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Note

PRESERVING MIAMI: AN EVALUATION OF MIAMI'S  
TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM

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**\*272 I. Introduction**

[Transfer Development Rights (TDR)] assume that landownership, in the sense of physical possession, can be separated from the right to develop land in any manner other than the existing use . . . [and] . . . [t]he development right, viewed independently from landownership, is made a separate article of private property, which can be shifted from one land parcel to another.<sup>1</sup>

Thus, TDR serve to preserve a particular character or use of a property without depriving the landowner the reasonably foreseeable financial benefit that would come with the ability to change the property.<sup>2</sup> TDR, although widely implemented,

have varying levels of success in achieving their intended goals. However, certain factors have been identified as predicting TDR success.<sup>3</sup>

Miami, in connection with its newly adopted form based code, Miami 21, has implemented a TDR program aimed at preserving its historic building stock. This Note seeks to explore the mechanics, application, benefits and shortcomings of Miami's TDR program by evaluating the program against established factors of TDR success. From this evaluation, strengths and weaknesses of the program will be identified and recommended changes to the current TDR program will be made.

## **\*273 II. TDR Programs**

### **A. General Overview and Commonalities**

TDR are a planning tool that use market mechanisms to implement and finance the redistribution of development rights to achieve a particular planning or zoning goal.<sup>4</sup> In general, TDR programs work by severing the development rights from properties in “sending areas” and selling them to others to use in “receiving areas.”<sup>5</sup> The severed right becomes assignable for the purpose of achieving an underlying goal (e.g., historic preservation).<sup>6</sup> In exchange for assigning the severed right, the property owner is required to apply some kind of easement or covenant restricting future development of the property.<sup>7</sup> The owner of the sending property retains all other property rights and the land remains in private ownership.<sup>8</sup>

TDR programs can be used to achieve a variety of land use goals: to preserve farmland, open and recreational spaces; to maintain water quality; and to encourage affordable housing, downtown revitalization, and historic preservation.<sup>9</sup> Although TDR can serve a multiplicity of land use goals, all TDR programs share a general structure and all effective TDR programs create a market that compensate property owners whose development rights have been limited for the “public good” to make the regulation(s) politically feasible and to provide affected landowners compensation.<sup>10</sup> Given the shared general structure and desired outcome of a TDR program, the success of a particular TDR program can be evaluated from general criteria.

### **B. Legal History and Working Framework of TDRs**

TDR are legislative creatures.<sup>11</sup> In Florida, TDR are established by [Section 163.3177 of the Florida Statutes](#). This enacting legislation does not, however, create TDR programs. Rather, the enabling legislation only provides the legal bases for establishing a TDR program.<sup>12</sup> As such, the statute must be subsequently interpreted by local governments **\*274** for implementation.<sup>13</sup> In Miami, [TDR have been implemented by adoption of Article 3.10 of the Miami comprehensive Plan, Miami 21](#), as well as Chapter 23 of the Miami city ordinances.

Conservation easements are the precursor of TDR,<sup>14</sup> describing a transaction in which the government acquires a landowner's right to develop their property, leaving the property owners with all rights of ownership, including the right of continued possession.<sup>15</sup> However, conservation easements have had limited success because they are expensive and, in turn, have come to be viewed as undesirable, potentially unfair, and legally dangerous.<sup>16</sup> Although a TDR program can be organized much like a conservation easement, TDR are more likely to rely on the selling and buying of severed rights between private property owners.<sup>17</sup> For this reason, TDR are considered more desirable, fair, and perfectly legal-although TDR are not free from legal challenges. The first legal challenge to TDR came in 1978 in New York City.<sup>18</sup>

In *Penn Central v. New York*, the New York Landmarks Preservation Ordinance included a TDR arrangement to transfer restricted developmental potential to other property owned in the area.<sup>19</sup> When the owner of Grand Central Station, a historic landmark in the heart of New York City, was denied application to build an office building over the station, the owner challenged the TDR scheme as a regulatory taking of the landowner's air rights over Grand Central Station.<sup>20</sup> The Supreme Court held that the TDR did not amount to a regulatory taking.<sup>21</sup>

The Court reasoned that, although the TDR afforded to Grand Central Station's owners may not be “‘just compensation’ if a ‘taking’ had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens that the law imposed on [the owners] . . .” and the owner's “ability to use these rights has not been abrogated; [that] they are made transferable.”<sup>22</sup> The ruling in *Penn Central* has been overwhelmingly upheld in subsequent challenges to TDR programs.<sup>23</sup> \*275 However, *Penn Central* and its progeny have not settled all claims regarding the validity of TDR programs.

