriction on the land from which the development rights were transferred (sending parcel). The restriction limits the use of the land to agriculture, forestry, or undeveloped open space for passive recreation only, or deeding the land to the city as a permanent park or for conservation. The ordinance provides that development rights may be transferred from a sending parcel and held indefinitely before being assigned to a receiving parcel for the development of residential units.

2018 Amendments

Chapter 209 of the Acts of 2018 amended the Zoning Act to both define TDRs and make them more flexible. Section 15 of that act amended G.L. c. 40A, §1A, by adding new definitions of TDRs and TDR zoning. “Transfer of development rights” is defined as “the process by which the owner of a parcel may convey development rights, extinguishing those rights on the first parcel and where the owner of another parcel may obtain and exercise those rights in addition to the development rights already existing

on that second parcel.” “Transfer of development rights zoning or TDR zoning” is defined as “zoning that authorizes transfer of development rights by permitting landowners in specific preservation areas identified as sending areas to sell their development rights to landowners in specific development districts identified as receiving areas.”

Section 16 amended G.L. c. 40A, §9, to authorize zoning ordinances or bylaws that allow transfer of development rights to be permitted as of right without the need for a special permit or other discretionary zoning. This change permits municipalities to choose whether to allow transfer of development rights in their local zoning ordinance or bylaw by special permit or by right.

For landowners and developers, the opportunity to use TDRs as a matter of right lessens the uncertainty of a deal that would otherwise carry more risk if they had to apply for a discretionary permit. The hope is that this change will make TDRs more attractive for landowners and developers and give cities and towns another means by which to advance smart growth planning. This policy rationale also motivated the Legislature’s amendment to the Zoning Act in 2000 to authorize zoning ordinances or bylaws allowing cluster development either by special permit or by right. *See* St. 2000, c. 148.

Effective Date

An emergency preamble attached to Chapter 209 made these amendments to the Zoning Act effective upon the governor’s approval on August 9, 2018.