

JAN 26 2011

A BILL FOR AN ACT

RELATING TO LAND USE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Chapter 205, Hawaii Revised Statutes, is
2 amended by adding a new part to be appropriately designated and
3 to read as follows:

4 "PART . TRANSFERABLE DEVELOPMENT RIGHTS

5 §205-A Short title. This part is to be known and may be
6 cited as the "Transfer of Development Rights Program" or the
7 "TDR Program".

8 §205-B Purpose. The purposes of this part include:

- 9 (1) Preserving open space, scenic views, critical and
10 sensitive areas, and natural hazard areas;
- 11 (2) Conserving agricultural land, including important
12 agricultural lands;
- 13 (3) Protecting lands and structures of aesthetic,
14 architectural, and historic significance;
- 15 (4) Preventing or deterring urban sprawl into agricultural
16 lands;
- 17 (5) Ensuring that the owners of agricultural lands may
18 make reasonable use of their property rights by



1 transferring their right to develop to eligible zones
2 in urban areas;

3 (6) Providing a mechanism whereby development rights may
4 be reliably transferred; and

5 (7) Ensuring that development rights are transferred to
6 properties in certain urban areas or districts that
7 have adequate community facilities, including
8 infrastructure, to accommodate additional development.

9 **§205-C Definitions.** As used in this part:

10 "Development rights" means the development potential of
11 real property that can be removed from the real property to
12 which is it appurtenant and transferred to other real property
13 to increase the amount of development allowed on the other real
14 property. For purposes of this definition, development
15 potential specifically comprises the rights of the owner of a
16 parcel of land, under land development regulations, to configure
17 that parcel and the structures thereon to a particular density
18 for residential uses or floor area ratio for nonresidential
19 uses, and specifically excludes uses allowable on the lot or
20 parcel. Development rights include transferable development
21 rights.



1 "Density" or "net density" means the result of multiplying
2 the net area in acres times 43,560 square feet per acre and then
3 dividing the product by the required minimum number of square
4 feet per dwelling unit required by the zoning ordinance or state
5 statute for a specific use district. Density or net density is
6 expressed as dwelling units per acre or per net acre.

7 "Floor area" means the area of all floors of a structure
8 excluding unroofed areas, measured from the exterior faces of
9 the exterior walls or from the center line of party walls
10 dividing a structure. The floor area of a structure, or portion
11 thereof, that is not enclosed by exterior walls shall be the
12 area under the covering, roof, or floor above that is supported
13 by posts, columns, partial walls, or similar structural members
14 which define the wall line. Excluded from the floor area are:

- 15 (1) Parking structures, including covered driveways and
16 accessways, porte cocheres, and parking attendant
17 booths;
- 18 (2) Attic areas with head room less than seven feet;
- 19 (3) Basements;
- 20 (4) Lanais;
- 21 (5) Projections such as sunshade devices and architectural
22 embellishments which are decorative only;



1 (6) Areas covered by roofing treatment to screen roof top
2 machinery only; and

3 (7) Areas underneath unsupported building overhangs,
4 provided the area is not otherwise enclosed.

5 Floor area includes the floor area of accessory buildings and
6 structures.

7 "Floor area ratio" means the ratio of floor area to total
8 area of the zoning lot expressed as a per cent or decimal.

9 Where rounding of numbers is necessary to determine floor area
10 ratio, the nearest one-hundredth shall be used. Multiplying the
11 permissible floor area ratio by the lot area of the zoning lot
12 determines the maximum floor area permitted.

13 "Net area" means the total area of a site for residential
14 or nonresidential development, excluding street rights-of-way
15 and other publicly dedicated improvements, such as parks, open
16 space, and stormwater detention and retention facilities, and
17 easements, covenants, or deed restrictions that prohibit the
18 construction of building on any part of the site. Net area is
19 expressed in either acres or square feet.

20 "Receiving district" means one or more districts in which
21 the development rights of parcels in the sending district may be
22 used.



1 "Receiving property" means a lot or parcel of land in the
2 receiving district that is the subject of a transfer of
3 development rights, where the owner of the receiving property is
4 receiving transferable development rights from a sending
5 property, and on which increased density, increased intensity,
6 or both, is allowed by reason of the transfer of development
7 rights.

8 "Sending district" means one or more districts in which the
9 development rights of parcels in the district may be designated
10 for use in one or more receiving districts.

11 "Sending property" means a parcel of land in the sending
12 district that is the subject of a transfer of development
13 rights, where the owner of the parcel is conveying development
14 rights of the parcel, and on which those rights so conveyed are
15 extinguished and may not be used by reason of the transfer of
16 development rights.