In Florida, TDR have not only been challenged as a regulatory taking, but also for purposes for valuing real property as collateral, as well as whether TDR are subject to assessment for ad valorem taxes. In *Glisson v. Alachua County*, appellant landowners challenged an amendment to Alachua County's comprehensive plan that sought to protect the environmentally sensitive area of Alachua County by effectively limiting the development of the landowner's land.<sup>24</sup> The amendments created a TDR program that allowed appellants to “transfer density in a restricted use zone to appropriate contiguous property under the same ownership, or to appropriate adjoining property not under the same ownership if all affected properties were presented for development as a planned unit development.”<sup>25</sup>

The court noted that “while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.”<sup>26</sup> The court reasoned that requiring the property owner to maintain the status quo with respect to the land use was a proper exercise of the police power and “not arbitrarily or capriciously applied.”<sup>27</sup> The court also noted that a police power regulation is not invalid simply because it denies the highest and best use of the property and that “if a regulation is a valid exercise of the police power, it is not a taking if a reasonable use of the property remains.”<sup>28</sup> Ultimately, the court held that “because the regulations permit most existing uses of the property and provide a mechanism whereby individual landowners may obtain a variance or a transfer of development rights, the regulations on their face do not deny individual landowners all economically viable uses of their property.”<sup>29</sup>

In *Gordon v. Flamingo Holding P'ship*, the court considered whether a transfer of development rights belonging to a parcel of property held as collateral for a note and mortgage, accomplished without the knowledge or consent of the mortgagee, can support the creation of an equitable lien where that transfer has significantly impaired the collateral's value and where no remedy at law can compensate the mortgagee for the loss of value.<sup>30</sup> Although the facts of this case were particularly unique requiring that a unique solution be \*276 “[w]hen a specific action of an essential characteristic of TDR: that they have real value. However, this value is only realized when the TDR are applied to the development of property as illustrated in *Wilkinson v. St. Jude Harbors, Inc.*”<sup>31</sup>

In *Wilkinson v. St. Jude Harbors, Inc.*, the court held that TDR will only become taxable as real property if the legislature decides to do so.<sup>32</sup> The court reasoned that, under the current statutory definition of “real property” as “land, buildings, fixtures, and all other improvements to land,”<sup>33</sup> TDR are not “real property” and the definition should not be expended to include interests which may be considered to be only the substantial equivalent of land.<sup>34</sup> However, the court did not rule on whether

TDR may be considered for ad valorem tax purposes after they have taken on a different status by having been transferred to other property.<sup>35</sup>

Thus, in Florida, the challenges to TDR programs have established the legal treatment of TDR in a variety of settings. The Florida courts have recognized that, although TDR are not “real property,” TDR have real value when applied to a development site.<sup>36</sup> Most importantly, TDR have been upheld as a viable mechanism for diffusing the cost of a land use regulation on a land owner and, in turn, limiting the success of takings challenges.<sup>37</sup> This is particularly important given that, in Florida, the ceiling has been lowered with respect to determining the takings effect of a land use regulation.<sup>38</sup>

### C. The Special Problem of Bert Harris

The Bert J. Harris, Jr. Private Property Rights Protection Act was enacted in 1995 (the Bert Harris Act).<sup>39</sup> The Bert Harris Act created a cause of action for an aggrieved property owner “[w]hen a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property.”<sup>40</sup> As such, a new challenge to the use of TDR to successfully discourage and encourage particular types and locations of development may emerge. However, to date, there is no case law on point challenging the regulation of property subject to a TDR program in violation of the Bert \*277 Harris Act. There is, however, evidence of settlements made by a local government and threatened legal action with respect to a landowner's allegation that TDR are unable to relieve the burden imposed on a landowner's property due to a land use regulation.<sup>41</sup>

To recover under the Bert Harris Act, the court must determine that an inordinate burden has been imposed on the landowner and a then jury must determine the total amount of compensation due to the property owner.<sup>42</sup> The landowner is entitled to compensation equal to the difference between the fair market value of the property prior to the governmental action and the fair market value after the governmental action including the government's settlement offer and ripeness decision.<sup>43</sup> An “inordinate burden” gives rise to two kinds of government action for which the Bert Harris Act may provide relief.<sup>44</sup> The first is a governmental action that has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a landowner's vested right to a specific use of the real property as a whole.<sup>45</sup>

The second is a governmental action leaving the land owner with existing or vested uses that are unreasonable, such that the property owner bears a disproportionate share of a burden imposed for the good of the public.<sup>46</sup> Existing use is defined as “[a]n actual, present use or activity on the real property,”<sup>47</sup> or “reasonably foreseeable, non-speculative land uses which are . . . compatible with adjacent land uses.”<sup>48</sup> The landowner that must establish the implemented regulation changed the existing use and created an inordinate burden. Under a vested rights claim, the property owner must establish a reasonable expectation that his rights have vested and he has made a substantial change in his position relative to a development based on reliance of government assurances.<sup>49</sup> A claim under vested rights cannot arise pursuant to a temporary impact on the property or based upon subjective expectations.<sup>50</sup> The significance of the Bert Harris Act is that TDRs \*278 may not provide the incentive to land owners to mitigate a substantial burden placed on property due to a land use regulation. Although the legality of TDR programs is not the focus of this Note, it is directly related to its effectiveness to provide a landowner compensation roughly proportional to the impact of the regulation on the property and, in turn, is one measure of the success of a TDR program.<sup>51</sup>

