

In light of the controversy created at the February meeting over material being introduced without prior notice, this is a notification that I will be making a motion at the April meeting under Old & New Business.

I would appreciate it if you would forward this information to the Council members before the April meeting.

I {will} move that we, the Council, review our Transfer of Development Program to conform to our Regional Master Plan Objective 7B7g, comply with The State TDR Act, specifically, NJSA 40:55D-155 -156 &157, and follow the direction of the Highlands TDR Technical Report, page 37, that all require a periodic review of the TDR Program.

In The Regional Master Plan (page 202)

Policy 7B7: Establish a Highlands TDR Program which is **sufficiently certain and predictable** to allow Sending Zone landowners to sell Highlands Development Credits or borrow against the value of such credits

Objective 7B7g: Review and assessment of the Highlands TDR Program **five years after the effective date of the Highlands RMP.**

From TITLE 40 - MUNICIPALITIES AND COUNTIES

C.40:55D-155 Review by planning board, governing body after three years.

C.40:55D-156 Review after five years.

C.40:55D-157 Periodic reviews.

(Full text of these statutes are included below on pages 4-6)

From the Highlands TDR Technical Report (May 15, 2008)

Review and assessment of the Highlands TDR Program (page 37) (Full text of this section is included below on pages 7 & 8)

My Comments

1. The Highlands **Act** and our **bylaws** state that: This council shall establish a transfer of development rights program.
2. The **Act** and the **Regional Master** plan state that “The transfer of development rights program shall be **consistent** with the State Transfer of Development Rights Act," P.L.2004, c.2 (C.40:55D-137 et seq.) except as otherwise provided in this section.”
The only exception in this section is not requiring mandatory receiving zones. *Nothing else in this section provides for an exception from the TDR Act. (See definition of consistent on pages 3 & 4 below)*
3. The Highlands TDR program and the Master Plan were adopted and became effective on July 17, 2008
4. The State TDR Act was enacted Mar. 29, 2004 and is titled “An Act authorizing the transfer of development rights by municipalities”.
5. The State TDR Act was enacted before the Highlands Act was signed, therefore the Highlands Act or regional TDR Programs are not mentioned in the State TDR Act.
6. How do we become consistent with a statute that is intended to be used by municipalities for the transfer of development potential within their jurisdiction?
7. Municipal TDR programs are carried out by municipal planning boards.
8. We are a Regional Planning Board.
9. To be consistent with the State TDR Act, we must insert Highlands Council in place of municipality in the Act. How else can we be consistent?
10. If that is not what must be done, how do we have a program? Why is the 5-year review included in the RMP?

What does “be consistent with” mean?

Definition from: *thelaw.com Law Dictionary and Black’s Law Dictionary 2nd Ed.*

That which agrees with something else; as a consistent condition, which is one which agrees with all other parts of a contract, or which can be reconciled with every other part.

Dictionary definitions of “consistent” are as follows:

Consistent

a. compatible, not contradictory, (with); (of person) constant to same principles; The Concise Oxford Dictionary of Current English, 7th ed. (Oxford: Oxford University Press, 1982)

Consistent (adverb)

1. conforming to a regular pattern; unchanging.
2. (consistent with) in agreement. The Compact Oxford English Dictionary, 2nd ed. (Oxford: Oxford University Press, 2002)

Consistent (adjective)

1. archaic: possessing firmness or coherence.
2. a: marked by harmony, regularity, or steady continuity: free from variation or contradiction.
b: marked by agreement: compatible — usually used with with.
c: showing steady “Have regard to,” “conformity to character, profession, belief, or custom.
3. tending to be arbitrarily close to the true value of the parameter estimated as the sample becomes large. Meriam-Webster Online Dictionary

“Dictionary meanings are a useful starting point for the purpose of establishing the meaning of a term. As an example, the Webster Dictionary defines the term “consistent” to mean:

- Marked by agreement and concord;
- Coexisting and showing no noteworthy opposing, conflicting or contradictory qualities or trends;
- In harmony with;
- Compatible with;
- Constant to the same principle as;
- Not contradictory with.

“Shall be consistent with” is a higher policy implementation standard and is a more demanding test than “shall have regard to”. It requires decision-makers to apply the policies and make decisions that are consistent with the applicable policies. It is a stronger implementation standard focusing on achieving policy outcomes, while retaining some flexibility in how it is implemented.”

C.40:55-155 Review by planning board, governing body after three years.

19. A development transfer ordinance and real estate market analysis shall be reviewed by the planning board and governing body of the municipality at the end of three years subsequent to its adoption. This review shall include an analysis of development potential transactions in both the private and public market, an update of current conditions in comparison to the development transfer plan element of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) and capital improvement program adopted pursuant to section 20 of P.L.1975, c.291 (C.40:55D-29), and an assessment of the performance goals of the development transfer program, including an evaluation of the units constructed with and without the utilization of the development transfer ordinance. *A report of findings from this review shall be submitted to the county planning board, the Office of Smart Growth and, when the sending zone includes agricultural land, the CADB for review and recommendations. Based on this review the*

municipality shall act to maintain and enhance the value of development transfer potential not yet utilized and, if necessary, amend the capital improvement program adopted pursuant to section 20 of P.L.1975, c.291 (C.40:55D-29), the development transfer plan element of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) and the development transfer ordinance adopted pursuant to P.L.2004, c.2 (C.40:55D-137 et al.).

