PDRS AND TDRS: LAND PRESERVATION TOOLS IN A UNIVERSE OF VOLUNTARY AND COMPULSORY LAND USE PLANNING TOOLS

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Purchase of Development Rights ("PDRs") and Transferable Development Rights ("TDRs") are two land use planning tools popularly believed to be located generally on opposite ends of the continuum of coerciveness. PDRs are seen as elements of mostly voluntary programs whereas TDRs are found in more coercive programs. These techniques may be used in conjunction with other

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techniques and with each other. As used in individual programs the level of coerciveness of these programs is not necessarily a function of the techniques employed. It is the purpose of this paper to demonstrate that the level of coercion is not necessarily a function of the techniques selected and that neither of these techniques need be used in a coercive manner.

I. PURCHASE OF DEVELOPMENT RIGHTS

A PDR is an interest in real property that is nonpossessory and entitles its holder to enforce certain land use restrictions or to enforce certain rights to public use or access upon the holder of the possessory interest.[1] PDRs may be held by either governmental or nongovernmental entities.[2] PDRs are typically held to prevent certain types of development on the property thus restricted.[3] PDRs may be of fixed or perpetual duration although most are of perpetual duration.[4] At common law a PDR (except for those that provide for public use or access) most closely resembles a negative easement in gross.[5] A negative easement is one that prohibits the holder of the possessory interest from doing something rather than granting an affirmative right to the easement holder.[6] An easement in gross is one that is personal to the individual or entity that hold it rather than providing a benefit to a dominant tract as is more typical.[7] Easements in gross were relatively ephemeral in that they expired with the holder and were not transferable, with exceptions for commercial easements in gross.[8] Most states also have marketable title acts that may cut off interests in easements, generally, defeating long-term attempts to control the development of property.[9]

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1. *See* Mark R. Rielly, Comment, *Evaluating Farmland Preservation Through Suffolk County, New York's Purchase of Development Rights Program*, 18 PACE ENVTL. L. REV. 197, 203 (2000).
2. *See id.*; *see also* Elizabeth Evensen, Note, *Open Space Preservation in Utah: Techniques, Tools, and First "Quality Growth" Steps*, 19 J. LAND RESOURCES & ENVTL. L. 267 (1999).
3. *See* Rielly, *supra* note 1, at 203.
4. *See* Evensen, *supra* note 2, at 276; *see also* Rielly, *supra* note 1, at 213.
5. *See* Rielly, *supra* note 1, at 203.
6. *See* Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, ANN. SURV. AM. L. 235, 243 (1992-1993).
7. *See* PATRICK K. HETRICK & JAMES B. MCLAUGHLIN, JR., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 15-3 (Michie Co., 4th ed. 1994) (1971).
8. *See id.* at §§ 15-25, 15-25 n.211.
9. *See, e.g.*, N.C. GEN. STAT. § 47B-2 (2001); HETRICK & MCLAUGHLIN, *supra* note 7, at § 25-3 (explaining the effect of Marketable Title Act as once marketable title is established, all prior conflicting claims are expunged).

These common law and statutory impediments to the use of PDRs have been addressed in those states that have enacted the Uniform Conservation Easement Act ("UCEA"). A committee of the National Conference of Commissioners on Uniform State Laws prepared this model legislation.[10] In those states that have adopted this uniform act, most common law and statutory restrictions that would prevent a conservation easement from being less than perpetual are abolished.[11] The Uniform Conservation Easement Act has been adopted in about half of the states.[12] In addition to providing protection against being extinguished, the UCEA provides, for those PDRs drafted as conservation easements under its provisions, the basis for claiming both federal and state income and estate tax benefits.[13] Even among those states that have not adopted the UCEA most have enacted statutory authority for conservation easements.[14] Of course, even among those states that have adopted the UCEA the provisions vary according to the preferences of individual legislatures.[15] This article will use the terms PDR and conservation easement synonymously for any encumbrance on real property of potentially infinite duration that is designed to support conservation values broadly defined.

A. *Federal Income and Estate Tax Benefits*

1. *Calculation of Tax on Sales*

PDR programs that employ perpetual conservation easements may confer substantial income tax benefits on participating landowners. Where a PDR is purchased for its fair market value ("FMV") a landowner will report capital gain

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10. *See* THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, SUMMARY: UNIFORM CONSERVATION EASEMENT ACT, *at* http://www.nccusl.org/nccusl/uniform_summaries/uniform-s-ucea.asp (last visited Mar. 27, 2002).

11. *See* THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS; SUMMARY: UNIFORM CONSERVATION EASEMENT ACT; *at* http://www.nccusl.org/nccusl/uniform_summaries/uniform-s-ucea.asp.

12. *See* THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS; SUMMARY: UNIFORM CONSERVATION EASEMENT ACT; *at* http://www.nccusl.org/nccusl/uniform_summaries/uniform-s-ucea.asp.

13. *See* Maureen Rudolph & Adrian M. Gosch, Comment, *A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications*, 4 GREAT PLAINS NAT. RESOURCES J. 143, 146 (2000).

14. *See id.* at 147.

15. *See id.* at 147, n.19.

equal to the difference between the purchase price of the PDR and the adjusted basis of the property allocated to the PDR.[16] Basis is allocated to the property based upon the proportion of the total value represented by the PDR.[17] Farm and forest property, although property used in a trade or business, is given capital gains treatment under section 1231 of the Internal Revenue Code.[18]

Whether a conservation easement or other development right is purchased, donated or purchased in a bargain sale, basis must be fairly allocated between the development right and the remaining fee.[19] An example from the regulations illustrates:

> Example 9. D owns property with a basis of $20,000 and a fair market value of $80,000. D donates to a qualifying organization an easement for conservation purposes that is determined under this section to have a fair market value of $60,000. The amount of basis allocable to the easement is $15,000 ($60,000/$80,000=$15,000/$20,000). Accordingly, the basis of the property is reduced to $5,000 ($20,000 minus $15,000).[20]

2. *Treatment of Full and Partial Donations*

Most PDR programs increase their effectiveness by soliciting partial or full donations of PDRs.[21] Partial donations are bargain sales that involve pur-

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16. *See id.* at 154.

17. *See* 26 C.F.R. § 1.170A-14(h)(3)(iii) (2001). "In the case of the donation of a qualified real property interest for conservation purposes, the basis of the property retained by the donor must be adjusted by the elimination of that part of the total basis of the property that is properly allocable to the qualified real property interest granted. The amount of the basis that is allocable to the qualified real property interest shall bear the same ratio to the total basis of the property as the fair market value of the qualified real property interest bears to the fair market value of the property before the granting of the qualified real property interest. When a taxpayer donates to a qualifying conservation organization an easement on a structure with respect to which deductions are taken for depreciation, the reduction required by this paragraph (h)(3)(ii) in the basis of the property retained by the taxpayer must be allocated between the structure and the underlying land." *Id.* § 1.170A-14(h)(3)(iii).

18. *See* I.R.C. § 1231 (2000).

19. *See* 26 C.F.R. § 1.170A-14(h)(3)(iii) (2001).

20. *See id.* § 1.170A-14(h)(4).

21. *See* I.R.C. § 170(f)(3)(B) (2000). In general, the charitable deduction is denied for contributions of partial interests in property; however, this section provides an exception for "(i) a contribution of a remainder interest in a personal residence or farm, (ii) a contribution of an undivided portion of the taxpayer's entire interest in property, and (iii) a qualified conservation contribution." *Id.* § 170(f)(3)(B). It is this section that enables those who make bargain sales of conser-

chase of the PDR for less than its FMV.[22] The landowner has made a donation of either the FMV of the PDR or the FMV less the bargain sale price.[23] In general the landowner may claim a charitable deduction equal to the FMV of the donation.[24] The unrealized gain is not taxed and is part of the deduction. If there is a loss in the property the loss cannot be realized either. A portion of the basis attributable to the PDR is transferred with the PDR and will not be available if the property is later sold.[25]

Section 170(h) defines three interests in real property that qualify as qualified conservation contributions:

(A) the entire interest of the donor other than a qualified mineral interest,

(B) a remainder interest, and

(C) a restriction (granted in perpetuity) on the use which may be made of the real property.[26]

The last is a conservation easement. In addition to being a qualified interest in real property as defined above, there are two additional qualifications.[27] First, the organization receiving the conservation easement must be a qualified organization and second, the donation must be solely for conservation purposes.[28] A qualified organization is a governmental entity or a private organization that meets the requirements of section 501(c)(3).[29] The organization must be organized and qualified to receive and hold conservation easements.[30] Conservation purpose is defined as:

> (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
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> (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

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vation easements (that are otherwise qualifying) to take the difference between the FMV and the sale price as a charitable deduction.

22. *See id.* § 170(f)(3)(A).
23. *See* 26 C.F.R. § 170A-14(h)(3)(i) (2001).
24. *See id.* § 170A-14(h)(3)(i).
25. *Id.* § 1.170A-14(h)(3)(iii).
26. I.R.C. § 170(h)(2) (2000).
27. *See id.* § 170(h)(1).
28. *See id.* § 170(h)(1).
29. *See id.* § 170(h)(3)(B).
30. *See generally id.* § 170(h) (discussing qualified conservation contributions).