Ultimately, with respect to potential takings claims that arise due to the implementation of a TDR program, the intent of the TDR program is to fully compensate owners who are restricted from the full development of their land.<sup>52</sup> In a study that considered a hypothetical TDR system in which the entire jurisdiction was subject to a TDR program and no development could occur without the purchase of development rights from landowners in areas restricted from development, transfer value of development rights varies and does not always provide adequate compensation to owner of restricted land.<sup>53</sup>

However, if applied on a limited scale, as in site-to-site transfer situations, as those contemplated in Penn Central and Glisson, the exchange value of development rights can be expected to approach full compensation so long as the local land market is relatively active.<sup>54</sup> The issue of the land market aside, there is both a legal and economic basis for thwarting takings claims even under the relaxed standard allowed by the Bert Harris Act. However, TDR programs do not exist in a vacuum and the local market is relevant not only to the potential claims challenging the legality of the TDR program, but also to its overall success to achieve its intended purpose-to protect a particular parcel or kind of property.

### III. The TDR Evaluative Framework

In 2008, a study was published that surveyed all publications listing factors responsible for affecting the success of TDR programs.<sup>55</sup> The publications listed 55 individual success factors and noted that 10 of these factors were cited in 5 or more articles.<sup>56</sup> These 10 factors provide the criteria for evaluating Miami's TDR program, listed and briefly \*279 explained below:<sup>57</sup>

**Demand for Bonus Development:** The TDR for purchase by developers must be something they actually want. If developers are satisfied with what they are allowed under a zoning scheme, TDR programs may fail.

**Receiving Areas Customized to the Community:** The receiving area has adequate infrastructure to accommodate the additional development, political acceptability, compatibility with existing development, clear designation, consistency with the comprehensive plan, and location where developers perceive a market for higher density.

**Strict Sending-Area Development Regulations:** Strict sending-area zoning not greater than one unit per five acres.

**Few or No Alternatives to TDR Achieving Additional Development:** Presence of alternative methods for obtaining bonus density without participating in the TDR program.

**Market Incentives: Transfer Ratios and Conversion Factors:** Increased conversions of density ratios or other conversion factors: square footage, building height, or lot coverage.

**Ensuring that Developers Will be Able to Use TDR:** Clear process of applying TDR to receiving area absent discretionary approvals.

**Strong Public Support for Preservation:** Indicative of the presence of complementary programs or supporting entities: locally funded purchase of development rights (PDR), other program, other public conservation program, or a TDR bank.

**Simplicity:** Simple and clear requirements and procedures, creating greater support amongst involved and interested parties.

**TDR Promotion and Facilitation:** Regular outreach to developers and landowners about the TDR program in the form of a well-maintained webpage.

TDR Bank: Presence of a TDR bank officially authorized by the community to buy, hold, and resell TDRs.

Of course, these factors work in tandem and there is no “magic” \*280 combination that ensures success.<sup>58</sup> However, whether each of these factors are individually addressed by Miami's TDR program should provide a basis for generalized predictions of the program's potential and, equally important, the ways in which it can be improved.

#### IV. Form Based Codes: Theoretical Underpinnings and Mechanics

Form-based codes are the evolved response to traditional Euclidean zoning. Euclidian zoning seeks to separate competing uses and group compatible uses together, resulting in a clear separation of land uses: residential versus commercial, recreational versus industrial.<sup>59</sup> The result is a dispersed pattern of development, rendering people dependent on their automobiles in order to live, work, and play in their communities, better known as “sprawl.”<sup>60</sup> Smart Growth, Transit Oriented Design (TOD), and New Urbanism represent the responses to sprawl's isolating and unsustainable development form and comprise the planning underpinnings for the development of form-based codes.<sup>61</sup>

Smart Growth most directly evolved as a reaction to sprawl, emphasizing preservation of farmland and open space by accommodating population growth in compact new developments or in revitalized redeveloped cities through the application of sustainability principles into planning goals and practices.<sup>62</sup> TOD builds on this Smart Growth concept by focusing further on the integration of uses through transit to create sustainable urban environments.<sup>63</sup> TOD is a planning and design trend that seeks to create walkable communities centered on a transportation node (transit station, transit route, or bus stop).<sup>64</sup> New Urbanism embraces both TOD and Smart Growth principles and practices. An American planning movement that arose in the 1980s to create and promote walkable, neighborhood-based development as an alternative to sprawl, New Urbanism encourages the re-establishment of mixed-use urban neighborhoods and the efficient use of existing infrastructure and preservation of natural habitats.<sup>65</sup> These movements \*281 advocate an end to the single land use per area, establishing broader zoning designations that embody a variety of land uses that de-emphasizes dependence on vehicular travel.

The major tool for implementing the goals of Smart Growth, TOD, and New Urbanism is the form-based code.<sup>66</sup> Form-based zoning codes are a method of regulating development to achieve a specific urban form.<sup>67</sup> Form-based codes place an emphasis on the relationship between the street and buildings, pedestrian and vehicles, public and private spaces, and the relationship between multiple buildings, a block, a neighborhood, and transitions in scale. They create a predictable public realm by controlling physical forms of private developments with a secondary focus on land use regulations.

