UNBUNDLING THE BUNDLE: CREATION OF WEALTH AND RATIONALIZATION OF LAND USE THROUGH DEVELOPMENT RIGHTS*

John David C. Atanacio[**]
Roentgen F. Bronce[***]

I. INTRODUCTION

The method of establishing and protecting property rights is a very productive activity to which resources can be devoted.[1] The creation and specification of property rights are endogenously determined.[2] One of these endogenous variables is how the State behaves towards property, as manifested by State actions such as the enactment of laws, ordinances, rules and regulations. With these actions providing a particular legal mechanism through which property rights can be employed, new forms of property rights are created or the exercise of existing property rights are further facilitated.

The enactment of any law, ordinance, rule, and regulation could be for the purpose of recognizing new property rights and providing the mechanism through which they are to operate. It could also be for the purpose of preventing any haphazard implementation of previous laws or rules on property rights.

---

* This paper won the Araceli Baviera Prize for Best Paper in Civil Law for the year 2012. *Cite as* John David Atanacio & Roentgen Bronce, *Unbundling the Bundle: Creation of Wealth and Rationalization of Land Use through Development Rights*, 87 PHIL. L. J. 475, (page cited) (2013).

** Junior Associate, Castillo Laman Tan Pantaleon & San Jose. J.D., University of the Philippines (2012). BS Business Economics, *magna cum laude*, University of the Philippines (2005).

*** Deputy Executive Director, Office of the Speaker, House of Representatives, Congress of the Philippines. J.D., University of the Philippines (2012). B.A. Public Administration, *cum laude*, University of the Philippines (1998).

[1] Terry Anderson & P. J. Hill, *The Evolution of Property Rights: A Study of the American West,* 18 J.L. & ECON. 163 (1975), *available at* http://www.jstor.org/stable/725249.

[2] *Id.*, at 164.

This paper will show the existence of property rights that are not yet expressly recognized, but can be readily accommodated under our laws. The long-standing concept of property rights as a bundle containing individual sticks of rights shall be examined. This prevailing representation of property has already been subjected to scrutiny, with some scholars proposing alternative models to replace the archetype. Justice Cardozo's admonition puts it best -- "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[3]

The bundle-of-rights representation prevents us from viewing property as a continuously evolving economic concept, when, in fact, the rights that come with property are indeterminate. This means that there may be more rights that can be included in the bundle, with each right having its own rules, consequences, and duties. The concept of property is not and cannot be of definite content.[4] Moreover, the bundle-of-rights model bears the underlying assumption that the rights are individual sticks. But the sticks in the so-called bundle of rights may also consist of smaller bundles themselves, with other sticks of rights. An example is the right to use one's property. Article 437 of the Civil Code embodies the multiple dimensions of the right to use:

> Art. 437. The owner of a parcel of land is the owner of its surface and of everything under it, and he can construct thereon any works or make plantations and excavations which he may deem proper, without detriment to servitudes and subject to special laws and ordinances. He cannot complain of the reasonable requirements of aerial navigation.

A better analogy is to view property as a **basket of rights** that contains a mixture of bundles and individual sticks of rights. Viewing property as such would serve three purposes: 1) to stress the economic nature of property, 2) to set the conceptual parameters of ownership, and 3) to allow the accommodation of possibilities such as placing other bundles or sticks in the basket.

The economic nature of property is emphasized when some rights are alienated while others are left intact. Fragmentation of property rights enhances the property's value since each right now carries an economic weight.

---

[3] Berkey v. Third Avenue Railway Co., 244 N.Y. 602 (1927).

[4] *See* John Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision,* 91 HARV. L. REV. 402 (1977).

This "conventional unbundling" works on the assumption that property rights are still utilized on the very same land. However, even if these rights are transferred, they still devolve on the property to which they are attached.

"Unconventional unbundling" can be done in two ways. The first way is by unbundling the bundle of the right to use to reflect its extent accurately. The right to use is of significant value because, after all, the value of a property is measured by what can be done with it.[5] Moreover, the recognized components or sub-components of the right to use can be further subdivided to create additional uses. This, in turn, adds more value to the property.

The other way by which "unconventional unbundling" can be done is by unbundling these components from the land such that the rights within the right to use, when alienated, may be exercised on another land.

Focusing on the second method of unconventional unbundling, this paper will discuss how the dimensions within the right to use have been implemented. It will show that by unbundling the right to use from the land, wealth can be generated, land use can be better regulated, and landmarks and forests can be preserved. Furthermore, this paper will discuss how to create the regulatory framework to support such unbundling and to address the possible spillovers of such implementation.

II. UNBUNDLING THE RIGHT TO USE: THE PLACE FOR DEVELOPMENT RIGHTS

Development rights are rights included in the bundle of the right to use. An owner may use his/her land to plant crops, erect improvements, or create any development over the land. In other words, what the owner actually possesses is the right to carry out a circumscribed list of actions. One common characteristic of development rights is that they all pertain to real property.

There is no uniform definition of these rights, but a number of state laws in the United States ("US") provide understanding as to how they are utilized. Under the State of Washington's Administrative Code, development

---

[5] JOHN COSTONIS, SPACE ADRIFT: SAVING URBAN LANDMARKS THROUGH CHICAGO PLAN 36 (1974).

rights refer to the "transferable rights to the unused development on a parcel of land measured by the difference between the existing development density on the parcel and the density allowed by applicable zoning laws."[6] In the Code of Virginia, they are defined as "the permitted uses and density of development that are allowed on the sending property under any zoning ordinance of a locality on a date prescribed by the ordinance."[7] Simply put, they refer to the right to develop the property, subject to existing laws and regulations.

The following are the identified kinds of development rights:

a. *Right to improve*[8] - the right to embellish or modify or alter the use of the real property to increase its value;

b. *Air rights* - the right to occupy the space above a specified plane over, on, or beneath a designated tract of land.[9] Air rights have a more technical definition when they are applied as rights to the air space over highways and roads. In this context, they refer to the "inclusive and undisturbed use and control of a designated air space within delineated boundaries, either at the surface or above a stated elevation." These air rights should not be confused with the same terminologies used in civil aviation[10] and condominium law;[11]

c. *Subsurface or mineral right* – the right of the owner to exploit, mine, and/or produce any or all the minerals lying below the property.[12] This is not entirely applicable in the Philippine setting due to Article XII, Section 2 of the 1987 Constitution which states that,

---

[6] WASH. ADMIN. CODE § 458-61A-111 (2005). "Easements, Development rights, Water rights, and Air rights," *available at* http://apps.leg.wa.gov/wac/default.aspx?cite=458-61A-111 (last visited Dec. 14, 2011).

[7] Code of Virginia, *available at* lis.virginia.gov/000/src.htm (last visited Dec. 14, 2011).

[8] Many references, especially those on land use, employ the term "development rights" or "right to develop" to refer to this right, but this creates confusion with the umbrella term "development rights".

[9] Frumencio Pulgar, *Air Rights Perspective of a Local Government Unit,* 9 LAW. REV. 6 (1995), *citing* Maurice Brunner, *Annotation, Separate Assessment and Taxation of Air Rights*, 56 A.L.R. 3D 1300 (1970).

[10] *See* Rep. Act No. 9497 (2008).

[11] *See* Rep. Act No. 4726 (1966).

[12] The Free Dictionary, *Mineral Rights*, *available at* http://encyclopedia.thefreedictionary.com/subsurface+rights (last visited Dec. 3, 2011).

"All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State…;"[13] and

d. *Riparian right* – the right of the landowner to use his/her property, through which a natural watercourse runs, for all purposes to which it can be applied.[14] The closest references in the Civil Code are Articles 457,[15] 459,[16] 461[17] and 465[18] pertaining to natural accessions. Discussions on riparian rights under Philippine law may be found in *Zapata v. Director of Lands*[19]and *Hilario v. City of Manila.*[20]

Although the right to improve and air rights are the main kinds of development rights, a strict dichotomy is not often observed in practice. For instance, these two are lumped together in valuation. These two types of development rights -- the right to improve and air rights will be the subject of this paper.