> (iii) the preservation of open space (including farmland and forest land) where such preservation is -
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> (I) for the scenic enjoyment of the general public, or
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> (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
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> (iv) the preservation of a historically important land area or a certified historic structure.[31]

Qualified conservation purposes will be discussed in more detail under the general discussion of guidelines for a PDR program found in the section on *Restrictions, Stewardship and Monitoring.*

"A contribution shall not be treated as exclusively for conservation purposes unless the conservation [easement] is protected in perpetuity."[32] Transfers between qualifying organizations are permitted.[33] Qualifying private land trusts that are well managed generally have a succession plan in place in the event of cessation of operations. Under limited circumstances where unforeseen changes in the surrounding area "makes impossible or impractical the continued use of the property for conservation purposes, the requirement of [perpetuity] will be met if the property is sold or exchanged and any proceeds are used by the donee organization in a manner consistent with the conservation purposes of the original contribution."[34] The option of determining that conditions have changed and selling the rights must lie with the donee, not the donor, and must be judicially approved.[35] The proceeds to be received by the donee must be proportionate to the original value of its interest unless state law provides that the donor is to receive the entire value of the interest without regard to the conservation easement.[36]

The rights that a donor reserves in a conservation easement without destroying its perpetual character are quite limited. For example, if an easement is granted for scenic enjoyment, most reservations would interfere with the stringent requirements for meeting that objective.[37] The regulations provide contrasting examples:

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31. *Id.* § 170(h)(4)(A).
32. *Id.* § 170(h)(5)(A).
33. *See* 26 C.F.R. § 1.170A-14(c)(2) (2001).
34. *Id*. § 1.170A-14(c)(2); *see also id.* § 1.170A-14(g)(6).
35. *See* 26 C.F.R. § 1.170A-14(g)(6)(i) (2001).
36. *See id.* § 1.170A-14(g)(6)(ii).
37. *See id.* § 1.170A-14(d)(5)(i).

> Example 3: H owns Greenacre, a 900-acre parcel of woodland, rolling pasture, and orchards on the crest of a mountain. All of Greenacre is clearly visible from a nearby national park. Because of the strict enforcement of an applicable zoning plan, the highest and best use of Greenacre is as a subdivision of 40-acre tracts. H wishes to donate a scenic easement on Greenacre to a qualifying conservation organization, but H would like to reserve the right to subdivide Greenacre into 90-acre parcels with no more than one single-family home allowable on each parcel. Random building on the property, even as little as one home for each 90 acres, would destroy the scenic character of the view. Accordingly, no deduction would be allowable under this section.
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> Example 4: Assume the same facts as in example (3), except that not all of Greenacre is visible from the park and the deed of easement allows for limited cluster development of no more than five nine-acre clusters (with four houses on each cluster) located in areas generally not visible from the national park and subject to site and building plan approval by the donee organization in order to preserve the scenic view from the park. The donor and the donee have already identified sites where limited cluster development would not be visible from the park or would not impair the view. Owners of homes in the clusters will not have any rights with respect to the surrounding Greenacre property that are not also available to the general public. Accordingly, the donation qualifies for a deduction under this section.[38]

For qualifying conservation easements on property with historic structures, the reservation will not destroy the qualifying character of the easement only if permitted future development conforms "with appropriate local, state, or Federal standards for construction or rehabilitation within the district."[39] Subsection (e)(3) provides that some inconsistent uses may be permitted:

> A use that is destructive of conservation interests will be permitted only if such use is necessary for the protection of the conservation interests that are the subject of the contribution. For example, a deduction for the donation of an easement to preserve an archaeological site that is listed on the National Register of Historic Places will not be disallowed if site excavation consistent with sound archaeological practices may impair a scenic view of which the land is a part.[40]

Pre-existing uses will not affect the deductibility of the donation provided that the use does not conflict with the conservation purpose of the donation.[41] However, the example in subsection (e)(2) provides a cautionary note for

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38. *Id.* § 1.170A-14(f).
39. *Id.* § 1.170A-14(d)(5)(i).
40. *Id.* § 1.170A-14(e)(3).
41. *See id.* § 1.170A-14(e)(3).

those who wish to donate conservation easements on tracts used for commercial agriculture or forestry.

> For example, the preservation of farmland pursuant to a State program for flood prevention and control would not qualify under paragraph (d)(4) of this section if under the terms of the contribution a significant naturally occurring ecosystem could be injured or destroyed by the use of pesticides in the operation of the farm. However, this requirement is not intended to prohibit uses of the property, such as selective timber harvesting or selective farming if, under the circumstances, those uses do not impair significant conservation interests.[42]

Commercial farmers who make heavy use of pesticides, genetically modified crops, and other tools of modern agriculture may want to carefully evaluate whether those practices are compatible with the use of conservation easements. This may be even more problematical for forest landowners in the Southeast for whom clear cutting and herbicide application are normal forestry activities.

No surface mining may be permitted.[43] Retention of mineral rights that may be extracted by surface mining negates a use as exclusive for conservation purposes unless the surface and mineral rights have been previously separated and the probability of surface mining is remote.[44] Nonetheless the regulations suggest that some mineral extraction activities will not negate deductibility of the value of donations of conservation easements:

> a deduction under this section will not be denied in the case of certain methods of mining that may have limited, localized impact on the real property but that are not irremediably destructive of significant conservation interests. For example, a deduction will not be denied in a case where production facilities are concealed or compatible with existing topography and landscape and when surface alteration is to be restored to its original state.[45]

Mortgage or other indebtedness for which the property serves as security may defeat favorable tax treatment for any donation of a conservation easement unless the indebtedness has been subordinated to the conservation easement.[46]

> (2) *Protection of a conservation purpose in case of donation of property subject to a mortgage*. In the case of conservation contributions made after February 13, 1986,

42. *Id.* § 1.170A-14(e)(2).
43. *See* I.R.C. § 170(h)(5)(B) (2000).
44. *Id.* § 170(h)(5)(B)(ii); *see also* 26 C.F.R. § 1.170A-14(g)(4)(ii)(3) (2001).
45. 26 C.F.R. § 1.170A-14(g)(4) (2001).
46. *See id.* § 1.170A-14(g)(2).

> no deduction will be permitted under this section for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity. For conservation contributions made prior to February 14, 1986, the requirement of section 170 (h)(5)(A) is satisfied in the case of mortgaged property (with respect to which the mortgagee has not subordinated its rights) only if the donor can demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee's rights.[47]

A final requirement for a conservation easement to be in perpetuity is that the provisions of the easement must be enforceable in perpetuity.[48] For states that have enacted the UCEA this will not be an issue. For other states it will be a question of an analysis of specific legislation authorizing the use of conservation easements. Lack of appropriate legislation puts not only the deductibility of charitable deductions for donations in doubt, but the durability of PDRs as well. The regulations provide that the remote possibility that an easement may be extinguished does not defeat deductibility.[49] The regulations state, "a state's statutory requirement that use restrictions must be rerecorded every [thirty] years to remain enforceable shall not, by itself, render an easement nonperpetual."[50] Nonetheless, any local government considering a PDR program should have sufficient administrative depth and funding to ensure that renewals required by state law are made both to protect donors' tax benefits and to protect the investment of taxpayer funds in PDRs.

The total contribution that a taxpayer can deduct in any taxable year is limited to either fifty percent or thirty percent of adjusted gross income, depending on the aggregate of the contributions.[51] For a donation of a conservation easement to qualify at all, the receiving organization must be one in the fifty percent category.[52] For amounts in excess of the contribution limit, the taxpayer can carryover the excess contribution into each of the succeeding five years until the contribution is fully deducted.[53] Any contribution amounts that cannot be deducted in the carryover period are lost.[54] As a planning note, donations of con-

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47. *Id.* § 1.170A-14(g)(2).
48. *See id.* § 1.170A-14(g)(1).
49. *See id.* § 1.170A-14(g)(3).
50. *Id.* § 1.170A-14(g)(3).
51. *See* I.R.C. § 170(b)(1)(B) (2000).
52. *See* 26 C.F.R. § 1.170A-14(c) (2001); *see, e.g.*, I.R.C. § 170(b)(1)(A) (2000) (discussing organizations in the fifty percent category).
53. *See* I.R.C. § 170(d)(1)(A) (2000).
54. *See id.* § 170(d)(1)(A).

servation easements may, under some circumstances, be split into different years to avoid the carryover limits.[55]

3. *Installment Sales of Conservation Easements*

Conservation easements may be sold as an installment sale.[56] If so, payments are taxable only as received unless an election out is made.[57] This can be a useful tax planning tool for the landowner as it can be used to spread the payments across several tax years. In addition, Pennsylvania, Maryland, Virginia and New Jersey have established installment purchase agreement programs that provide additional tax benefits.[58] Under these programs, the governmental unit acquiring the conservation easement issues a valid and binding general obligation similar to a municipal bond to support payments under the conveyance agreement with the landowner.[59] Under the terms of the conveyance agreement, the landowner receives the interest on the general obligation for the duration of the agreement (up to thirty years in Pennsylvania) and receives the principal due as a balloon payment at the end of the agreement.[60] The interest payments as interest on qualified state and local bonds under I.R.C. § 103 are generally free of both federal and state income taxes.[61] If the landowner dies prior to receipt of the balloon payment, it may be available to the heirs or legatees of the landowner free of any income tax obligation if it was subject to I.R.C. § 1014, which provides for a step-up in basis at death.[62] The extent to which the balloon payment receives a step-up in basis will depend in part upon the year of death.[63]