Components of the form-based code include the regulation plan and atlas, building form standard, public space and street standards, administration, and definitions. The first component is a master plan and atlas of the regulated area indicating the type of allowed activities and regulations for each property located within the municipal boundary. These designations are termed “transects,” identifying a zone more like an inclusive environment.<sup>68</sup> Each transect includes details on building disposition and configuration, function and intensity of each transect (a percentage of buildings that may accommodate a particular use), landscape standards, parking standards, standards that integrate individual property with the public realm, and the successional relationship between transects.<sup>69</sup>

Building-form standards regulate the configuration, features, and functions of buildings that define an interaction between the public and private realm to create comfortable spaces for people. Public space and street standards provide specifications for the

elements within the public realm (e.g., sidewalks, travel lanes, street trees, street furniture).<sup>70</sup> The administration component provides a clearly defined application and project review process.<sup>71</sup> Definitions are also a crucial component often included in the plan as a glossary to ensure the precise use of technical terms. These components are increasingly being embraced by local \*282 planning bodies and, in turn, the benefits are becoming evident.

Economic studies have demonstrated that form-based codes, when compared to conventional zoning ordinances, generally enhance the long-term value of areas in which they have been implemented.<sup>72</sup> In addition, form based codes increase predictability and thus decrease conflict over future development.<sup>73</sup> Because the specific form of an area will have already been agreed upon during the code's drafting period, it will make it easier for land owners to determine in advance the compatibility of a project with the local code. Form-based codes also eliminate administrative and judicial delays and costs associated with changes in zoning designations by embracing a range of uses on any given property.<sup>74</sup> In contrast, conventional zoning ordinances are open to interpretation and conflict because they do not provide clear direction on building form or flexibility in building use.<sup>75</sup>

### V. Miami 21: Miami's Form Based Code

Miami has embraced the planning shift away from the classic Euclidean model by adopting its own form-based code. Miami has a long and rich history of planning, adopting its first master plan in 1915 and its first zoning ordinance in 1934.<sup>76</sup> Over the years, however, Miami's previous zoning ordinance-Zoning Ordinance 11000-had become overwhelmed by spot zoning and was in need of an overhaul.<sup>77</sup> The overhaul began in 2009 by amending the Miami Comprehensive Neighborhood Plan (MCNP) in order to maintain consistency between the zoning and the underlying comprehensive plan.<sup>78</sup> The MCNP amendments included the adoption of a future land use map as well as form-based code objectives-transitioning into scaled communities and encouraging stronger mixed-use activity.<sup>79</sup> Upon issuance of a sufficiency statement by the Florida Department of Community Affairs (the DCA, since dismantled) in December of 2009, Miami 21 was \*283 formally approved and ready for implementation.<sup>80</sup> Miami has embarked on a new theoretical and methodological approach to planning for the city's future. Miami is embracing Smart Growth, TOD, and New Urbanism principles to balance the need for physical and economic growth with creating healthy, human-scaled communities.<sup>81</sup> One component of this new plan is an emphasis on safeguarding natural and historical resources.<sup>82</sup>

### VI. The Mechanics: Historic Preservation and TDRs in Miami

Article 3.10 of the Miami 21 ordinance directs the reader to Chapter 23 of the Miami Code, titled Historic Preservation.<sup>83</sup> Chapter 23 was amended to reflect the provisions and language of the Miami 21 code, "to encourage the preservation of historic resources by creating a process whereby the otherwise unusable development rights for historic resources may be converted into an asset that may be sold."<sup>84</sup> The result is a TDR program aimed at preserving historic sites and buildings, particularly those located in the Miami Modern (MiMo)/Biscayne Boulevard Historic District (District).<sup>85</sup> The authority for such a program is derived from [Section 163.3177 \(6\)\(A\)\(6\) of the Florida Statutes](#) which recognizes transfer of development rights programs as an effective tool to preserve historic buildings and create public open space in an urban area.<sup>86</sup>

The District is defined as the corridor of Biscayne Boulevard from 54th to 77th Street.<sup>87</sup> The District was defined and given particular consideration with respect to future development due to the large collection of Miami mid-century modern structures that characterize the area. Under Miami 21, the District is largely designated T4, T5, and T6-8.<sup>88</sup> The T4 transect is primarily

residential, allowing for a range of building types limited to 3 stories in height, within walking distance \*284 from a town center, and available with short setbacks and wide sidewalks.<sup>89</sup> T5 zones consists of a higher density mixed-use building type, limited to 5 stories in height, accommodating retail and office uses with apartments.<sup>90</sup> T6 zones consist of the highest density and greatest variety of uses, including civic building of regional importance.<sup>91</sup> T6 zones vary by height-ranging from 8 to 80 stories. Buildings in the District would be limited to 8 stories, the lowest of the T6 zones. However, due to the TDR program, all structures are limited to a height of 35 feet (a maximum of 3 stories).<sup>92</sup>

