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TDR's - The New Gold

by

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I. INTRODUCTION – WHAT ARE TDRs

Transferable Development Right ("TDRs") for some local governments have become the "new gold." TDRs create a transferable right of development in a parcel of land that, as a result of regulation, has a diminished use, thus allowing a local government to balance its interest in promoting a certain goal, i.e., preservation of land or landmarks, with a landowner's interest in developing his parcel. TDRs defy the traditional boundaries of zoning laws by allowing a landowner purchasing such rights to build in excess of that which zoning restrictions on the property normally allow. Essentially, this transfer of zoning rights has its foundation and stems from the bundle of rights theory of property law where a landowner has rights such as possession, exclusion, and the transfer of land.[1] TDRs recognize these rights are separable and a TDR program takes advantage of the distinction between the rights of ownership versus the right to develop.[2] A TDR program is valuable because it allows city officials, on the one hand, to create new markets full of development potential and suitable for growth in conjunction with growth management strategies, while on the other hand, either fostering a goal that might not otherwise be achieved, such as affordable housing, or ensuring the protection of areas that contain historic landmarks or require environmental shelter-all without causing a taking.[3]

II. THE HISTORY OF TDRs & THE KEY CASES

From the first occurrence of TDRs in 1968[4], the practice has progressively evolved from simple plans that only allowed the transfer of development rights from one lot to an adjacent lot to the complex and innovative land use planning tools that they are today[5]. First generation TDRs began in New York with the Landmarks Preservation Law.[6] Historically, the city had its first zoning regulations in 1916 with major amendments occurring in 1961 and, finally, the 1968 amendment implemented the Landmarks Preservation Law.[7] The objective of this law was to

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[1] See Margaret Walls & Virginia McConnell, Resources for the Future, Transfer *of Development Rights in U.S. Communities: Evaluating Program Design, Implementation, and Outcomes,* (2007), http://www.rff.org/RFF/Documents/ Walls_McConnell_Sep_07_TDR_Report.pdf

[2] See Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* 379-81 (2nd ed. 2003).

[3] See id. at 379.

[4] See William Fulton, et al., *TDR and Other Market-Based Land Mechanisms: How They Work and Their Role in Shaping Metropolitan Growth,* The Brookings Institution Center on Urban and Metropolitan Policy 8 (June 2004); Sarah J. Stevenson, *Banking on TDR: The Government's Role as Banker of Transferable Development Rights,* 73 N.Y.U. L. Rev. 1329, 1334 (1998); Jennifer Frankel, *Past, Present, and Future Constitutional Challenges to Transferable Development Rights,* 74 Wash. L. Rev. 825, 830 (1999).

[5] See Stevenson, supra note 4, at 1333-34; Frankel, supra note 4, at 830-833; Fulton et al., supra note 4, at 8-9.

[6] See Fulton et al., supra note 4, at 8; Stevenson, supra note 4, at 1334.

[7] See Fulton et al., supra note 4, at 8-9; Stevenson, supra note 4, at 1334-35.

preserve historical landmarks, but it also had the effect of diminishing development rights.[8] The TDR program was implemented to compensate the landmark landowners for their unused development rights.[9]

The United States Supreme Court has interpreted TDRs on three occasions.[10] The first major case, *Penn Cent. Transp. Co. v. City of New York*[11] arose from the Landmark Preservation Law.[12] In Penn Central, the owner-developer wanted to build a 53-storey building atop New York's famed Grand Central station.[13] After requesting permission, the owner-developer was denied on the grounds that the station was a historical landmark.[14] The city's position was that New York's standing as a worldwide capital of tourism and business would be threatened if they were not allowed to enact legislation to protect the city's major landmarks.[15] Penn Central asserted that there were similar tall buildings all around Manhattan such that nothing would be diminished by their proposed project.[16] Accordingly, Penn Central argued that prohibiting the development constituted a taking without just compensation in violation of the Constitution.[17] The Court reasoned that although Penn Central's most valuable use of the property had been taken away by the restrictions, the fact that the developer also owned a number of other building sites in Midtown Manhattan, to which the owner-developer's Penn Central development rights could be transferred, prevented a finding that there was a taking.[18] The Court further emphasized that although transferred development rights may have value less than development rights in the original site, this does not automatically amount to a taking without due process of the law.[19] In essence, the Penn Central case gave legitimacy to TDRs as the wave of the future.[20]

The challenge to TDRs did not stop there. In *Fred F. French Investing Co. v. City of New York*[21], there was a huge residential complex located in midtown Manhattan.[22] Within the

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[8] See Stevenson, supra note 4, at 1334; Fulton et al., supra note 4, at 8; Frankel, supra note 4, at 830

[9] See Juergensmeyer & Roberts, supra note 2, at 379.

[10] See Paul Merwin *Caught Between Scalia and The Deep Blue Lake: The Takings Clause and Transferable Development Rights Programs* 83 Minn. L. Rev. 815, 817 (1999); Callies et al., infra note 12, at 513; Fulton et al., supra note 4, at 8-9.

[11] 438 U.S. 104 (1978)

[12] See David L. Callies, et al., Cases and Materials on Land Use 513 (5th ed. 2008); Juergensmeyer & Roberts, supra note 2, at 383.

[13] See *Penn Central*, 438 U.S. at 117.

[14] See id. at 118.

[15] See id. at 109.

[16] See id. at 114.

[17] See id. at 130; Merwin, supra note 10, at 819.

[18] See *Penn Central*, 438 U.S. at 151-52.

[19] See id.

[20] Fulton et al., supra note 4, at 9; For an interesting saga of air rights, see Stephen D. Kowaloff, *Grand Central Zoning Game: Project symbolized Contest between City and Developer,* N.Y.L.J, September 20, 1989 at 33.

[21] 350 N.E.2d 381 (N.Y. 1976)

[22] See id. at 383.

complex, there were two parks rezoned exclusively as being areas open to the public.[23] The owner of the complex was granted TDRs to use elsewhere.[24] However, the TDRs were floating, as they were not tied directly to specific properties.[25] The complex was later sold to a new owner who wanted to build a 50-storey tower in the parks.[26] The owner-developer sought to have the area rezoned, but this request was denied.[27] The Court held that the floating nature of the TDRs failed to secure the economic value of the development rights as they existed when attached to the property, and was, therefore, not a proper allocation of the economic burden since it left just compensation almost up to coincidence.[28] The court further held that to the extent that TDRs are necessary to compensate the owner of the original site, they must be either "in cash, acceptable in kind, or easily translatable to cash." [29]

Unlike the Penn Central case, the regulations that deprived the original site of any possibility of producing a reasonable return (only parks being permitted) and the TDRs were left in "legal limbo" (not readily attachable to any other property), the court felt the Plaintiffs were deprived of property without due process of law. [30]

Finally, there is the *Suitum v. Lake Tahoe Regional Planning Agency*[31] where Mrs. Suitum owned a lot in Lake Tahoe that a land zoning commission gave zero credit, which prohibited her from development of her land because it was located in a stream environment zone.[32] Suitum was given TDRs that would allow her to transfer her development rights to other parcels of land.[33] However, Suitum never attempted to utilize the TDRs, instead, she filed suit for just compensation alleging that the rezoning was a regulatory taking.[34] The lower court granted summary judgment on ripeness grounds, holding that Suitum was required to await the decision of an administrative hearing, exhausting all remedies, before bringing suit.[35] The Supreme Court remands the case and holds that she only needs the administrative hearing if there

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[23] See id.
[24] See id. at 384.
[25] See id. at 388.
[26] See id. at 383.
[27] See id. at 388
[28] See id.
[29] See id.
[30] Judge Breitel later wrote about his own decision and distinguished the two cases because he pointed out that the owner in the Fred French case had been offered a very high price for the TDR somewhere else in mid-Manhattan but by the time the case was decided, it was overbuilt and the value had dropped, hence the "taking." Query: Should constitutionality (like market value) be tied to market conditions? See, Breitel, *A Judicial View of TDR*, 30 Land Use L. & Zoning Digest, No.2 at 5 (1978).

[31] 520 U.S. 725 (1997).
[32] See id. at 728.
[33] See id. at 731.
[34] See id.
[35] See id.

is no adequate alternative for compensation.[36] In his concurrence with Justices O'Connor and Thomas, Justice Scalia agreed with the majority on the ripeness issue, but tackled the issue lurking in Penn Central, asserting that the availability of TDRs can only determine what compensation is owed to a landowner.[37] Scalia stated that there must, first, be a determination of whether there was a taking before the court can decide whether TDRs are just compensation for the alleged taking.[38]

These were the key cases that created a framework within which to construct a TDR program.

