AN UPDATE ON DENVER'S TDR ORDINANCES

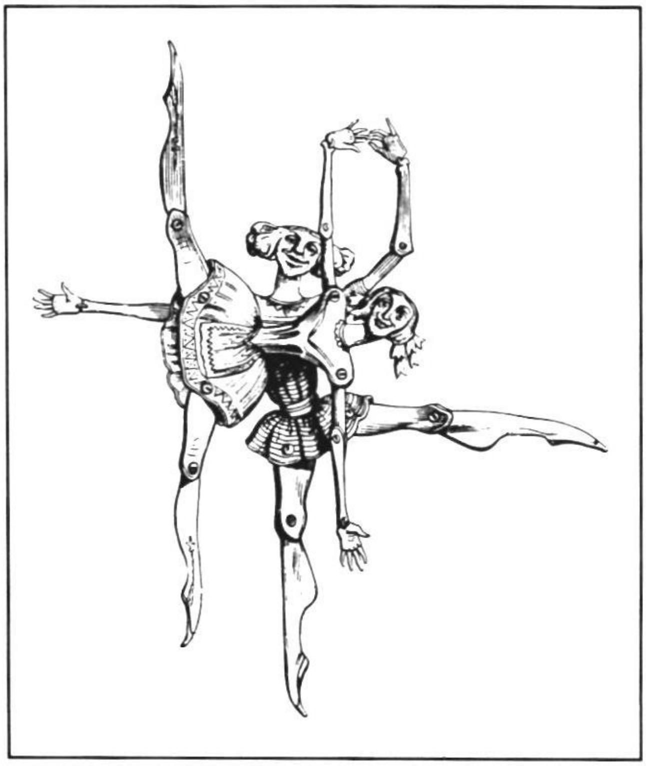
by Lisa Purdy and Peter D. Bowes, CRE

In the Spring/Summer 1982 edition of REAL ESTATE ISSUES we presented the story and background of Denver's B-5 TDR Ordinance (Transferable Development Rights). Over three years have passed since this ordinance was adopted, and it is worthwhile now to evaluate the consequences of this creation. Also, a new TDR ordinance was passed for a different part of downtown, and it will be described and evaluated as well. Lastly, this article will explore some interesting reactions to the ordinances by various preservation communities.

Update

The 1982 ordinance allows for the transfer of unused development rights from locally designated buildings to noncontiguous sites within the same zone district. Certain requirements must be met by both the sending and receiving sites and there are limits on the amount of density sold.

Since the passage of the more recent B-5 TDR Ordinance, two events have taken place that have some bearing on the effectiveness of this new mechanism—the completion of the Sixteenth Street Mall and an oversupply of office space.



It is clear there was good reason for the preservation community to be concerned about the mall's effects on Denver's historic buildings in the area. Recently, retailers have demonstrated an increased interest to locate in the mall, while at the same time large retailing centers are now seen by the new city administration as an impetus for Denver's much touted 24-hour city. The recently opened Tabor Center, with 120,000 square feet of retail space, has exceeded all projections for sales, and has produced spin-off benefits to neighboring retailers by bringing many new people into the city to shop. All of this creates tremendous pressure on the smaller historic buildings in the mall. It seems all of the economic

