

Transferable Development Rights on the Rise in Response to Miami's Post-Pandemic Growth

Bouncing back from the COVID-19 pandemic, South Florida has experienced significant growth throughout business and real estate markets. People are looking to Miami as a diverse global city with relatively-low taxes and warm winters – appealing to international transplants as well as corporate executives looking to relocate businesses from other domestic markets. As highlighted in a recent Wall Street Journal article, *Miami's Gold Rush: Finance Firms and Crypto Move in, Bringing Strains*, while the uptick in investment presents economic opportunities, the Miami market is also facing real challenges of inflation, rising construction costs and labor shortages, and a housing affordability crisis that has priced out many working families.

As the demand to support South Florida's booming growth intensifies, the public and private sector is turning towards transactional land use mechanisms rooted in economics to accomplish smarter growth patterns while also investing in housing and infrastructure. One of the primary tools on the rise, particularly in City of Miami, is the concept of transferable development rights (TDRs) or transfer of development density (TDDs). This regulatory tool effectively acts to shift density from existing sites/buildings to be preserved for specific purposes (e.g historic landmarks, natural features/floodplains, or more recently affordable housing) to areas ripe for redevelopment and supported by public transit infrastructure.

I. Background on Transferable Development Rights: Purpose and Overview of TDR Programs

Transferable Development Rights (or TDRs) are a regulatory tool that can be used to achieve land preservation by allowing a landowner to transfer unused development rights (the "Sending Site") in exchange for compensation from a landowner seeking additional development rights for another parcel (the "Receiving Site"). The Receiving Site may be seeking increased *intensity* (floor area and/or height) or *density* (units per acre), shifting development away from a sensitive site, use or building that is desired to be preserved.

The Sending Site is typically encumbered by a legal instrument (often a Declaration of Restrictive Covenants), in a form to be authorized by the local government with zoning jurisdiction over the properties, that limits the established development rights on the Sending Site. Unused development rights from the Sending Site become a marketable commodity that can be assigned to the Receiving Site, shifting density away from sites/buildings to be preserved for specific purposes, like reinvesting in historic landmarks or preserving floodplains. Receiving Sites are typically areas ripe for redevelopment, promote affordable housing and supported by adequate public infrastructure.

Legal Basis for TDRs

Zoning Practice, American Planning Association, December 2007

The concept of transferable development rights came into practice in 1968 when New York City adopted a TDR program in the form of transferable air rights to protect historic landmarks (Preutz 1997). In 1978, the U.S. Supreme Court upheld New York City's transferable air rights program and found the owners of Grand Central Station could earn a reasonable profit by transferring development potential above the station to another site in the city. That is, the owner of Grand Central Station could build higher than the zoning height limit would normally allow on another site (see *Penn Central Transp. V New York City*, 438 U.S. 104 (1978)).

II. City of Miami's Transfer of Development Density Program: Requirements for Sending and Receiving Sites

Under the City of Miami's Historic Preservation TDR Program established in 2018,¹ qualifying sending sites must be a local, state or federal designated historic landmark or historic district. Prospective developers qualify as a Receiving Site by demonstrating location of the project within a TOD area centered on a Metrorail or Metromover station. Density bonuses are capped at 50% of underlying maximum density in the applicable transect zone or established through a Residential Density Increase Area (RDIA). As an example, development sites within T6 zones typically have a maximum density of 150 units per acre. Applying the 50% cap, that development site could secure up to +75 units per acre of additional density.

While there is no established market price, arms-length transactions typically range between \$10,000 and \$20,000 per dwelling unit; although this number can vary based on relative bargaining power, number of units being transacted and other factors. The proceeds derived from the TDR sale must be used for future improvements and maintenance of the historic property. The property owner demonstrates compliance with this requirement via applicable building permits and/or Certificate of Appropriateness. Portions of the proceeds from the TDR transfer must be reinvested into the historic resource. Upon transfer of the development rights, a restrictive covenant is placed on the Sending Site to ensure the historic structure is maintained and has a revenue stream to finance those improvements.

At the end of the transfer process, which is facilitated administratively, the City collects application fees, which include a 15% capital improvement fee to fund the City's Historic Preservation Trust Fund, Employee Assistance Program and Senior Rental Assistance Program. There is significant coordination involved between applicant representatives, transactional counsel and land use counsel, along with the City Attorney's office to ensure the transaction is memorialized effectively and having an informed awareness as to methodology is critical to ensure contractual alignment and satisfaction of contract deliverables.

The City of Miami is not alone. Other jurisdictions including Bay Harbor Islands, Coral Gables and Miami-Dade County have different programs in place that act similarly and are being utilized today. In the case of Bay Harbor Islands, the Town's comprehensive plan establishes a base density of 34 units per acre for all multifamily residential properties comprising the Town's east island. The Town's TDR program permits applications to acquire TDRs on a per unit basis up to a maximum of 70 units per acre. Developers can acquire TDRs privately from existing properties with unused density and a percentage of TDRs requested may be secured through acquisition from the Town's bank.²

III. Factors contributing to increased interest

Why an uptick in utilization of TDRs? There are several reasons for increased interest in the market:

- *Trend towards Smaller Units.* However, cities in Miami-Dade County and across the state of Florida typically regulate density as units per acre. Therefore, despite smaller units or shifting preference for construction of studios and 1-bedrooms, developers do not gain additional density. In fact, they are running out of density faster and finding room for additional units in their building envelope.