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55. *See id.* § 170(d)(1)(A).
56. *See* I.R.C. § 453(b) (2000).
57. *See id.* § 453(b).
58. *See* Dept. of Agric., Commonwealth of Pa, Farmland Preservation 2000-2001, Annual Report to the General Assembly (2001), at 3-4, *available at* http://sites.state.pa.us/PA_Exec/Agriculture/bureaus/farmland_protection/2001_annual_report.htm.
59. *See id., available at* http://sites.state.pa.us/PA_Exec/Agriculture/bureaus/farmland_protection/2001_annual_report.htm.
60. *See id., available at* http://sites.state.pa.us/PA_Exec/Agriculture/bureaus/farmland_protection/2001_annual_report.htm.
61. *See id.; see also* I.R.C. § 103 (2000).
62. *See* I.R.C. § 1014 (2000). Section 541 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (Pub. L. No. 107-16) provides for a new section, 1022, and for a partial phase-out of the step-up in basis at death. Pub. L. No. 107-16 sunsets after December 31, 2010. *See* H.R. REP. NO. 107-84, at 195 (2001), *reprinted in* 2001 U.S.C.C.A.N. 46, 116-119.
63. *See* I.R.C. § 1014(b)(1) - (9) (2000).

4. *Like Kind Exchanges Involving Conservation Easements*

Section 1031(a)(1) provides that "[n]o gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind . . . ."[64] To qualify as like-kind the exchange must be completed not more than 180 days after the transfer of the exchanged property[65] or by the due date, including extensions, of the tax return for the year in which the property is relinquished, if that time is less than 180 days.[66] The property to be received must be identified within forty-five days after the property to be exchanged is relinquished.[67] For deferred transactions, a qualified person who is not related to the person making the like-kind exchange must hold the funds from the exchanged property in escrow.[68] Based upon Rev. Rul. 55-749 and Rev. Rul. 72-549, the IRS, by private letter ruling, has approved nonrecognition of gains in several like-kind exchanges of conservation easements for fee interests in land.[69] Exchanges approved by the IRS have included a conservation easement on farmland for a fee interest in another farm,[70] a conservation easement that reduces the value of the remaining fee to zero in exchange for wetlands mitigation credits,[71] a conservation easement on ranch land for a fee interest in timberland, farmland or ranch land,[72] and a conservation easement on land used for cattle grazing and duck hunting for a fee in either farm land, ranch land or commercial real property.[73] The significance of the foregoing is that a landowner may sell PDRs on existing land and use the proceeds to buy other land in fee without recognizing any gain. By careful use of PDR sales a farmer can leverage their existing property to expand land farmed without recognizing any gain.

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64. I.R.C. § 1031(a)(1) (2000).
65. *See id.* § 1031(a)(3)(B)(i).
66. *See id.* § 1031(a)(3)(B)(ii).
67. *See id.* § 1031(a)(3)(A).
68. *See* 26 C.F.R. § 1.1031(k)-1(g)(3)(ii)(A) (2001).
69. *See* Priv. Ltr. Rul. 92-15-049 (Apr. 10, 1992).
70. *See id.*; *see also* Priv. Ltr. Rul. 92-32-030 (Aug. 7, 1992); Priv. Ltr. Rul. 98-510-39 (Dec. 18, 1998).
71. *See* Priv. Ltr. Rul. 96-12-009 (Dec. 18, 1995).
72. *See* Priv. Ltr. Rul. 96-21-012 (Feb. 16, 1996).
73. *See* Priv. Ltr. Rul. 96-010-46 (Oct. 10, 1995).

5. *Treatment of Conservation Easements in Estates*

Conservation easements may also be donated posthumously.[74] In general, the value of the taxpayer's gross estate is calculated as the FMV of the property owned at the date of death or the alternate valuation date; however, the Taxpayer Relief Act of 1997 provided two benefits.[75] First, it allows a charitable deduction for the FMV of the conservation easement donated posthumously on behalf of the estate.[76] The easement must be granted no later than the due date of the estate tax return, including extensions.[77] The conservation easement must meet all of the requirements of section 170(h) that would be required for a qualified conservation easement granted prior to death.[78] A partnership, corporation, or trust could donate the easement, provided that the decedent controlled (directly or indirectly) at least thirty percent of the entity making the donation.[79] To take the charitable deduction on the estate tax return, neither the decedent nor an heir may have taken the charitable deduction against income.[80] Although the issue is not addressed explicitly, section 2031(c)(9) makes no distinction between those states that vest property in the heirs at death from those that delay vesting until distribution or some other point in the probate process. Second, the Taxpayer Relief Act of 1997 allows estate tax exclusion for a portion of the remaining value of the property.[81] The estate tax exclusion will be discussed in more detail below. If the decedent's will failed to provide for the donation of a conservation easement or the decedent died intestate, donating a conservation easement posthumously may lead to insurmountable hurdles. If all of the heirs who may receive the property are competent and can agree, then the donation of the conservation easement should be possible. If an heir is not competent or is unascertainable, then the ability of the administrator or executor to make the donation will depend upon state law. The following excerpt from the Virginia Code is provided by way of example.

> [Section] 64.1-57.3. Power granted to personal representatives and trustees to donate conservation easements.-

74. *See* Rudolph & Gosch, *supra* note 13, at 181.
75. *See id.* at 176.
76. *See* I.R.C. § 2031(c)(9) (2000).
77. *See id.* § 2031(c)(9).
78. *See id.* § 2031(c)(8)(B).
79. *See id.* § 2031(c)(10).
80. *See id.* § 2031(c)(9).
81. Rudolph & Gosch, *supra* note 13, at 176.

> Personal representatives and trustees, whether heretofore or hereafter qualified or appointed, are hereby granted the power to donate a conservation easement as provided in the Virginia Conservation Easement Act (§ 10.1-1009 et seq.) or the Open-Space Land Act (§ 10.1-1700 et seq.) on any real property of their decedents and settlors, in order to obtain the benefit of the estate tax exclusion allowed under § 2031(c) of the United States Internal Revenue Code of 1986, as amended, provided they have the written consent of all of the heirs, beneficiaries and devisees whose interests are affected thereby. Upon petition of the personal representative or trustee, the circuit court may give consent on behalf of any unborn, unascertained or incapacitated heirs, beneficiaries or devisees whose interests are affected thereby after determining that (i) the donation of the conservation easement will not adversely affect such heirs, beneficiaries or devisees or (ii) it is more likely than not that such heirs, beneficiaries or devisees would consent if they were before the court and capable of giving consent. A guardian ad litem shall be appointed to represent the interests of any unborn, unascertained or incapacitated persons.[82]

There are several aspects of this statute that are worthy of comment. Only those conservation easements that comply with Virginia's conservation easement law and which qualify for the estate tax exclusion under 26 USC § 2031(c) may be donated posthumously.[83] This is logical as there would seldom be any incentive to do anything that did not qualify for the estate tax exclusion. Second, the donation may only be made if all those with interests affected provide their written consent.[84] Again, it is logical that property rights may not be altered without the consent of the owner. The difficulty arises where the owner is incapable of providing consent. The statute requires that a guardian ad litem be appointed to represent the interests of those who lack the capacity to consent, or are unascertainable,[85] and further imposes a two-part test, set forth above, upon the guardian ad litem. Most attempts to make a posthumous donation will fail upon the first part of the test. Donation of a conservation easement almost always adversely affects the interests of those with an interest in the property. It is difficult to imagine a circumstance under which a guardian ad litem could ever grant consent to the donation of an easement. To date, no published Virginia decision has addressed this issue. Indeed no published state decision on the point (of posthumous donations of conservation easements) from any state could be found.

For land subject to conservation easement donated during life, the FMV of the remaining fee included in the calculation of the gross estate reflects the

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82. VA. CODE ANN. § 64.1-57.3 (Michie 2001).
83. *Id.* § 64.1-57.3.
84. *Id.* § 64.1-57.3.
85. *See id.* § 64.1-57.3.

reduction in value resulting from the loss of development rights.[86] This holds whether the conservation was sold as a PDR or fully or partially donated.[87] There is a further advantage to donations made during lifetime in that any appreciation in the value of the development rights given up in the conservation easement will not become part of the gross estate.[88] If the estate sells the PDR for full value there is no net change in estate tax; real property has been converted to personal property (assuming that the land did not change in value from the date of valuation to the date of sale).[89] If the estate makes a full or partial donation of the conservation easement, there is then a charitable deduction equal to the value of the rights given up that may be used to offset part of the value of the property that was included in the gross estate.[90] In addition, however the conservation easement is created, there is an additional estate tax benefit, the estate tax exclusion.[91] To obtain the estate tax exclusion, the executor (or administrator) must make an election on the estate tax return on or before the due date of the return, including extensions.[92]

The estate tax exclusion is calculated as either the lesser of forty percent of the remaining value of the possessory interest in the property or the exclusion limitation.[93] The exclusion limitation is determined in accordance with the following table:

1998	$100,000
1999	$200,000
2000	$300,000
2001	$400,000

86. *See* Rudolph & Gosch, *supra* note 13, at 172-73.
87. *See id.* at 179.
88. *See id.* at 175.
89. *See* I.R.C. § 2031(c)(2), (5)(A) (2000) (stating that the tax is reduced by the value of retained development rights).
90. *See id.* § 2055(f) (stating that a deduction is allowed for transfer of a qualified real property interest).
91. *See id.* § 2031(c)(1). Neither regulations nor published decisions address the application of this section to conservation easements that were sold during the life of the decedent. Since the method of creation is not an issue, the estate exclusion is therefore available for property subject to such otherwise qualified conservation easements.
92. *See id.* §§ 2031(c)(1), 2031(c)(6).
93. *See id.* §§ 2031(c)(2) & 2031(c)(3).