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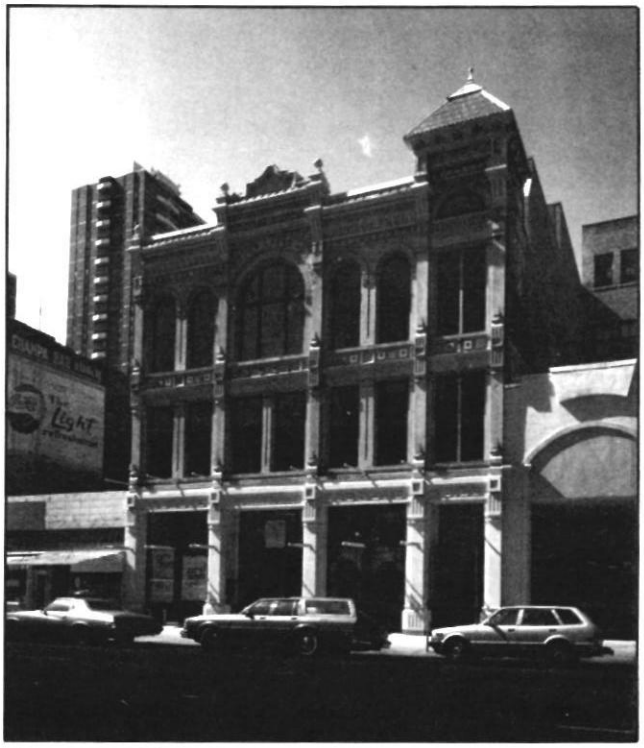
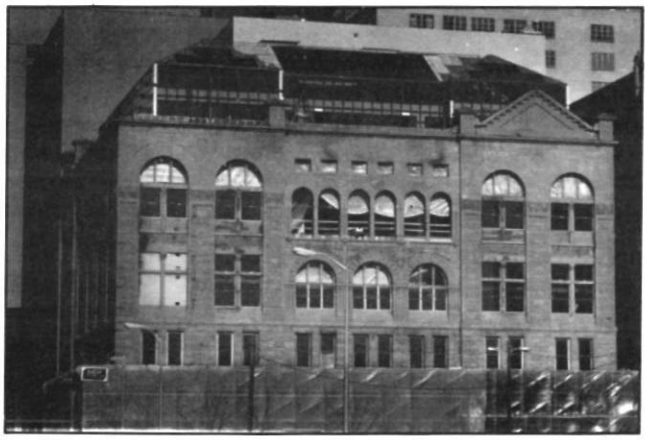
The Navarre Building



Oddfellows Hall

incentives—TDRs, investment tax credits, easements, etc.—cannot offset the tremendous pressure to build new, glamorous, and large retail complexes that are capable of bringing in national retail anchors. Furthermore, the newer retail complexes can be built within existing FAR (floor area ratio) limitations, negating the need to buy TDRs.



Masonic Temple Building

The second event affecting the TDR Ordinance was the tremendous increase in office space supply in the B-5 zone district (creating vacancies as high as 28%). When supply exceeded demand in the bigger office buildings, the market for TDRs disappeared. As a result, there have been fewer transfers than anticipated—much to the relief of the city council concerned about the potential numbers of requests for designation, and to the dismay of those with TDRs to sell and those wishing to evaluate the effectiveness of this new mechanism.

Much can be said on the positive side of TDRs, since they have been responsible for the decision to preserve the following valuable historic structures:

1. The Navarre Building is the structure for which the original ordinance was created and it has now become a first-rate western art museum. In 1982, even though the owners were unable to find buyers for the Navarre TDRs (due to the oversupply of office space), they were able to use the TDRs as a key piece of collateral for their rehabilitation construction loan. Following the building's sale, the owners severed the TDRs from the Navarre, and are holding them for future sale when the market picks up.

2. Odd Fellows Hall used 58,700 square feet of TDRs as part of the collateral for a $4 million construction loan. This is now the site of a high-quality restaurant, retail and office space.

3. The Masonic Building, which is in the mall, has TDRs the owners anticipate selling when the office market improves. This building, now under renovation, will include restaurant, retail and office space.

4. The Denver Athletic Club is the only building with a recorded TDR sale. It occurred in January 1984 and 60,000 square feet were transferred to a site five blocks away.

Referring to the TDR ordinance, Chuck Lohmiller, president of the Denver Athletic Club, told the Rocky Mountain News, "It is unfortunate we didn't have this 10 years ago. We lost a lot of historical buildings to the wrecker's ball in downtown that would have been saved." (*Rocky Mountain News*, September 16, 1984, p. 90).

It appears our original assessment of the ordinance was correct— it does not solve all the problems of saving historic structures in the CBD, but it provides one additional tool for the developer to consider when trying to cope with the economic problems of preserving a historic property.