17 "Severance of development rights" means the process by
18 which development rights from a sending property are severed and
19 extinguished pursuant to this part.

20 "Transfer of development rights" means the procedure
21 prescribed by this part whereby the owner of a lot or parcel in
22 the sending district may convey development rights to the owner



1 of a lot or parcel in the receiving district, whereby the
2 development rights so conveyed are extinguished on the sending
3 property, affixed to the receiving property as an appurtenant
4 real property interest that runs with the land, and may be
5 thereafter exercised on the receiving property in addition to
6 the development rights already existing regarding that lot or
7 parcel.

8 "Transferable development rights" means all or that portion
9 of development rights that are transferred or are transferable.

10 "Transferee" means the person or legal entity that owns
11 property in a receiving district, who purchases the transferable
12 development rights.

13 "Transferor" means the landowner of a lot or parcel in a
14 sending district.

15 **§205-D Sending district and sending properties;**

16 **description.** (a) All land within the agricultural state land
17 use district shall comprise the sending district.

18 (b) Any landowner of land within the sending district may
19 convey the land's development rights under this part, subject to
20 the restrictions in this part.

21 **§205-E Receiving districts and receiving properties;**

22 **description.** (a) The receiving district shall be land within



1 the urban state land use district on which is allowed multi-
2 family dwellings, commercial, industrial, business, or mixed use
3 as permitted uses by the applicable zoning authority. No land
4 on which is allowed only single-family dwellings by the
5 applicable zoning authority shall be within the receiving
6 district. Each zoning agency shall cause its official zoning
7 district map and general plan to be amended by depicting the
8 qualifying areas as overlay districts to the affected
9 properties. The designation "TDR-R" shall be the title of the
10 overlay for a receiving district.

11 (b) A receiving property may increase its density up to
12 the maximum density and intensity described in section 205-G.
13 If a proposed receiving property has already met or exceeded
14 this maximum density or intensity allowable for the receiving
15 property by the applicable zoning agency, then the proposed
16 receiving property may not receive transferable development
17 rights pursuant to this part. A receiving property may use only
18 the development rights permitted in accordance with the zoning
19 regulations applicable to the receiving property and must meet
20 all other development requirements under state law and county
21 ordinances, and any rules adopted thereunder.



1 (c) No amendment to the zoning map, ordinance, statute, or
2 rules, nor any amendments to the text of the zoning ordinance,
3 statute, or rules, with respect to the zoning district
4 applicable thereto, initiated by the zoning agency that
5 eliminate or materially restrict, reduce, or downzone the uses
6 or the density of uses permitted in the zoning district
7 applicable to any property to which development rights have been
8 transferred, shall be effective with respect to such property
9 unless there has been mistake, fraud, or a material change in
10 circumstances substantially affecting the public health, safety,
11 or welfare.

12 **§205-F Right to transfer development rights.** (a) Each
13 transferor shall have the right to sever all or a portion of the
14 development rights from a sending property owned by the
15 transferor in a sending district and to sell, trade, or barter
16 all or a portion of those rights to a transferee consistent with
17 the requirements of this part.

18 (b) Upon transfer of development rights from a sending
19 property, the transferee may apply them to the transferee's
20 receiving property in a receiving district in order to obtain
21 approval for development at a density or intensity of use



1 greater than would otherwise be allowed on the land, up to the
2 maximum density or intensity indicated in section 205-G.

3 **§205-G Maximum density and intensity allowed through**
4 **transfer of development rights.** (a) The maximum increase in
5 residential density on a receiving property is one hundred per
6 cent of the number of residential dwelling units otherwise
7 permissible by the zoning agency for the receiving property;
8 provided that for any receiving property that is otherwise
9 permitted by the zoning agency to construct ten residential
10 dwelling units, the maximum increase in residential density on a
11 receiving property is fifty per cent of the number of
12 residential dwelling units otherwise permissible by the zoning
13 agency for the receiving property.

14 (b) The maximum increase in the floor area of commercial,
15 industrial, business, mixed-use, or other uses in the receiving
16 areas and on receiving properties is fifty per cent of the floor
17 area ratio otherwise permissible by the zoning agency for the
18 receiving property.

19 **§205-H Conversion of development rights; density formula.**

20 (a) The authority to construct one single-family dwelling unit
21 that is authorized by right by the applicable zoning authority
22 on a sending property shall equal one dwelling unit for the



1 receiving property. The authority to construct one single-
2 family dwelling unit that is authorized by right by the
3 applicable zoning authority on a sending property shall equal
4 1,500 square feet of floor area, for purposes of calculating
5 transferable development rights for the receiving property when
6 the density of the receiving property is measured by floor area
7 by the receiving property's zoning agency.

