

ARTICLE XXII TRANSFERABLE DEVELOPMENT OPPORTUNITIES

Section 1 Transferable Development Opportunities

1.01 Legislative Findings. Over the past several years, the Commission has investigated the desirability and feasibility of using Transferable Development Opportunities as a tool to implement the *Growth Policy*. This investigation resulted in two reports: the *Transferable Development Rights Feasibility Committee Report* (November, 2004); and the Solimar, Inc. report, titled *Using a Voluntary, Market-Based Mechanism to Manage Growth in Gallatin County, Montana – an evaluation of Transferable Development Rights to Implement Gallatin County’s 2003 Growth Policy* (August, 2007). As evidenced by the TDR Feasibility Committee’s report and discussions with numerous citizens, widespread support exists throughout the County for development of a County-wide *voluntary* market based TDR/TDC program. This support exists because Gallatin County residents value both property rights and conservation of open land. As a tool to unify these values, the Commission creates this Article to provide incentives for landowners in rural areas of Gallatin County to hold their properties as open land while abiding by certain development restrictions. Through the transfer of allocated credits or rights, this Article provides opportunities for those landowners to realize economic benefits from their property while abstaining from developing it.

While there is no specific enabling authority in Montana for the creation of a TDR or TDC program, the Gallatin County Attorney, in response to a question from the Commission regarding whether the County could “establish a County-wide program for Transfer of Development Rights (TDR)” stated the following:

“... I cannot give you an unqualified opinion on your TDR question. A TDR regulation adopted under the aegis of zoning would give the courts the opportunity resolve this conflict by endorsing the liberal interpretation of county powers spelled out in the Montana Constitution Art. XI, §4(2). This of course assumes that it will be the Commission’s judgment that it is in the best interest of Gallatin County’s citizens to enact a TDR program. *Although the question is close I conclude that the courts will follow the more expansive reading of police power in this case and you may establish a TDR program as part of the 201 county zoning district.*”

Letter from Gallatin County Attorney Marty Lambert to Joe Skinner, Gallatin County Commissioner, March 23, 2006 (emphasis added).

1.02 Intent and Purposes. The intent of this Article is to implement the Growth Policy and any other applicable growth policy or formally adopted neighborhood or community plan adopted by the Commission by providing a voluntary, non-

mandatory, Transferable Development Opportunity (TDO) to landowners within a zoning district that specifically authorizes either a Transferable Development Credit (TDC) or a Transferable Development Right (TDR), or both, the opportunity to sell or transfer those credits or rights to landowners in zoning districts specifically authorized to receive them. These “receiving” area landowners, in turn, may use those credits or rights to increase the allowable density and engage in any other available incentive for the use of credits or rights but only as authorized in the zoning district in which they are used.

1.02.1 This Article provides the specific procedures sending area landowners seeking to engage in a TDO must comply with to be eligible to transfer any allocated credits or rights.

1.02.2 This Article provides the specific procedures receiving area landowners seeking to engage in a TDO must comply with to be eligible to transfer any allocated credits or rights.

1.02.3 It is further the intent of this Article that the Zoning Enforcement Agent shall track the recording of all documents related to the TDC and TDR program and shall keep a registry, available for public viewing, of all TDCs and TDRs transferred and retired.

1.02.4 The specific purposes of this Article are to:

- Implement the *Growth Policy*, any other applicable growth policy, and any applicable planning documents adopted pursuant to the *Growth Policy*;
- Provide options other than development for landowners to receive value from their property;
- Preserve open space, scenic views, critical and sensitive lands, and areas prone to natural hazards;
- Conserve agricultural and forested land and associated economic and cultural opportunities;
- Protect lands and structures of aesthetic, architectural, and historical significance;
- Retain open areas in which healthful outdoor recreation can occur;
- Ensure owners of preserved, conserved, or protected land can make reasonable use of their property rights by transferring rights or allocated credits for development in eligible areas; and

- Provide a mechanism whereby development rights and allocated credits may be reliably transferred.

