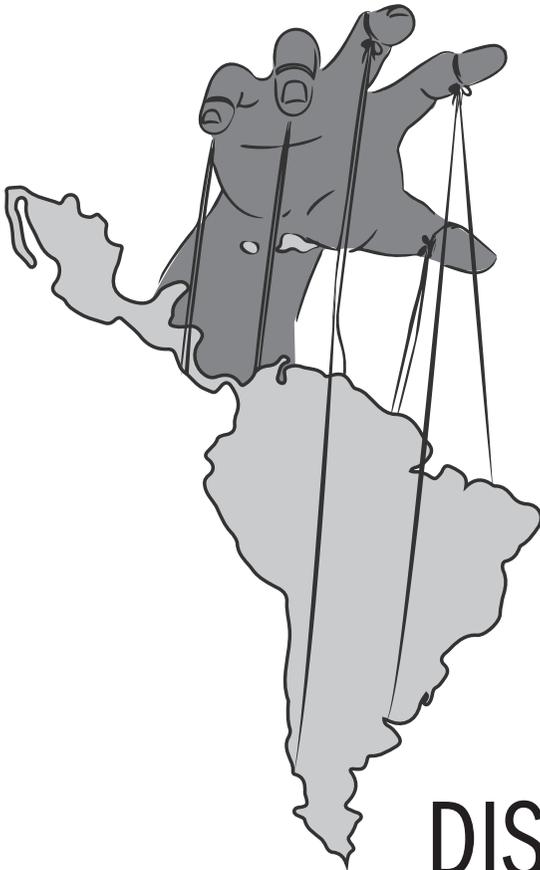


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# 3D Titling: Comments on the Introduction of the Transfer of Development Rights to Peru

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## ABSTRACT

*The transfer of development rights is an instrument of urban policy originally used in the United States. It allows the owners of landmarks in a city to sell their air rights to developers for them to build over the standard height limits of their properties. The article explains the recent introduction of the mechanism to the Peruvian legal system, highlighting the similar logic that it has with the programs of land titling, which have been promoted as a recipe for development in Latin American countries.*

## 1. INTRODUCTION

The transfer of development rights (TDR) is a mechanism that allows owners of landmarks in a city to sell their unused air rights to developers interested in building over the normal height limits. The first time people hear about the mechanism, they cannot help but think that it is the perfect solution for more than one problem. It is welcomed by the owners of landmarks or, in general, properties that have a restricted use, and is also welcomed by developers who are eager to obtain higher profits from their properties. How can this instrument achieve a win-win outcome?

TDR seemingly lets us put the development where we really believe it should be—where sufficient infrastructure, the need for density, the advantages of economies of scale, and so forth exist. At the same time, TDR promises to let us save what we must—wetlands, vistas, farmland, wellhead protection, you name it—without paying a nickel, with no *Kelo*-esque angst of eminent domain, and with the

pleasure of watching the property owner smile all the way to the bank.<sup>1</sup>

The TDR is part of a set of regulatory instruments of urban planning that aim to take advantage of the spontaneous forces of the market. This has been part of the appeal used in its introduction to the Peruvian legal system. It was first launched in 2012 in a neighborhood in Lima as a way of protecting its landmark buildings. In the last couple of years, it has become part of a program at the national level promoted by the Ministries of Culture and of Housing.

In the following sections it will first be explained the program introducing the TDR in Peru. That will be followed by an explanation of how this program can be understood within a trend in development theory of advocating market-based regulatory approaches. Finally, it will be argued that the programs of land titling in Latin America and the TDR program have in common the intent of using market forces to promote development.