III. HOW AND WHERE TDRs WORK

Because development rights may be removed from property, it logically follows that these same rights may be added to other properties. A TDR program resembles tradable air and water programs because it creates a market through the reassignment of rights.[39] These rights are transferred by permission of the local government through a TDR "bank" also administered by the same agency.[40]

In TDR program transactions, there are "sending"[41] parties and "receiving"[42] parties that are established by the local government beforehand.[43] The "sending" area refers to the land from which the development rights are transferred.[44] Conversely, the "receiving" area refers to the land that is allowed more development than its underlying zoning generally permits as a result of the "senders" transferred rights.[45] Next, local governments legally separate the development rights from the property.[46] This is accomplished by putting a procedure into place to effectuate and document the transfer from the "sender" to the "receiver."[47] The owner of the "sender" site is then required to record a restrictive covenant permanently running with the land that reflects the forfeiture of its development rights.[48] Probably the most difficult aspect of creating such a

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[36] See id. at 744.
[37] See id at 746-50.
[38] For a helpful analysis of Suitum, see E. Holloway &Donald C. Guy, *The Utility and Validity of TDR Under the Takings Clause and the Role of TDR in the Takings Equation Under Legal Theory*, 11 Penn St. Envtl L. Rev 45 (2002).
[39] Fulton et al., supra note 4, at 7.
[40] See for example, Stevenson, supra note 4.
[41] See Juergensmeyer & Roberts, supra note 2, at 381; Fulton et al., supra note 4, at 7; Walls & McConnell, supra note 1, at 22.
[42] See Juergensmeyer & Roberts, supra note 2, at 382; Fulton et al., supra note 2, at 8; Walls & McConnell, supra note 1, at 22.
[43] See Juergensmeyer & Roberts, supra note 2, at 381; Walls & McConnell, supra note 1 at 22.
[44] See Fulton et al., supra note 4, at 7-8; Walls & McConnell, supra note 1, at 22.
[45] Id.
[46] See Merwin, supra note 10, at 832.
[47] See Merwin, supra note 10, at 832; Fulton et al., supra note 4, at 22-23 components of a successful TDR program; Walls & McConnell, supra note 1, at 9.
[48] See Juergensmeyer & Roberts, supra note 2, at 381.

program, though, is assessing the market between buyers and sellers and "valuing" the TDRs. The success of a TDR program depends largely on the presence or absence of incentives for a market to develop. "Sending" and "receiving" parties are left to reach an equilibrium that allows the newly created markets to balance.[49] A TDR bank is an extremely useful mechanism in addressing this last issue. The Sunny Isles Beach program discussed below was successful in calibrating the market by using all available planning tools including a bonus program and creating a bank that served as an intermediary that bought and sold TDRs. The bank is now serving as a holding mechanism in these less than jubilant economic times.

Another successful TDR program that utilized a TDR bank was achieved in the South Street Seaport Historic District of New York because preservation and redevelopment areas were specifically designated; the areas had high land values, and hence preserved the landmarks and facilitated development.[50]

Seattle, Washington has a successful program aimed at creating affordable housing wherein development rights can be transferred from low income "senders" to more developer "receivers" with the purpose of preserving low income sites, while at the same time, bringing in more profitable buildings.[51] The program necessitated a simultaneous transfer of development rights and utilized a TDR bank that absorbed what excesses that the private market could not. Another reason for this program's success was that the demand for development rights always exceeded the supply.[52] This was a strategically achieved market condition because they executed initiatives to ensure that they demand always exceeded the supply of development rights.

In Montgomery County, Maryland a TDR program was created to protect farmlands, agricultural, and rural areas.[53] This involved the transfer of development rights from rural farmlands to areas ripe for development in closer proximity to Washington, D.C.[54] The program's success was attributed to incentives, a comprehensive plan that included analysis of the economy and incorporated information on the relevant real estate market, and a relatively easy procedural process. Public support of the TDR program was also very high.

The New Jersey Pinelands TDRs are an example of a regional TDR program.[55] It was developed to preserve an environmentally unique agricultural area.[56] The Pinelands TDR program was a success because of a well-thought out comprehensive plan, incentives, and public support.[57] Some of the elements of both the Montgomery and Pineland plans that contributed to their success were the measures taken to ensure marketability of development rights (using TDR

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[49] See Fulton et al., supra note 4, at 22-23; Juergensmeyer & Roberts, supra note 2, at 382-83.
[50] See Stevenson, supra note 4, at 1345-48.
[51] See Frankel, supra note 4, at 833-35.
[52] See id.
[53] See Juergensmeyer & Roberts, supra note 2, at 379;
[54] See Walls & McConnell, supra note 1, at 11; Stevenson, supra note 4, at 1355-58 : Fulton et al., supra note 4, at 15-17.
[55] See Walls & McConnell, supra note 1, at 11; Stevenson, supra note 4, at 1355-58; Fulton et al., supra note 4, at 15-17.
[56] See Fulton et al., supra note 4, at 18-20.
[57] See id.

banks) and careful limitations in development in the receiving areas to avoid adverse impacts.

There are many other successful programs but some have been subjected to challenges that question for example: where their authority is derived from, whether they constitute an antitrust violation, and whether the program and bank can cross over into a governmental abuse.[58] Such challenges are described next.

IV. LEGAL ISSUES THAT MAY BE RAISED IN A TDR PROGRAM

Legal challenges to TDR programs have arisen in the form of takings and due process actions.[59] Land use regulation can be considered a taking, but a two-pronged test has been established to determine whether, in fact, there has been a taking.[60] First, one must determine whether the regulation advances a legitimate state interest.[61] Second, a determination must be made as to whether the regulation denies all viable use of the land.[62] Landowners can also assert challenges under the Tenth Amendment[63] concerning whether the regulation is a valid exercise of the state's police power.[64] However, the state can defend on the grounds that the regulations are in furtherance of the general welfare of the citizens.[65] Notably, takings claims are rarely, if ever, successful in TDRs cases because the regulations do not remove all economic viability from the subject land.

Another avenue of challenge to TDRs arise in "just compensation" claims dealing with the fairness in value of such programs.[66] There has not been any case law specifically addressing this issue, although the opinions in *French*[67], *Penn Central*[68], and *Suitum*[69] provide general guidelines for determining whether TDRs constitute just compensation.[70] Because value is attached to TDRs, it may constitute just compensation, thereby, avoiding a takings claim.[71] While there is no definitive answer regarding this issue, Justice Scalia's concurring opinion in *Suitum*[72], alludes to the idea that TDRs should be evaluated solely for a determination of just compensation.[73] As such, the determination of whether there was a taking is a wholly separate inquiry.

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[58] See Stevenson, supra note 4, at 1358-59.
[59] See Frankel, supra note 4, at 836.
[60] id.
[61] See Stevenson, supra note 4, at 1368.
[62] id.
[63] U.S. Const. amend. X.
[64] See Frankel, supra note 4, at 846; *Village of Euclid, OH v. Ambler Realty Co.* 272 U.S. 365, 395 (1926).
[65] id.
[66] See Merwin, supra note 10, at 837.
[67] 350 N.E.2d 381 (1976).
[68] 438 U.S. 104 (1978).
[69] 520 U.S. 725 (1997).
[70] See Merwin, supra note 10, at 838.
[71] See Merwin, supra note 10, at 840.
[72] See *Suitum,* 520 U.S. at 745.
[73] See id.

On the flip side of the takings debate, however, under certain circumstances, the owners of the land in the receiving area might raise objections. If, for example, a city restricts allowable development in the receiving area to an amount below what might otherwise normally be permitted so that with the acceptance of the TDRs it can be increased to the original allowable amount, such owners might argue that a TDR program is simply a mechanism for a municipality to raise funds by "selling zoning" in the receiving districts with no particular benefit to them. The Sunny Isles Beach Florida TDR program discussed below addressed this issue by creating a intensity and density bonus program rather than restricting or reducing the receiving area zoning.[74]

There may be another issue with regard to the fact that TDR banks are usually run by a local government and this has given rise to antitrust claims.[75] An outspoken critic of has voiced concerns about the utilization of government-run TDR bank.[76] Forcing all sellers to trade through a TDR bank may result in competition that is illegally reduced thereby potentially violating antitrust laws.[77] Pooling of resources by sellers and buyers also results in antitrust violations.[78] This critic asserts that the South Street Seaport TDRs were a valid program because it permitted the seller to sell their TDRs to third parties, not just the TDR bank.[79] While states are exempt from federal antitrust law, local governments are not sovereign and the Supreme Court has held that municipalities are not automatically entitled to immunity afforded to states.[80] However, there are several programs that protect local governments. These programs including the Sunny Isles Beach program described below (which also uses a bank that allows the holders of TDRs to sell to third parties), while presumed valid, have never been tested or upheld in courts, so it is imperative that practitioners are aware of this issue.