8 (b) Notwithstanding subsection (a), when the sending
9 property and the receiving property are located in the same
10 county, then the ratio above shall be increased by twenty-five
11 per cent, such that a receiving property receives 1.25 dwelling
12 units for one dwelling unit transferred from a sending property,
13 and a receiving property receives 1,875 square feet of floor
14 area for one dwelling unit transferred from a sending property.

15 (c) For any county that determines allowable density by
16 stating the minimum building site area and does not authorize
17 more than one dwelling unit on the building site even if the lot
18 is more than twice the minimum building site area, the number of
19 single-family dwellings allowed by the zoning authority shall be
20 measured by dividing the lot by the minimum building site area.



1 (d) The authority to construct an ohana dwelling on the
2 sending property shall not be a development right that may be
3 transferable under this part.

4 (e) If the applicable zoning agency will only approve a
5 second dwelling unit on the sending property:

6 (1) Subject to conditions, such as a farm plan, that are
7 not required for the first dwelling unit on the
8 sending property; or

9 (2) Subject to limitations on square footage that are not
10 required for the first dwelling unit on the sending
11 property,

12 then the authority to construct the second dwelling on the
13 sending property shall not be a development right that may be
14 transferable under this part.

15 (f) Any zoning agency may give an additional density
16 bonus, similar to the density bonus described in subsection (b),
17 for the transfer of development rights into a specific portion
18 of the receiving district under the jurisdiction of the zoning
19 agency which may be better served by increasing the area's
20 density. Any designation of an area under this subsection shall
21 be consistent with the community or development plan for the
22 area.



1 **§205-I Residual use of sending property.** (a) After the
2 severance of a sending property's transferable development
3 rights, a sending property may be used to generate one or more
4 forms of renewable energy, as otherwise allowed by law, subject
5 to the requirements or conditions of the applicable zoning
6 agency.

7 (b) The declaration described in section 205-M shall
8 further describe the residual uses of the sending property.

9 **§205-J Zoning agency; transferable development rights**
10 **certificates; duties.** Each zoning agency shall be responsible
11 for:

12 (1) Determining, upon application by a transferor, the
13 development rights that may be transferred from a
14 sending property within a sending district to a
15 property in a receiving district and issuing a
16 transfer of development rights certificate upon
17 application by the transferor;

18 (2) Determining, upon application by a transferee, whether
19 the development rights described in a certificate
20 issued to a transferor may be affixed to the
21 transferee's receiving property within a receiving
22 district, or whether the rights described exceed the



1 maximum density of the receiving property, and issuing
2 a transfer of development rights certificate upon
3 application by the transferee;

4 (3) Countersigning the deed and declaration described in
5 section 205-M, provided that a transfer of development
6 rights certificate and a receipt of development rights
7 certificate for the sending and receiving properties
8 have been validly issued by the applicable zoning
9 agency or agencies;

10 (4) Maintaining permanent records of all certificates
11 issued, deeds conveying transferable development
12 rights from a sending property to a receiving
13 property, declaration of transferable development
14 rights, and development rights retired or otherwise
15 extinguished and transferred to specific properties;
16 and

17 (5) Making available forms on which to apply for a
18 transfer of development rights certificate and receipt
19 of development rights certificate.

20 **§205-K Determination of development rights; issuance of**
21 **certificate for transferor.** (a) An application for a transfer
22 of development rights certificate shall contain:



- 1 (1) A completed application form;
- 2 (2) A title report for the sending property dated not
3 later than forty-five days prior to the date of the
4 application;
- 5 (3) A description of the state land use district in which
6 the sending property is located, the sending
7 property's zoning designation, and whether the sending
8 property has used any of its allowable development
9 rights;
- 10 (4) A statement of the type and number of development
11 rights in terms of density or floor area ratio being
12 transferred from the sending property, and
13 calculations showing their determination;
- 14 (5) Applicable fees; and
- 15 (6) Any other additional information required by the
16 zoning agency as necessary to determine the number of
17 development rights that qualify for transfer.
- 18 (b) A transfer of development rights certificate shall
19 identify:
 - 20 (1) The transferor;
 - 21 (2) The transferee, if known;



1 (3) A legal description of the sending property on which
2 the calculation of development rights is based;

3 (4) A statement of the number of development rights in
4 either dwelling units per net acre or square feet of
5 nonresidential floor area eligible for transfer;

6 (5) The date of issuance; and

7 (6) The signature of the director or head of the zoning
8 agency.