---

[13] *See also* Republic v. Court of Appeals, G.R. No. L-43938, 160 SCRA 228 (1988).

[14] *See* Answers™, *Riparian Right*, *available at* http://www.answers.com/topic/riparian-right (last visited Dec. 3, 2011).

[15] CIVIL CODE, art. 457. To the owners of lands adjoining the banks of rivers belong the accretion which they gradually receive from the effects of the current of the waters.

[16] Art. 459. Whenever the current of a river, creek or torrent segregates from an estate on its bank a known portion of land and transfers it to another estate, the owner of the land to which the segregated portion belonged retains the ownership of it, provided that he removes the same within two years.

[17] Art. 461. River beds which are abandoned through the natural change in the course of the waters ipso facto belong to the owners whose lands are occupied by the new course in proportion to the area lost. However, the owners of the lands adjoining the old bed shall have the right to acquire the same by paying the value thereof, which value shall not exceed the value of the area occupied by the new bed.

[18] Art. 465. Islands which through successive accumulation of alluvial deposits are formed in non-navigable and non-floatable rivers, belong to the owners of the margins or banks nearest to each of them, or to the owners of both margins if the island is in the middle of the river, in which case it shall be divided longitudinally in halves. If a single island thus formed be more distant from one margin than from the other, the owner of the nearer margin shall be the sole owner thereof.

[19] G.R. 17645, 6 SCRA 335 (1962).

[20] G.R. 19570, 19 SCRA 931 (1967).

III. UNBUNDLING THE RIGHT TO USE FROM THE LAND: THE TRANSFER OF DEVELOPMENT RIGHTS

Development rights may be alienated, leaving the rest in the bundle unaffected. The transfer of development rights ("TDR") is an alienation of a land's "unused development potential calculated as the difference between its existing use and its full development as permitted by existing laws."[21] Although the right to improve may be transferred, the owner may still use the property.

The TDR differs from the other conventional alienations in one important aspect. In conventional alienations, the rights severed can be exercised only and still on the subject land itself. In usufruct, for example, the *jus utendi* and the *jus fruendi* can only be exercised by the usufructuary over the landowner's property. On the other hand, development rights introduce an innovation where there is an "invisible" transfer of one property's right to another.

A. Types of TDR

The TDR may be understood either in a loose or strict sense. In its loose sense, a TDR may involve all alienations of development rights, including a mere conveyance of the development rights to another, without the rights being transferred to another area. This is illustrated below:

---

[21] *See* State Agriculture Development Committee, Department of Agriculture, State of New Jersey, *Definitions*, *available at* www.state.nj.us/agriculture/sadc/tdr/faqs/definitions (last visited Nov. 28, 2011).

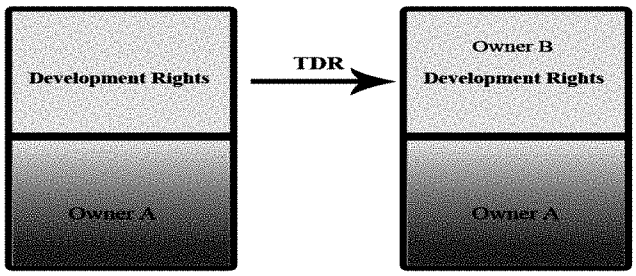

Figure 1. TDR in a Loose Sense.

On the other hand, a TDR always involves a sending area and a receiving area if to be construed in the strict sense. The sending area is the property with a development right. The receiving area is another property where the alienated development right will be used. With this in mind, permutations may be obtained which could make TDR either simple or complex. A simple TDR is shown by Figure 2 below.

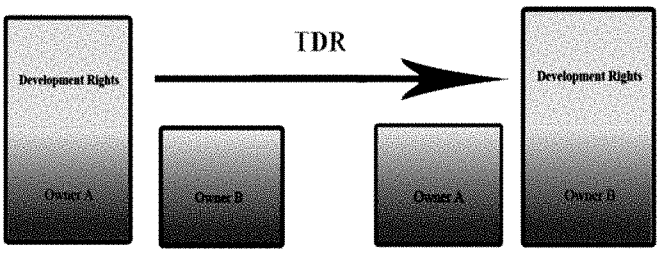

Figure 2. TDR in a Strict Sense – Simple TDR.

In a complex TDR, there may be more than two properties involved. There may even be one or more sending areas and one or more receiving areas. The figure below shows a complex TDR:

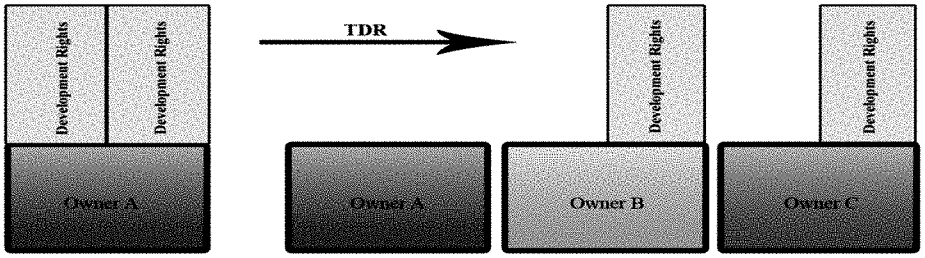

Figure 3. TDR in a Strict Sense – Complex TDR.

Finally, a TDR may be also be classified based on the geographic distance between the receiving and sending areas. It is a simple TDR when the sending and receiving areas are adjacent to each other, as in neighboring lots. When the properties on either side of the equation are not adjoining, then the TDR is complex.

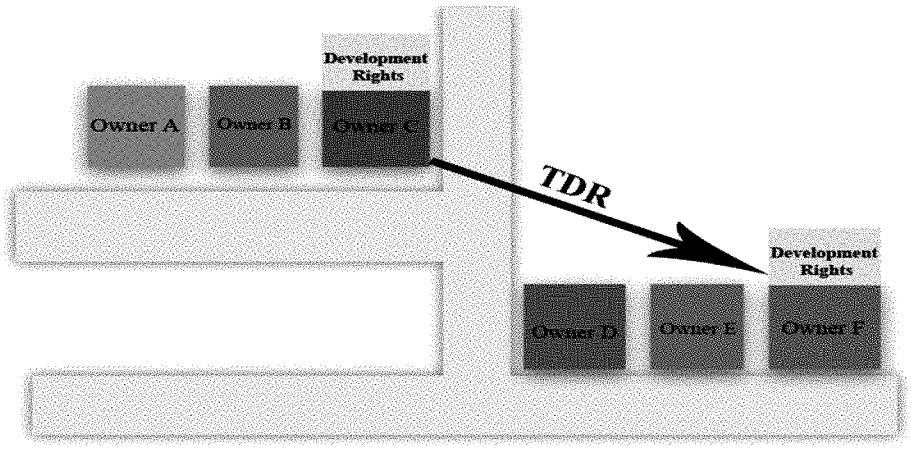

Figure 4. TDR Based on Geographic Distance - Complex TDR.

B. Historical and Legal Precedents of TDR

TDR may appear unconventional, but they have been implemented for a long time already, especially in the US, where the creation of planning districts gave birth to four precedents of TDR. These were government programs which made it possible to transfer the development potential of individual properties to other private owners:[22]

1. **The early transportation systems.** When private toll roads were constructed in the early 1800's, "private corporations were given the power to acquire rights-of-way upon the payment of compensation."[23] Later on, this power was extended to the private builders of railroads and canals. The practice "established the precedent for a system by which the right to develop some part of a person's property could be transferred to another private

[22] Donald Carmichael, *Transferable Development Rights as a Basis for Land Use Controls*, cited in THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION (Jerome Rose ed., 1975).