2002 or thereafter.. $500,000.[94]

To discourage creation of conservation easements in areas of limited development pressure, there is a further limitation on the estate tax exclusion for properties where the difference between the value of the property with and without the easement is not great.[95] Where that difference is less than thirty percent, the estate tax exclusion of forty percent is reduced by two percent for each percentage point that the difference is less than thirty percent.[96] The estate tax exclusion is never reduced to less than zero.[97] Section 551(b) of the Economic Growth and Tax Relief Reconciliation Act of 2001 provided clarification that this calculation is to be made as of the date that the conservation easement was created.[98]

The estate tax exclusion does not include any value of the property that is subject to acquisition indebtedness.[99] It also does not include any value in development rights that were retained by the transferor of the conservation easement.[100] A development right is defined as a right "retained for any commercial purpose which is not subordinate to and directly supportive of the use of such land as a farm for farming purposes . . . ."[101] A prohibited development right may include a reservation of the right to extract minerals from the property.[102] All the heirs or devisees may agree to extinguish the development right.[103] If the agreement is filed with the estate tax return and the right is actually extinguished either within two years of the date of the decedent's death or before the property is sold, the tax due may be reduced accordingly.[104] If the agreement to extinguish the development rights is not fully executed the heirs or devisees are personally liable for the tax due.[105]

For decedents dying prior to January 1, 2001, the estate tax exclusion was restricted to land:

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94. *Id.* § 2031(c)(3).
95. *See id.* § 2031(c)(2).
96. *See id.* § 2031(c)(2).
97. *See id.* § 2031(c)(2).
98. *See* H.R. REP. NO. 107-84, at 194-96 (2001), *reprinted in* 2001 U.S.C.C.A.N. 46, 119-23.
99. *See* I.R.C. § 2031(c)(4) (2000).
100. *See id.* § 2031(c)(5)(A).
101. *Id.* § 2031(c)(5)(D).
102. *See* H.R. REP. NO. 107-84, at 195.
103. *See* H.R. REP. NO. 107-84, at 195.
104. *See* I.R.C. §§ 2031(c)(5)(B), (C) (2000).
105. *See* H.R. REP. NO. 107-84, at 195.

> (i) which is located-
>
> (I) in or within 25 miles of an area which, on the date of the decedent's death, is a metropolitan area (as defined by the Office of Management and Budget),
>
> (II) in or within 25 miles of an area which, on the date of the decedent's death, is a national park or wilderness area designated as part of the National Wilderness Preservation System (unless it is determined by the Secretary that land in or within 25 miles of such a park or wilderness area is not under significant development pressure), or
>
> (III) in or within 10 miles of an area which, on the date of the decedent's death, is an Urban National Forest (as designated by the Forest Service),
>
> (ii) which was owned by the decedent or a member of the decedent's family at all times during the 3-year period ending on the date of the decedent's death, and
>
> (iii) with respect to which a qualified conservation easement has been made by an individual described in subparagraph (C), as of the date of the election described in paragraph (6).[106]

Subsection (i), above, was repealed by section 551 of the Economic Growth and Tax Relief Reconciliation Act of 2001, with the result that properties located anywhere in the country may qualify for the estate tax exclusion.[107]

B. *State Tax Benefits*

Most states that have an income tax will also provide for a charitable deduction where a deduction is available on the federal tax return. Some states provide additional benefits. North Carolina's tax credit program is an example of such a program.[108] North Carolina's program provides an income tax credit "equal to twenty-five percent of the fair market value" of the donation, with either complete donations of land or donations of conservation easements qualifying.[109] The credit allowed is subject to an annual cap of $250,000 for individuals and $500,000 for corporations with carryover of any excess over the following five tax years permitted.[110] Qualifying purposes include "public beach access or

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106. I.R.C. § 2031(c)(8)(A) (2000).
107. *See* H.R. REP. NO. 107-84, at 196.
108. *See* N.C. GEN. STAT. §§ 105-151.12(a), 105-130.34(a) (1999).
109. *Id.* §§ 105-151.12 (a), 105-130.34(a).
110. *See id.* §§ 105-151.12(a), 105-130.34(a).

use, public access to public waters or trails, fish and wildlife conservation, or other similar land conservation purposes."[111] Application of the credit is not automatic; a certification by the Department of Environment and Natural Resources is required to accompany any state income tax return upon which the credit is claimed.[112] In general, the credit may not be claimed where the restrictions attached to property were required by a governmental agency.[113]

C. *Real Estate Tax Benefits*

Where a conservation easement is sold or donated and the FMV of the remaining property is reduced this will generally reduce any taxes on the real estate. Some states, such as North Carolina, have addressed this issue through legislation:

> Whenever any real property is appraised it shall be the duty of the persons making the appraisals... [i]n determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to... conservation or preservation agreements . . . .[114]

New York law contains a similar provision:

> That within one year after a development right is transferred, the assessed valuation placed on the affected properties for real property tax purposes shall be adjusted to reflect the transfer.[115]

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111. *Id.* §§ 105-151.12, 105-130.34.

112. *See id.* §§ 105-151.12, 105-130.34.

113. *See id.* § 105-151.12(a); *see also* N.C. Op. Att'y. Gen. No. 248: Availability of North Carolina Conservation Tax Credits Under G.S. §§ 105-130.34 & 105-151.12 for Donations of Mandatory Riparian Buffer Lands (March 20, 1996).

114. N.C. GEN. STAT. § 105-317(a)(1).

115. N.Y. GEN. CITY LAW § 20-f(2)(d) (McKinney Supp. 2002), *available at* http://www.pace.edu/lawschool/landuse/law.htm.. The texts of the Town Law and Village Law are identical. *See* N.Y. TOWN LAW § 261-a(2)(d) (McKinney Supp. 2002), *available at* http://www.pace.edu/lawschool/landuse/law.htm.; N.Y. VILLAGE LAW § 7-701(2)(d) (McKinney 1996), *available at* http://www.pace.edu/lawschool/landuse/law.htm.. The language of these statutes may be advisory in nature despite the binding language used. *See* Joseph Stinson & Michael Murphy, *Transfer of Development Rights* (1996) *in* Pace University School of Law Land Use Law Center, L.U.C.A.S., *at* http://www.pace.edu/lawschool/landuse/tdr.html (last updated July 12, 2001).

Even in the absence of a statute, courts have recognized that general principles of appraisal require consideration of the conservation easement.[116]

D. *Appraisal and Valuation Issues*

The value of a conservation easement or PDR is its fair market value at the time of donation or purchase. If the value of the property retained by the donor increases as a result of the donation of the easement the amount of the deduction for the donation must be reduced by the amount of that increase.[117] Where the financial or economic benefits to the donor exceed the benefits to the general public, deductibility is denied.[118] If there have been sufficient sales of PDRs then the value is to be established by the use of comparable sales.[119] If, as is typically the case, there have not been sufficient comparable sales to establish value then the value of the interest is to be established by the before and after method.[120] Value calculated by this method is the fair market value of the property before being encumbered by the conservation easement less the value of the property after it has been encumbered.[121]

> If before and after valuation is used, the fair market value of the property before contribution of the conservation restriction must take into account not only the current use of the property but also an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use. Further, there may be instances where the grant of a conservation restriction may have no material effect on the value of the property or may in fact serve to enhance, rather than reduce, the value of property. In such instances no deduction would be allowable. In the case of a conservation restriction that allows for any development, however limited, on the property to be protected, the fair market value of the property after contribution of the restriction must take into account the effect of the development. In the case of a conservation easement such as an easement on a certified historic structure, the fair market value of the property after contribution of the restriction

116. *See* Rainbow Springs P'ship v. County of Macon, 339 S.E.2d 681, 685-86 (N.C. Ct. App. 1986) (affirming State Property Tax Commission requirement that the county tax office consider the effects of a conservation easement on the property value of a tract of land). The General Assembly adopted the result in this case when it adopted N.C. GEN. STAT. § 105-317(a)(1) in 1987. *See* N.C. GEN. STAT. § 105-317(a)(1).

117. *See* 26 C.F.R. § 1.170A-14(h)(3)(i) (2001).

118. *See id.* § 1.170A-14(h)(3)(i).