In the cases of the first three historic buildings previously cited, the developers were already planning to preserve the structures. The TDR ordinance, coupled with ITCs and other preservation incentives, merely tipped the scale in making it more economically feasible to renovate. When the Denver office market improves, many developers believe TDRs will become an increasingly valuable tool.

A delicate balance in the market must exist before TDRs are fully realized. When development pressures are too strong for a particular type of building (such as the demand for large-scale retail centers in the mall), economic incentives alone are not enough to protect historic buildings. On the other hand, there must be enough demand for new buildings to buy up the available TDRs. Ironically, a stagnant office market may lead to more speculative destruction of historic buildings for use as holding patterns (i.e., parking lots), than an active market where extra density purchases can be justified. However, when an owner decides (for whatever reason) there is a feasible use for the historic building, and when there is a strong market for TDRs, the decision to renovate is reached more easily.

In the original effort, there was some consideration given to allowing TDR sales from local historic districts (only individually designated buildings were and are eligible to sell them). However, because the city administration only was willing to allow contributing district buildings to sell TDRs, and because there was no mechanism in place to make the distinction, the owner has to submit individual applications to determine the contributing status of each building. By the time owners went through all this, they might just as well have had the eligible building individually designated. In the end this was seen as an unnecessary and redundant process.

The B-7 Historic TDR Ordinance

Soon after the B-5 TDR Ordinance was passed, another group began working to revise the zoning in Denver's historic warehouse B-7 district. This effort came in response to construction of a high-rise building that was out of scale with the character of the area. The B-7 area was where Denver began and had formerly been unaffected by Denver's boom periods. Consequently, it includes the largest concentration of historic warehouse buildings and a cohesiveness that is unmatched in other parts of downtown.

Once again the Denver Partnership (a downtown business non-profit advocacy organization) provided leadership for this effort. The venture had two major goals: 1) to protect the historic quality of B-7 (preservation priority), and 2) to provide mechanisms that would encourage the development of additional housing in the area (city priority). Funding for the study of the area came from the National Trust for Historic Preservation ($25,000), Petro Lewis ($20,000, private) and the Denver Housing Authority ($5,000) with staff support provided by the Denver Partnership. The public/private policy committee formed to guide this effort included the preservation community, private developers, property owners, city representatives and other technical disciplines (i.e., attorney, real estate counselor, appraiser, architect, banker).

Group of buildings in Lower Downtown Denver.

Several months into the process of studying the 23-block area, it became clear some of the stated goals were at odds with one another. In order to provide incentives for housing, increased building densities were being considered. However, increased densities could contribute to the destruction of the scale of a B-7 area, and preservationists were becoming more adamant about the need for height restrictions and design guidelines to protect the historic flavor— all of which made property owners fearful of their ability to build economically feasible projects. Tempers began to flare as the committee became bogged down in the legal intricacies and mechanics of design guidelines. Discussions centered on whether design controls could ever be, or had ever been, effective in producing well-designed projects. It also was explained that plans for this area needed to be in the context of a plan for all of Denver in order to establish the appropriate priorities.

As an interim step, it was decided to narrow the focus of the proposed zoning ordinance to deal with issues of housing, scale, setbacks and use, and let the matter of design guidelines be dealt with later (design guidelines and height restrictions have not yet materialized, but are being looked at now as part of an overall plan for Denver). What resulted from this effort was a new zoning ordinance requiring the following:

- An increase in FAR limits for buildings that included housing
- The extension of the TDR concept into the B-7 area (to be detailed later)
- A reduction in the parking requirement that was

leading to the destruction of many historic buildings

- New incentives to encourage ground floor retail
- Incentives to encourage new buildings be built out to the lot line (matching the historic buildings) and to step the newer buildings back between the second and sixth floors (to provide adequate sky exposure and better compatibility with the smaller scale historic buildings)

Even though height controls were not put in place, an ultimate cap of 7.4:1 FAR was enacted.