9 (c) All development rights shall be calculated to the
10 nearest whole number. For example, any fractional calculation
11 as to development rights must be converted upward if the result
12 is one-half or more of a whole unit, or converted downward if
13 the result is less than one-half of a whole unit, rounded to the
14 nearest whole unit.

15 (d) After receiving and considering a complete application
16 for a determination of compliance, the zoning agency shall
17 provide a written determination stating the number of
18 residential development rights available for severance from the
19 sending property.

20 **§205-L Receipt of development rights; issuance of**
21 **certificate for transferee.** (a) An application for receipt of
22 development rights certificate shall contain:



- 1 (1) A completed application form;
- 2 (2) A title report for the receiving property dated not
- 3 later than forty-five days prior to the date of the
- 4 application;
- 5 (3) A transfer of development rights certificate for the
- 6 sending property issued by the zoning agency for the
- 7 sending property;
- 8 (4) A description of the state land use district in which
- 9 receiving property is located, the receiving
- 10 property's zoning designation, and whether the
- 11 receiving property has used any of its allowable
- 12 development rights;
- 13 (5) Applicable fees;
- 14 (6) Copies of the deed and declaration described in
- 15 section 205-M that are executed by the transferor and
- 16 the transferee; and
- 17 (7) Any other additional information required to the
- 18 zoning agency as necessary to confirm that the
- 19 transfer of development rights is authorized.
- 20 (b) A receipt of development rights certificate shall
- 21 identify:
- 22 (1) The transferor;



- 1 (2) The transferee;
- 2 (3) A legal description of the receiving property and a
3 statement that the development rights to be
4 transferred may be affixed to the receiving property
5 without exceeding the maximum density allowable for
6 the receiving property;
- 7 (4) A statement of the number of development rights in
8 either dwelling units per net acre or square feet of
9 nonresidential floor area eligible for transfer;
- 10 (5) The date of issuance; and
- 11 (6) The signature of the director or head of the zoning
12 agency.
- 13 (c) After receiving and considering a complete application
14 for a determination of compliance, the zoning agency shall
15 provide a written determination stating that the development
16 rights to be transferred may be affixed to the receiving
17 property without exceeding the maximum density allowable for the
18 receiving property. Additionally, the zoning agency shall
19 countersign the deed and the declaration described in section
20 205-M and return the deed and declaration to the transferee for
21 recording or filing pursuant to section 205-M.



1 **§205-M Instruments of transfer.** (a) A transfer of
2 development rights shall be effectuated by the concurrent
3 recordation in the bureau of conveyances or the filing in the
4 office of the assistant registrar of the land court, as
5 applicable, of the following documents:

- 6 (1) A deed entitled "Deed; Transferable Development
7 Rights"; and
8 (2) A declaration entitled "Declaration; Transferable
9 Development Rights".

10 (b) The deed shall convey the transferable development
11 rights described in the transfer of development rights
12 certificate and the receipt of development rights certificate.
13 The deed shall contain a legal description of the sending
14 property and the receiving property, shall be countersigned by
15 the zoning agency that has jurisdiction over the receiving
16 property, and shall have attached as exhibits the applicable
17 transfer of development rights certificate and the applicable
18 receipt of development rights certificate. The deed shall be
19 recorded in the bureau of conveyances or filed in the office of
20 the assistant registrar of the land court, as applicable.

21 (c) Concurrently with the recordation of the deed
22 described in subsection (b), the owner of the sending real



1 property shall record in the bureau of conveyances or the land
2 court, as applicable, the declaration described in subsection
3 (a). The declaration shall contain a legal description of the
4 sending property and the receiving property, shall be
5 countersigned by the zoning agency that has jurisdiction over
6 the receiving property, and shall have attached as exhibits the
7 applicable transfer of development rights certificate and the
8 applicable receipt of development rights certificate. The
9 declaration shall also contain a description of residual uses of
10 the sending real property. The declaration shall run with the
11 land and shall permanently remove the transferable development
12 rights from the sending property.

13 (d) Transferable development rights conveyed pursuant to
14 this part shall be interests in real property and shall be
15 considered as such for purposes of conveyance and taxation.
16 Once the deed and the declaration described in this section have
17 been recorded in the bureau of conveyances or filed in the
18 office of the assistant registrar of the land court, as
19 applicable, the transferable development rights shall vest in
20 the transferee and thereafter may be transferred to a successor
21 in interest, provided that the transaction meets all of the
22 requirements of this part.