[23] THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION (Jerome Rose ed., 1975) at 5.

owner, upon the payment of compensation, where such transfer is designed to meet a public need."[24]

2. **The Milldam Acts**. Before the effectivity of these laws, owners of land along streams built dams to harness hydropower for the grinding of grain. However, these structures flooded the land of upstream owners, depriving them of the right to develop their lots. The statutes allowed the erection of dams but mandated the compensation of upstream landowners. These allowed "the involuntary transfer of the right of upstream owners to develop their land, without the exercise of the power of eminent domain."[25]

3. **The early major drainage and irrigation projects.** Under these projects, some owners [within an irrigation district] were deprived of the right to develop or use their property so that the water resources could be channeled to achieve the greatest benefit for the district."[26] The "resources of all participants were pooled and the rights of development were reassigned within the district to achieve the maximum utilization of local resources."[27]

4. **The oil and gas production regulations**. These rules were designed to limit the landowner's production of gas or oil in order to prevent draining of the neighbor's property. The states passed laws which regulated the "availability of common fund of oil and gas resources" for all landowners. However, these rules depleted resources and jeopardized overinvestment in drilling machines. TDR expert Professor Donald Carmichael thinks that the statutes supported TDR "in that the potential for development within a planning or zoning district is similar to a reservoir of all gas or oil resources."[28]

The transfer of air rights, however, is not strictly American in origin. Experts identify the Ponte Vecchio over the Amo River in Florence, Italy, where commercial shops were allowed to be assembled on the bridge, as one of the first structures built on air rights.[29] However, it was in the US where air rights development became more pervasive. The first airspace activity occurred

---

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *See, e.g.,* Ventura Village Initiatives, *Proposal for Air Rights Development* (1969), *available at* http://www.venturavillage.org/masterplan/air-rights-summary.PDF (last visited Nov. 29, 2011).

"when the rights-of-way along Park Avenue (New York City) were depressed during the 1890's."[30] The term "air rights" was first employed to refer to the use of space over railroad tracks and terminals,[31] starting with the establishment of the Grand Central Terminal in New York City in 1902. Eventually, the phrase acquired a broader application.[32]

The proliferation of roads and highways clashed with the demand to maintain houses for city dwellers and to sustain a sane urban form. For instance, French architect Le Corbusier proposed the creation of a building raised off the ground on *pilotis*, which 'freed' the ground for vehicular circulation and services.[33] City governments eventually recognized the need for balanced urban development. In 1916, New York City introduced the first American ordinance that "allowed landowners to sell their unused air rights to adjacent lots, which could then exceed the new height and setback requirements."[34] In 1968, New York City amended its ordinance to allow transfers between properties which were blocks apart.[35] Other cities, such as Chicago,[36] followed suit.

The evolution of TDR shows that it came about as a product of police power. TDR was adopted to promote public use and constituted a limitation on the right to use, at least, and ownership, at most. However, this view is opposed by another school of thought which claims that TDR falls under eminent domain. Since TDR is a government-initiated program, the alienation of the development right is seen as a "taking" and the payment to the landowner is viewed as "compensation." It is difficult to maintain that the

---

[30] *Id.*

[31] Sean Clancy, Air Rights Development: Is It Different From Traditional Land Development? (1988) (thesis for Master of Science in Real Estate Development, Massachusetts Institute of Technology, on file with the Department of Urban Studies & Planning), *available at* http://hdl.handle.net/1721.1/9641 (last visited Nov. 29, 2011).

[32] *Id.* at 4.

[33] *See* Ventura Village Initiative, *supra* note 29.

[34] Jason Hanly-Forde, George Homsy, Katherine Lieberknecht & Remington Strone, *Transfer of Development Rights Programs*, *available at* http://ecommons2.library.cornell.edu/web_archive/government.cce.cornell.edu/doc/html/Transfer%20of%20Development%20Rights%20Programs-2.html (last visited 19 June 2011).

[35] *Id.*

[36] Farm Business Development Center, *Transfer of Development Rights (TDR) Program*, *available at* http://www.prairiecrossingfarms.com/transferofdevrights.pdf (last visited Nov. 29, 2011).

transfer of the development rights is a mere "regulation" of property. "The underlying legal theory of the TDR proposal is that the right to develop is one component of [ownership and] it is separated out from the rest of the ownership and transferred away over the owner's property."[37]

The question of whether TDR is within the ambit of police power or eminent domain assumes significance when the matter of just compensation is taken into consideration. If it is in the exercise of police power, then just compensation is irrelevant because the taking under this great power is *damnum absque injuria.*[38] On the other hand, if it is under eminent domain, the taking must be done with just compensation.

Remarkably, the US Supreme Court has not made a definitive ruling on the issue, probably because a controversy on the very question has not been brought before it. In 1978, this issue was slightly discussed in *Penn Central Transportation v. New York City.*[39] In this case, Penn Central Transportation Co. owns Penn Central Station which was designated as a landmark under New York City's Landmarks Law. Penn entered into a lease agreement with a private corporation for the construction of a multi-storey office building over the terminal. New York City did not approve the same, invoking the Landmarks Law. Penn filed a suit alleging that the law had "taken" their property without just compensation by depriving them of their right to their superjacent airspace (essentially, their air rights). The US Supreme Court held that it was not a "taking." It ruled that, "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and nature and extent of the interference with property rights in the **parcel as a whole** (emphasis supplied)."

Later on, in the case of *Suitum v. Tahoe Regional Planning Agency,*[40] the same Court ruled on a government agency's action on a TDR application. The issue, however, was the ripeness of the petition pending the agency action and not on TDR itself. Nevertheless, Justice Antonin Scalia made a collateral discussion in his concurring opinion, to wit:

---

[37] Jerome Rose, *Psychological, Legal and Administrative Problems of the Proposal to Use the Transfer of Development Right as a Technique to Preserve Open Space*, *in* THE TRANSFER OF DEVELOPMENT RIGHTS, supra note 23 at 296.

[38] *See* Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) & Keystone Bituminous v. Debenedictis, 480 U.S. 470 (1987).

[39] 438 U.S. 104 (1978).

[40] 520 U.S. 725 (1997).

> TDRs of course have nothing to do with the use or development of the land to which they are [by regulatory decree] "attached." The right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop *his* land…the relevance of TDRs is limited to 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.

Hence, the question remains unanswered. It must be stressed though that the big issue is not on the legality of a TDR, but on its classification. The murkiness of the legal classification has caused some experts to place TDR in the middle ground between police power and eminent domain. TDR programs "do not fit precisely into either category. It combines the characteristics of both. To use legal phraseology, it is *sui generis:* it is a class by itself."[41]

Notwithstanding this issue, TDR programs are now implemented for various purposes in many cities and municipalities in the US and around the world. TDR is used for land use regulation,[42] housing,[43] landmarks preservation,[44] environmental protection,[45] and promotion and regulation of urban growth.[46] TDR programs have also been proposed specifically for forest protection.[47]

---

[41] *Supra* note 37 at 295-96.

[42] *See* New Jersey Pinelands Comm'n., *The New Jersey Pinelands Development Credit (PDC) Program* (2011), *available at* http://www.nj.gov/pinelands/infor/fact/PDCfacts.pdf (last visited Nov. 30, 2011).

[43] *Supra* note 37 at 244.

[44] *See supra* note 5. Hong Kong TDR at http://www.hkis.org.hk/ufiles/2008-pli.pdf (last visited June 19, 2013).

[45] Lincoln Inst. of Land Policy & Regional Plan Assoc., *Transfer of Development Rights for Balanced Development* (1998), *available at http://www.rpa.org/pdf/transferdevelopment.pdf* (last visited June 19, 2013).

[46] *Id.* For the Brazilian experience, *see* Mila Freire, *Urban Planning: Challenges in Developing Countries* (2006) (presented before the International Congress on Human Development in Madrid 2006), *available at* http://www.reduniversitaria.es/ficheros/Mila%20Freire(i).pdf (last visited Nov. 29, 2011).