1.03 Distinction Between TDR and TDC. TDR and TDC provide two distinct opportunities for landowners to obtain value from their lands. A TDR evidences a landowner's ability to transfer, sell or otherwise convey one or more underlying zoning entitlements to construct a Residential Dwelling Unit or a create a Tract of Record at the density permitted by the zoning district in which the land is located. A TDC represents an opportunity available to a landowner allocated TDCs to sell, transfer, or otherwise convey the allocated credit to a developer which in turn could allow the developer to increase density above the baseline established for a zoning district. In most circumstances, a TDC is separate from and unrelated to the underlying zoning entitlement to develop a Residential Dwelling Unit.

1.04 Applicability. Transferable Development Opportunities are available to landowners of property located in the AG-160 district (and any other district which specifically authorizes TDC or TDR, as applicable) upon petition to Gallatin County and compliance with the requirements of this Article and the requirements of the zoning district where the rights or credits are being transferred from and/or to.

Section 2 Transferable Development Credits (TDC).

2.01 General. This Section provides the requirements and procedures landowners within an authorized zoning district must comply with to voluntarily participate in the TDC program. To participate in this voluntary program, in exchange for the issuance of TDCs by Gallatin County, a landowner must be willing to restrict construction of new or additional Residential Dwelling Units or creation of Tracts of Record on their property for a period of 40 years through a TDCA Overlay, unless otherwise authorized by these Regulations. A landowner allocated TDCs may then transfer the TDCs pursuant to the requirements of this Section, for use by landowners in authorized receiving zoning districts.

2.02 Use of TDCs. TDCs may only be allocated, transferred and used by complying with the requirements of this Article and by compliance with the requirements of the applicable zoning district in which the TDCs are to be consumed.

2.03 Allocation of TDCs.

2.03.1 Submittal of Petition for Allocation of TDCs. A landowner who volunteers to have TDCs allocated must petition the Zoning Enforcement Agent and provide the following:

- 2.03.1.1** The information included in **Appendix XXII.1** (*TDC Petition and TDC Petition Requirements*); and

2.03.1.2 At the landowner's expense, an appraisal conducted by a licensed real estate appraiser in compliance with generally accepted land appraisal methods for the land on which TDCs are requested to be allocated. The appraisal shall examine development opportunities available to the subject property pursuant to the underlying zoning and determine the reduction, if any, in the market value of the subject property should a landowner forego those development opportunities. Upon submittal of the real estate appraisal to the Zoning Enforcement Agent the appraisal and all information contained therein becomes a public document to be kept in the records of the Gallatin County Planning Department.

2.03.2 Receipt of Petition for Allocation of TDCs. Upon receipt of all required information, the Zoning Enforcement Agent shall review all applicable requirements of these Regulations and any other relevant information and shall determine the number of TDCs to be allocated to the landowner.

2.03.3 Determination of TDCs to be Allocated. The Zoning Enforcement Agent shall determine the number of TDCs by dividing the reduction in market value of the land upon placement of a TDCA Overlay (as determined by the appraisal) by \$20,000. The resulting number represents the number of TDCs available to be allocated by the Zoning Enforcement Agent to the landowner.

2.03.3.1 Adjustment of TDC Allocation Divisor. No later than every two years after adoption of this Article, the Commission shall, in consultation with the Zoning Enforcement Agent, reevaluate the divisor provided in **Sect. 2.03.3**. The Commission may use any means or information necessary to determine, maintain, or adjust said divisor.

2.03.4 Allocation of TDCs and Recordation. After determining the appropriate number of TDCs, the Zoning Enforcement Agent shall then, upon final written request of the landowner, and evidence the *Notice of Allocation of TDC and Zoning Restriction* form (**Appendix XXII.2**) has been recorded with the Gallatin County Clerk and Recorder, allocate the appropriate number of TDCs to the landowner by issuing a *TDC Certificate* (**Appendix XXII.3**) for each TDC allocated. The *TDC Certificate* evidences the allocation and ownership of a TDC.