Chapter 23 lays out an intensive process for the transfer of development rights for sending areas.<sup>93</sup> First, owners of eligible properties are issued a “certificate of eligibility” following confirmation that the property meets certain criteria.<sup>94</sup> The certificate of eligibility only serves to acknowledge that an owner of a particular property is eligible to apply to sell their unused development rights. There are three kinds of eligible properties. The first is a property located in a T4-O transect and recognized as a historic place which can be accomplished through a number of mechanisms, such as being individually listed on the national register of historic places.<sup>95</sup> The second is “contributing” properties located within the District, such as a recognized historic place.<sup>96</sup> The third is “non-contributing” properties located within the District, properties that help realize the historic character of the District but are not themselves historic places.<sup>97</sup> Regardless of the type of property, the owner must submit an application for local historic designation with the planning department and obtain approval by the Historic and Environmental Preservation Board (HEPB) to participate in the TDR program.<sup>98</sup> Upon receiving a certificate of eligibility, the owner is subject to the requirement of the issuance of a “certificate of appropriateness” for changes made to the building.<sup>99</sup> Once the eligible property has been officially designated a historic site and the landowner has provided all the required documentation, including an existing \*285 conditions report and a maintenance plan, then the landowner may request a certificate of transfer.<sup>100</sup>

The zoning administrator, or their designee, “calculates the unused development potential (base development rights) that [are to] be transferred to a receiving property at 100 percent of the available square feet permitted by the underlying transect . . .” for eligible sites not located within the District.<sup>101</sup> Inside the District, the calculations are slightly altered.<sup>102</sup> For contributing buildings, the zoning administrator calculates the “unused development potential (base development rights) that may be transferred to a receiving property at [2.25%] per square foot of the available square feet permitted by the underlying transect . . .”<sup>103</sup> The rate is 1.75% per square foot of the total available square feet permitted by the underlying transect available for transfer.<sup>104</sup> For properties in the District, the underlying transect is actually the 35 foot height limit imposed on the area by Miami 21 and Chapter 23-the reason why TDRs are offered in the District as illustrated in Penn Central. Finally, an owner must file a restrictive covenant with the City, providing for the long-term maintenance of the historic resource. At that time, the certificate of transfer is released and may be sold to the owner of an eligible receiving site.<sup>105</sup>

The calculated square footage available for transfer may be applied to property located in T6 zones. T6 zones are largely clustered in the area defined by the Julia Tuttle Causeway on the North, SE 15th Road to the South, Interstate 95 to the West and the Miami Bay.<sup>106</sup> The zoning designations in this area allow between 24 and 80 story buildings along with permissible percentages of bonus area measured by floor lot ratio (FLR). FLR is the total lot area that determines the maximum building area allowed above grade in a given zoning designation.<sup>107</sup> It is through TDRs that developers are able to take advantage of permissible bonus area by purchasing transferable rights and applying them to their sites. Allowed bonus area provides an absolute ceiling on development.

To illustrate the point, consider the transfer of TDR from a sending site, a vacant non-contributing lot in the District, to a receiving site located in a T6-12 transect. The TDR is the maximum build out allowed \*286 under the underlying zone, which

is a 35 foot height limit (which will likely be less than the underlying transect maximum of 20,000 square feet-the number used for purposes of illustrating the calculation), minus the current square footage multiplied by 1.75%, or  $(20,000 - 0) * 0.0175 = 350$ . The additional 350 square feet can be applied to the allowed 30% bonus FLR. The by-right FLR of the T6-12 transect is 8 and the maximum lot area is 70,000 square feet.<sup>108</sup> Thus, the potential allowed bonus is equal to  $(8 * 70,000) * 0.30$ , or 168,000 square feet, in addition to the by-right of 560,000 square feet.<sup>109</sup>

## VII. Miami's TDR Program in Application

There has not been a single TDR transaction to date.<sup>110</sup> However, property owners have obtained certificates of transfer, meaning such transactions are potentially forthcoming.<sup>111</sup> It is arguably more important that owners are obtaining certificates of transfer rather than the being an actual transaction given that the release of the certificate of transfer alone effectively preserves a historic resource-a landowner cannot receive the certificate of transfer until the restrictive covenant is recorded with the city. Attempts to obtain data concerning the number of certificates of eligibility and certificates of transfer granted have not been successful, but experts in the field hypothesize that as many as ten properties have received certificates of transfer.<sup>112</sup> Still, considering that there are 115 identified historic structures, not including non-contributing sites, in the 27 designated blocks of the District, the overall number of certificates seems low.<sup>113</sup> The evaluation of Miami's TDR program provides insights into the reasons behind these unimpressive numbers and, in turn, is informative in considering improvements to the program. Comparisons to widely celebrated historic preservation TDR programs in Denver and San Francisco are also used for analysis under the evaluative factors.