[47] Kenneth Chomitz, *Transferable Development Rights And Forest Protection: An Exploratory Analysis* (1999) (prepared for a Workshop on Market-Based Instruments for Environmental Protection in July 1999 at Harvard University John F. Kennedy School of Government) , *available at* http://www.landecon.cam.ac.uk/up211/EP09/reading/session_danilo/Chomitz_tdr.pdf (last visited Nov. 29, 2011).

IV. DEVELOPMENT RIGHTS IN PHILIPPINE PROPERTY LAW

A. Development Rights in General

The term "development rights", as understood above, has neither been defined in our laws nor has it been sufficiently explained in our jurisprudence. The lone mention of the phrase can be found in *Metropolitan Manila Development Authority ("MMDA") v. Trackworks Rail Transit Advertising, Vending and Promotions, Inc.*[48] In this case, the Supreme Court quoted the agreement entered into between the Philippine government and Metro Rail Transit Corporation, Limited ("MRTC") to build MRT 3, where the latter was awarded "development rights" which covered the "commercial premises in the Depot and the air space above the [MRT 3] Stations, which shall be allowed to such height as is legally and technically feasible." MRTC leased these rights to Trackworks. The main question in this case, however, was MMDA's authority to prohibit the installation of commercial advertisements, and not the legality of the agreement concerning the award of development rights.[49]

Definitional absence, however, does not mean lack of conceptual presence. Our Civil Code can accommodate development rights, notwithstanding the lack of definition in our laws. Article 428 of the Civil Code[50] embraces these rights in principle. These rights do not introduce a concept that alters our property law, but simply introduce variations within the right-to-use framework that modifies the way such right is understood. The two most widely-used development rights will be discussed below — the right to improve and air rights.

B. Right to Improve

As a bundle of rights, the right to use contains the owner's right to improve the property. The extent to which an owner can use his property is

---

[48] G.R. 167524, 474 SCRA 331 (2005).

[49] But *see* discussion *infra*.

[50] CIVIL CODE, art. 428. "The owner has the right to enjoy and dispose of a thing, without other limitations than those established by law. The owner has also a right of action against the holder and possessor of the thing in order to recover it."

indicated in the first sentence of Article 428 — "without other limitations than those established by law." This indicates that the owner has the right to develop the property to its fullest potential and the right to convert it for another use until the law sets limitations.

One valid limitation set by law is zoning. A zoning ordinance is "a local city or municipal legislation which logically arranges, prescribes, defines and apportions a given political subdivision into specific land uses as present and future projection of needs."[51] *Village of Euclid, Ohio v. Ambler Realty*[52] is the landmark case which affirmed zoning as a valid exercise of regulatory power in the US. In the Philippines, zoning was upheld in the case of *Ortigas & Co. Limited Partnership v. Feati Bank and Trust Corporation*.[53] Republic Act No. 7160 ("R.A. 7160")[54] has put the question to rest when it gave local government units ("LGUs") the power to "prepare their respective comprehensive land use plans enacted through zoning ordinances which shall be the primary and dominant bases for the future use of land resources: *Provided*, that the requirements for food production, human settlements, and industrial expansion shall be taken into consideration in the preparation of such plans."[55]

Zoning, however, results in the deprivation of the owner of his right to improve. Should an area be identified as residential, the owner's realization of its full potential is suddenly a foregone objective. For instance, the owner is prevented from turning it into a commercial area which cuts off revenue stream. What happens then to the right "lost?" Philippine jurisprudence does not address the issue. In the US, the bulk of jurisprudential precedence dealt with the loss of the right to improve in the context of police power versus eminent domain debates. When the taking "goes too far", as Justice Holmes wrote in *Pennsylvania Coal v. Mahon*,[56] it becomes eminent domain and the loss must be compensated.

While *Euclid* recognized the unequal burdens of property owners, it also generated ingenuity to compensate for the loss. Thus, state laws provided the remedy by inventing the conveyance of the right to improve:

---

[51] Pasong Bayabas Farmers Association, Inc v. Court of Appeals, G.R. No. 142359, 429 SCRA 109 (2004).

[52] 272 U.S. 365 (1926).

[53] G.R. 24670, 94 SCRA 533 (1979).

[54] LOC. GOV'T. CODE, Rep. Act No. 7160 (1991).

[55] § 20.

[56] *Supra* note 38 at 415.

> There may arise situations, where the limitation of use imposed for the public good inflicts an economic impact on the landowner that, while not confiscatory, is so substantial as to prompt the government to provide some type of compensation. Cases involving the preservation of scenic easements and historic or architecturally valuable landmarks, preserving as they do benefits to the public that are largely cultural or aesthetic, yet concentrating the burden upon relatively few, have moved government officials to find ways to compensate the affected property owners.[57]

If they can be conveyed, do they have value? The key to the answer is the simple understanding that *land has a monetary equivalent.* Ergo, all the rights over it have respective values which, when added up, results in the composite value of the land. Ordinances have been passed in many jurisdictions in the US providing graduated values for this right.[58] "For some areas, this right tends to become the component of greatest value among the many possible rights of ownership."[59] As mentioned earlier, however, the US Supreme Court has not yet dealt with this issue squarely.

C. Air Rights

Air rights are property rights of a landowner to the space above the real property. They find support under our statutes and case law. The eminent civilist and former Senator Arturo Tolentino explains that the right of the landowner under Article 437 "extends to the space and subsoil as far as necessary for his practical interests, or to the point where it is possible to assert his dominion; beyond these limits, he would have no legal interest."[60] *Article 437 is sufficient to contain air rights.* It can accommodate an interpretation that airspace may be owned. It is so worded to make room for an understanding

---

[57] West Montgomery County Citizens Ass'n. v. Maryland-National Capital Park and Planning Comm'n., 309 Md. 183, 522 A.2d 1328, 1330 (1987).

[58] For valuations, *see, e.g.,* Joe Daubenmire & Thomas Blaine, Purchase of Development Rights, *available at* http://ohioonline.osu.edu/cd-fact/1263.html (last visited Dec. 3, 2011); and LINCOLN, *supra* note 45.

[59] *Supra* note 37 at 3.

[60] II ARTURO TOLENTINO, CIVIL CODE OF THE PHILIPPINES, 90 (1992), *citing* 1 Camus 354; 2-II Colin y Capitant 551; Borrel y Soler, Dominio, pp.43-45; Brugi, p.175; Valverde 71-73.

that the ownership of the land translates to a concomitant ownership of the airspace above it.

The criterion then is economic utility. The landmark case of *U.S. v. Causby*[61] supports this view: the "landowner owns as much of the space above ground as he can occupy or use in connection with the land." The owner must have "exclusive control of the immediate reaches of the enveloping atmosphere" in order to maintain full enjoyment of the land. It added that when the use of the undeveloped airspace is restricted, the compensation would be for the loss of the value of the land. "But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value."[62] In the case of *National Power Corporation v. Spouses Gutierrez*,[63] the Philippine Supreme Court found the construction of posts and wire cables over the owners' land as well as the limitation on the height of plants that can be planted on the same land as a severe restriction on ownership. In holding that it falls under eminent domain, the Supreme Court explained that the prohibitions against the use of the land deprive the owners of its ordinary use. The doctrines in these cases imply that the use of the airspace *is* the use of the land.

The implication then is that the superjacent space is not a distinct property or a separate parcel of real property. The land extends by fiction to the airspace. From this perspective, land can be seen as a legal abstraction that allows for horizontal development. A writer puts it aptly by describing airspace as "a fertile soil."[64]

If air rights are not distinct properties, what are they then? The answer cannot be found in the swirl of Philippine jurisprudence. Instead, reference is placed on American jurisprudence in discussing this concern upon consideration that they can be applied to the Philippine setting.

Although air rights may not be separate parcels of real property, they may, however, be "independent units of the real property."[65] But can a unit be

---

[61] 328 U.S. 256 (1945).

[62] *Id.*, at 262.

[63] G.R. 60077, 193 SCRA 1 (1991).

[64] Eugene Morris, *Air Rights are "Fertile Soil"*, 1 URB. LAW. 247 (1969).