2.03.5 Placement of TDCA Overlay. A TDCA Overlay shall be automatically applied to the lands for which TDCs were allocated and shall restrict development not in accordance with these Regulations for a period of 40 years unless the TDCA Overlay is lifted pursuant to these Regulations. The TDCA Overlay shall run with the land.

2.04 Transfers of TDCs After Allocation. An owner of TDCs may sell, transfer, or otherwise convey them pursuant to the requirements of this Section. To do so, the owner of TDCs must complete a *Gallatin County Transfer of TDC* form ([Appendix XXII.4](#)) and must obtain approval for the transfer from the Zoning Enforcement Agent.

2.05 Consumption and Retirement of TDCs.

2.05.1 Intent. The intent of the following provisions is to provide the required procedures that shall be followed by a receiving landowner or developer seeking to increase density above the baseline density in a zoning district where the use of TDC is authorized.

2.05.2 Applicability. These provisions apply to any person intending to construct or develop Residential Dwelling Units and/or create new Tracts of Record above the baseline density permitted in a zoning district. To qualify for increased density, the regulations for the district must authorize the increase in density through the use of TDCs. The maximum density authorized is provided for in the regulations for the specific zoning district.

2.05.3 TDC/Density Transfer Ratio. Except as authorized by the regulations for a specific zoning district, a subdivider may be eligible for no more than two additional Residential Dwelling Units above the baseline density authorized in the receiving zoning district for each TDC consumed and retired.

2.05.4 Subdivision Approval Required. For development projects requiring TDCs and review and approval under Sections 5 and 6 of the Montana Subdivision and Platting Act and the Gallatin County Subdivision Regulations, the following requirements apply:

2.05.4.1 Preliminary Plat. An applicant for subdivision review must provide the following to the applicable County planning agency: (i) a determination of the number of TDCs necessary, if any, to achieve the density requested in the preliminary plat application; and (ii) any zoning approval required by the regulations for the zoning district where the TDCs are being consumed and retired.

2.05.4.2 Final Plat. At the time of filing an application for final plat approval, a landowner needing TDC(s) to increase the density of Residential Dwelling Units in the subdivision above the permitted density must submit to the applicable County planning agency the following:

2.05.4.2.1 All TDC Certificates that are required to be retired in order obtain the requested density; and

2.05.4.2.2 A *Notice of Retirement of Allocated TDC* form (see [Appendix XXII.5](#)) for each TDC that will be retired. The *Notice of Retirement of Allocated TDC* form shall be recorded with the final plat.

2.05.5 Additional Density Requiring TDCs Where No Subdivision Review Required. If, pursuant to law, a landowner is granted or obtains the ability to increase density above the baseline density of the zoning district where the parcel is located, the landowner may be required to obtain one or more TDCs. If so, the landowner must comply with the requirements of this Article. Prior to issuance of a Land Use Permit pursuant to [Art. II, Sect. 3](#), the Zoning Enforcement Agent shall determine whether a TDC is required for the construction or development of any Residential Dwelling Unit and shall not issue a Land Use Permit unless the applicant for the Land Use Permit records, simultaneously with the issuance of the Land Use Permit, a *Notice of Retirement of Allocated TDC* form.

2.06 Development Subsequent to TDC Allocation (Partial Allocation Rule).

2.06.1 Intent. The intent of this Section is to provide development options *after the allocation of TDCs* for a landowner or lands that have previously been allocated TDCs. The ability to develop after allocation of TDCs recognizes the need for landowners to have flexibility over time in the land use decisions affecting their economic circumstances. In addition, the requirements of this Section integrate the intent and purposes of the density requirements of the zoning district where the land is located by allowing landowners or land the ability to conduct a Rural Cluster Development (RCD) project if available, or use another exemption from the applicable density requirements, while ensuring development densities over time in the zoning district are consistent with intent and purpose of that zoning district. [See Examples: Development After TDC Allocation \(Appendix XXII.6\).](#)

It is also the intent of this Section that the ability to construct or develop a Residential Dwelling Unit or create a Tract of Record must be authorized in addition to the requirement to obtain a TDC, and can only be permitted with the existence of the underlying zoning entitlement or through an exception to the density requirements as authorized by the zoning district in which the land is located.