119. *See id.* § 1.170A-14(h)(3)(i).

120. *See id.* § 1.170A-14(h)(3)(i).

121. *See id.* § 1.170A-14(h)(3)(i).

> must take into account the amount of access permitted by the terms of the easement. Additionally, if before and after valuation is used, an appraisal of the property after contribution of the restriction must take into account the effect of restrictions that will result in a reduction of the potential fair market value represented by highest and best use but will, nevertheless, permit uses of the property that will increase its fair market value above that represented by the property's current use. The value of a perpetual conservation restriction shall not be reduced by reason of the existence of restrictions on transfer designed solely to ensure that the conservation restriction will be dedicated to conservation purposes.[122]

To qualify for a deduction the taxpayer must be able to substantiate the value of the deduction.[123] For interests in real property this always requires the services of an appraiser licensed in the jurisdiction. Governments operating a PDR program are under no such obligation to obtain appraisals prior to making offers for PDRs;[124] however, the use of such appraisals is good practice. Without an appraisal as a guide it is difficult to know whether the government is overpaying for the PDR.

Browning v. Commissioner[125] addressed both the issue of valuation method and its application. The case arose from a bargain sale made by the taxpayers in 1990 of a conservation easement to the Howard County, Maryland, Agricultural Land Preservation Program and claimed a charitable deduction for the difference between the fair market value of the rights transferred and the price received for those rights.[126] The program was designed to encourage bargain sales and was limited by law until 1989, and thereafter by policy, in the amounts that it could pay per acre for conservation easements.[127] Howard County was the sole purchaser of conservation easements in Howard County.[128] The IRS argued that the taxpayers must use the comparable sales method because there have been many sales of conservation easements to Howard County.[129] The Tax Court rejected this contention, holding that where there was evidence that sales occurred in an inhibited market (i.e., one buyer and a per acre limit on payments) the com-

122. *Id.* § 1.170A-14(h)(3)(ii).

123. *See id.* § 1.170A-14(i).

124. *See generally id.* § 1.170A-14(h)(3)(i) (discussing the process for determining fair market value of the conservation easement); *see also* Browning v. Comm'r, 109 T.C. 303 (1997) (discussing valuation processes and their application).

125. Browning v. Comm'r, 109 T.C. 303 (1997).

126. *See id*. at 304.

127. *See id.* at 305-06.

128. *See id.* at 306.

129. *See id.* at 312-13.

parable sales method could not be used.[130] The Tax Court noted that even in an uninhibited market there might be a bargain sale if the facts support it.[131] The IRS also argued that if the before and after method was appropriate it had been misapplied in this case.[132] The Tax Court engaged in a detailed comparison of the methods used by the appraisers for the parties and, while modestly reducing the taxpayers' deduction, essentially handed them a victory.[133] The opinion illustrates the importance of a fact intensive, well-documented appraisal as essential to support any deduction claimed.[134]

E. *Requirements for a Well-Run PDR Program: Selection and Restrictions, Stewardship and Monitoring*

Given the common heritage of the legal systems in the various states and the overriding importance of federal law, particularly tax law, it is not surprising that it should be possible to set forth some common characteristics that all PDR programs should possess. The discussion is divided chronologically into two areas. The first is selection of properties for the program and application of legally enforceable restrictions to those properties that are consistent with protecting conservation values. The second is stewardship and monitoring of those properties to ensure, at a minimum, that those legal restrictions are enforced. A truly excellent program will provide assistance to landowners to help them exceed the minimums set by legal restriction.

There are three fundamental reasons for using the federal tax law's requirements for deductibility of donations of conservation easements as a set of minimum requirements for any PDR program. The first is that a great deal of thought on the part of many individuals has gone into the development of the federal requirements and there is very little justification for duplicating that effort. The second is more practical. A PDR program that fails to conform itself to the requirements of federal tax law will be unable to assure landowners that donations to the program will generate the charitable deductions and other tax benefits discussed above. Without such assurance, donations are much less likely and monetary savings associated with donations to PDR programs will not be realized. Third, following the requirements of federal tax law provides a measure of assurance that local funds will not be squandered on dubious purchases or worse.

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130. *See id.* at 316-17.
131. *See id.* at 317-20.
132. *See id.* at 320-24.
133. *See id.* at 320-25.
134. *See id.* at 320-24.

There is no reason that local tax funds used to acquire PDRs should receive less protection than the protection that federal tax revenues foregone, as the result of donations, receive under federal tax law.

In general terms the section 170(h) requirement that a donation of a qualified conservation interest provide a substantial public benefit may be achieved through any of the following means:

> (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
>
> (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
>
> (iii) the preservation of open space (including farmland and forest land) where such preservation is -
>
> (I) for the scenic enjoyment of the general public, or
>
> (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
>
> (iv) the preservation of an historically important land area or a certified historic structure.[135]

While public recreation and education will meet the requirements of the regulations, those requirements are not met without granting the public substantial access to the property.[136] Examples from the regulations that meet this requirement include a city lot used for a public garden, but not the lot without the garden, or the preservation of a unique natural land formation for the enjoyment of the general public.[137] Another example from the regulations illustrates the need for public access to support a public recreation justification for deductibility:

> *Example 1*. State S contains many large tract forests that are desirable recreation and scenic areas for the general public. The forests' scenic values attract millions of people to the State. However, due to the increasing intensity of land development in State S, the continued existence of forestland parcels greater than 45 acres is threatened. J grants a perpetual easement on a 100-acre parcel of forestland that is part of one of the State's scenic areas to a qualifying organization. The easement imposes

135. I.R.C. § 170(h)(4)(A) (1994).
136. *See* 26 C.F.R. § 1.170A-14(d)(2)(ii) (2001).
137. *See id.* § 1.170A-14(d)(4)(iv)(B).

> restrictions on the use of the parcel for the purpose of maintaining its scenic values. The restrictions include a requirement that the parcel be maintained forever as open space devoted exclusively to conservation purposes and wildlife protection, and that there be no commercial, industrial, residential, or other development use of such parcel. The law of State S recognizes a limited public right to enter private land, particularly for recreational pursuits, unless such land is posted or the landowner objects. The easement specifically restricts the landowner from posting the parcel, or from objecting, thereby maintaining public access to the parcel according to the custom of the State. J's parcel provides the opportunity for the public to enjoy the use of the property and appreciate its scenic values. Accordingly, J's donation qualifies for a deduction under this section.[138]

Protection of environmental systems is an important justification for deductibility.[139] Deductibility is not negated by substantial human modification of the environment; examples given include a man-made lake or salt pond formed by a man-made dike if these features serve as important wildlife feeding areas or habitat for endangered species.[140] Vicinity to parkland or other public resources is an important consideration.[141] Since the conservation values protected by easements that protect environmental systems provide substantial public benefit without public access (indeed public access might be detrimental to an endangered species), public access is not an issue for these conservation easements.[142]

Open space preservation is also a substantial public purpose; qualified real property interests in farmland and forestland may qualify if certain conditions are met.[143]

This condition is easier to meet if the donation supports a "clearly delineated Federal, state, or local governmental conservation policy."[144] Open space donations may be designed to support scenic enjoyment by the public.[145] There is no specific set of factors to be considered in evaluating scenic enjoyment, as the regulation states "all pertinent facts and circumstances germane to the contribution" will be considered.[146] Factors listed in the regulation to be considered include:

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138. *Id.* § 1.170A-14(f).
139. *See id.* § 1.170A-14(d)(3).
140. *See id.* § 1.170A-14(d)(3)(i).
141. *See id.* § 1.170A-14(d)(3)(ii).
142. *See generally id.* § 1.170A-14(d)(3)(iii) (discussing access and deductibility).
143. *See id.* § 1.170A-14(d)(4)(i).
144. *See id.* § 1.170A-14(d)(4)(i)(A).
145. *See id.* § 1.170A-14(d)(4)(ii)(A).
146. *See id.* § 1.170A-14(d)(4)(ii)(A).

> (1) The compatibility of the land use with other land in the vicinity;
>
> (2) The degree of contrast and variety provided by the visual scene;
>
> (3) The openness of the land (which would be a more significant factor in an urban or densely populated setting or in a heavily wooded area);
>
> (4) Relief from urban closeness;
>
> (5) The harmonious variety of shapes and textures;
>
> (6) The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area;
>
> (7) The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory; and
>
> (8) The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency.[147]

Access to or across the property by the general public is sufficient to support the access requirement; the entire property need not be visible to the public to support deductibility of the donation.[148]

Acceptance of a donation of a conservation easement by an agency of the federal government or an agency of a state or local government tends to establish the deductibility of the donation, however, it is not dispositive.[149] Where an agency merely accepts gifts without a review policy, the necessary governmental policy has not been established.[150] Limitations on public access to the donated property interest may result in the loss of deductibility in the same manner as if the interest had been donated to a private land trust.[151] To ensure deductibility for donations and to protect the public funds used to acquire PDRs, the goals of any PDR program must be given careful thought and the criteria that flow from those goals should be delineated in writing, preferably in the ordinance establishing the PDR program. Written guidelines will ensure consistency across properties and

147. *Id.* § 1.170A-14(d)(4)(ii)(A).
148. *See id.* § 1.170A-14(d)(4)(ii)(B).
149. *See id.* § 1.170A-14(d)(4)(iii)(B).
150. *See id.* § 1.170A-14(d)(4)(iii)(B).
151. *See id.* § 1.170A-14(d)(4)(iii)(C).

avoid the appearance of favoritism, which can be very corrosive to the political support for PDR programs.