[65] *Note: Conveyance and Taxation of Air Rights*, 64 COLUM. L. REV. 338 (1964); *see also* 873 Third Avenue Corp. v. Kenvic Associates, et.al. 109 A.D.2d 489, 492 N.Y.S.2d 727 (1st Dept. 1985).

made out of thin air? This was answered in the affirmative in *Alvord Investment, LLC v. Zoning Bd. of Appeals.*[66] A land developer applied for a permit for the construction of a retail food/grocery store on leased land. The original plan for the land was changed when the lessee made a declaration that the property is to be divided into three airspace units by virtue of Connecticut's Common Interest Ownership Act. A zoning permit was granted in this wise. The neighboring residents appealed the issuance of the permit arguing that the subdivision into three airspace units was actually an indirect way of dividing the property into three lots, which violates zoning. The Connecticut Supreme Court held that what has been divided here was not the land, but merely the airspace above it. Therefore, no violation of zoning rules was committed.

The view that the airspace is an independent unit of the land gives way to the proposition that it can, like any other right within the bundle, be conveyed. Although a determination from the highest echelon of the US judiciary is lacking, state courts have already ruled on this matter. In one early case, [67] the City of Seattle passed an ordinance declaring that it will vacate the imaginary horizontal plane sixteen (16) feet above an alley owned by it. Under the state's law, the abutting landowner gets the property which the state vacates. The ordinance, therefore, had the effect of conveying the airspace to the neighboring landowner. In holding the ordinance valid, the Court recognized horizontal subdivision and that the Seattle's "vacation was indistinguishable from a vertical subdivision."

In the Philippines, *MMDA vs. Trackworks* illuminates the principle a bit. The respondent in this case asked the Court for a writ of preliminary injunction to stop the MMDA from dismantling the billboards. In granting the same, the Court held that the respondent Trackworks has established its right. Thus, "[t]he contract with the MRTC vested it the exclusive right to undertake advertising and promotional activities at the MRT 3 structure." A careful reading of the case would show that the Court seemed to have recognized a contractual stipulation involving air rights. However, *MMDA* must be confined to its facts. As discussed earlier, TDR could be understood either in the loose or strict sense.[68] *MMDA* tackled only the loose TDR as the air rights were still used by Trackworks on the same property and were not transferred elsewhere. Needless to say, a case on TDR in the strict sense has yet to be considered.

---

[66] 282 Conn. 393 (2007).

[67] *See supra* note 65.

[68] *See supra* Figure 1.

There is also a paucity of judicial reference for a complex TDR. Although *Penn Central Transportation vs. New York City*[69] tackled a controversy involving the scheme, the validity of the TDR was not its very *lis mota*. Nevertheless, the wind of authority is blowing in the direction of the recognition of such conveyances. "It appears that the prevailing authority would allow airspace to be conveyed, leased, subdivided, and have interests created in it, and estates carved out of it in the same manner."[70] Like any property right, air rights can be alienated. However, unlike other property rights, air rights can be exercised not only on the property to which they are attached, but also on any other property, when alienated.

If the airspace can be conveyed, the next question to be dealt with is the value of the conveyance. *Causby,* and more strongly, *Penn Central*, seem to suggest that the superjacent space has value. In *Penn Central*, the US Supreme Court noted that the corporation was not denied all use of its pre-existing air rights over the terminal. "Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal…" This seemed to suggest that air rights are of value since they can be "taken into account in considering the impact of regulation."

The value of air rights was illustrated in the case of *Fred F. French v. City of New York*.[71] Two French-owned private parks were rezoned by New York City as public parks by virtue of an amendment to its Zoning Resolution. The city government granted the French development rights (specifically, air rights), but the receiving areas were not determined. The owner brought New York City to court on the ground that there was undue "taking." In holding that there was deprivation of property without due process of law, the court said:

> [T]he development rights are an essential component of the value of the underlying property because they constitute some of the economic uses to which the property may be put. As such, they are a potentially valuable and even a transferable commodity and may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property.

---

[69] See *supra* note 39.

[70] *See supra* note 9 at 7.

[71] 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

D. Transfer of Development Rights

If development rights can be accommodated by our existing laws, TDR can also be adopted using these laws. There is, therefore, no legal obstacle for the implementation of TDR in the Philippines. Article 415 of the Civil Code states that:

> Art. 415. The following are immovable property:
> (1) Land, buildings, roads and constructions of all kinds adhered to the soil;
>
> x x x
>
> (10) Contracts for public works, and servitudes and other real rights over immovable property. (334a)

A real right is the "the power belonging to a person over a specific thing, without a passive subject individually determined against whom such right may be personally exercised."[72] This right may be exercised against the whole world. TDR can be considered a real right. According to Tolentino, real rights have the following characteristics:

> 1) a subject and an object connected by a relation of ownership of the former over the latter;
> 2) a general obligation or duty of respect for such relation, there being no particular passive subject; and
> 3) effective actions recognized by law to protect such relation against anyone who may want to disturb it.[73]

TDR meets the first characteristic; the owner still owns the property since only certain rights are alienated from the heap of ownership. The second characteristic is also met because the separation of the development rights is enforced against the whole world (the passive subject). Finally, the third characteristic is also present because the law provides a protective action for TDR (to be discussed below).

---

[72] *See supra* note 60 at 5.
[73] *Id.* at 163.

The TDR may be subject to any transaction involving a real right. In the US, the most common type of transaction is sale, the most onerous transmission of rights. This is due to the character of permanence of the TDR. An example of a less onerous mode is the TDR involved in *MMDA*. However, this is not popular because of the difficulty that it could create. Once the development rights are alienated, they cannot be brought back to the sending area because these rights have already been applied on the receiving area. The option then of the property owner is to purchase other development rights.

V. THE CASE FOR DEVELOPMENT RIGHTS

In considering the legal variable in the development rights calculus, there is no legal block for the implementation of TDR in the country. However, the policy variable also needs to be added in the equation.

A. Determination of Demand and Supply

Land is a finite resource. Similarly, the rights over land are limited. In light of this, it is only fair that laws should rightfully acknowledge as many rights as possible. Unfortunately, the Philippines has no comprehensive national land use plan to serve as the overall structure for rights determination. Instead, the country has a chaotic mix of laws that address various land use concerns — Presidential Decree No. 705 or the Revised Forestry Code of the Philippines, Republic Act. No. 6657 or the Comprehensive Agrarian Reform Law ("CARL") of 1988, Republic Act 8371 or the Indigenous Peoples Rights Act ("IPRA") of 1997, and Republic Act No. 8435 or the Agriculture and Fisheries Modernization Act ("AFMA") of 1997. The lack of a rationalized and harmonized national framework hampers effective management of land resources. According to former Department of Environment and National Resources ("DENR") Undersecretary Elmer Mercado, the absence of a comprehensive land use policy results in a "haphazard development in rural and urban areas - with competing allocations for industrial, mining, residential and protective areas."[74]

---

[74] Marianne Go, *National land use policy pushed*, PHIL. STAR, Jul. 28, 2011, *available at* http://www.philstar.com/business/710147/national-land-use-policy-pushed (last visited Dec. 7, 2011).

Another major stroke that paints the whole scenario of development in disarray is urbanization. The country is an "urbanizing society"[75] with a continuing rise in urban population at 65 % by 2020.[76] The growth in urban population has "been growing much faster than total population."[77] The trend is two-pronged: 1) *geographic deconcentration,* in the sense that smaller towns and cities have higher population growths; and *urban sprawl*, in the sense that "while core cities may not be growing fast, the surrounding areas are growing faster, indicating spillover effects."[78] Rapid urbanization has brought about problems such as the decline of agricultural productivity faster than the pace of finding policy remedies.