2.06.2 Retirement of TDCs for Each Residential Dwelling Unit or Tract of Record. After TDCs have been allocated, the construction or development of any Residential Dwelling Unit or the creation of any new Tract of Record on the lands subject to the TDCA Overlay requires the retirement of TDCs and compliance with this [sub-section 2.06](#), and if applicable, [sub-section 2.07](#). Notwithstanding the above, each Residential Dwelling Unit

constructed or each new Tract of Record created pursuant to this provision must conform to applicable density requirements of [Art. III, Sect. 3](#).

2.06.2.1 Determining TDCs Required for RCD After Allocation. If, after allocation of TDCs to an area of land, a landowner wishes to create a RCD project, a landowner must have retained, or must obtain TDCs commensurate with the acreage of the land included in the RCD project and the subject TDCs must be retired. See [Appendix XXII.6](#) for examples.

2.06.2.2 Determining TDCs Required for Other AG-160 Exemptions After TDC Allocation. If a landowner seeks, after allocation of TDCs, to exceed the applicable density requirement through use of one of the exceptions authorized by [Art. III, Sect. 3](#), the landowner must have retained, or must obtain, TDCs commensurate with the number of Residential Dwelling Units and/or Tracts of Record sought to be created, and the subject TDCs must be retired. See [Appendix XXII.6](#) for examples.

2.07 Removal of the TDCA Zoning Overlay Prior to Expiration.

2.07.1 Retirement of TDCs. If the owner of a Tract of Record subject to the TDCA Overlay wishes to have the overlay removed prior to the expiration of the 40-year term restriction, the landowner may do so by retiring the same number of TDCs as were originally allocated to the property.

2.07.2 When Development has Occurred Subsequent to the Allocation of TDCs. In any instance where a property has been developed subsequent to the application of the TDCA Overlay, the remaining number of TDCs as determined through the process described in [Sect. 2.06](#) shall be retired.

Section 3 Transferable Development Rights.

3.01 General. This Section provides the mechanisms for landowners who voluntarily wish to transfer, sell, or otherwise convey a portion or all of the underlying zoning entitlements of their land to properties better suited for development in other zoning districts or in the same zoning district. The underlying zoning entitlement is determined by the density requirements of the zoning district in which the land is located but does not, absent creation of an entitlement pursuant to the requirements of these Regulations, include any potential density authorized by any exemptions from the density requirements or any increase available to an area of land through a Planned Unit Development (PUD), Rural Cluster Development (RCD), or any other exemption from the density requirement of the applicable zoning district. The ability to transfer, sell or otherwise convey the underlying zoning entitlement is referred to for purposes of these Regulations as a Transferable Development Right (TDR).

3.02 Applicability/Legal Non-Conforming Parcels. The opportunities of this Section are available to the owner of any Tract of Record except those listed in **Sect. 3.02.1**, regardless of compliance with the underlying zoning entitlement, if that Tract of Record existed as a Tract of Record as of the date of first adoption of this Article or is lawfully created pursuant to this Regulation and which is located within a zoning district that specifically authorizes the transfer of a zoning entitlement.

3.02.1 Exceptions. In no case shall the transfer of a zoning entitlement be authorized from a Tract of Record created for road purposes or resulting directly from the abandonment of a railroad right-of-way.

3.03 Use of TDRs. TDRs may only be transferred and retired by complying with the requirements of this Article and the requirements of the applicable zoning district in which the TDRs are to be consumed.