With regard to due process challenges, there may be some validity to such a claim if the landowner is forced to solely bear the economic burden of the regulation associated with TDR programs. Once again, however, these claims are mitigated by the development and use of TDR banks that now undertake much of the economic burden of TDR programs.

A final issue that arises within the context of TDRs is exaction. *Nollan v. California Coastal Comm.*[81] stands for the proposition that you need to show an essential nexus between the harm alleged and the condition of the land.[82] The court used a regulatory takings analysis instead of determining whether there was a legitimate state interest at play.[83] *Dolan v. City of*

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[74] For a case addressing issues raised by a landowner in a receiving areas but upholding a TDR scheme, see *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1988). Also see *Fisher V. Guiliani* 720 N.Y.S.2d 50 (App. Div. 2001) rejecting challenge by receiving area that the TDR scheme was not within legitimate zoning power.

[75] See Stevenson, supra note 4, at 1362.

[76] See Stevenson, supra note 4, at 1363.

[77] See id.

[78] See id.

[79] See id.

[80] See Stevenson, supra note 4, at 1363-65.

[81] See 483 U.S. 825 (1987).

[82] See *Nollan*, 483 U.S. at 837.

[83] See Frankel, supra note 4, at 847-48.

Tigard[84] established a standard of high scrutiny where rough proportionality must be made, with the city assessing an individualized determination of whether the required dedication is related in both nature and extent to the impact of the proposed development.[85] The *Nollan*[86] and *Dolan*[87] decisions may create an additional challenge.

In *Barancik v. County of Marin*[88], a Plaintiff ranch owner in Marin County, challenged a TDR program claiming the program was unconstitutional based on *Nollan*.[89] After adoption of reduced density zoning requirements, *Barancik* was summarily denied several requests to develop his ranch.[90] The county implemented a TDR program whereby development rights could be purchased and accumulated as long as the development was within the confines of the community wide plan.[91] *Barancik* objected to the cost of the development rights and did not acquire any development rights.[92] *Barancik* suggested that the TDR program was essentially an exaction with no essential nexus between the TDR program and a legitimate government purpose.[93] The court held that preservation of agricultural land is rationally related to a legitimate government purpose and payment to a private owner, as opposed to a state, precludes the finding of an exaction.[94]

It is clear that none of these challenges is insurmountable. Like many other successful programs, the Sunny Isles Beach TDR program addressed most, if not all, such issues.

V. SUNNY ISLES BEACH, FLORIDA TDR PROGRAM: TURNING "STRAW INTO GOLD"

The Sunny Isles Beach TDR Program attempts to address all possible legal challenges as outlined above and achieve the City's three most pressing land planning goals: 1) encourage redevelopment of a blighted aging community; 2) secure revenues for replacement and upgrading of the City's aging infrastructure and 2) fill the need for open space, parks, education and recreational facilities. Sunny Isles Beach is a fairly new city (incorporated in 1997) located north of Miami Beach on the same barrier island in the northeast corner of Miami-Dade County. It is a small, intensely zoned, urbanized municipality with approximately 20,000 people living along 2.2 miles from north to south along A1A (Collins Avenue) bounded on the East by the Atlantic Ocean and on the West by the Intracoastal Waterway. In the County's comprehensive plan, this area is located within the urban development boundary zone and also inside an area that is exempted from the requirements of transportation concurrency. In other words, from a planning perspective, this is a region in which the Florida Department of Community Affairs was

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[84] See 512 U.S. 374 (1994).
[85] See *Dolan*, 512 U.S. at 391; See Frankel, supra note 4, at 849-51.
[86] See *Nollan*, 483 U.S. at 837.
[87] See *Dolan*, 512 U.S. at 391.
[88] See 872 F.2d 834 (1989).
[89] See *Barancik*, 872 F.2d at 835.
[90] See id.
[91] See id.
[92] See id.
[93] See id.
[94] See id.

encouraging urbanization and growth as a countermeasure to the suburban sprawl that had been occurring in Miami- Dade County.[95]

In 1997, when the charter for the incorporation of this heretofore unincorporated area of Miami-Dade County was adopted by the electorate, this area was populated with older apartment buildings, housing a large population of senior citizens, a number of rundown, aging beachfront motels, hosting a variety of illegal activities, including prostitution, drug dealing, and other assorted criminal pursuits. Policing was sparse, code enforcement virtually nonexistent, and zoning was high density, however, there was little infrastructure to support that density and whatever was there was aging. Good future land use planning was absent.

Incorporation allowed this area to immediately assume responsibility for and address the policing, zoning, and code enforcement issues. The burgeoning challenge for this newly incorporated city, however, became how to create better planning, encourage redevelopment, and replace the aging infrastructure and overall blighted conditions. In particular, it was the vision of the founding father of this city, who originally hailed from Chicago, to create more open space and recreational, cultural and educational amenities and programs for the aging population, the increasing numbers of immigrants moving to the City, as well as the incoming younger families (looking for affordable apartments and tired of the commutes generated by suburban sprawl). To him, the challenge was to do all of this without imposing a greater tax burden on the City's elderly citizens generally living on fixed incomes. This meant attracting new real estate investment that would create additional property tax revenues and/or generating other kinds of revenue sources.

Being the original drafter of the charter and the first city attorney, I, along with the City Manager and the planners accepted this challenge. We started with the fact that the State of Florida in the 1970's had instituted a growth management program that required local governments to adopt their own comprehensive plans consistent with the overall State plan. Consequently, the City began to tackle these issues in a visioning process that solicited and generated public support and eventually resulted in a City Comprehensive Plan. As one of the goals, policies, and objectives of Future Land Use Element, the Plan contained the following language:

> "The City shall encourage the transfer of development rights from lands acquired by municipal government after the date of June 16, 1997 for uses other than residential or commercial purposes but including public open space, parks, and recreational facilities, community facilities, public educational and cultural facilities, and public utilities to development sites within the Town Center and commercial and resort districts abutting Collins Avenue to promote redevelopment and unified planning and design of sites, mixed uses, and the revitalization of the economic base of Sunny Isles Beach... to prioritize density increases where practical for production of affordable housing."[96]

At the direction of the City Commission, using this language, we crafted land development regulations designed to implement it including the attached ordinance. The ordinance created a program that, without altering the density cap set by the City and approved

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[95] *Eastward Ho!: Revitalizing South Florida's Urban Core* see, www.sfrpc.com/eho/report.htm.
[96] The City of Sunny Isles Beach Comprehensive Plan, Adopted 2000, Future Land Use Element, Objective 1, Policy 1 I, p. 6

by the State of Florida, designated sending and receiving sites, methods of valuation, a TDR bank for both public and privately owned TDRs, and limitations on the receiving sites to accept increased density, among other things. Probably the most innovative creation in this program, however, was allowing the City itself to sever the zoning rights from the land that was purchased by the City to create open space on the west side of Collins (non waterfront properties) and to sell those rights to developers of lands within the receiving district which were waterfront at the fair market square foot value of the receiving site. Developers in the receiving district could increase their density up to thirty (30%) percent. The price of these TDRs, while extremely profitable to the City, was still significantly lower than the cost of land and clearly would still result in huge profits to the developers. Thus, this TDR program turned "straw into gold" for the City and encouraged unprecedented redevelopment.

The Ordinance[97] is self-explanatory and we believe addresses all the legal issues discussed in this paper. The original version as well as today's codified regulations as they have evolved are attached to this paper. The oral presentation will go into detail on how it worked but, suffice it to say, to date, this TDR program has created approximately thirty-five ($35,000,000) million dollars in revenues which has, and continues to, fund nine (9) new parks, a wide array of amenities and recreational programs, a K-8 school where in partnership with the Miami-Dade County school system, the City provided the land and the School Board built and now operates the facility.

In addition, the roads have been repaved, the land and a decorative façade for a brand new electrical substation has been provided to FP & L, aging underground water, sewer, and electrical conduit pipes have been replaced, storm water drainage programs have been instituted in this low lying area between two bodies of water, and dozens of other public works projects have been initiated, including the under grounding of all electrical lines works.

There was indeed "gold" in these TDRs.