In the absence of a comprehensive land use policy, TDR can be used to address such problem brought by urbanization. History shows that they were implemented as a regulatory mechanism on land use. Most TDR programs were successful in combatting urban sprawl. In the US, these programs intended to eliminate the pressure on areas that lie on the fringes of urban concentration. This often involved large, adjacent farmlands. The advantages of this strategy are as follows: 1) it develops a "critical mass"[79] of farms which could preserve agriculture as an industry and source of livelihood; and 2) it creates bigger demand for agricultural supplies to sustain the industry due to the big number of farms.[80]

In addition, TDR can also address land use problems within urban centers. The land use technique now being used is *zoning,* and this resulted in a significant economic situation. Zoning created demand for space. The limitations placed on a property by laws, such as zoning ordinances, may induce profit-seeking property owners to sell their development rights, rather than use them on their property. As restrictions are increased, the property

---

[75] Comm'n. on Population (Phils.), *The Urban Sprawl*, *available at* http://mis.popcom.gov.ph/sppr/sppr03/pdfs/_Chapter%20I_NEW.pdf (last visited Dec. 7, 2011).

[76] Making Cities Work State of Population Report (5), available at http://www.scribd.com/doc/55163230/State-of-the-Philippine-Population-Report-2004 (last visited 20 June 2013)

[77] *See supra* note 75.

[78] *Id.*

[79] Joe Daubenmire and Thomas Blaine Purchase of Development Rights (Ohio State University Fact Sheet) *available at*
http://ohioline.osu.edu/cd-fact/1263.html (last visited June 20, 2013)

[80] *Id.* (the Daubenmire article as cited in the comment).

owners within a given area will have greater motivation to sell their development rights rather than actually use them on their property.[81]

However, zoning has three inherent limitations. *First*, the delineation of districts for different purposes is a *policy question* left to the legislative councils of the LGUs, under R.A. No. 7160. *Second*, zoning is a command-and-control regulation that leaves the owner *opportunity costs* for the loss of his/her development. For example, the owner of a vacant lot in a residential area is prevented from turning his/her land into a commercial property. Third, there is the noxious marriage of the two. In instances where the property owner wants to restrict or eliminate the loss of development rights, he needs to lobby before LGU officials. Politics enters the transaction as local leaders have the discretion to carve out an exemption from the zoning ordinance. The very purpose of zoning is defeated when local leaders exercise discretion arbitrarily.

An example would be SM Development Corporation's ("SMDC") construction of the high-rise, Blue Residences, along Katipunan Avenue. Under Quezon City's Comprehensive Zoning Ordinance No. SP-918, S-2000, as amended by Ordinance No. SP-1369, S-2004, the area along Katipunan Avenue is designated as a low-density residential zone (R-1) with the height limit for buildings set at 10 meters. Despite vehement opposition from residents and other interest groups, Quezon City passed an ordinance granting exemption to SMDC.

To fill in these gaps, TDR can be adopted as a complement of zoning. Properly, TDRs are "zoning plus (Z+)" programs because they address the three built-in limitations of zoning. The land use policies can still be left to LGUs. Each jurisdiction can still pass zoning ordinances to delineate districts according to use. More particularly, LGUs can still identify the high-density and low-density areas, as they do today. These areas will be the receiving and sending areas, respectively, in a TDR program. The low-density areas will hold excess development rights which will be transferred to the high-density areas. Politics is taken out because once the source of the excess development rights is identified, LGUs can no longer pass exemptions from its zoning ordinances in order to accommodate a property owner's interest. In a TDR program, the

---

[81] RICK PRUETZ, SAVED BY DEVELOPMENT: PRESERVING ENVIRONMENTAL AREAS, FARMLAND AND HISTORIC LANDMARKS WITH TRANSFER OF DEVELOPMENT RIGHTS 51 (1997).

sending areas are perpetually restricted[82] rather than just rezoned. As such, incumbent or future local officials can no longer change the restriction.[83] In other words, "TDRs are likely to mitigate the rent-seeking behavior that is commonplace with zoning. TDRs are efficient as they distribute the gains from development more equally among landowners than do direct land use controls."[84]

To use a concrete illustration, we refer to the buildings along Katipunan Avenue that have not reached the maximum height set by the applicable Ordinance. The owners of these below-limit buildings have excess air rights. Let us consider that SMDC desires to build a residential building on its land along Katipunan Avenue. Under a TDR program it could not erect a building beyond the limit. Additionally, it could not be subject of an exemption. The only way it can build higher than the legal limit is by buying the excess development rights of the neighboring properties which will constitute as an automatic exemption from the Ordinance. This would eliminate the Quezon City Council's discretion.

The question on how to compensate the owner for the opportunity costs of development rights remains unanswered. Equilibrium has to be found somewhere. In other jurisdictions, this objective is met by allowing the transfer of development rights from the "zoned" property to certain other properties, and these rights have been given **added value** by permitting a greater than normal intensity of development of the transferee or "receiving" property.[85] TDR, therefore, can fully compensate the owner of the sending area for whatever economic rights he/she lost as a result of a zoning law or ordinance.

In the Philippines, the classification of property by zoning reflects an assumption that the development potential of land is considered. For instance, a commercial area is assessed higher than a residential area. There is no separate assessment, however, as to the value of development rights. Thus, compensation is not possible for the loss of these rights.

---

[82] *See* discussion on Incidents of Implementing TDR, *infra.*

[83] *See supra* note 82 at 50.

[84] Elizabeth Kopits , Virginia Mc Connell & Margaret Walls, *Making Markets for Development Rights Work:What Determines Demand?* (2005) (discussion paper for Resources For The Future [RFF] in 2006), *available at* http://www.rff.org/RFF/Documents/RFF-DP-05-45-REV.pdf (last visited Dec. 10, 2011).

[85] *Supra* note 57.

This being the case, the question as to whether the landowners are fully compensated for all of their economic rights resulting from ownership is very much relevant in the Philippine context. With the presence of TDR, owners are compensated either by allowing them to transfer development rights, which has monetary equivalent, greater than or at least equal to the economic loss incurred. As such, owners may actually gain profit from the TDR, aside from recovering the compensation for the loss not currently awarded under current laws. On the other side of the transaction, TDR allows the receiving areas to have more development rights on their properties than is permitted by zoning. As such, they will be able to improve their property without having to look for another land on which such improvements could be built on.

B. Establishment of the Legal Structure

The examples from different jurisdictions in the US consider three issues in putting up a structure.

First is the identification of the sending and receiving areas based on the overarching policy that governs the TDR program. A zoning regulation identifies the commercial, residential, and industrial areas within a jurisdiction. Once a zoning regulation is passed, which lands are to be preserved (i.e., the sending area) and which lands may be developed (i.e., the receiving area) are determined. This composes the geographical perimeter of the TDR program.

To illustrate this, let us take Quezon City as an example and suppose that the objective is to focus development on a high-density commercial (C) area within the Cubao assessment district. Under the Quezon City Revenue Code,[86] an assessment area is subdivided by degrees in alphanumeric terms, with the first letter and number as the highest. Therefore, the highest valuation goes to the area at Ca-1, such as the area along Gen. Roxas St. from EDSA to Times Square.[87] The nearby N. Domingo St. from Balite Drive to Aurora Boulevard is residential (Ra-3). The former will be the receiving area, while the latter will be the sending area. To stop the neighboring pressure of turning the latter into a commercial zone, Quezon City will assess the excess development

[86] Quezon City Ordinance No. SP-357, series of 1995.
[87] *Id.* at 23.

rights which will be transferred to the former. Such transfer of excess development rights is illustrated in Figure 5.[88]