## 2. THE TRANSFER OF DEVELOPMENT RIGHTS IN PERU

In 2012, the neighborhood of Miraflores in Lima, Peru launched the program of conservation of old houses,<sup>2</sup> which entailed the first TDR project in Peru. Miraflores is one of the 43 neighborhoods of Metropolitan Lima, the capital of the country. Lima is governed by the Metropolitan Municipality, and each of the neighborhoods has its own municipality.<sup>3</sup> Even though most of the urban planning duties are entrusted to the Metropolitan Municipality of Lima, some of the responsibilities in relation to urban regulation are shared with the neighborhood municipalities.<sup>4</sup>

The municipalities of Lima have different levels of efficiency in their management, mostly correlated to the level of income of their residents. Miraflores is one of the neighborhoods with the highest level of income, and its local government has been in recent years arguably the most progressive in terms of urban planning and governance. It is also one of the oldest neighborhoods of Lima, and therefore is the location of several old houses with value as cultural heritage or neighborhood landmarks.

The fact that many owners of the old houses do not have enough incentives to bear the cost of the restoration or the conservation of their properties led the Municipality of Miraflores to launch the program of conservation of old houses. The program aims to provide the owners of properties that are considered landmarks of the city<sup>5</sup> with funds for the restoration or preservation of their properties, through the issuance of certificates of development rights by the Municipality. These certificates recognize that the owners of the landmarks would have the right to build on their properties until a certain height, if the properties were not considered landmarks by the government. For that reason, as a compensation for the restriction, the certificate allows them to

build in certain corridors of the city higher than the height limits usually set for those areas. The corridors that will receive the increased development are called the receiving corridors (*eyes receptores*).<sup>6</sup> The mechanism is based on the fact that the receiving corridors already have sufficient infrastructure and physical characteristics to host such increases in density.

Naturally, few or none of the landmark owners also have property in the receiving corridors and, for that reason, the certificates are designed as a transferable title. In that sense, the holders of the certificates can choose to use them in properties of their own, or to sell them to developers who own properties in the receiving corridors and want to develop a building taller than the basic allowed height.

It took several months for the Municipality of Miraflores to implement the mechanism, and since then it has been used on only eight old houses, according to information provided by the Municipality's own website.<sup>7</sup> The discussion around the TDR has not garnered much attention either, both because of the novelty of the mechanism and of urban planning not yet being a consolidated field in Peru.

However, the lack of massive involvement of the neighbors and developers with the mechanism contrasts with the dissemination of the TDR among other entities of the government. In 2015, the Metropolitan Municipality of Lima included the TDR mechanism in Ordinance 1869/MML, thereby allowing it to be available to the whole city.<sup>8</sup> Then, in 2016, the Ministry of Housing approved a regulation norm on territorial planning that contains the TDR as an instrument for "urban finance." More recently, the Ministry of Culture has developed a national-scale program for the restoration and conservation of properties with cultural value through the TDR model.

### 3. LAW AND MARKET-BASED REGULATORY APPROACHES

In relation to the origins of the mechanism, the TDR was first and most frequently used in New York City. They drew on the concern of groups advocating for the conservation of the city's landmarks in the face of an ever-growing real estate development market. In order to provide the owners of those landmarks with funds, the system allowed the developers to buy the landmark's air rights and consequently extend the traditional height limits of their own developments.

Traditional zoning in New York dates back to 1916. The logic of traditional zoning was the prescription of mandatory limits for buildings. Limits could take the form of restrictions for the use, the height, or the bulk of the properties. Because of its rigidity, the system was reviewed and there was a second stage in zoning regulation that included the possibility of granting special permits and other exceptions to the traditional zoning rules. This implied a higher level of negotiation between the city and the developers. The authority also gained more discretion when reviewing the development plans on a project-by-project basis.<sup>9</sup>

Finally, a third evolution of the zoning rules was the introduction of "market-based regulatory approaches," among which was the TDR. The market-based regulatory approaches rely on the combination of the urban planning public-interest goals and the spontaneous self-interest of the agents of the real estate market. This approach is an acknowledgement of the fact that developers are interested in erecting buildings as tall as possible, in order to obtain the highest profit on their projects. The city can take advantage of that interest by authorizing the extra development in exchange for some kind of amenity or compensation. In the case of the TDR, the extra height granted to the developers comes in exchange for the money invested in the development rights acquired from the landmarks' owners.<sup>10</sup>

To give some context, this move in the regulation of urban development coincided with mainstream thinking in development theory in the last decades of the 20th century, which was that the market was the main driver of progress. This approach was different from the development policy of the 1950s and 1960s, which was characterized by the state's strong role in the pursuit of social change. During that previous stage, law was deemed an instrument destined to materialize the intervention of the state in the economy.<sup>11</sup> However, by the 1970s and especially in the 1980s, due to the competing ideologies between the West and the Soviet Union during the Cold War, among other circumstances, there was a special effort to spread faith in the market as a tool for development.