[97] Section 265-23, Code of the City of Sunny Isles Beach, Florida

ORDINANCE NO. 2004-193

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF SUNNY ISLES BEACH, FLORIDA, AMENDING SECTION 265-23 OF THE LAND DEVELOPMENT REGULATIONS, RELATING TO TRANSFER OF DEVELOPMENT RIGHTS; PROVIDING FOR REVISED DEFINITIONS; PROVIDING FOR ESTABLISHMENT OF SENDER SITES, TDRS TRANSFERRED, FEES; PROVIDING FOR TDRS TRANSFERRED FROM CITY OWNED SENDER SITES; PROVIDING FOR TDRS TRANSFERRED FROM PRIVATELY-OWNED SENDER SITES AND A REVISED APPLICATION PROCESS TO CONSOLIDATE THE SITE PLAN REVIEW PROCESS AND THE TRANSFER OF DEVELOPMENT RIGHTS PROCESS; PROVIDING FOR ESTABLISHMENT OF RECEIVER SITES; PROVIDING FOR FEES; PROVIDING FOR TRANSFERABLE DEVELOPMENT RIGHTS FROM CITY OWNED SENDER SITES, COST OF TRANSFERABLE DEVELOPMENT RIGHTS FROM CITY OWNED SITES; PROVIDING FOR DEVELOPMENT RIGHTS FROM PRIVATELY OWNED SENDER SITES; PROVIDING FOR COST OF TRANSFERABLE DEVELOPMENT RIGHTS ISSUED BY PRIVATE OWNERS FROM PRIVATELY OWNED SENDER SITES; PROVIDING FOR DEVELOPMENT LIMITATIONS UPON RECEIVING SITES; IDENTIFYING LAND INELIGIBLE FOR CONSIDERATION AS RECEIVING SITES; PROVIDING FOR PROCEDURES PERTAINING TO THE PURCHASE OF DEVELOPMENT RIGHTS FOR USE ON A POTENTIAL RECEIVING SITE; PROVIDING FOR REVIEW AND RECOMMENDATION BY PLANNING AND ZONING ADMINISTRATOR, SCHEDULING OF HEARING, REVIEW BY THE CITY COMMISSION AND RECORDING OF DOCUMENTS; PROVIDING FOR TDR BANK; ESTABLISHMENT OF TDR BANK; DEPOSITS AND WITHDRAWALS FROM TDR BANK AND LIMITATIONS; PROVIDING FOR A REPEALER; PROVIDING FOR SEVERABILITY; PROVIDING FOR AN EFFECTIVE DATE

THE CITY COMMISSION OF THE CITY OF SUNNY ISLES BEACH, FLORIDA, AFTER CAREFUL CONSIDERATION, HEREBY ORDAINS AS FOLLOWS:

Section 1. Amendment of Section 265-23 of the Land Development Regulations.

Section 515 of the City's Land Development Regulations is hereby amended as follows: Section 515 shall hereinafter be known as Section 265-23 of the Code of the City of Sunny Isles Beach and shall read as follows:

1. 265-23 (1). Purposes and Applicability.

This section is intended to provide for greater flexibility in the pattern of development by allowing for the transfer of development rights (unused floor area and density) from one parcel to another where the City Commission determines that (a) such transfers will assist in the renewal, rehabilitation, and redevelopment of commercial, Town Center and beachfront property and that (b) preservation and enhancement of open space, natural

resources, historical and archeological resources, preservation of view corridors, concentration of public parking, or provision of educational or other public purpose objective may be achieved through such shifts in the development pattern.

2. 265-23 (2) Definitions:

As used in this section, the following terms shall have the meanings indicated:

Administrator: shall mean the Planning and Zoning Administrator.

Bank Statement: shall mean the statement used to record deposits and withdrawals from the TDR Bank, as herein defined, in accordance with this Section.

Comprehensive Plan: The Comprehensive Plan of the City of Sunny Isles Beach, Florida, as adopted October, 2000.

LDR : Land development regulations of the City of Sunny Isles Beach, adopted August 15 2003, as the same may be amended from time to time, consistent with the Comprehensive Plan of the City of Sunny Isles Beach.

Receiving Districts: Areas within the corporate boundaries of the City that are permitted to receive transferable development rights as defined in the City's Comprehensive Plan.

Sending Districts: Any areas within the corporate boundaries of the City that are permitted to transfer development rights as permitted by and as set forth herein.

Sever: The removal of a development right from property rights possessed by an owner of real property. The term connotes a removal or separation, in perpetuity, as distinguished from a restriction or limitation, which may be overridden, deleted or is subject to a time frame.

Transferable Development Rights: A development right is an appurtenant right of land ownership that has an economic value separate from the land itself, subject to reasonable regulation by local government under its police power, and that may be transferred from the land from which the right is severed (sender site) to another piece of land (receiver site). Once severed, if only a portion of the development rights attributable to a sender site is transferred to a receiving site, the remaining development rights may be deposited in a TDR Bank in accordance with the provisions of this section. Development rights transferred shall be composed of square footage and units and may be made through gift or sale of those units. These rights are sometimes referred to herein as "TDR'S".

3. 265-23.3 Establishment of Sending and Receiving Sites; TDRs Transferred; Fees.

a. Establishment of Sender Sites. Any property in any zoning district, upon the approval of the City Commission, in its sole discretion, after a public hearing, may be eligible as a sending

site, subject to the terms, conditions and limitations of this Ordinance.

b. TDRs transferred from City Owned Sender Sites.

Upon the adoption of this Ordinance, the City shall deposit all development rights (in terms of square footage and units) from its sender sites in the TDR Bank for distribution and transfer in accordance with all of the procedures and limitations of this ordinance except the five year limitation set forth in Sec. 23.3(c)(5) below.

All monies received by the City in connection with the transfer of development rights from City-owned sites shall be utilized for capital improvements only.

In no case shall the transfer of any TDR's from a City Owned Site currently designated as park sites interfere with the use of those public parks and said parks shall forever remain as public parks.

c. TDRs Transferred from Privately-Owned Sender Sites.

(1) Application Process.

Owner of prospective sender site shall submit a complete application to the City Planning & Zoning Administrator. A complete application shall include but not be limited to: the applicable fee, names, addresses and signatures of all fee simple owners of the prospective sender site (which shall require disclosure of ownership as more fully set forth in Section 7 (a) of this Ordinance), a current survey, current environmental audit, a deed conveying good, marketable and insurable title and a commitment of title insurance, all in a form acceptable to the City Attorney, and such other materials that staff may reasonably request. Staff shall review the application, prepare written findings and recommendations, and place the application on the City Commission agenda for its consideration at a public hearing. The application shall be subject to the same notice and hearing requirements required by the LDR's for zoning applications.

(2) Public Hearing.

After a public hearing, the City Commission shall determine, in its sole discretion, whether the proposed sending site is acceptable for use by the City, in accordance with the expressed intent of this Ordinance.

(3) Conveyance of Privately Owned Sender Sites to City.

Upon approval by the City Commission the sender site shall be conveyed to the City unencumbered, free and clear of any or all liens and mortgages, after correction of title defects and outdoor code violations, if any and payment of any outstanding fines or fees owed to the City, all in a manner and form acceptable to the City Attorney. All taxes, fees and all other charges, including but not limited

to assessments, on an approved sender site shall continue to be paid by the owner until the date the title is conveyed to the City. After title to the approved sender site has been conveyed to the City in the manner described in this subsection, the City shall authorize the release of the TDR's and shall record such release in its records and in the Public Records of Miami-Dade County, Florida, as set forth herein. No use shall be made of the TDR's from the approved sending site until documentation evidencing such release of TDR's has been recorded.

(4) Development Limitations on Privately Owned Sender Sites.

The approved sender site shall then remain undeveloped forever, except where development accomplishes a public purpose consistent with the Comprehensive Plan. Such allowable development includes, but is not limited to, the creation of public parks, Baywalks, plazas and/or open space, the conservation of historic, sensitive, environmental and archeological resources, the protection and enhancement of waterfront, public access corridors not otherwise required by the Land Development Regulations, the erection of public parking garages to serve the town center or the development of public educational facilities and other essential public facilities, including but not limited to recreational, public works, maintenance and operational facilities on the sender site. The foregoing limitation shall not apply to governmental sites designated in section 265-29(13)(4) hereinbelow, as may be amended from time to time.

(5) Limitation on use of TDRs from Approved Sender Sites.

The owners, successors, heirs or assigns of approved sender sites will be permitted to bank, in accordance with section 265-23.7.2 hereunder, any Development Rights from the sender sites for a five (5) year period from the date of the City Commission meeting at which the subject site was approved as a sender site. At the expiration of the five (5) year period, the TDR's from the approved sender sites shall expire and become extinguished and unusable.

d. Establishment of Receiver Sites:

All property within the Town Center, Business District abutting Collins Avenue and the Mixed Use High Density/Resort zoning districts are herewith established as Receiver Districts. Receiver sites may be developed as otherwise permitted by the Land Development Regulations, as may be amended from time to time, in combination with the development rights available to the site, provided that the overall density achieved is consistent with, and does not exceed, the overall density and intensity allowable by the Comprehensive Plan. If an approval was granted prior to the adoption of this Ordinance, pursuant to which a permit has been issued, that site shall not be available as a receiver site, unless the prior approval is revoked and a new development order is secured hereunder.

e. **Fees.**

Application fees for consideration of applications for establishment of sender sites and receiver sites and for TDRs shall be established by the City Commission. The applicant shall be responsible for all applicable application. Hiring of consultants to review data including engineering, planning, legal, appraisal, technical or environmental issue, shall be chargeable to the applicant in accordance with Ordinance No. 2001-132.