### A. Demand for Bonus Development

Current development patterns are not necessarily incentivized by increased square footage. Square footage provides for larger spaces; it \*287 does not provide for more units or increased density. Considerations such as Miami's already large stock of luxury housing units in the downtown area (largely T6 zones), the general economic downturn and foreclosure crisis, and the shifting housing market, reflects a greater demand for more affordable units which are not generally larger units.<sup>114</sup> In addition, the commercial real estate market has also been negatively affected by the poor economy and foreclosure crisis.<sup>115</sup> Ultimately, there is a growing emphasis on density rather than square footage or floor area and rights developers are not eager to purchase. In turn, there is a significant disconnect between the needs of the development market and what the TDR program can provide. In addition, T6 zones provide large by-right square footage, so the need to seek out additional square footage is questionable.

The transferable right is integral to TDR programs to entice developers to participate and owners to send sites to participate in the program. Landowners may not be encouraged to participate in the program where they are not being fully compensated for the lost development value.<sup>116</sup> However, under Miami's current TDR scheme, some landowners may be attracted to preservation regardless of the level of compensation because any TDR allocation would help relieve the burden on landowners due to the current development constraint (specifically the thirty-five foot height limit in the District). Additionally, sometimes the property owner is in financial difficulty and would rather than sell development rights at any price rather than the land itself.<sup>117</sup> For many property owners and developers, there is a personal desire to preserve MiMo buildings and the historic nature of the District regardless of any added incentive. However, a market for TDR cannot exist on these factors alone. A market exists when "sending area owners are willing to sell TDRs at a price that allows buyers to use the TDRs."<sup>118</sup>

### B. Receiving Areas Customized to the Community

Receiving sites are well suited as potential sites for TDR. Receiving sites are located within transects explicitly providing for bonus FLR and, thus, designed to accept TDR. Further, these transects are located in areas where increased FLR would be appropriate, areas already \*288 characterized by larger, taller buildings.<sup>119</sup> The receiving sites and the larger area in which they are located are appropriate for applying TDR.

### C. Strict Sending-Area Development Regulations

Miami's TDR program is geared toward historic preservation. The factor of strict sending-area development regulations has been discussed in the context of TDR programs aimed at conservation of farmland and open space. Miami's TDR program is geared toward historic preservation-not farmland and open space. Therefore, this factor is not particularly applicable in evaluating Miami's TDR program. Therefore, this factor is not very applicable to the Miami's TDR program as its definition in literature was geared toward conservation of farmland and open space TDR programs. However, a more broad interpretation of this factor would be the effectiveness of the sending area regulations in achieving the intended purpose. For Miami's TDR program, this would be the strength of the restrictive covenant placed on the sending site in preserving the historic site long-term.

Miami's TDR program requires that the sending site record a covenant with the Miami-Dade County's Clerk of Court providing that the eligible historic resource will be maintained according to the building department's standard for forty years, that the long-term maintenance will follow title to the property through subsequent owners, and that the city will be notified when and if the property changes ownership.<sup>120</sup> In addition to the covenant, there are additional safeguards built into the process of obtaining a certificate of transfer that ensures the preservation of the sending area's historic resource. The certificate of appropriateness requires permission from the HEPB for alterations or modification to the property, prohibits demolition by neglect, and requires affirmative maintenance efforts.<sup>121</sup> The combination and reinforcement of regulations in Chapter 23 will likely provide for the effective, long-term preservation of sending areas.

### D. Few or No Alternatives to TDR Achieving Additional Development

Miami 21 provides for a Public Benefits Program (PBR), intended to allow "bonus Building Height and FLR in T6 Zones . . . in exchange for the developer's contribution to specified programs that provide benefits to the public."<sup>122</sup> The bonus is not available, however, to properties in a \*289 T6 Zone if the property abuts a T3 Zone. The bonus is also not available in a T6-8 Zone if the property abuts a CS Zone.<sup>123</sup> Under the PBR, a developer can make cash contributions to the Public Benefits Trust Fund for various public benefits (affordable/workforce housing, public parks and open space, green buildings, brownfields, and civic space or civil support space) in exchange for additional square footage to be applied to the allowable bonus height (as defined by the site's transect zone).<sup>124</sup> The price of the additional building height and FLR is set by the city.<sup>125</sup>

The effect of the city providing an alternative to achieving bonus height undermines the TDR program through price setting and TDR availability. Because the city sells and sets the price for additional building height and FLR, it creates a ceiling on what an individual landowner could potentially sell their TDRs for. A developer would not pay a landowner more for TDR than what they would pay to the city. Further, purchasing additional building height through the City may be an easier process as the city is the central entity that possesses certificates of transfer.

In addition to finding an individual property owner with a certificate of transfer of adequate size and negotiating price, the developer must then have the transfer approved by the city. Ultimately, the TDR process is more involved than the PBR and consequently more costly and frustrating for developers than PBR is. If there is not a market for TDRs, the program will not

achieve its aim. Despite these shortcomings, Miami's TDR program is not without its strengths or potential to achieve real progress in the way of historic preservation in Miami.