The TDR programs clearly complied well with this neoliberal trend, since they implied the creation of a market of new assets (i.e. development rights). Even though the possibility of selling unused air rights had already been introduced in New York zoning regulations in 1916, it could only be used in adjacent lots. The real expansion of the mechanism happened in the 1960s with the landmark preservation legislation that was passed in New York, which provided the possibility of transferring development rights to receiving areas not adjacent to the landmarks. In addition, the consolidation of the TDR came with two court decisions—*Fred F. French Investing Co. v. City of New York*, 39 NY2d 587 (1976), and the famous *Penn Central Transportation Company v. City of New York*, 42 NY2d 324 (1977). Finally, in 1989 the state legislature provided specific statutory authority for TDR in New York by amending the Town, Village, and General City Law (General City Law 20-f; Town Law 261-a; Village Law 7-701).<sup>12</sup>

### 4. LAND TITLING AND 3D TITLING

When taking these ideas to the field of law and development, one finds that the economic idea of promoting markets was

translated into the enshrinement of property rights. From this perspective, Chang wrote, "The stronger the protection of property rights, the better it is for economic development, as such protection encourages the creation of wealth."<sup>13</sup> De Soto agreed when he said, "Nearly every developing and former communist nation has a formal property system. The problem is that most citizens cannot gain access to it. They have run into Fernand Braudel's bell jar, that invisible structure in the past of the West that reserved capitalism for a very small sector of society."<sup>14</sup> The protection of property rights and, more generally, the attention of development policy to the institutions of private law constitute what scholars call the moment of "Law and the Neoliberal Market."<sup>15</sup> This was the period when law was seen as an instrument that helped get the prices right, by allowing and promoting private transactions, and ensuring the protection of property rights (i.e. setting the rules of the markets).<sup>16</sup> This instrumentalization of the law, which operated in the Global North, was thought to be a universalizable model. As Trubek and Santos recall it, "Markets were markets, and the same legal foundations would be needed and could operate anywhere."<sup>17</sup> The materialization of this was the extensive land-titling programs promoted in developing countries.

Land titling was deemed the most effective method for reducing poverty in the developing world. It was thought that the reason why low-income people were not able to thrive was that they did not have clear and recorded property rights over their assets. That very fact put them outside the world of formal transactions and, therefore, outside of the opportunity to transfer their properties and/or obtain credit.<sup>18</sup> In that sense, titling was deemed the critical solution because of its potential to eliminate the uncertainty about asset ownership. The inventive character and entrepreneurialism of the people would take care of the rest. The state only had to make sure it provided a consistent

public record of the rights, and enforce them when needed.

Hence, the faith in titling as a means to reduce poverty was implemented by different countries, one of the main examples being the massive titling program that was launched in Peru in the 1990s. The expectation was that titling would immediately activate the assets of low-income people, taking them from the informal to the formal world. This would be possible because, through titling, the government could achieve the foundations of a prosperous market: property rights.

The TDR mechanism basically reproduces the same logic of land titling, but in a tridimensional perspective. In order to provide a specific group with the means to thrive (in this case, the owners of the landmarks), the government gives them a title over an asset that was previously uncertain or even non-existent: the development rights over the landmarks. More importantly, the system allows the transference of that title in transactions that will be subject to the rules of supply and demand. There would even be a record of the transactions of these assets. The purchase and sale deed would be taken to the public registry in order for future purchasers to know that the air rights of that specific property have been sold.<sup>19</sup>

Once again, the government is trusting in the power of property rights to form the basis for the creation of new markets: "TDR programs depend upon the creation of a functioning marketplace, with buyers, sellers, and 'market-greasing' intermediaries."<sup>20</sup> The role of the city government will be to manipulate the amount of development rights in the market, much like the role of a central bank in a national economy.<sup>21</sup> Such significance of the markets would lead to a more cost-efficient way of achieving the goal of protecting one of the most important values of a city: the preservation of its landmarks.