4. 265-23.4 Calculations.

a. Transferable Development Rights from City owned Sender Sites:

In the case of City owned sites, calculations will be based on the zoning permissible at the time of incorporation and prior to the City's acquisition of the site for public purposes. The square footage of a transferable development right for a unit shall be calculated and determined by dividing the permitted floor area of the sending site by the permitted density on said sending site. Only whole units may be purchased and transferred to the receiving site. The foregoing, however, is subject to all limitations set forth herein and in the City's Comprehensive Plan.

b. Cost of Transferable Development Rights from City owned Sites:

At the time of approval of the TDRs, the City Commission may consider the acceptance of the appraised land value for the receiving site as follows: the cost for a square foot of development right shall be determined by the market value of the receiver site as determined by a current real estate appraisal prepared for the City by an appraiser, selected by the City Manager, but paid for by the owner of the receiving site. The appraisal amount shall then be divided by the permitted floor area ratio including bonuses on the receiver site. Since the issuance of city-owned TDRs shall be from a TDR Bank, as described herein, the formula set forth in 265-23.4(a) above shall be applied to the totality of the banked square footage divided by the allowable density based on the underlying zoning.

c. Transferable Development Rights from Privately Owned Sender Sites.

In the case of privately owned sites, the City shall determine the floor area ratio and density on the site based on the existing zoning. In cases where a privately owned site of greater than three (3) acres of frontage along Collins Avenue, in the Town Center, is offered to the City, for the purposes set forth herein, the City may accept said sender site and may provide to the owner the maximum density of 80 units per acre and a maximum floor area ratio of 3.75 provided the owner of the sender site shall either commit to provide public improvements in accordance with a design approved by the City Commission or shall fund said improvements as a condition of and no later than the actual transfer of the TDRs. Notwithstanding anything to the contrary, the property owner rendering the site shall have up to five (5) years to utilize such development rights in accordance with Section 3 c. (5) hereinabove. It is understood that the development rights to be transferred to a receiving site shall be approved by the City Commission through the site plan approval process as specified herein.

d. Cost of Transferable Development Rights Issued by Private Owners From Privately Owned Sender Sites:

The price of TDRs from approved privately owned sender sites shall be determined by the private owners.

5. Section 265-23.5

a. Development Limitations Upon Receiving Sites.

i. Within the Receiving Districts, development rights shall be limited by a combination of the underlying zoning regulations, approved bonuses and allowable development rights transferable to the land in the receiving districts. Notwithstanding anything to the contrary, and in accordance with the Comprehensive Plan, neither the transferable density or intensity of permitted uses shall ~~not~~ exceed thirty percent (30%) of the maximum residential density permitted on the receiver site and in no case shall the resulting density bonus increases on any given receiver site exceed the number of dwelling units attainable on the sender site(s) under these plan provisions so as to assure no net increase in City-wide residential dwelling unit Comprehensive Plan capacities. Furthermore, the maximum amount of undeveloped floor area that may be transferred from a sender site to a site within the Receiving District shall not exceed (30%) of the receiving site based on the base floor area ratio plus bonuses allowable at the time of the adoption of the Land Development Regulations.

ii. Parking and all other requirements of the LDRs shall be required in accordance with any additional density acquired through the transfer of development rights.

iii. All TDR's purchased or transferred shall be used within 24 months from the date of rendition of the authorizing City Commission resolution, or all such TDR's shall thereafter be fully extinguished.

iv. The transfer of development rights to a receiving site will not decrease required open space, buffers, setbacks or cause a request for variances or any other adverse impact to surrounding site or increase allowable height, if applicable.

v. No property upon which a prior zoning approval was granted may apply for transferable development rights unless a site plan application is made for the entire site.

6. **Section 265-23.6**

Land Ineligible for Consideration as Receiving Sites.

No transferable development rights shall be computed for any land outside the Town Center, Business District abutting Collins Avenue and the Mixed Use High Density resort zoning districts/ or for any land which has received a density or floor area variance.

7. **Section 265-23.7**

Procedures Pertaining to the Purchase of Development Rights For Use on a Potential Receiving Site.

a. Application. An applicant for the transfer of development rights to a potential receiving site shall file a complete application with the Planning and Zoning Administrator, together with a complete site plan application.

i) Every application shall contain:

a) the names, addresses and signatures of all fee simple owners of all properties included in the receiving site. "Fee simple owner," for the purpose of this requirement, shall be defined as all parties having a financial interest, either direct or indirect, in the subject matter of the application. Such disclosure shall include, but not be limited to, disclosure of all natural persons having an ownership interest, direct or indirect, in all properties involved.

b) the street address, folio number and legal description of each parcel of land included in the potential receiving site, a description of adjacent lands, including land uses, densities, circulation systems, public facilities and the impact, if any, of the requested transfer of development rights.

c) a current survey, plans, including but not limited to, a site plan elevation, landscaping, an area analysis of surrounding properties including but not limited to street elevations, height of buildings, surrounding floor area ratio and density and construction schedules;

d) a site conditions map including a three dimensional model of the proposed development potential (site plan) without TDRs and a separate three dimensional model showing the development potential utilizing the proposed transfer of development rights;

e) status of financing, if applicable; evidence of ownership;

f) amount of consideration, including purchase price of the property, an executed closing statement, or, an executed copy of the purchase and sale contract if Applicant is a contract purchaser;

g) a general description of the manner in which the project shall be constructed, impact if any of the transfer of development right to adjacent properties, copies of any covenants affecting the receiver and sending sites; and

h) any other agreements required by the Land Development Regulations and this Section or that may be reasonably requested by the City Manager or other reviewing agencies.

b. Review and Recommendation by Planning and Zoning Administrator. The Planning and Zoning Administrator shall review the application and shall forward its written findings of facts and recommendations to the City Commission together with all site plans.

The application shall be subject to the same notice and hearing requirements applicable to zoning applications under the Land Development Regulations.

c. Scheduling of Hearing. Prior to the scheduling of a hearing to consider a potential sending site, or to consider the transfer of development rights to a receiver site, all required documentation and all required fees, as described in this Section, shall have been submitted to the City in a timely fashion and reviewed and approved by City staff.

d. Review by City Commission. The City Commission after reviewing the application and the written findings and recommendations of the Planning and Zoning Administrator may, in its sole discretion, approve with modifications or conditions, approve less than the full amount of requested TDRs, in which case the Applicant shall return to the City Commission with revised site plan for its further consideration or deny the application for transfer of development rights. The issuance of a resolution approving such transfer shall automatically change the TDR Bank Statement.

The City Commission shall review the application based on the following criteria, provided however that approval of the application, in whole or in part, is solely within the Commission's discretion:

i. The project is consistent with the Comprehensive Plan and will not reduce the levels of service set forth in the plan.

ii. The project is consistent with the intent of this Ordinance entitled "Purposes and Applicability."

iii. The project meets all other criteria set forth in the LDRs.

iv. The transfer of development rights is desirable on the individual site being considered for purposes of enhancing overall development and the sender site is dedicated to public ownership or preserved for public purpose to a conservation easement or other recordable mechanism, creating view corridors, improving pedestrian environment, public right-of-way and publicly owned property, accomplishing the public purpose that is consistent with the Comprehensive Plan and this Ordinance. The sender site shall be dedicated to the public by the transfer of fee title to the City in a form acceptable to the City.

v. The development on the receiving site shall be designed to produce an environment of desirable character and harmony with the neighborhood, resulting

in a superior quality of development and open space relationships with high standards for recreational and parking areas. The transfer of these rights shall create a logical and superior pattern of development, which would not otherwise occur if the property were developed without them.

It is understood in the case of privately owned sending sites that are donated to the City, if the TDRs from that site are banked in the TDR Bank more particularly described in Section 8 hereinbelow, subject to all applicable conditions, limitations and other criteria, including but not limited to those contained in the Comprehensive Plan and this Ordinance, applications for approval of developments using development rights withdrawn from the TDR bank account of a sender site donor through the site plan approval process, shall be approved by the City Commission using good faith.

e. Recording of Documents. Prior to issuance of a building permit, documentation evidencing the transfer shall be recorded against the titles to both the sending and receiving sites, as may be applicable, in the Public Records of Miami-Dade County, Florida. An irrevocable covenant running against the receiving site, which shall include the additional FAR(TDR), required parking and all other conditions, restrictions, and obligations imposed as conditions of the approval by the City Commission and the LDRs , shall be recorded against the title to the receiving site, in the Public Records of Miami-Dade County, Florida. The covenant and all other documents recorded pursuant to this Section shall include a warning that the approval of the TDRs shall be extinguished, become null and void and shall be of no further force nor effect in the event no building permit is issued for the receiving site within twenty-four (24) months from the date the Resolution is rendered, and shall contain a statement by which the owner(s) of the receiver site shall agree to bind itself, its successors and assigns with regard to all conditions, restrictions, and obligations contained therein, and, further, shall include a statement prohibiting any changes, amendments, modifications or releases to the document without the prior written approval of the City Manager and the City Attorney after approval by the City Commission at a public hearing. All documents recorded pursuant to this section shall be in a form acceptable to the City Attorney and shall be recorded at the expense of the applicant. Copies of documents recorded pursuant to this Section shall be delivered to the City by the applicant.