Stewardship is the establishment and maintenance of the relationship between the government administering the PDR program and the owners of the land in the PDR program. A good stewardship program will include an educational component to inform and train landowners with regard to their obligations. Such a program should include provisions for those who acquire land subject to PDRs either by purchase, gift or inheritance. Most problems that arise with violations of PDR provisions occur after ownership of the land has passed from the original owner who transferred the PDR to a subsequent owner. Subsequent owners often fail to understand their obligations. A good stewardship program can substantially reduce the costs of monitoring and enforcement.

Monitoring is an essential component of any PDR program. Indeed, monitoring is a requirement for deductibility of donations;[152] although funding does not have to be provided for this purpose at the time of the donation for the donation to be deductible.[153] The failure, however, to have identified a source of stable funding for monitoring and enforcement is fatal to a successful PDR program even though not required by regulations under the Internal Revenue Code. The few studies of monitoring rates that have been conducted suggest serious problems.[154] Monitoring must include a right of access to the property to be monitored and violations of conservation provisions must be enforceable through legal action.[155] Where the donor is permitted to reserve certain rights that may be inconsistent with the conservation values in the property, the donor must be required to notify the donee prior to exercise of those rights if deductibility is to be preserved.[156]

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152. *See id.* § 1.170A-14(g)(5)(ii).

153. *See id.* § 1.170A-14(c)(1) (regarding private land trusts); *see also id.* § 1.170A-14(d)(4)(iii) (regarding agencies of federal, state, or local governments).

154. Bay Area Open Space Council, Ensuring the Promise of Conservation Easements, Report on the Use and Management of Conservation Easements by San Francisco Bay Area Organizations 14 (1999); Land Trust Alliance, How Strong Are Our Defenses: The Results of the Land Trust Alliance's Northern New England Conservation Easement Quality Research Project 16 (2000).

155. *See* 26 C.F.R. § 1.170A-14(g)(5)(ii) (2001).

156. *See id*. § 1.170A-14(g)(5)(ii).

II. TRANSFER DEVELOPMENT RIGHTS PROGRAMS

Transfer of development rights programs ("TDRs") are another land preservation tool employed by some local and regional governments. TDR programs are difficult to set up, relatively expensive to operate and administer, and are used relatively little compared with PDR programs.[157] A prerequisite to any TDR program is comprehensive land use planning and zoning.[158] PDRs will form a part of any TDR program. A TDR program requires the existence of a sending area and a receiving area.[159] Landowners in the sending area sell credits to landowners in the receiving area.[160] By selling credits a landowner in the sending area gives up the right to develop at the full density permitted by existing zoning (or the zoning prior to down zoning if the TDRs were provided in mitigation) while the buyer of credits obtains the right to develop at a greater density than existing zoning would otherwise permit.[161] Landowners who sell TDRs are prevented from later developing the property by perpetual conservation easements attached to their property as deed restrictions at the time they sell TDRs (or at some earlier time such as at down zoning).[162]

The TDR program adopted by Montgomery County, Maryland is one of the best known. Montgomery County is located immediately northwest of Washington, D.C. in an area of intense development pressure.[163] It consists of 497 square miles and has a 2000 Census population of 873,341.[164] In large part be-

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157. *See* Sean F. Nolan & Cozata Solloway, Comment, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State,* 17 PACE L. REV. 591, 631-33 (1997).

158. *See* Joseph Stinson & Michael Murphy, *Transfer of Development Rights* (1996) *in* Pace University School of Law Land Use Law Center, L.U.C.A.S., *at* http://www.pace.edu/lawschool/landuse/tdr.html (last updated July 12, 2001).

159. *See* Joseph Stinson & Michael Murphy, *Transfer of Development Rights* (1996) *in* Pace University School of Law Land Use Law Center, L.U.C.A.S., *at* http://www.pace.edu/lawschool/landuse/tdr.html (last updated July 12, 2001).

160. *See* Joseph Stinson & Michael Murphy, *Transfer of Development Rights* (1996) *in* Pace University School of Law Land Use Law Center, L.U.C.A.S., *at* http://www.pace.edu/lawschool/landuse/tdr.html (last updated July 12, 2001).

161. *See* Joseph Stinson & Michael Murphy, *Transfer of Development Rights* (1996) *in* Pace University School of Law Land Use Law Center, L.U.C.A.S., *at* http://www.pace.edu/lawschool/landuse/tdr.html (last updated July 12, 2001).

162. *See* Joseph Stinson & Michael Murphy, *Transfer of Development Rights* (1996) *in* Pace University School of Law Land Use Law Center, L.U.C.A.S., *at* http://www.pace.edu/lawschool/landuse/tdr.html (last updated July 12, 2001).

163. *See* Jeremy Criss, *Farmland Preservation Options in Montgomery County, Maryland - Transferable Development Rights, at* http://www.farmlandinfo.org/fic/ft/ohio/criss.html (last visited Mar. 28, 2002).

164. Map of County, *available at* http://www.co.mo.md.us/cntymap.htm (last visited

cause of its comprehensive farmland preservation program, 93,000 of the total 316,000 acres in the county are still in agriculture.[165] The County calculates that agriculture and horticulture contributed $350 million to the County's economy.[166] A total of 53,269 acres are protected including 41,270 through the TDR program; the remaining acres are protected through various PDR programs.[167] The program was established as the result of a 1980 master plan revision that established an urban growth boundary and an agricultural reserve.[168] This master plan revision was accompanied by a down zoning of the land in the agricultural reserve from one residence per five acres to one per twenty-five acres.[169] Landowners within the agricultural reserve were permitted to sell TDRs to receiving areas elsewhere based upon the one house per five acre prior zoning that they were denied by the down zoning.[170] Upon selling TDRs, a perpetual conservation easement is recorded as a deed restriction on the property from which the TDRs were transferred.[171] While this approach cost Montgomery County little, landowners within the agricultural reserve saw their land values drop by as much as eighty percent.[172]

At the outset of the program the price of a TDR was about $3,500 (or about $700 per acre at five acres per TDR).[173] The price of a TDR peaked in 1996 at $11,000.[174] The program has been subject to two ultimately unsuccessful judicial challenges. One was brought by landowners who asserted a takings

Mar. 28, 2002).

165. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

166. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

167. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

168. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

169. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

170. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

171. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

172. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

173. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

174. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

claim, and the other was brought by those in the receiving area who were opposed to increased density.[175]

Other TDR programs have been implemented with varying degrees of success in Seattle, New York City, Long Island, and several jurisdictions in New Jersey.[176] One of the primary purposes of a TDR program is to mitigate the harshness, and thus the political consequences, of protective zoning of critical property whether those be historic sites, groundwater recharge zones, or agricultural areas.[177] A second purpose, and perhaps the most legitimate reason for a TDR program, is to provide flexibility to zoning programs by allowing individual decisions and market forces to redistribute density within a defined geographic area.[178] A TDR program, if well designed, can relieve zoning authorities of some of the administrative burden of making individual variance decisions, as well as provide for a more comprehensive and less ad hoc approach.

The Supreme Court has addressed the issue of TDRs, but has never answered most of the constitutional issues surrounding them. In *Penn Central Transportation Company v. New York City*[179] the issue raised, but not answered was whether a grant of TDRs could save a zoning regulation that otherwise would constitute a taking in violation of the Fifth Amendment.[180] Justice Brennan mentioned transfer of development rights in the majority opinion as providing mitigation for harsh consequences of a zoning regulation.

> While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.[181]

The New York Court of Appeals never reached the issue of TDRs in its opinion because it determined that the City of New York's zoning regulation did

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175. *See* Montgomery County Dept. of Econ. Dev., Agric. Services, Agric. Preservation, *at* http://www.emontgomery.org/ded/AgServices/agpreservation.html (last visited Mar. 28, 2002).

176. *See generally* Jennifer Frankel, Note, *Past, Present, and Future Constitutional Challenges to Transferable Development Rights*, 74 WASH. L. REV. 825 (1999) (discussing Seattle's innovative TDR system may still face problems because of due process challenges); Joseph D. Stinson, Comment, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 PACE L. REV. 319 (1996) (discussing the benefits and detriments of TDRs).

177. *See* Stinson, *supra* note 176, at 319-322.

178. *See* Frankel, *supra* note 176, at 842-843.

179. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

180. *See id.* at 107.