In this context, the question is whether 3D titling in Peru will have the same successes and weaknesses as the land titling programs. That is today yet to be seen, and because of space constraints, I will leave my own assessment for a future text.

## NOTES

<sup>1</sup>Arthur C. Nelson et al., *The TDR Handbook. Designing and Implementing Transfer of Development Rights Programs* (Washington, DC: Island Press, 2012), xiii.

<sup>2</sup>The program was issued through Ordinance 387/MM of 19 July 2012.

<sup>3</sup>Except for the area of Callao, the main port. Although it is part of the metropolitan area of Lima, it has the status of a region, which is not under the jurisdiction of any of the Lima authorities.

<sup>4</sup>In this case, the height limits of the buildings are usually a matter of responsibility of the Metropolitan Municipality of Lima. However, according to the interpretation of the Municipality of Miraflores, Ordinance 920 of the Metropolitan Municipality of Lima authorized Miraflores to establish special building conditions for properties in front of parks, avenues, and on corners. Since the so-called “receiving corridors” of the TDR (as it will be explained below) are located in front of avenues, Miraflores would be authorized to regulate this matter under this interpretation.

<sup>5</sup>These could be houses considered as cultural heritage, or houses with a typology that is characteristic of the neighborhood. The exact definition of the intervened areas established in the Ordinance is: “Areas identified in this Ordinance with buildings with predominantly homogeneous characteristics in the treatment of their facades, volume, urban profile, typology and/or architectonic style, declared or not by the Ministry of Culture as cultural properties, that are part of spaces or sub-spaces organized by corridors, with a value of group visible from the public space and that have a special regime of conservation and development, according to the established in this ordinance” (Article 3.1

of the Ordinance). As it can be seen, the definition is ambiguous and broad, and could be subject to misinterpretations. However, the ordinance includes in an appendix the actual list of all the properties that would be subject to this special regime.

<sup>6</sup>They are also called in Spanish “*Eje de aprovechamiento del potencial del desarrollo urbano.*”

<sup>7</sup>Municipalidad de Miraflores, “Casonas que están en el programa,” n.d., [http://www.miraflores.gob.pe/\\_contenTempl2.php?idpadre=8770&idhijo=8772&idcontenido=8788](http://www.miraflores.gob.pe/_contenTempl2.php?idpadre=8770&idhijo=8772&idcontenido=8788).

<sup>8</sup>However, the detailed regulations are yet to be approved.

<sup>9</sup>Jerold S. Kayden, “Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States,” *Boston College Environmental Affairs Law Review* 19, no. 3 (1992): 568.

<sup>10</sup>Kayden, “Market-Based Regulatory Approaches,” 568.

<sup>11</sup>David M. Trubek and Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006), 2.

<sup>12</sup>James A. Coon, *Transfer of Development Rights* (New York: Local Government Technical Series, New York State Division of Local Government Services, 2015), 2-5.

<sup>13</sup>Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem, 2002), 82.

<sup>14</sup>Hernando De Soto, *The Mystery of Capital* (London: Black Swan, 2001), 160.

<sup>15</sup>Trubek and Santos, *The New Law and Economic Development*, 5.

<sup>16</sup>Trubek and Santos, *The New Law and Economic Development*, 5; World Bank Group, *World Development Report: Building Institutions for Markets* (Washington, DC: World Bank, 2002), 1.

<sup>17</sup>Trubek and Santos, *The New Law and Economic Development*, 6.

<sup>18</sup>De Soto, *The Mystery of Capital*, 47-48.

<sup>19</sup>Kayden, “Market-Based Regulatory Approaches,” 577.

<sup>20</sup>Kayden, “Market-Based Regulatory Approaches,” 577.

<sup>21</sup>Kayden, “Market-Based Regulatory Approaches,” 575.