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MEMORANDUM

TO:	Legislative Reform Subcommittee to TDR Task Force Members
CC:	Staff, Office of Smart Growth
FROM:	Joy Farber, Chief Counsel, Office of Smart Growth
RE:	TDR Reform
DATE:	February 26, 2010

The legislative reform subcommittee of the Statewide TDR task force met on February 17th to discuss possible reform of the State Transfer of Development Rights Act (TDR Act) and/or the Municipal Land Use Law (MLUL) in an effort to increase the possibility of municipalities using both cluster ordinances that permit certain development transfers (sometimes referred to as "non-contiguous cluster ordinances" or "TDR light") as well as full TDR.

MLUL Non-Contiguous Cluster Legislation

The need for legislative reform to enable these options was discussed in light of recent case law invalidating a development transfer ordinance that attempted to use local clustering among non-contiguous parcels to transfer development rights, regardless of whether or not the parcels were under common ownership for a planned unit development (PUD). Builders League of South Jersey v. The Township of Franklin, 395 N.J.Super. 46 (N.J. Super. Ct. App. Div. 2007). At this time, the MLUL allows for transfers between non-contiguous parcels only if they are developed within the context of a planned unit development (PUD) which is to be developed by a single entity (under common ownership). N.J.S.A. 40:55D-39(c)(4)-(5). It was generally agreed that if the MLUL were to allow for non-contiguous cluster ordinances to apply to parcels that are not part of a PUD, and which may be under separate ownership, then legislative reform would be necessary.

Members of the task force had difficulty distinguishing the point at which a non-contiguous cluster ordinance would be distinct from a TDR program that is covered under the TDR Act. Possible distinctions could turn on whether or not sending and receiving zones are delineated or whether or not development potential is converted into a fungible "credit" that can be treated as a commodity in an open market exchange. At this time, the nature of the distinction is still unclear. If the full task force is interested in preparing language for legislative reform, the distinction between the two modes must be made clear.

As an observation, when planned development is used to create transfers, the land pattern outcome of the transfers is known. However, broadening application of non-contiguous clustering to lands that are not within a planned development introduces uncertainty as to the

outcome of the transfer. Generally, zoning to allow for development potential in environmentally sensitive areas to be severed while zoning areas intended for development as areas where said development potential may be used to obtain intensified development is a step in the right direction. However, without a defined outcome, increases in development potential apart from a comprehensive land use plan could worsen land use patterns in the receiving areas. Specifically, a development pattern that is inconsistent with the State Plan could result in land use patterns that foster relatively low density sprawl type development or large-scale big-box stores that have limited life-spans but can be very destructive to the landscape. Accordingly, in any proposed reform, development in areas outside of designated centers or growth areas should be discouraged and development in receiving areas should be within defined parameters that avoid undesirable development patterns.

Another ramification of added development outside of a comprehensive land use plan is that it could drive infrastructure needs and investment in areas that might not be appropriate. Current DEP rules for Water Quality Management, once enforced, would define sewer service areas and require downzoning to certain septic density standards in the remaining areas. A transfer program outside of the TDR Act parameters could place increased pressure on DEP to authorize amendments to the sewer service areas or approve package treatment plants outside of these areas. In addition, the need for transit options in and around receiving areas should be addressed. Adding density sufficient to justify and obtain transit options could achieve multiple planning advantages whereas adding density insufficient for such options could perpetuate denser sprawl and the traffic congestion associated with it. Finally, redevelopment is an important aspect of economic vigor. If receiving areas create added expense in areas in which redevelopment is desirable, care should be taken to avoid adding expenses that would deter a developer from converting underutilized land. In conclusion, it is unclear whether the outcome of expanding development potential transfers would be consistent with statewide goals of limiting infrastructure extensions outside of designated growth areas and decreasing sprawl.

Interplay with Current Legislative Activity

It is important to recognize that the legislature is currently quite active in land use law. Three proposals in this session alone could impact the ability to use non-contiguous clustering in the expanded sense. First, newly proposed legislation one wastewater management planning (A 2070 sponsored by Assemblyman Green) would extend the deadline for wastewater management planning agencies to establish updated wastewater management plans and extends validity of sewer service areas and wastewater service areas, until April 7, 2011. Any development potential that is transferred would likely exceed DEP's septic system threshold densities and therefore the only areas that could reliably be zoned for use of the development potential would need to be in existing sewer service areas. However, these could be changing through April 7, 2011 as updated plans consistent with the new rules get approved.

The uncertainty arising from the deadline extension mentioned above could be mitigated by a second piece of legislation. A time of ***application*** law has been proposed (S 82 sponsored by Senator Rice) that would require the date of submission of an application for development to govern the review of that application for development. A decision made with regard to that application would be based on those development regulations which are in effect at that time. Any provisions of an ordinance adopted after the application date would not apply. The bill would become effective one year after adoption. Accordingly, transfer ordinances would have to be adopted before there could be a market for transferred development potential.