#### **E. Market Incentives: Transfer Rations and Conversion Factors**

The results of the illustrated calculation of potential TDR makes clear that the conversion factors are not appropriate; the potential bonus of a T6-12 transect is 168,000 square feet and the hypothetical sending site could only provide 350 square feet. At the current conversion rate it would take over 400 of the hypothetical sending areas to fill the potential bonus FLR of the hypothetical receiving site.

#### **F. Ensuring that Developers Will be Able to Use TDR**

There is little language within Chapter 23 speaking to any authority or process that would prevent or discourage a developer's use of TDR. \*290 The TDR program only provides that TDR “may be converted into an asset that may be sold to a receiving site located within a T-6 transect, where a public benefits bonus may be used.”<sup>126</sup> In the absence of any evidence that a developer would have difficulty applying the TDR, the criteria for applicability appears easy and a developer should feel confident that the purchase of a TDR will translate to the ability to use it.

#### **G. Strong Public Support for Preservation**

Although the District appears to have a very active community concerned with preserving the District's historic character, the presence of concerned citizens does not speak directly to this evaluative factor. Rather, because Miami does not have complementary programs or supporting entities such as a locally funded purchase of development rights (PDR) program, another public conservation program, or a TDR bank, there is not a strong public support for preservation.

#### **H. Simplicity**

Acquiring a certificate of transfer is an involved process that requires owners of sending sites to provide a plethora of information. Nonetheless, these requirements are thoroughly explained and the steps that a landowner must take are clearly enumerated.<sup>127</sup>

#### **I. TDR Promotion and Facilitation**

There is no website maintained by the City of Miami or any other entity reaching out to developers or landowners specifically concerning the TDR program. The Department of Historic Preservation for the City of Miami website provides links to historic districts, Chapter 23, and other resources, but provides no specific information about the TDR program.

#### **J. TDR Bank**

Chapter 23 does not expressly provide for the banking of TDRs, but nothing in Chapter 23, Miami 21, or any other state law or local ordinance prohibits this practice. Bankable TDR, or TDR that can be bought by and resold to a third-party, would contribute to the likelihood of the success of Miami's TDR program. A TDR bank is “an entity operated by a local jurisdiction, regional government or private \*291 nonprofit organization for the purpose of buying, selling, and holding development rights

or facilitating private TDR transactions. By providing a single point of contact, a TDR bank can streamline the process for buyers and sellers of development rights.”<sup>128</sup>

### VIII. Evaluation Results and Recommendations

It is first worth noting that “the most successful TDR ordinances in the country have been refined, sometimes more than once.”<sup>129</sup> It should also be noted that neither Miami 21 nor Chapter 23 provides a benchmark against which Miami could gauge its TDR program's success. That being said, given the relatively few number of certificates of transfer that have been obtained and that not a single TDR transaction has occurred, there is room for improving the Chapter 23 scheme. To this end, the evaluation of Miami's TDR program serves to provide both a benchmark for future evaluations as well as guidance as to which areas of the program need to continue to evolve.

Miami's TDR program contains only 4 of the 10 factors indicative of TDR program success: (1) receiving areas customized to the community, (2) strict sending area development regulations, (3) ensuring that developers will be able to use TDR, and (4) simplicity. Although the TDR program should be lauded for obtaining these factors, there is always room for improvement, particularly in relation to policies and practices that aid in creating and promoting a thriving TDR market. Given these results, several changes to the TDR program are recommended-to allow transfer of density measured by dwelling units per acre, to create a municipal TDR Bank, and to create a TDR program website.

#### A. Allow Transfer of Density

Because the T6 transects provide generous by-right square footages, additional square footage is available for purchase through the city's Public Benefits Program, and the increase of square footage does not necessarily provide an attractive incentive for developers, the unused TDR of historic and noncontributing sites should be allowed to be converted into additional density and not only additional square footage. This change would require both an amendment to the Chapter 23 statutory scheme as well as to Miami 21. Specifically, Chapter 23 would have to provide for an appropriate conversion done by the Zoning Administrator. Furthermore, the transect definitions in Miami 21 would \*292 have to be adjusted to provide for bonus density. Although this change is possible, it would be an unusual conversion as most TDR conversions involving the transfer of development rights (from a residential sending site to a commercial receiving site) is usually a measurement of square footage.<sup>130</sup> However, although the conversion is not “usual,” it is not prohibited by the language of any statute, ordinance, or the master plan itself. Further, the sending site is not necessarily residential and the receiving site is not necessarily commercial given the flexibility of land uses under Miami's form-based code.

