



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

April 26, 1999

TO: David W. Edgerley, Director
Department of Economic Development

FROM: Karen L. Federman Henry *Karen L. Federman Henry*
Associate County Attorney

RE: Transfer of Development Rights Easements — Effect of Rezoning

You have requested that this office address a series of questions involving the effect of a Transfer of Development Rights (TDR) Easement in the event that the property subject to the easement is rezoned to RE-2. These questions stem from questions raised by Stanley D. Abrams, Esquire, regarding a transaction being considered by his client. As a general matter, your inquiry constitutes a request for a private opinion, which this office cannot provide pursuant to § 213 of the Montgomery County Charter. You have indicated an interest in determining what the continuing viability of a TDR Easement is upon approval of a rezoning application and, therefore, this memorandum provides you with the result of the analysis conducted for purposes of assisting the agencies involved in these transactions.

Although the request from Mr. Abrams listed separate questions, the real issue is whether a change in the zoning designation of property subject to a TDR Easement has any impact on the effect of the Easement. If it does, the next question involves what the precise impact is. As explained below, it is the opinion of this office that the TDR Easement continues to restrict development, and a change in the underlying zoning of the property does not affect the terms and conditions of the Easement, absent legislation to the contrary.

TDRs

The system of TDRs used in Montgomery County is a means of implementing the Agricultural Preservation and Rural Open Space Master Plan adopted in 1980. The purpose

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of the Master Plan is to preserve open space and agricultural land in upper Montgomery County by restricting development. To ensure preservation and to reduce the hardship of downzoning property to Rural Density Transfer (RDT), TDRs provide a means of compensating owners for transferring their development rights to designated areas.¹

The Zoning Ordinance governs the creation and transfer of the TDRs. An owner of property zoned RDT may create an easement to transfer TDRs, while the zones that can receive the TDRs are delineated in the Zoning Ordinance, with the caveat that "No land shall be classified in any of the transferable development rights zones unless recommended on an approved and adopted master or sector plan." § 59-C-1.33 of the Zoning Ordinance. Moreover, because the primary purpose of the RDT zone is to promote agriculture, development rights may be transferred *from* RDT-zoned property, but no mechanism exists to transfer the development rights *to* RDT-zoned property. See §§ 59-C-9.23 and 59-C-9.6 of the Zoning Ordinance. To allow the return of development rights to the property would be contrary to the purpose for which the District Council downzoned the agricultural preserve. In fact, it would be incongruous to permit the creation of a receiving area within a sending area.

Although the Zoning Ordinance lists properties that may be exempt from the development restrictions, each circumstance involves a right that accrued before the RDT zoning was applied to the property or involves lots for children of the owner. § 59-C-9.7 of the Zoning Ordinance. No provision exists to exempt a property from the TDR restrictions based upon a change in the zoning of the property. Based on these provisions, there are no statutory mechanisms to eliminate the effect of the creation of the TDR Easement.

Terms of the Easement

In addition to the purpose of the TDR program, as delineated in the Zoning Ordinance, the terms of the Easement itself preclude termination of the development restrictions. Several clauses reflecting the terms, conditions and restrictions of the Easement reflect an intent that the development restriction continue even if the property is rezoned:

¹The Court of Appeals described the purpose and concept of TDRs in *West Montgomery County Citizens Ass'n. v. Maryland-Nat'l. Capital Park and Planning Comm'n.*, 309 Md. 183, 187-189, 522 A.2d 1328, 1329-1331 (1987).

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This Easement shall be perpetual. It is an easement in gross, and as such, is inheritable and assignable and runs with the land as an incorporeal interest in the property enforceable with respect to the property by the Grantee, and its successors and assigns, against the Grantors and their heirs, successors and assigns.

* * *

A one-family dwelling may not be constructed, occupied, or maintained on the property unless one Development Right is retained with the property for each one-family dwelling constructed, occupied, or maintained.

The restrictions imposed by this Development Rights Easement **shall operate independently** of the restrictions imposed by the zoning of the property.

* * *

[F]rom this date forward, three (3) more one-family dwellings may be constructed on the property. This may not be interpreted to permit additional dwellings inconsistent with the zoning of the property or to prevent the reconstruction of existing one-family dwellings which complied with the terms of this Easement in the event such dwelling may be destroyed or damaged.

Excerpts from p. 2 of the Transfer of Development Rights (TDR) Easement (emphasis added).

The plain and unambiguous language of the Easement provides no relief from the restrictions upon a change in the zoning of the property.

Analysis

Nothing in either the statute or in the Easement terms and conditions suggests a basis for terminating the Easement. Assuming the District Council chose to approve the rezoning, to permit additional development based upon the new zoning would undermine

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the purpose and intent of the TDR program. The goal of the Council under the program was to preserve agricultural land and open space in the County. If the landowners who entered into these easements and enjoyed the benefits of selling the TDRs could circumvent that goal simply by rezoning their property, the program would become meaningless.

The only program that permits termination of an Easement appears in Chapter 2B. The current Easement, however, was created pursuant to the provisions of the Zoning Ordinance.² To establish a similar mechanism for terminating TDR Easements under the Zoning Ordinance, the District Council would have to enact a zoning text amendment providing the circumstances under which the termination could occur.

Absent clear legislative intent in the statute or a clear provision in the Easement that would permit the TDR Easement to become ineffective, it is the opinion of this office that the Easement would remain in effect without change even if the property were rezoned to RE-2. This means that only three additional single-family dwellings may be built on the property.

I hope that this responds to your inquiry. If you have additional questions, please do not hesitate to contact me.

²The Zoning Ordinance program differs from the program administered by the Department of Economic Development under Chapter 2B of the Montgomery County Code. The Agricultural Easement program includes the creation and transfer of TDRs, but the County compensates the property owner for the purchase of the agricultural easement and the TDRs. Moreover, the program specifically recognizes the extinguishment of the easements, providing:

Not earlier than twenty-five (25) years after the county has purchased an easement, an owner may, in writing, ask the county to terminate the easement. Termination may be requested earlier only if the district council zones the land subject to easement in a manner that precludes agricultural uses as a matter of right.

§ 2B-13(a)(1) of the County Code. The TDR easements governed by the Zoning Ordinance, however, involve County review of the Easement and assignment of TDR numbers, but the rest of the transaction is private.

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cc: Jeremy Criss, Department of Economic Development
 Denis Canavan, Maryland-National Capital Park and Planning Commission
 Stanley D. Abrams, Esquire
 Charles W. Thompson, Jr., County Attorney
 Marc P. Hansen, Chief, Division of General Counsel

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