1 (e) For purposes of the title to the receiving property,
2 the transferable development rights shall constitute an
3 appurtenant real property right that runs with the land and,
4 upon recordation or filing described in this section, shall be
5 affixed to the receiving property. The transferable development
6 rights shall not be conveyed separately from the receiving
7 property, unless the rights are conveyed to another receiving
8 property at which point the transferable development rights
9 shall become appurtenant to the subsequent receiving property.

10 (f) For purposes of the title to the sending property, the
11 transferable development rights shall constitute an encumbrance
12 on the title of the sending property that runs with the land."

13 SECTION 2. Chapter 501, Hawaii Revised Statutes, is
14 amended by adding a new section to be appropriately designated
15 and to read as follows:

16 "§501- Transfer of transferable development rights.
17 Notwithstanding section 501-109, transferable development
18 rights, pursuant to part of chapter 205, received by a
19 receiving property shall be considered an appurtenant real
20 property right that runs with the land, and shall be reflected
21 on the title of the registered land of the receiving property,
22 as defined in section 205-C, in this manner. A declaration



1 filed in accordance with section 205-M shall be treated as an
2 encumbrance on the title of the registered land of the sending
3 property, as defined in section 205-C, for purposes of this
4 chapter. Both the deed and the declaration described in section
5 205-M shall be filed concurrently, and the deed described in
6 section 205-M shall not be recorded without a corresponding
7 declaration. The deed and the declaration shall correspond to
8 the requirements described in section 205-M and shall have the
9 exhibits described in section 205-M attached. The certificates
10 attached to the deed and declaration shall refer to the correct
11 sending and receiving properties, and the transferable
12 development rights referred to in the certificates and in the
13 deed and declaration shall be consistent."

14 SECTION 3. Chapter 502, Hawaii Revised Statutes, is
15 amended by adding a new section to be appropriately designated
16 and to read as follows:

17 "§502- Transfer of transferable development rights. For
18 purposes of this chapter, transferable development rights,
19 pursuant to part of chapter 205, received by a receiving
20 property shall be considered an appurtenant real property right
21 that runs with the land, and shall be reflected on the title of
22 the receiving property, as defined in section 205-C, in this



1 manner. A declaration recorded in accordance with section 205-M
2 shall be treated as an encumbrance on the title of the sending
3 property, as defined in section 205-C, for purposes of this
4 chapter. Both the deed and the declaration described in section
5 205-M shall be recorded concurrently, and the deed described in
6 section 205-M shall not be recorded without a corresponding
7 declaration. The deed and the declaration shall correspond to
8 the requirements described in section 205-M and shall have the
9 exhibits described in section 205-M attached. The certificates
10 attached to the deed and declaration shall refer to the correct
11 sending and receiving properties, and the transferable
12 development rights referred to in the certificates and in the
13 deed and declaration shall be consistent."

14 SECTION 4. In codifying the new sections added by
15 section 1 of this Act, the revisor of statutes shall substitute
16 appropriate section numbers for the letters used in designating
17 the new sections in this Act.

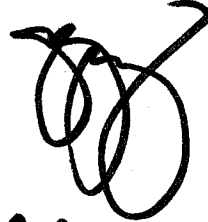
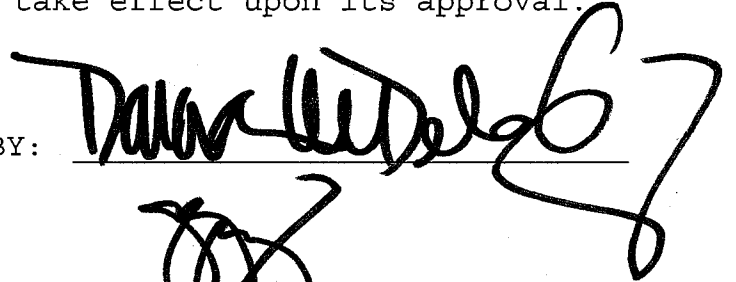
18 SECTION 5. New statutory material is underscored.
19



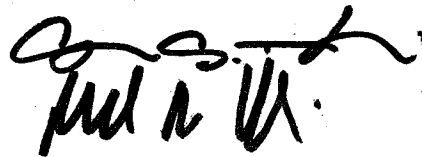
1 SECTION 6. This Act shall take effect upon its approval.

2

INTRODUCED BY:



Clarence K. Mitchell



Mark A. Miller



Report Title:

Land Use; Transferable Development Rights

Description:

Authorizes certain development rights to be conveyed from owners in agricultural districts to certain owners of land in urban districts, subject to conditions.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

