

**Transfer of Development Rights (TDR): Considerations for Application in Kelley's Corner**

The Acton 2020 Comprehensive Community Plan lists among other Town-wide goals the preservation of remaining undeveloped lands as permanent open space and the improvement and redevelopment of Acton's existing villages and commercial areas, including Kelley's Corner, into more vibrant, walkable and mixed use centers. The Transfer of Development Rights (TDR) has been considered as a land use management technique to help redirect future growth in Acton away from the remaining open lands and into the existing centers. Examples of TDR programs are in Appendix 1 of the Acton 2020 Plan. A presentation in Acton on the subject was also made by the Metropolitan Area Planning Council in January 2014.

The Kelley's Corner Improvement Initiative's scope of work includes an assessment of the suitability and readiness of Kelley's Corner to absorb development rights as a participant in a TDR program, and if yes, how such a program would need to be structured. This essay summarizes the TDR concept and reviews whether the conditions in Kelley's Corner are suitable to apply the TDR technique as a means for directing new development in Kelley's Corner. The conclusion is that the transfer of development rights into Kelley's Corner - at the present time - is not compatible with the redevelopment goals for Kelley's Corner.

Transfer of development rights (TDR) is one of the more complex forms of land use regulation. In Acton, as in most other US municipalities, property development rights are defined in a zoning ordinance or bylaw through use and dimensional regulations and relate to the location, size and shape of the property in a general manner. Development rights constitute value that finds its expression in property appraisals, valuations for property tax assessment purposes, and in the prices at which properties are bought and sold. The worth of a certain amount of development rights, as may be expressed, for instance, in building square footage, varies between more desirable and less desirable locations, or between locations where certain higher value land uses are allowed and other locations where they are not allowed.

Development rights are unique and separable from a property under a TDR program, and may be traded as commodities from one defined geographic area to another. The typical community goals of a TDR regulation are to restrict or eliminate development in one area where development may not be desirable, which is called the "sending district," and to transfer the development rights to another place where development is desired, which is called the "receiving district". The idea is that the transfer of development in some form will meet the goals for development in both the sending district and the receiving district.

TDR may be useful in a community where the goals of preservation and development may be accomplished simultaneously *and* the private real estate market supports the transactions with sellers and buyers ready to trade development rights. When the development rights are purchased from property in the sending district a deed restriction against further use of the sold development rights is placed on that property, and a commensurate increase in density or intensity of development is then permitted on a corresponding property in the receiving district. The designation of TDR sending and receiving districts, TDR definitions, units, and formulas, and

procedural details for TDR transactions are typically enshrined in a municipality's zoning bylaw or ordinance.

Some TDR programs use a 'bank' to buy development rights, hold them for a period of time, and then sell them as development credits. The TDR bank thus fulfills the role of a development rights trader and clearinghouse eliminating the need for a seller and buyer to meet and come to terms on each individual transaction at the same point in time. The TDR bank can pay out funds for purchases of development rights from a sending district, and receive funds when development rights are sold to and exercised in a receiving district, but the two transactions can be handled separately and at different times.

With or without a TDR bank, TDR requires (1) that there is a receiving district with the physical and practical space, the suitable regulatory framework, and the economic opportunity as defined by the market place to absorb additional development rights, and (2) that the transaction is profitable on both ends of the transfer. In other words, the opportunity to use the acquired development rights in the receiving district must be real, tangible, and profitable. And, without a public subsidy, a TDR program can only succeed where the difference in development value provides enough incentive for the private market; that is where the value of the development rights sold from the sending district is low enough compared to their value in the receiving district to ensure a profitable return on the corresponding investment in the receiving district.

A TDR program to encourage redevelopment in Kelley's Corner, as the receiving district, would require at least three basic conditions to be satisfied:

- First is the designation of a sending district somewhere else in Acton with characteristics that promote a public goal for preservation or conservation. This could be property that is currently open space, historic landscape or historic district, critical watershed, farmland, or possibly areas developed at low densities which have potential for more intense redevelopment. As Acton is not fully built out, it is assumed that there are areas that can be considered as sending districts for a TDR program and meet the stated public policy goals of the Acton 2020 Plan to preserve natural, open space, historic and other resources.
- Second is that the value of development rights in Kelley's Corner must be higher by a significant margin than the cost for purchasing them from the sending district. This is needed in order create sufficient incentives to overcome drag, higher risk, and additional development costs. In addition, there must be a profit from selling development rights in the sending district that is higher or at least equal to simply executing the development in place. In short, the value created by the demand must be greater than the cost of entry into that market through the purchase of development rights. Otherwise, the cost of the transaction negates the financial value of the development rights. It is not likely that this condition can be met so as to

create a reliable and steady market place for development rights involving Kelley's Corner as a receiving district because:

- Potential sending districts in Acton are in most cases zoned for single-family residential use, and housing and land available for housing are highly desirable commodities; and,
  - Kelley's Corner faces considerable challenges as a commercial and mixed-use center in a highly competitive region. Under the present and foreseeable market conditions, the cost of buying development rights from other areas, especially if required by regulation, would hinder rather than facilitate or incentivise desired redevelopment in Kelley's Corner.
- Third, that conditions in Kelley's Corner allow the additional development to be incorporated into the redevelopment plans. This requires that the increased density allowances can be actually achieved in a marketable design and under use and dimensional standards of zoning regulations that Acton voters are likely to embrace. The Kelley's Corner Improvement Initiative has considered the economic, practical, regulatory, and design parameters needed for marketable redevelopment. Analysis of the market and development pro formas included in this study lead to the finding that, under current and foreseeable conditions, Kelley's Corner does not have the economic or practical capacity to incorporate additional acquired development rights. Key consideration leading to this finding are:
    - In order to incentivise redevelopment in Kelley's Corner, significant additional development potential must be granted to the area through appropriate zoning changes at no financial cost to the redevelopment; and,
    - The economics of structured parking in Kelley's Corner is very limited, leaving most of the parking need to be answered with exterior surface parking lots, thus limiting building footprints and favoring height instead, and placing constraints on layout, design, landscaping and amenities.

The recommendation is that if an increase in density in Kelley's Corner is a desirable public policy in general in order to stimulate walkable town center redevelopment, then the zoning should be amended to derive that density from within Kelley's Corner rather than demand that it take place within a TDR program. This does not mean to suggest that a TDR program with or without a TDR bank could not be successful in other situations or in other places. However, with respect Kelley's Corner only, there are substantial thresholds to accomplishing a successful TDR program, and these thresholds cannot likely be overcome at the present time nor in the foreseeable future.