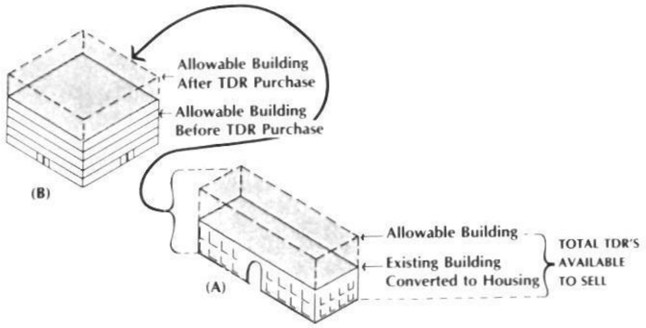
The TDR portion of this ordinance is very similar to the B-5. Essentially it works like this:

- Only locally designated historic buildings are eligible to transfer TDRs
- The historic building must be renovated to the satisfaction of the Denver Landmark Commission before a transfer can take place
- The amount of square footage that can be transferred is calculated by deducting the density of the historic building from a 4:1 FAR (basic allowable density for the B-7 area)
- The transfer may take place *within* the B-7 area
- The site receiving the TDRs may be enlarged an extra 2:1 FAR above the former (without TDR) limits
- Once the unused density is sold, the density of any redevelopment of the transferring site will be reduced by the amount of TDRs sold

An extra mechanism was put into place to encourage both renovation and residential uses in the historic structures. This measure allows owners to sell one square foot of density for each square foot of residential floor area in historic buildings. This is in *addition* to the unused density that may be sold from that site. It is now possible for property owners to sell the entire square footage of residential buildings while retaining the building itself (see Illustration A). This measure was a key shift politically,

ILLUSTRATION A

CALCULATION OF TDR'S IN B-7 ZONE DISTRICT (USING THE HOUSING PREMIUM)



Source: *The Preservation Handbook* published by the Denver Partnership and Historic Denver, Inc.

ILLUSTRATION C

because, unlike the B-5 TDR mechanism, it allows for an overall *increase* in density of the B-7 zone district—as opposed to a mere shifting of densities. However, this concept sold because it was put in place to encourage housing downtown—an important goal for the city.

For each square foot of residential development in a new project, an additional square foot of commercial space could be added up to 1:1 FAR. This provided an economic incentive to the housing option not feasible on its own.

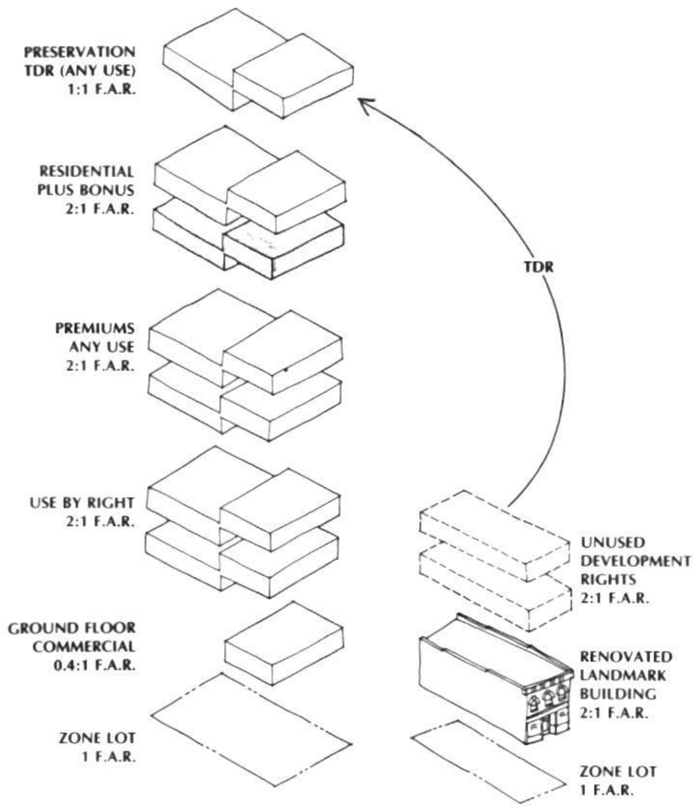
An evaluation of the new ordinance's effectiveness is even more difficult than B-5 because the office market in B-7 also was severely affected by the oversupply of office space. There have been no recorded transfers since the passage of this ordinance (late 1982), and there has been an absence of new development in the area. When supply and demand for office space become balanced again, it will be interesting to see how effective the ordinance will be in protecting and promoting the historic character of the area—especially without height controls and design guidelines.