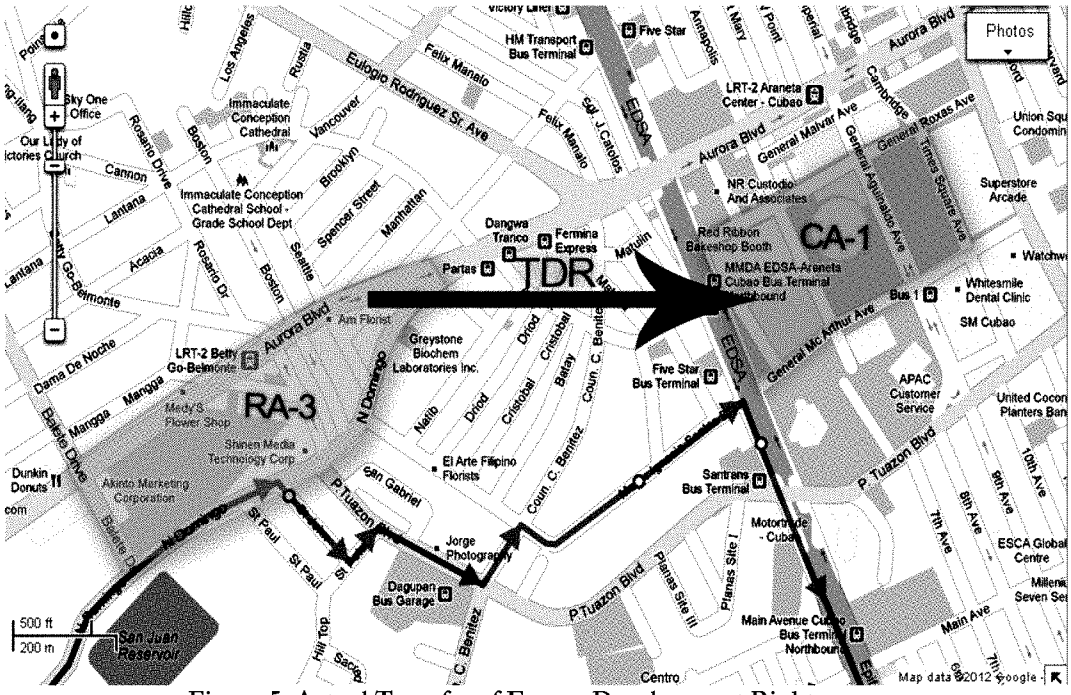

Figure 5. Actual Transfer of Excess Development Rights.

The second important aspect of structure is the creation of a pool of development rights that has to be created after the valuation of the same. With the implementation of a TDR program, the more intensive land-use options are now precluded. Zoning may or may not lower the market value of a

[88] *From maps.google.com.*

particular parcel of land, but it does prohibit the current or future owners from utilizing the land for certain uses.[89]

At least two formulas have been proposed in assigning development rights in the US: (a) allocate a number of development rights per acre regardless of any physical or value characteristics of the land in the sending area; or (b) assign development rights according to the development value foregone by that same land.[90] The second formula will be used in this paper because it is more in keeping with the principle that the value of a property is measured by what can be done with it. A land having a greater potential development will certainly be assigned more development rights. Besides, the second formula will present less deviation from existing practice. Remember that value of lands in the Philippines is assessed on the basis of the actual use or "the purpose for which the property is principally or predominantly utilized by the person in possession thereof."[91]

By slightly modifying the second formula to fully capture the value of all development rights accruing to the land owner, the units of development rights ("UDR") can be computed as follows:

$$UDR = DRF / k$$

Where:

UDR = Unit of Development Rights

DRF = Development Rights Foregone

k = constant, to be determined by law or ordinance

The DRF shall be computed as follows:

DRF = [(total floor area that can be developed[92] – total floor area of existing development) * assessed value of

---

[89] Barry Field & Jon Conrad, *Economic Issues in Programs of Transferable Development Rights*, 51 LAND ECONOMICS 331-40 (1975).

[90] *Id.* at (331).

[91] BUREAU OF LOCAL GOV'T. FINANCE, DEP'T. OF THE INTERIOR & LOC. GOV'T., MANUAL ON REAL PROPERTY APPRAISAL AND ASSESSMENT OPERATIONS 2 (2006).

[92] Exclude undevelopable area, such as steep slopes, unusable geology, unsuitable soils and the like.

land and existing improvements per square meter] / Lot Area

In symbol form:

$$DRF = \{[(Max\ FAR * LA) - (FAEI)] * AV\} / LA$$

Where:

FAR = Floor-to-Area Ratio

LA = Lot Area, in square meters

FAEI = Floor Area of Existing Improvement, in square meters

AV = Assessed Value of Existing Land and Improvements per Square Meter

The third aspect of the structure is the administrative support and procedure for transfers. The implementation of a TDR program in the Philippines will be best carried out by an intermediary government-owned bank such as the Land Bank of the Philippines. With a bank, sellers of development rights are assured that they can sell, while buyers are assured that there is a ready source for development rights that they can tap should the need arise. In addition, given the permanence and stability of a bank, the transfer of development rights could be institutionalized.

In TDR programs, "transfers will only occur where a market for development rights is created."[93] A market could be created by presenting the sale of development rights as more attractive than actually using them. This can be effected by incentivizing property owners within the sending area by increasing their UDR by a multiplier. The increase in the owner's UDR will allow him to sell more development rights, thereby increasing his revenue from the sale. A market can also be created by making the purchase of development rights profitable on the part of the property owners within the receiving area. This can be effected by passing a law or ordinance reducing the density limit allowed in the area to create scarcity.

---

[93] *See supra* note 82.

Transferring development rights in the private market is beneficial. Owners of sending areas may sell their development rights at higher prices. Owners of receiving areas, on the other hand, may purchase development rights up to the amount where the revenue that they can generate out of the additional development rights would only equal the cost of purchase. However, if development rights are transferred totally through private transactions, the significant increase in the demand for TDR will result in a similar significant increase in their prices. Furthermore, private transactions will not only require that owners willing to sell and owners willing to buy have to find each other, but will also require that both have to agree on a price.[94] The need for the creation of a government-owned bank then becomes paramount.

The price of development rights may be determined by the market. The market-based price is dependent on market demand for new construction and applicable zoning. Market demand for new construction makes development rights saleable because without demand, there will be no new or additional construction into which development rights can be put into use. Zoning also determines the price of development rights because as zoning provisions become more restrictive, more scarcity of space is created. This leads to a greater necessity for development rights and its transfer mechanism.[95] The government-owned bank should not be precluded to impose price ceilings which would provide stability in TDR prices.

The value created by TDR could be best explained by determining the profitability of using TDR on the part of both the buyer and the seller. Suppose that the buyer of the development rights is a developer who is engaged in the construction business. The projected revenue of the buyer-developer of the development rights arising from the sale of the improvements made on the receiving area, when divided by the desired rate of return on investment of the buyer-developer and less all the costs (except the cost of the TDR), would result in the value of the development rights to the buyer-developer.[96] For example, SMDC would like to construct the Blue Residences along Katipunan Avenue, for which it is expected to earn PhP26 million, with a desired return on investment of 130%. Assuming that SMDC will spend PhP19 million in actual costs, excluding the cost paid for the TDRs purchased, the buyer-developer should be willing to pay PhP1 million per TDR. Note that

---

[94] *Id.*

[95] COSTONIS, *supra* note 5.

[96] *See supra* note 82.

the PhP1 million cost of the TDR is much less than the cost of acquiring a new piece of land within the Katipunan Avenue area, if there is available.

Let us suppose that SMDC needs five UDRs. These units will be sourced from any holder of development rights within the Katipunan Avenue area. The revenue that such holders will earn out of the sale of their UDRs is PhP5 million. Suppose further that the expected income of the seller in continuing to own the property is PhP10 million and that, because of the existence of unused UDRs, the expected income of selling the very same property to a buyer-developer is PhP12.5 million, the seller of development right will have a profit of PhP2.5 million. This is apart from the fact that the losses that such sellers incurred by virtue of the zoning ordinance have been rightfully compensated.

The value of the development rights accruing to a certain land (i.e. the PhP 1 million per UDR in the example) should not be added to the assessed value of the land to mitigate the inflationary effect of the introduction of development rights on the price of lands. Certainly, an acknowledgment of an additional property right increases the return on the use of the property, and such increase in turn positively affects the price of the property. The increase in the market value of land will make it more difficult for buyers to purchase land. To mitigate this effect, the value of the development right must be severed from the assessed value of the land. Keeping the value of development rights separate from the assessed value of the land is consistent with the observation that the rights included in the bundle may be disaggregated and acted on separately and independently of other rights. This approach is likewise practicable in light of the fact that development rights could be transferred. If they are to be transferred while keeping all other rights intact, it is but necessary that they must have value of their own.