181. *See id.* at 137 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 n.3 (1962)).

not constitute a taking.[182] Essentially in agreement with the New York Court of Appeals the Supreme Court did not reach the issue and applied its often discussed balancing test.[183]

Justice Rehnquist, joined by Chief Justice Berger and Justice Stevens, in dissent would have found a taking in the *Penn Central* case and would have remanded on the question of whether a TDR can save an otherwise unconstitutional regulation from being a taking.[184]

> Appellees, apparently recognizing that the constraints imposed on a landmark site constitute a taking for Fifth Amendment purposes, do not leave the property owner emptyhanded . . . the property owner may theoretically 'transfer' his previous right to develop the landmark property to adjacent properties if they are under his control.[185]

Suggesting an answer to whether a TDR can provide just compensation, Justice Rehnquist noted,

> Of all the terms used in the Taking Clause, 'just compensation' has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires 'a full and perfect equivalent for the property taken.'[186]

Justice Rehnquist framed the factual issues presented by the existence of TDRs in the *Penn Central* dispute,

> And in other cases the Court of Appeals has noted that TDR's have an 'uncertain and contingent market value' and do 'not adequately preserve' the value lost when a building is declared to be a landmark. (citation omitted). On the other hand, there is evidence in the record that Penn Central has been offered substantial amounts for its TDR's.[187]

In *Suitum v. Tahoe Regional Planning Agency*,[188] the Supreme Court was once again confronted with the issue of whether a TDR can save an otherwise unconstitutional regulation by providing just compensation, however, the majority declined to address the issue.[189] The majority opinion advances understanding

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182. *See* Penn. Cent. Transp. Co. v. New York City, 366 N.E.2d 1271, 1274 (1977).
183. *See Penn. Cent. Transp. Co*., 438 U.S. at 124.
184. *See id.* at 152 (Rehnquist, J., dissenting).
185. *Id.* at 150.
186. *Id.* at 326.
187. *Id.* at 151-52.
188. Suitum v. Tahoe Reg’l Planning Agency, 520 U.S. 725 (1997).
189. *See* Frankel, *supra* note 176, at 839.

of TDRs only in that a takings claim will be ripe for review even though the landowner has made no effort to market TDRs.[190] Justice Scalia, concurring in part, objected to considering the TDR in the analysis of whether a taking had occurred.[191] He concluded that the TDR should be considered only once the issue of a taking had been resolved, and then only as part of the determination of whether just compensation had been paid.[192]

> Putting TDRs on the taking rather than the just-compensation side of the equation . . . is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our Takings-Clause jurisprudence: Whereas once there *is* a taking, the Constitution requires just (i.e., full) compensation, (citation omitted) . . . a regulatory taking generally does not occur so long as the land retains substantial (albeit not its full) value. (citation omitted). If money that the government-regulator gives to the landowner can be counted on the question of whether there *is* a taking . . . rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here. It would be too obvious, of course, for the government simply to say 'although your land is regulated, our land-use scheme entitles you to a government payment of $ 1,000.' That is patently compensation and not retention of land value. It would be a little better to say 'under our land-use scheme, TDRs are attached to every parcel, and if the parcel is regulated its TDR can be cashed in with the government for $1,000.' But that still looks too much like compensation. The cleverness of the scheme before us here is that it causes the payment to come, not from the government *but from third parties*-whom the government reimburses for their outlay by granting them (as the TDRs promise) a variance from otherwise applicable land-use restrictions.[193]

Justice Scalia's argument is compelling and serves as a warning to anyone planning to use TDRs for the purpose of making an otherwise unconstitutional ordinance constitutional.[194] Nonetheless there is an interesting alternative view that was presented by the Tahoe Regional Planning Agency ("TRPA") in its opposition to Mrs. Suitum's suit. Essentially the argument is that Lake Tahoe is a unique resource upon which the property values of all property owners in the region depend.[195]

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190. *See Suitum*, 520 U.S. at 735-44.

191. *See id.* at 745.

192. *See id.* at 747-50.

193. *Id.* at 747-48.

194. *See also* Corrigan v. City of Scottsdale, 720 P.2d 528, 535-40 (Ariz. Ct. App. 1985) (striking down a city ordinance holding transferable development rights (or density credits) does not constitute just compensation for property taken by eminent domain).

195. *See* Richard J. Lazarus, *Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supremes Court*, 12 J. LAND USE & ENVTL. L. 179, 190 (1997).

> TDRs are the kind of innovative land use planning device that warrant commendation, not condemnation. TDRs seek to reduce inequities and achieve environmental protection by relying on property rights and market forces. They restore substantial economic value to petitioner's bundle of property rights and avoid collapse of an ecosystem upon which petitioner's pre-restriction, higher market value, depended.[196]

Certainly Lake Tahoe is a uniquely fragile resource, a fact that makes this argument particularly compelling. Although the argument has validity in other contexts, it is certainly less compelling where the resource is neither so unique nor so fragile. Because the decision in *Suitum* was based on narrow grounds of ripeness this issue was never addressed.

Notable by its omission in both the statutes authorizing TDR programs and in the literature discussing them is a concise definition of the nature of a TDR. Is a TDR property or something else? Although a TDR has its origin in land in a sending district, a TDR is clearly not real property—if it were it would hardly be capable of transfer to a new location (a logical notion that has served as no barrier to drafters of legislation.) If a TDR is property it must be personal, and since no person has ever touched one it would also have to be intangible.[197] A contrary view is that a TDR is a special form of zoning variance with the consequence that a TDR is not property. If not property a TDR is a zoning variance or license. The fact that TDRs may be highly valued does not negate this analysis, as the same is true of FCC broadcasting licenses and tobacco quota (the right to market tobacco) and neither of these governmental created rights are property. Stinson and Murphy support this view:

> [t]he TDR credits are a legal representation of the abstract development rights which will be severed from property in the sending district and grafted onto property in the receiving district. The TDR credits are traded in a free market, although a TDR bank may be established to facilitate exchanges. When a TDR credit is purchased from a property owner in the sending district, that property owner records a deed restriction prohibiting development on his property. The TDR credit can then be applied to property in the receiving district as a density bonus or other zoning incentive. [198]

A zoning incentive while valuable is not a property right.

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196. *See id.* at 191.

197. *See Suitum*, 520 U.S. at 745-50. By equating TDRs with monetary payments Justice Scalia implies that TDRs are the equivalent of money and, therefore, as with money, intangible personal property. *See id.* at 747.

198. Stinson & Murphy, *supra* note 115.

New York takes a contrary view.[199] The definition does not address the issue:

> 'Development rights' shall mean the rights permitted to a lot, parcel, or area of land under a zoning ordinance or local law respecting permissible use, area, density, bulk or height of improvements executed thereon. Development rights may be calculated and allocated in accordance with such factors as area, floor area, floor area ratios, density, height limitations, or any other criteria that will effectively quantify a value for the development right in a reasonable and uniform manner that will carry out the objectives of this section.[200]

A later sentence from another subsection of 20-f appears to resolve the issue, "[a] development right which is transferred shall be deemed to be an interest in real property and the rights evidenced thereby shall inure to the benefit of the transferee, and his heirs, successors and assigns."[201]

Although this language is written in mandatory terms, language elsewhere in this codification of TDR authority for New York indicates that this codification is essentially advisory in nature.[202]

Authorities for other programs are even more ambiguous; Monterey County (California) defines a transferable development credit ("TDC")[203] as

> the right to transfer the right to develop a residential building site from a donor site to a receiver site within the Big Sur Coast Land Use Plan area. One credit or TDC would equal the right to develop one residential building site on an eligible parcel designated as a receiver site.[204]

199. *See* N.Y. GEN. CITY LAW § 20-f, *supra* note 115, *available at* http://www.pace.edu/lawschool/landuse/law.htm; N.Y. TOWN LAW § 261-a, *supra* note 115, *available at* http://www.pace.edu/lawschool/landuse/law.htm; N.Y. VILLAGE LAW § 7-701, *supra* note 115, *available at* http://www.pace.edu/lawschool/landuse/law.htm.

200. N.Y. GEN. CITY LAW § 20-f(1)(a), *supra* note 115, *available at* http://www.pace.edu/lawschool/landuse/law.htm. The text of the Town Law and the Village Law is identical.

201. *Id.* § 20-f(2)(d), *available at* http://www.pace.edu/lawschool/landuse/law.htm.

202. *See* Stinson & Murphy, *supra* note 115.

203. Although transfer of development right is probably the most common term, there is no consistency of terminology between jurisdictions. There is no model legislation currently available.

204. MONTEREY COUNTY ZONING COASTAL IMPLEMENTATION PLAN - TITLE 20 § 20.64.190.030, *available at* http://www.co.monterey.ca.us (last visited Mar. 28, 2002).

The Monterey County Code provides that TDCs exist in perpetuity if not transferred,[205] but once transferred exists only so long as "the right to use the approval for development granted to the receiver site" continues.[206] There is no provision for further transfer of the TDC to a site where it can be used; it is apparently extinguished without compensation paid. The ability of the county to extinguish the TDC by administrative decision is inconsistent with the existence of a property right and entirely consistent with the notion that a TDR (or TDC) is a specialized form of zoning variance to which property rights have never attached.