3.04 Severance of TDR and Elimination of Ability to Develop Residential Dwelling Units Upon Transfer of a TDR. Transfer of a TDR severs the ability to develop that particular underlying zoning entitlement from the land and permanently eliminates the ability of any current or subsequent owner of that Tract of Record to construct or develop any Residential Dwelling Units or create any new Tracts of Record pursuant to the severed underlying zoning entitlement. Except as required by a zoning district, an increase in the underlying zoning entitlement of a parcel after the transfer of any development rights from that parcel shall result in the subject parcel being granted the newly established zoning entitlements less the number of development rights previously severed from the property. In such a case, the applicable zoning overlay shall be automatically amended to reflect the change in development rights.

3.05 Procedures for Transferring TDRs.

3.05.1 Initial (First) Transfer of a TDR/Petition Required. A landowner severing the underlying zoning entitlement from a parcel and wishing to transfer a TDR must identify the Tract of Record upon which the zoning entitlement will be used and petition the Zoning Enforcement Agent by submitting a *Petition for Transfer of TDRs* and providing all requirements included in the *TDR Petition Requirements* form (**Appendix XXII.7**).

3.05.2 Review of TDR Petition and Transfer(s) of TDRs. The Zoning Enforcement Agent shall review the requirements of the applicable zoning district and the *Petition for Transfer of TDRs*, and if the requirements of these Regulations are met, shall approve the transfer of the TDR.

3.05.3 Recordation and Zoning Requirements. The procedures of this Section shall be followed by any party transferring a TDR.

3.05.3.1 Recording. Upon written approval by the Zoning Enforcement Agent of the *Petition for Transfer of TDRs* a transfer is

effectuated only by the petitioner recording with the Gallatin County Clerk and Recorder a *Gallatin County Transfer of TDR* form ([Appendix XXII.8](#)) and a *Notice of Transfer of TDR and Zoning Restriction* form ([Appendix XXII.9](#)). The Clerk and Recorder shall not record any transfer of TDRs unless authorized in writing by the Zoning Enforcement Agent.

3.05.3.2 Development Right Removal Overlay (DRR Overlay). At the time of recording of the *Notice of Transfer of TDR and Zoning Restriction* the Zoning Enforcement Agent shall automatically place a DRR Overlay on the property indicating: (i) the number of TDRs severed from the sending Tract of Record; and (ii) whether any underlying zoning entitlements remain on the Tract of Record. If no underlying zoning entitlements remain, the DRR Overlay shall so indicate.

3.05.4 Subsequent Transfers of a TDR. Every transfer of a TDR after the initial transfer of the TDR requires compliance with [Sects. 3.05.1, 3.05.2, and 3.05.3](#) and written notice to the Zoning Enforcement Agent and recording with the Gallatin County Clerk and Recorder of a *Gallatin County Transfer of TDR* form and a *Notice of Transfer of TDR and Zoning Restriction* form. The Clerk and Recorder shall not record any subsequent transfer of TDRs unless the transfer is authorized in writing by the Zoning Enforcement Agent and contains the Gallatin County Clerk and Recorder document numbers evidencing all previous transfers.

3.06 Transfer of TDR Not Authority to Use TDR. No transfer of a TDR shall be effective and shall not be available for use on another Tract of Record unless every transfer of the TDR is approved in writing by the Zoning Enforcement Agent and the requirements of this Section are complied with. Approval of a transfer of a TDR does not in any way authorize the use of the transferred TDR on another separate Tract of Record. The use of a TDR is subject to all applicable requirements of these Regulations.

3.07 Compliance with Other TDR Provisions Required. Transfers of TDRs under this section must comply with all other requirements of these Regulations.

3.08 Transfers Back to Parcels Having Transferred TDRs. Nothing in this Article shall prevent the transfer of a TDR onto a property that had previously transferred a TDR from the property if the provisions of this Article are complied with. In such a case, any applicable zoning overlay shall be removed or amended as appropriate.

3.09 Subdivision Required/Compliance with Laws. Nothing in this Article obviates compliance with the Montana Subdivision and Platting Act or any other applicable federal, state, or local law.