40:55D-156 - Review after five years

20. A development transfer ordinance and the real estate market analysis also shall be reviewed by the planning board and governing body of the municipality at the end of five years subsequent to its adoption. This review shall provide for the examination of the development transfer ordinance and the real estate market analysis to determine whether the program for development transfer and the permitted uses in the sending zone continue to remain economically viable, and, *if not, an update of the development transfer plan element of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) and capital improvement program adopted pursuant to section 20 of P.L.1975, c.291 (C.40:55D-29) shall be required.* If at least 25% of the development potential has not been transferred at the end of this five-year period, the development transfer ordinance shall be presumed to be no longer reasonable, including any zoning changes adopted as part of the development transfer program, within 90 days after the end of the five-year period unless one of the following is met:

- a. The municipality immediately takes action to acquire or provide for the private purchase of the difference between the development potential already transferred and 25% of the total development transfer potential created in the sending zone under the development transfer ordinance;
- b. A majority of the property owners in a sending zone who own land from which the development potential has not yet been transferred agree that the development transfer ordinance should remain in effect;

c. The municipality can demonstrate either future success or can demonstrate that low levels of development potential transfer activity are due, not to ordinance failure, but to low levels of development demand in general. This demonstration shall require the concurrence of the county planning board and the Office of Smart Growth, and shall be the subject of a municipal public hearing conducted prior to a final determination regarding the future viability of the development transfer program; or

d. The municipality can demonstrate that less than 25% of the remaining development potential in the sending zone has been available for sale at market value during the five-year period.

C.40:55D-157 Periodic reviews.

21. Following review of a development transfer ordinance as provided in section 20 of P.L.2004, c.2 (C.40:55D-156), the planning board and the governing body of the municipality shall review the development transfer ordinance and real estate market analysis at least once every five years with every second review occurring in conjunction with the review and update of the master plan of the municipality pursuant to the provisions of section 76 of P.L.1975, c.291 (C.40:55D-89). This review shall provide for the examination of the ordinance and the real estate market analysis to determine whether the program and uses permitted in the sending zone continue to be economically viable and, if not, an update of the development transfer plan element of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) and capital improvement program adopted pursuant to section 20 of P.L.1975, c.291 (C.40:55D29) shall be required. If 25% of the remaining development transfer potential at the start of each five-year review period in the sending zone under the development transfer ordinance has not been transferred during the five-year period, the municipal governing body shall repeal the development transfer ordinance, including any zoning changes adopted as part of the development transfer program, within 90 days after the end of that five-year period unless the municipality meets one of the standards established pursuant to section 20 of P.L.2003, c.2 (C.40:55D-156).

From the Highlands TDR Technical Report (May 15, 2008)

Page 37

REVIEW AND ASSESSMENT OF THE HIGHLANDS TDR PROGRAM

The State TDR Act requires that any adopted municipal TDR program be reviewed and assessed to determine whether it is meeting the goals of the program. These reviews occur at the third and fifth anniversaries of the program's adoption.

Although not specified by the TDR provision of the Highlands Act, Highlands Council believes that a similar review of the Highlands TDR Program should be conducted. Unlike the reviews required by the State TDR Act, however, these reviews would occur at the fifth and seventh anniversaries of the program's adoption because of the program's scope and voluntary nature of the Receiving Zones.

At the fifth anniversary of the program's adoption, the Highlands Council would examine the development potential transactions in both the private and public market, compare current conditions with those at the outset of the program, and examine the units constructed with and without utilization of the Highlands TDR Program in the seven Highlands counties. This assessment would also examine the effectiveness of the HDC allocation process and the procedures for designating voluntary Receiving Zones. With this review, the Council would prepare a report examining the efficacy of the program to date and make recommendations for program changes if warranted.

At the seventh anniversary of the program's adoption, the Highlands Council would conduct another assessment. If an insufficient number of

development potential transactions have occurred, the Highlands Council would presume the program is no longer reasonable and requires significant amendment. This presumption may be overcome by the Highlands Council by either:

1. immediately requiring the Highlands Development Credit Bank to acquire or provide for the private purchase of the difference between the HDCs already transferred (including consideration of fee simple and easement acquisition through State programs such as the Garden State Preservation Trust, county programs, municipal programs or non-governmental land trusts) and 15% of the total HDCs created in the Highlands Region Sending Zones; or
2. demonstrating that low levels of HDC transfer activity is due, not to the program's failure, but to low levels of development demand in general throughout the seven Highlands counties.

From Regional Master Plan page 125

Establishment of the Highlands TDR Program has been shaped by a number of circumstances. First and foremost, the program is guided by the TDR provision of the Highlands Act. This provision includes an initial requirement that **the program be consistent with the State Transfer of Development Rights Act** unless otherwise stated by the Highlands Act.

Council Member Richard Vohden