Finally, a revision to the TDR Act has been proposed (S 80 sponsored by Senator Doherty) that would revise the Highlands Water Protection and Planning Act to expand the Highlands TDR Program receiving areas to extend beyond the seven counties in the Highlands Region to the entire state. It would also authorize the State Planning Commission and Highlands Council to determine a project is appropriate as a receiving area. This proposal could redirect growth from the Highlands Region to the remainder of the state rather than use TDR as a regional planning tool as originally envisioned in the Highlands Act. Since land values in the Highlands Region and the seven counties within it are greater than most of the rest of the state, a large transfer ratio would be necessary to make the transfers marketable. Finally, it is difficult to anticipate how the REMA (required under the TDR Act) could be performed in this scenario.

The interplay between just these three proposals makes the outcome of future local land use ordinances to transfer development potential even more uncertain. Expanding the use of non-contiguous cluster ordinances while new land use schemes are being crafted runs the risk of undermining efforts to create predictability with respect to land use issues and could undermine the transfer effort. For example, there is a risk that purchased development rights in a non-contiguous cluster ordinance could be rendered unusable and valueless to the owner in the event the intended receiving area is outside a designated sewer service area and DEP denies an application for a subsurface disposal system.

TDR Act Legislation

The task force also pursued an evaluation of the present requirements of the TDR Act and whether there is a possibility for reform that could both broaden its application and be less burdensome. The subcommittee identified plan endorsement as a possible barrier to participation as it can be expensive and time consuming. In addition, lack of access to necessary infrastructure, even after participating in plan endorsement, was cited as a barrier to pursuing TDR. State agencies must increase efforts to identify limitations up front (i.e., in the Opportunities and Constraints step of plan endorsement) and when it is possible to obtain infrastructure, to commit to dedicating state agency resources to assure necessary infrastructure approvals are forthcoming (i.e., as action steps in the Memorandum of Understanding and Action Plan step of plan endorsement and during the implementation stage post- endorsement).

The two main forms of infrastructure that need to be made available are wastewater management plan approvals from DEP and traffic management approvals (such as traffic lights or highway access) from DOT. In addition, access to transit options, if appropriate, needs to be made available. The plan endorsement process has been developed to be a clearinghouse for relevant State agencies to participate in comprehensive land use planning, including TDR program development. Each relevant State agency participates in the process from the very beginning (i.e., relevant State agency representatives attend pre- petition meetings with petitioners). However, the ability to commitment each agency's best efforts to allow a TDR program to succeed is not available solely through involvement of mid-level managers that attend plan endorsement meetings. The commitment must be expressed from executive branch leadership and pervade State agency actions.

<u>Analysis of Impervious Cover Option</u>

One issue that was raised is the use of impervious cover as a form of transferrable development potential. To that end, I was asked to review the TDR Act to evaluate whether or not the concept of transfer of impervious cover is presently permitted in the State TDR Act. In addition, if the

possibility is not currently available, I was asked to analyze what language would need to be revised in order to allow for this possibility.

Background on TDR Act

The State TDR Act creates the ability of municipalities to establish TDR programs (outside of the existing TDR programs in the Burlington County pilot study jurisdiction). In addition, the TDR Act distinguishes Pinelands Area municipalities as they are subject to Pinelands Commission jurisdiction. These municipalities submit the required materials to the Pinelands Commission for review to establish whether the proposed ordinance is compatible with the provisions of the Pinelands Development Credit Bank Act and is otherwise consistent with the Pinelands Comprehensive Master Plan.

Municipalities may adopt individual TDR programs or participate in county or regionally established programs. The requirements for participating include:

- Adopt a development transfer plan element of the master plan
- Adopt a capital improvement program for the receiving zone to address infrastructure costs and any method of cost sharing
- Adopt a utility service plan element of the master plan
- Prepare a real-estate market analysis
- Receive either initial plan endorsement individually or as part of a county or regional plan or as an amendment to a previously endorsed plan[1]

The proposed receiving areas must be evaluated to assess whether it appears the added development potential can be accommodated. There must be a reasonable likelihood that the development potential is realistically achievable considering the availability of necessary infrastructure and the provisions of the zoning ordinance including those related to density, lot size and bulk requirements. There must be a reasonable likelihood that a balance is maintained between sending zone land values and the value of the transferable development potential.

Any TDR ordinance must be submitted to the relevant county planning board(s), along with the above referenced information. If agricultural land is involved, then the county agriculture development board is to be provided this information as well. The ordinance is evaluated based on criteria outlined in the TDR Act. See N.J.S.A. 40:55D-149(b). These boards make comments and either recommendations adoption or not within 60 days of receipt of the materials. Failure to respond constitutes a recommendation of the ordinance. If the recommendation is not to enact the ordinance, the Office of Smart Growth is contacted to resolve the issue. The decision is subject to appeal as a final agency action.