In urban areas in the Philippines, the demand for development rights will come from a few developers that construct buildings in commercial areas where exceeding the zoning limits is likely to happen. On the other hand, almost every land owner who fails to maximize the use of his/her property will have excess development rights. As such, there is likelihood that there will be few buyers relative to the sellers of development rights. These fewer buyers will have more power over the numerous sellers. As a result, much of the value created by a TDR program will inure to the benefit of the buyers. This is an effect of a poorly-organized market where prospective buyers might be able to identify the sellers who have relatively low reservation prices and contract for transfer at those prices. Should the purchase of additional development rights

be necessary, the remaining sellers with still low reservation prices would be sought.[97]

To remedy this possible inequity, government intervention through a government-owned bank is necessary. The government-owned bank will become an auctioneer to ensure that benefits from the TDR are evenly distributed.[98] To ensure that compensation to owners of development rights from sending areas are provided, the government-owned bank could enforce a price in transfer transactions. It may compute for the total reduction in value in a given LGU as a result of zoning restrictions which, when divided by the number of development rights created with that same LGU, results in a price per development right. The government-owned bank will enforce the said price in transactions involving the transfers of development rights within the LGU.[99]

C. Incidents of Implementing TDR

A law is necessary not only to establish the structure but also to provide necessary guidance for the legal rights and duties of property owners, LGUs, assessors, and the intermediary administrative agency which will serve as the performance evaluator. The more important reason for a governing statute is to address the incidents that come with the adoption of a system of development rights and TDR so as to make the system work. Admittedly, it would have the effect of amending certain laws, but this effect is negligible.

One of the primary concerns is the assessment of development rights by LGUs. In the US, this matter has been addressed by state laws or country ordinances. In the Philippines, R.A. No. 7160(the principal law governing LGUs) does not include valuation of development rights. A law is essential to create a uniform guide for LGUs. Legislation could establish the development rights that will be included in the assessment and the corresponding formula. The result is a coherent national framework within which LGUs can operate.

Additionally, the law can address various concerns on TDR. The law can ensure that the protection necessary for the existence of a real right is provided. The legislation can set out clearly the responsibility of the

---

[97] *See supra* note 90.

[98] *Id.*

[99] *Id.*

intermediary government agency vis-à-vis the property owners. In many TDR programs in the US, this is strengthened by the issuance of a certificate affirming the units of development rights sold or bought. The same can be done in the Philippines so that that the sellers and buyers can have documentary support. The protection, however, should not stop here. TDRs must be annotated on the title of the property, owing to the nature of TDRs as permanent alienations and restrictions. The whole world then would be constructively informed that the development rights of a certain property have been conveyed.

D. Spillovers of TDR

Another aspect to point out is the spillovers that the implementation of the system will create. In the US, the more prominent effect is on taxation. The issue on taxation is two-pronged: 1) taxation of development rights and 2) taxation of TDRs.

Some authors suggest that development rights be subject to *ad valorem* property taxation as a component of the total assessed value of the real property to be developed. Such approach may not be feasible in the Philippines since the current assessed value of real property does not incorporate development rights. Changing the manner in which the assessed value of real property is determined would entail substantial effort. Thus, the taxation of development rights should be effected in some other equally efficient yet less disruptive manner.

In assessing the value of development rights separate and distinct from the value of the land, the taxation of development rights independently from the real property tax imposed on land and existing improvements could be resorted to (if development rights should be subject to taxation at all). To subject development rights to real property taxation may lead to an increase in the real property tax collection of LGUs. TDR will not decrease the value of real property which may lead to a corresponding reduction in real estate taxation.

The second branch of the issue is the taxation of TDRs. In some jurisdictions, TDRs are subject to sales and transfer taxes. Policy questions may therefore arise. The imposition of a form of income or percentage tax in cases of less onerous transmissions may be explored. Another option would be to impose value-added tax on TDRs in the Philippines. The policy choice would

definitely call for a consideration of many aspects, such as the existing system of taxation of real rights, revenue-generation, price and demand elasticity of TDRs, and the administrative feasibility of adopting the same.

VI. CONCLUSION

Development rights have revolutionized the concept of land on two aspects. *First*, for purposes of property law, land is no longer just a two-dimensional expanse of soil with metes and bounds. Rather, land is a three-dimensional surface with horizontal and vertical breadth. *Second*, their transfers widen the view on where property rights may be exercised. A property's development rights may be used somewhere else other than the property concerned.

The predominant model used to represent property as an object of rights and obligations is the "bundle of rights," a representation that does not serve its purpose anymore. Thus, the "basket of rights" alternative can be adopted to illustrate the economic character of property and to permit a conceptual change in the composition of rights. To locate development rights in the basket, the right to use has been subdivided. In our body of laws, there is also room to accommodate development rights. However, a governing law may be passed to address the incidents and spillovers of the adoption of a system of development rights and TDRs.

The main reason for the adoption of a governing system is to address clashing governmental interests and property ownership. The law has set limitations on the exercise of property rights through land use techniques such as zoning. This limitation, however, does not address the loss of an owner's development rights. The costs, when taken along with the losses of other property owners, are too costly for the government to simply brush aside.

TDRs have been invented to address the limitations of zoning as a land use technique. In a country which has yet to recognize development rights and TDRs, the system is a wealth-generating mechanism not only for property owners, but for the government as well. The owners who suffered opportunity costs are compensated through the economic return from the sale of their development rights. Since the country has yet to incorporate development rights in its property valuation, these rights would add more value to the property, thereby creating wealth. On the other hand, property owners who

need more development rights are given the same so that they can generate more economic activity — erect improvements with more profitable densities. On either side of the equation, governmental interest is protected. The governmental command-and-control over land use is maintained by preventing landowners from converting their lands to other uses. The interest of promoting growth is pursued by concentrating it on a particular locus. Thus, the seeming contradictions of state limitations and property rights find an interface in TDRs.

A legal structure in which the system will work must be set in place. Experiences of other jurisdictions show that before the formation of a system, a multitude of factors has to be considered. A preliminary step is the identification of the interest sought to be protected. However, what is difficult to determine is the scope of market influence on the system. A number of programs have pursued a market-based system, with some even to the extent of trading development rights credits in the stock market.[100] Others have opted for government intervention to varying degrees.

Another challenging part is the design of the program itself. One paramount consideration is the responsiveness of the program to governmental interest. This is important not only for purposes of efficiency, but also for political support. A program with a clear purpose can easily generate acceptance. The design of the TDR program should also address the supposed weaknesses of the system. Experts have pointed out that although TDR is a "less costly preservation technique", it requires a large "administrative capacity" for implementation.[101] This administrative facet is also present even in a market-led mechanism because the assessment of development rights and the determination of sending and receiving areas require technical competence and governmental determination. Another factor to look at is the distributional consequence of the TDR, whether or not the program maintains equity considerations and balanced growth.

---

[100] *See, e.g.,* http://www.ceem.unsw.edu.au/content/userDocs/Spiel_Raum_3.pdf (last visited Dec. 19, 2011) & Mila Freire, *supra* note 46.

[101] Antonio Tavares, *Can the Markets be Used to Preserve Land? The Case for Transfer of Development Rights* (2003) (paper presented before the Eurpean Regional Science Association 2003 Congress), *available at* http://repositorium.sdum.uminho.pt/bitstream/1822/3224/1/NEAPPSerieII(10).pdf (last visited Dec. 20, 2011).

Even with the supposed weaknesses, TDR programs have made strides in land-use approaches. The country can learn from the experiences of other jurisdictions which have not only adopted or employed TDR for its traditional uses (i.e. containing urban sprawl, preservation of landmarks and housing), but have modified the technique to address other community needs. Our policy-makers cannot turn a blind eye on these innovations. The time has arrived to develop development rights in the country.

– o0o –