¹ See Chapter 23-6, City of Miami Code of Ordinances

² See Chapter 23-22.2, Town of Bay Harbor Islands Code of Ordinances

- *Entitlement Challenges associated with Rezoning and Public Hearing Applications.* As the demand to support South Florida's booming growth intensifies, so do challenges introducing multifamily residential buildings or mixed-use development in established residential neighborhoods. In many established communities, there is an increasing fear of over-development, making it more difficult and expensive to pursue traditional applications for rezonings and land use changes, even in areas already slated for multifamily and mixed-use development. TDR programs are a useful tool because they typically operate through clear established standards that allow for an administrative approval process to shift density to a Receiving Site – helping establish density compatible with high quality of life walkable neighborhoods and areas served by transit.
- *TDR Programs are a form of Public-Private Partnership* – Even in programs where developers are acquiring TDRs purely from other private property owners, local government officials are facilitating a private transaction between property owners through the transfer of land entitlements which are inherently a regulated commodity. TDR programs typically involve a revenue sharing component, in addition to application fees, which creates a new revenue stream for the local government to support authorized purposes. Being voluntary in nature, local governments can legally establish a legitimate basis to support contributions towards public benefit trust funds, transportation trust funds and other accounts that hold voluntary contributions in trust for the public.

IV. Wynwood TDR/TDD Program Facilitates Redevelopment in Wynwood Neighborhood Revitalization District while Encouraging Adaptive Use of Legacy Structures

Adopted by the City of Miami in 2015, the Wynwood Neighborhood Revitalization District ("NRD-1") is an overlay district providing a regulatory structure aimed at transforming the former warehouse district into a vibrant mixed-use neighborhood while retaining its artistic character. The Wynwood NRD-1 incorporated a TDR program with the intent of preserving Legacy Structures. Limited to properties within the Wynwood NRD-1 boundaries, unused development rights (floor area) of Legacy Structures may be converted into an asset to be sold to eligible receiving sites. Legacy Structures are defined as an existing building which has been maintained and re-purposed that contributes to the character of Wynwood.

In December 2020, the City of Miami amended the NRD-1 to incorporate a Wynwood TDD Program, which allows for developers to acquire additional density (50% density increase, up to 225 units/acre) through: (i) unused density from a Legacy Structure or new non-residential development within the NRD-1 boundaries after September 2015; or (ii) payment of \$20,000 per unit through the Wynwood Public Benefits Trust Fund, limited to dwelling units less than 650 square feet.

V. City of Miami Adopts Affordable Housing TDD Program; Opens up Additional Density to Transit Corridor Development in T5 and T6 zones

As housing costs continue to rise, on July 28, 2022, the City of Miami adopted legislation to create an *Affordable and Attainable Mixed Income Housing Transfer of Development Density Program*, which will allow Affordable Housing developments within Community Redevelopment Areas ("CRA") to transfer unused as-of-right density to receiving sites within TODs and Transit Corridors at market rate value. The legislation allows for eligible off-site properties to receive up to 50% increase above allowable density, while the Affordable Housing developer unlocks an additional income source for the development of the project. A percentage of the proceeds of each transfer (between 15-25%) will be contributed to the City's Affordable Housing Trust Fund or to the applicable CRA for implementation of the CRA master plan.

For developers interested in utilizing TDDs to increase effective density in new projects, one of the distinguishing factors that makes this program attractive is the broadened qualification for Receiving Sites. Unlike the City's established TDD program where receiving sites must be located within a TOD area within close proximity of an existing rail station, receiving sites under this new Affordable Housing TDD Program can be located within a TOD area or within a Transit Corridor, which includes properties within ¼ mile of a corridor with trolley/bus service with combined headways less no more than 10 minutes.

VI. Looking Ahead: TDR/TDD Applications on the Rise

With time and costs involved in pursuing rezonings and the demand for new housing throughout Miami-Dade County, Wernick & Co has seen a noticeable increase in transactions coming out of the pandemic. Since 2020, the Firm, which represents property owners and developers – both as sellers and buyers – has filed applications totaling thousands of square feet and more than 600 units being shifted from eligible Sending Sites to development projects built and/or currently in the pipeline.

Notably, the Firm represented the owner of the Alfred I. duPont Building, an office building constructed in the 1930s and a nationally and locally designated historic landmark, on the largest TDD transactions from a historic property in City of Miami history.

The Firm has also seen increased transactions within the Wynwood TDR/TDD Program, where there is a trend towards smaller units responding to market factors and serving a creative class demographic in a walkable mixed-use neighborhood that serves as a built-in amenity.

All signs indicate TDRs and TDDs will continue to be a valuable tool for municipalities and developers looking for creative ways to unlock development rights while preserving needed resources for the public interest.

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