Under the law of Maryland, TDRs are interests in real property that are recorded in the same manner as any other interest in real property.[207] The Maryland Code states, "[t]he Program provides funds to the local governments and land trusts to purchase interests in real property from willing sellers, including easements, transferable development rights, and fee estates, focused in designated Rural Legacy Areas."[208]

New Jersey law contains a brief definition that is not very helpful for resolving the nature of TDRs: "h. 'Pinelands development credit' means a transferable development right created pursuant to the comprehensive management plan."[209] That New Jersey has established a registry of Pinelands Development Credits ("PDC") that is separate from the property record system is suggestive that PDCs are not real property and perhaps not property at all.[210] "[T]he intent of the pinelands development credit program is to provide a mechanism to facilitate both the preservation of the resources of this area and the accommodation of regional growth influences in an orderly fashion."[211] The legislative intent is primarily regulatory and does not imply intent to create new property rights al-

205. *See id.* § 20.64.190.070.

206. *Id.* § 20.64.190.060.

207. MD REGS. CODE tit. 8, § 05.01.06 (1997), *available at* https://constmail.gov.state.md.us/comar/08/08.05.01.06.htm.

A. The title to a transferable development right (TDR) acquired by a sponsor shall be recorded jointly in the name of the sponsor or easement grantee and the Rural Legacy Board, and shall be described in detail in the project agreement.

B. Within 30 days of acquisition, the titleholders shall file the TDR in the land records of the local jurisdiction where the land is located, with a copy filed in the Maryland State Archives.

C. A TDR acquired with rural legacy funds shall only be acquired, held, and resold in accordance with the rules of the local TDR program under which it was acquired. *Id.*

208. *See* MD. CODE ANN., NAT. RES. I § 5-9A-01(b)(2) (2000).

209. N.J. STAT. ANN. § 13:18A-32h (West 1991).

210. *See id.* § 13:18A-36.

211. *Id.* § 13:18A-31.

though the legislature clearly intended to endow PDCs with some property-like attributes:

> The Legislature further finds and declares that the concept of transferable development credits is innovative and, as yet, unprecedented on a regional scale; that in order to realize the full measure of the benefits of such a program, steps must be taken to assure the marketability of these credits; and that the best means of providing this assurance is through the establishment of a Pinelands Development Credit Bank empowered to purchase and sell pinelands development credits and to guarantee loans secured thereby . . . .[212]

The New Jersey Supreme Court has defined the Pinelands scheme as primarily one of zoning.[213] As such, it protected legitimate state interests in preserving a unique resource, did not in fact alter the current use of the property as agricultural land, and did not deny the owner all economically beneficial use of the property.[214] The court held that the involuntary recordation of a conservation easement against the landowner's property did not create a compensable taking.[215] The court did not resolve the nature of PDCs; it mentioned them only briefly as mitigating the economic harm associated with the regulation of the property.[216] A lower New Jersey court has determined that PDCs are not securities.[217]

Whether TDRs are property or an attribute of zoning, e.g., a variance, is important because it determines how courts should evaluate them. On the one hand, if a TDR is property, either real or personal, then the argument made by Justice Scalia in his concurrence in *Suitum* is supported.[218] The TDR should be considered only at the stage of determining whether, once a taking is found, just compensation was paid. On the other hand, if TDRs are in the nature of variances then the ordinance as a whole should be evaluated to determine whether there has been a taking, with the TDR relegated to a minor role in that analysis.[219] Again Justice Scalia stated the problem succinctly:

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212. *Id.* § 13:18A-31.

213. *See* Gardner v. N.J. Pinelands Comm'n, 593 A.2d 251, 257 (N.J. 1991) (rejecting plaintiff's argument that the involuntary application of deed restrictions, creating conservation easements, to his property was an uncompensated taking).

214. *See id.* at 257-62.

215. *See id.* at 262.

216. *See id.* at 256.

217. *See* Matlack v. Burlington County Freeholder Bd., 466 A.2d 83, 93 (N.J. Super. 1982).

218. *See Suitum,* 520 U.S. at 745-50 (Scalia, J., concurring).

219. *See Gardner,* 593 A.2d at 263-64.

> I do not mean to suggest that there is anything undesirable or devious about TDRs themselves. To the contrary, TDRs can serve a commendable purpose in mitigating the economic loss suffered by an individual whose property use is restricted, and property value diminished, but not so substantially as to produce a compensable taking. They may also form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property is taken . . . . (... Penn Central had been "offered substantial amounts" for its TDRs and suggesting the appropriateness of a remand for a determination of whether the TDRs are valuable enough to constitute full compensation). I suggest only that the relevance of TDRs is limited to the compensation side of the takings analysis, and that taking them into account in determining whether a taking has occurred will render much of our regulatory takings jurisprudence a nullity . . . .[220]

For a TDR program to succeed, buyers must have some confidence that the values represented in the TDRs will be supported. As property TDRs have constitutional protection from being extinguished that does not exist if TDRs are not property. Nonetheless, if the political will is sufficient it is possible to have a market in TDRs without defining them as property.

Takings claims are not the only constitutional challenge that TDR programs face. In *Fred F. French Investing Company v. City of New York*,[221] the Court of Appeals of New York concluded that the "State may not, under the guise of regulation by zoning, deprive the owner of the reasonable income productive or other private use of his property and thus destroy all but a bare residue of its economic value."[222] To do so, the court concluded violates due process under section 1 of the 14th Amendment.[223] If that test sounds identical to the test for a regulatory taking under the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*[224] it is. For that reason and others several commentators have suggested that the essential nexus test that the Supreme Court developed in *Dolan v. City of Tigard*[225] and *Nollan v. California Coastal Commission*[226] may be applicable to exercises of the police power such as zoning, under a due process analysis.[227] Implicit in this is an application of heightened scrutiny

220. *Suitum,* 520 U.S. at 749-50.

221. Fred F. French Inv. Co. v. City of New York, 350 N.E. 2d 381 (N.Y. 1997).

222. *Id.* at 383.

223. *See id*.

224. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

225. Dolan v. City of Tigard, 512 U.S. 374 (1994)

226. Nollan v. Californian Coastal Comm'n, 483 U.S. 825 (1987).

227. *See* James E. Holloway & Donald C. Guy, *A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making For Social Welfare Goals of Urban Communities*, *in* ZONING AND PLANNING L. HANDBOOK, 357, 411 (Patricia E. Salkin ed. 2001); *see* Frankel, *supra* note 176, at 836-37.

and an unwillingness of courts to continue to review zoning decisions under the deferential standard applied in the past.[228] This suggests that for a TDR program to pass constitutional scrutiny there needs to be an essential nexus between the receiving area and the sending area.[229] There must be an essential nexus between the harm prevented by the TDR program and the design of the program.[230] The market for TDRs will be a part of any judicial analysis.[231] To enhance marketability of TDRs some jurisdictions have included banking schemes in their TDR programs.[232]

While much of the focus of constitutional analysis has been on the restricted property in the sending district there are also potential due process issues raised by increasing density in the receiving district.[233] If, on the one hand, densities are correctly set in the receiving district then increasing density with TDRs would harm the health and safety of the citizens in the receiving district; on the other hand, if increasing densities has no impact, then original densities were set to low in violation of due process.[234] Clearly there must be some upper limit on the density that the receiving district can accommodate.[235] As the size of the receiving district is expanded to accommodate more TDRs, there is a second issue raised. The reciprocity of advantage, e.g., the benefit that a property owner gains from submitting to the restrictions imposed under zoning, may be lost.[236] For example, a neighborhood that serves as a receiving area for TDRs from an adjacent agricultural sending zone benefits from the opportunity to enjoy nearby open space and perhaps purchase locally grown products. As the receiving neighborhood becomes larger and therefore farther from the sending agricultural zone the opportunity to enjoy the benefits of the sending zone diminishes, eventually to the point that reciprocity of advantage is broken.

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228. *See* Holloway & Guy, *supra* note 226, at 358.
229. *See* Frankel, *supra* note 176, 846-47.
230. *See id.*
231. *See id.* at 838.
232. *See* Sarah J. Stevenson, Note, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329, 1329-333 (1998).
233. *See* Frankel, *supra* note 176, at 841-46.
234. *See id.*
235. *See* Stinson, *supra* note 177, at 347-48.
236. *See id.* at 348.

III. CONCLUSION

From this discussion several points for the construction of TDR programs can be gleaned. A TDR program should not be a substitute for a constitutionally sound zoning ordinance as there is considerable doubt that slapping a TDR program on top of an unconstitutional ordinance will save it. Doing so, even if constitutional, is poor policy as it will create long-lived resentment that will ultimately make the land use planning process more difficult. Second, sending and receiving areas should be in close geographic proximity so that the reciprocity of advantage can be maintained. Third, TDRs should be established as a form of zone variance rather than as a property interest to avoid tying the hands of future zoning boards that may face very different problems than those faced today.

Both TDRs and PDRs must be used in conjunction with comprehensive planning as to do otherwise risks not only the successful legal challenge but squanders public funds on ill-conceived expenditures and costly administrative structures in return for dubious benefits. To the extent possible officials responsible for land use planning should ask whether voluntary programs would achieve the same goals as mandatory programs. Neither PDRs nor TDRs are essentially coercive (beyond the background of coercion associated with existing zoning). The level of coercion is a political question, not a question of the legal tools employed. PDRs may be acquired either by voluntary purchase or donation or through eminent domain. TDRs may be applied as a voluntary program on top of existing zoning or TDRs may be applied in conjunction with confiscatory down zoning. The choice is not one of legal tools but of the extent to which the majority wishes to impose its will upon a minority.