A municipality may adopt a TDR ordinance and amend the zoning ordinance to reflect same in a manner consistent with the MLUL. Provisions for both zoning amendments and notice requirements in the TDR Act reference the appropriate MLUL provisions. However, a technical amendment is necessary to properly reflect MLUL procedures. Namely, when a municipality is re-zoning as part of a master plan re-examination, the notice to each landowner within 200 feet

[1] Note: The TDR Act must be revised to reflect "plan endorsement" as opposed to "initial plan endorsement." In addition, in new plan endorsement, TDR may be pursued concurrently with plan endorsement with the ability to designate centers (i.e., receiving areas) early in the process and allowing for development of the TDR program upon achieving the certificate of eligibility milestone.

of boundaries of the zone is not required. In this case, the rules regarding hearings for revision or amendment of the master plan apply. See N.J.S.A. 40:55D-10(a). Accordingly, the provision in the TDR Act with respect to notice needs to be revised to reflect this alternative notice requirement. See N.J.S.A. 40:55D-143. This small change in the TDR Act is necessary to accurately reflect MLUL requirements and can do much in eliminating unnecessary and mostly redundant notice requirements.

A real estate market analysis (REMA) must be performed once the sending and receiving areas are proposed and prior to the adoption of the TDR ordinance. This is needed in order to assess whether the anticipated transfers can be market driven. The analysis evaluates the extent of development projected for the receiving zone and the likelihood of its achievement given current and projected market conditions to assure the receiving zone has the required capacity to accommodate the rights anticipated to be generated. Although this is NOT an appraisal, as it involves forecasting, it does rely on comparable sales in the vicinity to perform the assessment and is based on the general principles used in real estate valuation, namely standards such as highest and best use.

Transferrable Development Potential Analysis for Impervious Cover

The TDR Act does not include a specific definition for the development right(s) that may be transferred. However, the TDR Act has been incorporated into the MLUL which defines "development potential" as "the maximum number of dwelling units or square feet of nonresidential floor area that may be constructed on a specified lot or in a specified zone under the master plan and land use regulations in effect on the date of the adoption of the development transfer ordinance, and in accordance with recognized environmental constraints: In addition, the MLUL defines "development transfer" or "development potential transfer" to mean "the conveyance of development potential or the permission for development from one or more lots to one or more other lots by deed, easement, or other means as authorized by ordinance." Accordingly, if the amount of impervious cover is to be considered a transferrable right pursuant to the TDR Act, then these definitions must be broadened. For example, the definition of "development potential" could include language to the effect of: "in establishing a TDR program, development potential may be interpreted to mean front, rear and side-yard set back, height and impervious cover rights." Such expanded definition would allow for the inclusion of these aspects of development potential to be transferrable.

In addition, the TDR Act discusses balancing of the development transfers as it pertains to the development potential of the zoning ordinance. See N.J.S.A. 40:55D-145(a)-(c). However, most local land use ordinances do not specify impervious cover limits, especially for residential development. Accordingly, the ability to determine a likelihood of balance necessary for viability of a transfer program will be limited to the extent that such aspects of development potential are delineated in the local land use ordinance. In addition, DEP jurisdiction with respect to the Coastal Zone Management Rules (N.J.A.C. 7:7E-1 *et seq*.) adopted to implement CAFRA override local jurisdiction for affected municipalities. In addition, DEP jurisdiction with respect to residential densities is expected to widen to cover the entire state once the Water Quality Management Rules (N.J.A.C. 7:15-1 *et seq*.) regarding sewer service delineations is in full effect. These will serve to alter the local land use ordinances with respect to development potential. Accordingly, transfer programs based on impervious cover limits will need to take both local and statewide jurisdiction into consideration.

The TDR Act also requires any TDR ordinance to provide that upon granting any variance in excess of 5% of the development potential of a parcel of a property not in a receiving zone the parcel shall constitute a receiving zone and the relevant provisions of the TDR ordinance to apply with respect to the amount of development potential required to implement the variance. The same issue raised with respect to development potential raised earlier pertains here as well. Namely, impervious cover would need to be a specifically enumerated development potential and valuated right that is quantified in the zoning ordinance and TDR ordinances in order to use impervious cover as transferrable development potential.

Another aspect of the TDR Act that may need to be revised to account for transfer of impervious cover is the REMA. It is unclear whether or not it will be possible to perform this analysis based on transfer of impervious cover. There is not necessarily a direct correlation between land value and the addition of impervious cover, separate and apart from the addition of either a housing structure, additional height (or Floor Area Ratio) or square feet of commercial and/or industrial space. Accordingly, the ability to evaluate the market driven aspects of TDR might be compromised if this option is pursued. Similarly, the provisions regarding transmission of a record of transfer to the register of deeds assumes there will be a means to assess the new tax based on the post- transfer value. The ability to assess value for taxation purposes based on changes in impervious cover will possess these same limitations.

It may be necessary, if the task force is interested in enhancing the possibility for use of impervious cover as a basis for transfer of development rights to create a third option beyond the original TDR Act and enhanced non-contiguous clustering. Some advocates have mentioned "TDR Light" which is as yet undefined but would be a separate prong from non-contiguous cluster development and full blown TDR.