This change would be in keeping with nationally celebrated historic preservation TDR programs, including the TDR program in San Francisco. In 1985, San Francisco concurrently changed its land use plan designating over 300 properties as historically significant or contributory with the ability to transfer unusable while simultaneously limiting the density of downtown.<sup>131</sup> The combination of these polices created a greater incentive for developers to acquire TDRs to achieve the density desired for high rise buildings in downtown as well as a market from which developers could purchase this density: the historically preserved properties.<sup>132</sup> By 2009, 116 designated historic buildings had certified their unused TDR-a considerable number and indicative of a successful program.<sup>133</sup> Further, “[t]he allocation of development rights on the basis of unused density has received the greatest support in the TDR literature.”<sup>134</sup> Shifting from square footage to density is more responsive to Miami's development market and embraces practices of established successful TDR programs. Further, this shift is in keeping with the current Miami 21 regulations that already identify receiving sites appropriate for additional density. Figure 9 of Miami 21 identifies a number of specifically identified T6 transects in which the density has already been increased under the plan compared to other T6

transects throughout the city.<sup>135</sup> As such, Miami has already considered the ability of certain areas to sustain greater density, which could be built upon to encourage and bolster a TDR market.

### **\*293 B. Create a Municipal TDR Bank**

Generally, TDR programs with TDR banks are more successful than those without banks.<sup>136</sup> This is because TDR banks acquire TDRs at relatively low prices during weak economic conditions, can hold onto the TDR for long periods of time, and can sell the TDR to increase the supply of development rights in robust markets at a profit.<sup>137</sup> TDR banks support all parties involved in a transaction by offering diverse services, including “providing financing, providing facilitation and clearinghouse functions, educating the community, bringing TDR buyers and sellers together, recording transactions, issuing transfer certificates, and providing the program with overall credibility to build public confidence.”<sup>138</sup> Further, a TDR bank can “leverage limited preservation funding by using grants and other funding sources to buy TDRs, sell them, and use the proceeds to buy additional TDRs through a revolving fund.”<sup>139</sup>

Implementation of a TDR bank in Miami is possible and would likely strengthen the TDR market. This is particularly true given that the local government currently provides no active support for the TDR program. This undermines the general principle that a TDR program needs dedicated staff to set up and manage the program and that the local government typically provides the funds to administer a TDR program.<sup>140</sup> As such, Miami would not only need to amend Chapter 23 of its ordinances to provide for the creation of a TDR bank, but it would also need to provide funding for the administration of this entity. Miami could model its TDR bank after the New Jersey Pinelands and the Central Pine Barrens of Long Island, New York-two early and successful TDR Programs.<sup>141</sup> These two northeastern TDR programs “garner[] support by using TDR banks to purchase the rights at a stated but heavily discounted price” to jump start the local TDR marketplace with funding from state and federal grants, grants from private foundations and conservancies, and from the community's own general fund.<sup>142</sup>

### **C. Create a TDR Program Website**

In the absence of a TDR bank, the Historic Preservation Department **\*294** should be charged with creating or dedicating a portion of its own website to Miami's TDR Program. The website should provide, in addition to standard site information (contact information and forms), access to overviews of the TDR process; checklists for sending and receiving areas potentially participating in a TDR transaction; links to all documents required by the TDR process as well as examples of completed required documents; a searchable database of properties who have received certificates of eligibility, certificates of transfer, and available TDR; a searchable database of all successfully completed TDR transactions; and updated versions of all relevant laws, such as Miami 21 and Chapter 23.

## **IX. Conclusion**

The absence or presence of a particular factor or combination of factors is not determinative of a TDR program's success. However, such factors are informative, particularly when a program does not have any set objectives or goals and when there is no evidence to support that TDR transfers are taking place (as is the case in Miami). It is a success of Miami's TDR program, in and of itself, that property owners are seeking and have obtained certificates of transfers. Furthermore, obtaining this certificate accomplishes one of the purposes of the TDR program-to preserve historically significant and contributing sites. However, the program has not created a true market for TDR transfers and, in turn, is limited in preserving historic places to forces unrelated to incentivizing property owners to do so outside of their own desire to preserve a particular site or character of a neighborhood.

Fortunately, Miami has a number of the factors that do, in theory, make for successful TDR programs, and Miami has many models of successful TDR programs to improve its current TDR scheme. Specifically, Miami must first consider its own market. Miami must seek advice from groups involved in the construction and development markets to inform the conversion factor of transferable rights and then elsewhere in the state and country where TDR markets have been further incentivized and where the local government has participated in the TDR market.<sup>143</sup> Many successful TDR programs require monitoring and revision to become effected. Miami is no exception. Historically, Miami has sacrificed its historical resources for economic growth and new development. Without incentivizing a different pattern of development, the MiMo District and other historically significant sites may be destroyed forever.

Footnotes

- a1 Law Clerk to the Honorable Arthur B. Briskman, U.S. Bankruptcy Judge, Middle District of Florida, Orlando Division; J.D. University of Florida Levin College of Law; B.A. Haverford College. The Author would like to thank Professor Jeff Wade from the University of Florida Levin College of Law for his wisdom and guidance on this Note.
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- 4 See Arthur C. Nelson et al., *The TDR Handbook: Designing and Implementing Transfer of Development Rights Programs* xix (2012).
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- 6 See generally *id.* at 132.
- 7 See *id.* at 3.
- 8 See *id.*
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- 10 See *id.* at xxiii.
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- 29 Id. at 1037.
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- 32 Id.
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- 39 See id.
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- 46 Id.
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