8. Section 265-23.7.2

TDR Bank; Establishment of TDR Bank; deposits and withdrawals from TDR Bank; Limitations;

The City Commission may by resolution adopt procedures for the establishment of a "TDR Bank" (the Bank") which shall be maintained and conducted by the City Manager or its designee for the deposit and withdrawal/purchase by private developers of development rights. A fee shall be established by resolution to be paid by the depositor or purchaser for each transaction.

No one applicant may purchase more than 50,373 square feet of City-owned TDRs remaining in the Bank at the time of application and further providing that no less than 100,000 square feet of

City-owned transferable development rights shall remain in the bank for potential future use by the City for the specific benefit of the City and for City-designated purposes.

A developer may purchase TDRs from the TDR Bank only pursuant to a City Commission resolution issued by the City Commission in its sole discretion pursuant to Sec. 265-23.7 and all other applicable provisions of this Section. The Bank Statement attached as Exhibit "A" to each City Commission resolution authorizing the TDR's shall reflect approved sites and the units of TDR's attributable to each site. The Bank Statement shall be amended administratively and dated each time transfers are made in accordance with this Section.

a. Privately owned sender sites. Development rights not utilized at the time title to a privately owned sender site is conveyed to the City shall be deposited in the TDR Bank as provided in this subsection. Withdrawals from the Bank must occur no later than five (5) years after the initial deposit is made, in accordance with Section 265-23.3 (c)(5) hereinabove. Each depositor at time of initial deposit, shall execute a written waiver of its rights, if any, to assert any claim to those development rights except as specifically permitted by the terms of this Ordinance. All requirements of this Section shall be met prior to the actual transfer (withdrawal) of development rights.

Section 2. Repealer.

All ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed except that this amendment shall not apply to previously approved TDR's which transfers shall be accomplished in accordance with the terms of the ordinance in effect at the time of said transfer.

Section 3. Severability.

If any provision of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction such provision shall be deemed a separate, district, and independent provision and such holding shall not affect the validity of the remaining provisions.

Section 4. Effective Date.

This Ordinance is effective ten (10) days after its adoption on second reading.

PASSED and **ADOPTED** on first reading the 15th day of January, 2004.

PASSED and **ADOPTED** on second reading this 19th day of February, 2004.

Norman S. Edelcup

Norman S. Edelcup, Mayor

ATTEST:

Jane A. Hines, City Clerk

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

Lynn M. Dannheisser, City Attorney

Moved by: Commissioner Brezin

Second by: Commissioner Thaler

VOTE: 5-0

Mayor Norman S. Edelcup	(yes) ✓	(no) ____
Vice Mayor Gerry Goodman	(yes) ✓	(no) ____
Commissioner Roslyn Brezin	(yes) ✓	(no) ____
Commissioner Daniel Iglesias	(yes) ✓	(no) ____
Commissioner Lewis Thaler	(yes) ✓	(no) ____

§ 265-18 Administrative site plan review.

§ 265-19 Engineering permits.

§ 265-20 Reviews of building permits.

§ 265-21 Certificates of occupancy.

§ 265-22 Appeals.

§ 265-23 Transfers of development rights; definitions.

[Amended 9-18-2003 by Ord. No. 2003-179; 2-19-2004 by Ord. No. 2004-193; 4-15-2004 by Ord. No. 2004-200; 11-18-2004 by Ord. No. 2004-218; 6-9-2005 by Ord. No. 2005-230]

A.

Purposes and applicability. This section is intended to provide for greater flexibility in the pattern of development by allowing for the transfer of development rights (unused floor area and density) from one parcel to another where the City Commission determines that:

(1)

Such transfers will assist in the renewal, rehabilitation, and redevelopment of commercial, Town Center and beachfront property; and

(2)

Preservation and enhancement of open space, natural resources, and historical and archeological resources; preservation of view corridors; concentration of public parking; and provision of educational or other public purpose objective may be achieved through such shifts in the development pattern.

B.

Definitions. As used in this section, the following terms shall have the meanings indicated:

ADMINISTRATOR
The Planning and Zoning Administrator.

BANK STATEMENT
The statement used to record deposits and withdrawals from the TDR Bank, as herein defined, in accordance with this section.

COMPREHENSIVE PLAN
The Comprehensive Plan of the City of Sunny Isles Beach, Florida, as adopted October 2000.

LDRS
Land Development Regulations of the City of Sunny Isles Beach, adopted December 10, 2002, as the same may be amended from time to time, consistent with the Comprehensive Plan of the City of Sunny Isles Beach.

RECEIVING SITES (ALSO REFERRED TO AS "RECEIVER SITES")
Areas within the corporate boundaries of the City that are permitted to receive transferable development rights as defined in the Comprehensive Plan.

SENDING SITES (ALSO REFERRED TO AS "SENDER SITES")
Any areas within the corporate boundaries of the City that are permitted to transfer development rights as permitted by and as set forth herein provided that such site

shall be deemed by the City Commission to be appropriate or advisable for use as open space, parks, park amenities or recreational facilities or parking for those facilities (hereinafter individually and collectively referred to as "a park" or "parks" as the case may be). Any site to be used for any purpose other than a park may not be treated as a sender site as defined herein, and no transferable development rights may be calculated and transferred therefrom.

SEVER

The removal of a development right from property rights possessed by an owner of real property. The term connotes a removal or separation, in perpetuity, as distinguished from a restriction or limitation, which may be overridden, deleted or is subject to a time frame.

TDR BANK

The record maintained by the City for the deposit and withdrawal/purchase of TDRs.

TRANSFERABLE DEVELOPMENT RIGHTS

A development right is an appurtenant right of land ownership that has an economic value separate from the land itself, subject to reasonable regulation by local government under its police power, and that may be transferred from the land from which the right is severed (sender site) to another piece of land (receiver site). Once severed, all TDRs are technically deemed deposited in the TDR Bank but thereafter, if only a portion of the development rights attributable to a sender site is transferred to a receiver site, the remaining development rights remain deposited in a TDR Bank in accordance with the provisions of this section. Transferable Development Rights means the maximum floor area ratio (square footage) and density (dwelling units) exclusive of variances that would be permitted to be transferred by the property's zoning on the date of the transfer approval which will be calculated and allocated by a formula developed by the City. These rights are sometimes referred to herein as "TDRs".

C.

Establishment of sender sites; transfer of TDRs.

(1)

Establishment of sender sites. Any property in any zoning district, upon the approval of the City Commission, in its sole discretion, after a public hearing, may be eligible as a sending site, subject to the terms, conditions and limitations of this section.

(2)

TDRs transferred from City-owned sender sites. The City shall deposit all development rights (in terms of square footage and dwelling units) from its sender sites, as they are defined hereunder, in the TDR Bank for distribution and transfer in accordance with all of the procedures and limitations of this section except the five-year limitation set forth in § 265-23C(3)(f) below and specifically as limited by the following:

(a)

All monies received by the City in connection with the transfer of development rights from City-owned sites shall be utilized for capital outlays and improvements only.

(b)

In no case shall the transfer of any TDRs from a City-owned site currently designated as park sites interfere with the use of those public parks, and said parks shall forever remain as public parks.

(c)

TDRs may not be transferred from any parks that existed within the boundaries of the City on the date of the City's incorporation; provided, however, TDRs from properties acquired by the City subsequent to the date of incorporation and which were or will be developed and utilized as parks shall be calculated based on the underlying zoning existing at the time of the City's acquisition of said parks, and may be severed and transferred from those such sites acquired by the City to the TDR Bank for subsequent sale or use by the City.

(3)

Privately-owned sender sites.

(a)

Application process for sender sites. The owner of a prospective sender site shall submit a complete application to the Administrator. A complete application shall include but not be limited to: the applicable fee; names, addresses and signatures of all fee simple owners of the prospective sender site (which shall require disclosure of ownership as more fully set forth in § 265-23F(1) of this section); a certificate of resolutions and agreements from Miami-Dade County, a current survey; current environmental audit; a deed conveying good, marketable and insurable title; and a commitment of title insurance, all in a form acceptable to the City Attorney, and such other materials that staff may reasonably request. After all required documentation and all required fees have been submitted to the City in a timely fashion, staff shall review the complete application, prepare written findings and recommendations, and place the application on the City Commission agenda for its consideration at a public hearing. The application shall be subject to the same notice and hearing requirements required by the LDRs for zoning applications.