Upon reflection it appears the sale of TDRs from individual buildings in B-7 will not necessarily be the best vehicle for preserving the area's scale. In B-7 the value of the historic fabric does not come from the individual historic buildings, but from the grouping of historic buildings that creates a smaller scale, pedestrian-oriented environment. Even though it is beneficial to sell

ILLUSTRATION B

LOWER DOWNTOWN /PROPOSED ZONING

7.4:1 DEVELOPMENT WITH RESIDENTIAL COMPONENT AND TDR



TDRs from this area, there is a danger that density purchased through this mechanism could break up the continuity of scale.

In B-5 this is not as much a problem because the scale of the district as a whole is not the issue as is the preservation of significant *individual* buildings.

To counter some of the potential negative side effects of the B-7 TDR Ordinance, a small group of citizens and the city are working to further refine the zoning. Receiving and sending TDR zones are being considered to preserve the most significant historic portions of the large B-7 district. Another option might allow for the donation of TDRs to a neutral non-profit bank whereby the donors could take a charitable donation deduction on income taxes.

Receptivity Of The TDR Concept

The media are probably the biggest convert to the concept of TDRs. They were originally critical of this mechanism that created windfall profits for a number of historic building owners. However, now both local papers have done follow-up stories endorsing the concept as well as the affect of this ordinance.

Developers and property owners have taken a wait and see attitude. As mentioned earlier, the development market in Denver is slow causing a slump in real estate activity. As a result, most owners are holding on to their TDRs in hopes that someday they will be worth some real money. For now, the value of TDRs leaves owners wondering what all the fuss was about.

Denver's City Council has become used to the idea that transfers may take place, and their fears of numerous requests for historic designations have been allayed. Unlike two years ago, the council seems to have a realistic picture of the TDRs practical uses and limits.

Most of the attention to this ordinance has been from other communities across the nation. Several cities have enacted similar ordinances hoping to accomplish preservation goals and have been in touch with Denver's preservationists regarding the structuring of such a mechanism. The largest negative reaction has come from the established communities on the East Coast who have a basic difference in political philosophy. In the East there is a much stronger ethic for both preservation *and* regulation of property rights. As a result, most of their legislation includes strict controls on the demolition of designated properties. In some cases an owner's consent is not necessary for a designation of their buildings.

However in Denver, property rights are valued and protected. It is very rare for the city council to take an action deemed as taking away rights or property value from a building owner. Since historic preservation is not a high priority for most of those in positions of authority, the Preservation Ordinance (for local landmark designation) that passed in Denver does not prevent demolition of locally designated structures. Owner consent almost is always required (politically) for designation approval. The game becomes one of economic incentives because it is difficult to impose regulations on historic building owners.

While preservationists in Denver are proud there is now an additional incentive for renovation, preservationists in the East are dismayed since their attitude is that owners should be regulated into preserving their historic structures, not paid to do something for the public's benefit.

Conclusion

Once again, we reach the same conclusion. TDRs cannot solve all the problems faced by preservationists in larger cities, but they are an important option that in some cases will convince an owner to renovate rather than demolish. They seem to work best when there is a balance between too little and too much development pressure in order to assure a market for the sale of TDRs. In some cases, as in Denver's B-7 district, TDRs could be considered destructive to the continuity of an area's small buildings unless additional measures are put in place to restrict the receiving site.

While some think Denver's preservationists are too soft and generous with incentives, most of us in Denver are happy to find a means of equitably compensating those who wish to restore our community's treasures.