(b)

Establishment of TDRs.

[Amended 1-19-2006 by Ord. No. 2006-243]
[1]

The City shall determine the floor area ratio and density including bonuses on the proposed site based on the existing zoning at the time the application is filed.

[2]

In cases where a privately owned sender site within the Town Center or a site abutting Collins Avenue is offered to the City as a sender site, the City Commission, in its sole discretion, may consider accepting said sender site and may provide to the owner the maximum density of 80 units per acre and a maximum floor area ratio of 3.75, provided that:

[a]

The application of this provision shall not increase the overall density on any given site in violation of the terms of the Comprehensive Plan; and

[b]

The owner of the sender site shall, as a condition of and no later than the actual transfer of the TDRs, either commit to provide public improvements in accordance with a design approved by the City Commission or shall fund those improvements and pay all required bonus payments associated with the site.

(c)

Public hearing. After a public hearing, the City Commission shall determine, in its sole discretion, whether the proposed sending site is acceptable for use by the City, in accordance with the expressed intent of this section.

(d)

Conveyance of privately owned sender sites to City. Upon approval by the City Commission, the sender site shall be conveyed to the City unencumbered, free and clear of any or all liens and mortgages, after correction of title defects and outdoor code violations, if any, and payment of any outstanding fines or fees owed to the City, all in a manner and form acceptable to the City Attorney. All taxes, fees and all other charges, including but not limited to assessments, on an approved sender site shall continue to be paid by the owner until the date the title is conveyed to the City. After title to the approved sender site has been conveyed to the City in the manner described in this subsection, the City shall authorize the release of the TDRs and shall record such release in its records and in the public records of Miami-Dade County, Florida, as set forth herein. No use shall be made of the TDRs from the approved sender site until documentation evidencing such release of TDRs has been recorded.

(e)

Development limitations on privately owned sender sites. The approved sender site shall then remain undeveloped forever except as a park.

(f)

Limitation on use of TDRs from approved sender sites. The owners, successors, heirs or assigns of approved sender site shall be required to bank, in accordance with § 265-23G hereunder, all TDRs from the sender site. The banked TDRs may be withdrawn only in compliance with the provisions of this section within a period of no more than five years from the date of the City Commission meeting at which the subject site was approved as a sender site. At the expiration of the five-year period, the TDRs from the approved sender site shall expire and become extinguished and unusable.

D.

Establishment of receiver sites.

(1)

Eligible receiver sites. All property within the Town Center, the Business District abutting Collins Avenue and the Mixed Use High-Density/Resort Zoning Districts are herewith established as receiver sites. receiver sites (a) may be developed as otherwise permitted by the Land Development Regulations, as may be amended from time to time, in combination with the development rights available to the site, provided that the overall density achieved is consistent with, and does not exceed, the overall density and intensity allowable by the Comprehensive Plan and subject to § 265-23D(2) hereinbelow. If an approval was granted prior to the adoption of this section, pursuant to which a permit has been issued, that site shall not be available as a receiver site, unless the prior approval is revoked or abandoned by the applicant and a new development order is secured hereunder.

(2)

Development limitations upon receiving sites.

(a)

Development rights on a receiving site shall be limited by a combination of the underlying zoning regulations, approved bonuses and allowable development rights transferable to the land in the receiving sites. Notwithstanding anything to the contrary, and in accordance with the Comprehensive Plan, neither the transferable density or intensity of permitted uses shall exceed 30% of the maximum residential density permitted on the receiver site, and in no case shall the resulting density bonus increases on any given receiver site exceed the number of dwelling units attainable on the sender site(s) under these plan provisions so as to assure no net increase in City-wide residential dwelling unit Comprehensive Plan capacities. Furthermore, the maximum amount of undeveloped floor area that may be transferred from a sender site to a receiving site shall not exceed 30% of the base floor area ratio plus bonuses allowable on the receiving site pursuant to the LDRs in effect at the time application is filed.

(b)

Parking and all other requirements of the LDRs shall be required in accordance with any additional density acquired through the transfer of development rights.

(c)

All TDRs purchased or transferred shall be used within 24 months from the date of rendition of the authorizing City Commission resolution, or all such TDRs shall thereafter be fully extinguished and there shall be no refunds from the City.

(d)

The transfer of development rights to a receiving site shall not decrease required open space, buffers, or setbacks or cause a request for variances or any other adverse impact to surrounding sites or any increase to allowable height, if applicable.

(e)

No property upon which a prior zoning approval was granted may apply for TDRs unless a site plan application is made for the entire site.

(f)

In no event shall a site plan on a receiver site be approved with any structure exceeding 550 feet in height.

(g)

The foregoing is subject also to all other requirements of this section.

(3)

Land ineligible for consideration as receiving sites. No TDRs shall be assigned or transferred to any land outside the Town Center, the Business District abutting Collins Avenue and the Mixed Use High-Density/Resort Zoning Districts or for any land which has received a density or floor area variance.

(4)

Fees. Application fees for consideration of applications for establishment of sender sites and receiver sites and for TDRs shall be established by the City Commission. The applicant shall be responsible for all applicable application fees. Hiring of consultants to review data including engineering, planning, legal, appraisal, technical or environmental issue, shall be chargeable to the applicant in accordance with Ordinance No. 2001-132.

Editor's Note: See Ch. 267, Art. II, Zoning Application Professional Fees.

E.

Calculation and costs.

(1)

Calculation of density and intensity for TDR Bank calculation. The square footage of a transferable development right for a unit shall be calculated and determined by dividing the permitted floor area of the sending site by the permitted density on said sending site. This calculation will yield a square-foot-per-unit constant. Withdrawals from the TDR Bank shall result in a simultaneous decrease in square footage and units so that both square footage and density will reach zero at the same time. Only whole units may be purchased and transferred to the receiving site. The foregoing, however, is subject to all limitations set forth herein and in the Comprehensive Plan.

(2)

Cost of transferable development rights from city-owned sites:

(a)

Appraisal. At the time of approval of the TDRs, the City Commission shall consider the acceptance of the appraised land value for the receiving site as follows: the cost for a square foot of development right shall be determined by the market value of the receiving site as determined by a current real estate appraisal (updated no more than three months from the date the application is heard at a public hearing) prepared for the City by an appraiser, selected by the City Manager, but paid for by the owner of the receiving site. The appraisal amount shall then be divided by the permitted floor area ratio, including bonuses on the receiver site. Since the issuance of City-owned TDRs shall be from a TDR Bank, as described herein, the formula to be applied shall be the totality of the banked square footage divided by the allowable density based on the underlying zoning.

(b)

Nonrefundable deposit. Approval of a receiving site shall be subject to payment of a nonrefundable deposit of 10% of the cost of City-owned TDRs, which shall be paid within three working days of the date of City Commission approval of the application. Failure to make such deposit within the prescribed time frame shall result in an automatic voiding of the City Commission approval.

(3)

Cost of transferable development rights issued by private owners from privately owned sender sites. The price of TDRs from approved privately-owned sender sites shall be determined by the private owners.

F.

Procedures pertaining to the approval of development rights for use on a potential receiving site.

(1)

Application.

(a)

No receiver site, or site plan on that receiver site, may be approved by the City Commission unless a sender site has first been identified and approved by the City Commission, and the owner of the receiver site commits to purchase TDRs from the City in accordance with § 265-23D(2) above or the owner of the receiver site commits to purchase TDRs already deposited in the TDR Bank from a privately owned sender site. The formal approval by the City Commission of the transfer of the TDRs, whether from City-owned TDRs or TDRs from a privately owned sender site, already deposited in the TDR Bank, shall occur simultaneously with the approval of the receiver site's site plan, although the actual transfer may occur later, but in no event may a building permit on the receiver site be issued until such transfer has actually occurred and been documented as provided hereinbelow.

(b)

An applicant for the transfer of development rights to a potential receiving site shall file a complete application with the Administrator, together with a complete site plan application and all requirements contained in § 265-18 including but not limited to the following. Every application shall contain, as applicable:

[1]

The names, addresses and signatures of all fee simple owners of all properties included in the receiving site. "Fee simple owner" for the purpose of this requirement shall be defined as all parties having a financial interest, either direct or indirect, in the subject matter of the application. Such disclosure shall include, but not be limited to, disclosure of all natural persons having an ownership interest, direct or indirect, in all properties involved;

[2]

The street address, folio number and legal description of each parcel of land included in the potential receiving site, a description of adjacent lands, including land uses, densities, circulation systems, public facilities and the impact, if any, of the requested transfer of development rights;

[3]

A current certified survey, plans, including but not limited to a site plan elevation, landscaping, an area analysis of surrounding properties including but not limited to street elevations, height of buildings, surrounding floor area ratio and density and construction schedules;

[4]

A site conditions map including a three-dimensional model of the proposed development potential (site plan) without TDRs and a separate three-dimensional model showing the development potential utilizing the proposed transfer of development rights (both models shall be constructed of balsa wood, foam board, corrugated or like material);

[5]

Status of financing, if applicable; evidence of ownership;

[6]

Amount of consideration, including purchase price of the property, an executed closing statement or an executed copy of the purchase and sale contract if the applicant is a contract purchaser;

[7]

A general description of the manner in which the project shall be constructed; impact, if any, of the transfer of development right to adjacent properties; and copies of any covenants affecting the receiving site(s); and

[8]

Any other agreements required by the LDRs and this section or that may be reasonably requested by the City Manager or other reviewing agencies.

(2)

Review by Administrator.

(a)

The Administrator shall review the application and shall forward it to the City Commission together with all site plans.

(b)

The application shall be subject to the same notice and hearing requirements applicable to zoning applications under the Land Development Regulations.

(3)

Scheduling of hearing. Prior to the scheduling of a hearing to consider the transfer of development rights to a receiver site, all required documentation and all required fees, as described in this section, shall have been submitted to the City in a timely fashion and reviewed and approved by City staff.

(4)

Review and approval by City Commission. The City Commission after reviewing the application, may, in its sole discretion, approve with modifications or conditions or approve less than the full amount of requested TDRs, in which case the applicant shall return to the City Commission with revised site plan for its further consideration or deny the application for transfer of development rights.

(a)

It is understood that until a transfer of development rights is so approved by the City Commission, said TDRs have no intrinsic or inherent value and cannot be considered as a "matter of right" in the valuation of any potential sender or receiver site. Further, such transfers are subject to all the terms and limitations of this section. It is solely the final approval by the City Commission, in its complete discretion, and based on the criteria set forth herein, that gives rise to any value for TDRs.

(b)

A resolution authorizing the withdrawal and transfer of TDRs from the TDR Bank must be issued prior to such transfer, but, once adopted, the transfer shall automatically change the TDR Bank statement to reflect the approved transaction subsequent to the mandatory recording of such resolution by the City in the official records of Miami-Dade County, Florida, designed to both evidence and ensure the severance of said zoning rights from the sender site and the accrual and accumulation of those development rights to the receiver sites or deposit of same in the TDR Bank. If the TDRs are purchased directly from the TDR Bank, the procedures set forth in § 265-23G(1)(b) shall be followed. The issuance of a resolution approving such transfer shall automatically change the TDR Bank statement.

(c)

The City Commission shall review the application for TDRs based on the following criteria; provided, however, that approval of the application, in whole or in part, is solely within the City Commission's discretion:

[1]

The project is consistent with the Comprehensive Plan and will not reduce the levels of service set forth in the plan.

[2]

The project is consistent with the intent of this section entitled "Purposes and applicability."

[3]

The project meets all other criteria set forth in the LDRs.

[4]

The transfer of development rights is desirable on the receiver site being considered for purposes of enhancing overall development.

[5]

The development on the receiving site shall be designed to produce an environment of desirable character and harmony with the neighborhood, resulting in a superior quality of development and open space relationships with high standards for recreational and parking areas.

(5)

Recording of documents. Prior to issuance of a building permit, documentation evidencing the transfer shall be recorded against the titles to both the sending and receiving sites, as may be applicable, in the public records of Miami-Dade County, Florida and an irrevocable covenant running with the land, which shall include the additional FAR (TDR), required parking and all other conditions, restrictions, and obligations imposed as conditions of the approval by the City Commission and the LDRs, shall be recorded against the title to the receiving site, in the public records of Miami-Dade County, Florida. The covenant and all other documents recorded pursuant to this section shall include a warning that the approval of the TDRs shall be extinguished, become null and void and shall be of no further force or effect in the event no building permit is issued for the receiving site within 24 months from the date the resolution is rendered, and shall contain a statement by which the owner(s) of the receiver site shall agree to bind itself, its successors and assigns with regard to all conditions, restrictions, and obligations contained therein, and, further, shall include a statement prohibiting any changes, amendments, modifications or releases to the document without the prior written approval of the City Manager and the City Attorney after approval by the City Commission at a public hearing. All documents recorded pursuant to this section shall be in a form acceptable to the City Attorney and shall be recorded at the expense of the applicant. Copies of documents recorded pursuant to this section shall be delivered to the City by the applicant.

(6)

Zoning in progress. Notwithstanding Section 2 hereinbelow or any other provision to the contrary in the Land Development Regulations, all applications for transfers of development rights shall be subject to all of the terms and provisions of the TDR Ordinance in effect at the time the application is filed.

Editor's Note: Section 2 of Ord. No. 2005-230 stated that transfers of previously approved TDRs would be accomplished in accordance with the terms of the ordinance in effect at the time of said transfer.
Notwithstanding the foregoing, with respect to bank calculations, unless a site plan has already received Commission approval, all applications (even if filed) shall be subject to the methods of calculating TDRs described in this amendment (5/13/05) after first reading of said amendment.

G.

Establishment of TDR Bank; deposits and withdrawals from TDR Bank; limitations.

(1)

TDR Bank. The City Commission may by resolution adopt procedures for the establishment of a TDR Bank which shall be maintained and operated by the City Manager or designee, for the deposit and withdrawal/purchase by private developers of development rights and shall be retroactive to all TDR transactions.

(a)

An annual fee shall be established by resolution to be paid to the City by the depositor or purchaser for each transaction, including a request to extend the time frame for withdrawals from the TDR Bank.

[Amended 4-16-2009 by Ord. No. 2009-319]

(b)

The TDR Bank statement attached as Exhibit A to each City Commission resolution authorizing the TDRs and the deposit or withdrawal of development rights shall reflect approved sites and the units of TDRs attributable to each site. The TDR Bank statement shall be amended administratively and dated each time transfers are made in accordance with this section.

(c)

A purchaser may withdraw TDRs from a private TDR Bank pursuant to the original City Commission approval of a Receiver and sender site. The adoption of this withdrawal and transfer resolution is ministerial and may not be withheld by the City Commission in accordance with this section unless the terms and conditions of the original approvals have not been met (or otherwise waived) or the City has not received a written and notarized authorization from the owner of the sender site (and seller of all TDRs severed therefrom) and an indemnification and hold harmless of the City from both seller and purchaser as to any and all claims that may arise between the private parties as a result of such transaction. With respect to a purchase of TDRs from the City, a purchaser may withdraw same from the TDR Bank pursuant to a City Commission resolution issued by the City Commission in its sole discretion in accordance with this section.

(2)

Time limitations on private TDR transactions. All development rights from approved privately owned sender sites conveyed to the City shall be deposited in the TDR Bank as provided in this subsection. Withdrawals of TDRs from the TDR Bank must occur no later than five years from the date of the City Commission action approving the applicable sending site in accordance with § 265-23C(3)(f) hereinabove, unless the time frame for withdrawals is extended by resolution. Each depositor, at time of initial deposit, shall execute a written waiver of its rights, if any, to assert any claim to those development rights, except as specifically permitted by the terms of this section. All requirements of this section shall be met prior to the actual transfer (withdrawal) of development rights from the TDR Bank. Private TDRs shall be utilized within five years from the date of withdrawal from the TDR Bank. The City Commission may extend the time period for the utilization of private TDRs for a period up to two years. If an extension is granted, the City Commission has the authority to impose an administrative fee up to $10,000 as a condition of granting such extension.

[Amended 3-20-2008 by Ord. No. 2008-300; 4-16-2009 by Ord. No. 2009-319]

ARTICLE VI (Reserved) (§ 265-24

ARTICLE VII Zoning Districts (§ 265-25 — § 265-45)

ARTICLE VIII Off-Street Parking, Loading and Driveway Standards (§ 265-46 — § 265-47)

ARTICLE IX Sign Regulations (§ 265-48 — § 265-63.3)

ARTICLE X Landscaping Requirements (§ 265-64 — § 265-71)

ARTICLE XI Development Standards of General Applicability (§ 265-72 — § 265-78)

ARTICLE XII Nonconforming Uses and Structures (§ 265-79 — § 265-87)

265a Figure 1 265b Boundary Plan 265c Conceptual street frontage map 265d Summary Charts A through E 265e Sunny Isles Beach Blvd - eastbound 265f Street Typologies for Town

CHAPTER 267 ZONING FEES