

**RMP Component:** Smart Growth Component  
**Technical Report:** Transfer of Development Rights  
**Memorandum Title:** TDR Sending and Receiving Zone Criteria  
**Status:** Preliminary Draft  
**Date:** July 17, 2006

## **EXECUTIVE SUMMARY**

To meet the statutory obligation to identify Transfer of Development Rights (TDR) sending zones and voluntary receiving zones within 18 months of enactment of the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq. (Highlands Act), the Highlands Council approved the use of narrative criteria for zone identification during its meeting on February 23, 2006. These criteria serve to identify potential lands that may serve as sending zones and receiving zones in the Highlands TDR Program, which is currently under development. Importantly, these criteria are consistent with the provisions of the State TDR Act, N.J.S.A. 40:55D-137 et seq., regarding sending and receiving area characteristics. The use of narrative criteria will help inform all stakeholders regarding the ability to participate in the Highlands TDR Program.

## **INTRODUCTION**

The narrative criteria discussed below are intended to serve as a threshold for determining what lands in the Highlands Region are appropriate as sending zones and voluntary receiving zones as required by Section 13 of the Highlands Act. In essence, these narrative criteria serve as the lens through which each property in the Highlands Region will be viewed to determine its role, if any, in the Highlands TDR Program.

With respect to sending zones, the Highlands Council envisions a process whereby Preservation Area landowners will apply to the Council for a determination as to how many development rights or credits their respective properties are entitled. Specifically, the Highlands Council may utilize an individual property review process to assign TDR credits on a lot-by-lot basis that will be developed by the Council as part of the Regional Master Plan.

With respect to voluntary receiving zones, specific identification of these zones will occur during the Regional Master Plan conformance process. A similar process will be utilized to identify voluntary receiving areas outside of the Highlands Region but within the seven Highlands counties.

## **LEGAL REQUIREMENTS FOR INCLUSION IN THE REGIONAL MASTER PLAN**

The Highlands Council is empowered to establish a Transfer of Development Rights (TDR) program under the Highlands Act. Specifically, the Highlands Council is to develop the TDR program premised on “regional master plan elements prepared pursuant to sections 11 and 12 of this act, including the resource assessment and the smart growth component . . . .” See N.J.S.A. 13:20-13.a.

As components of the TDR program, the Highlands Council must identify sending zones in the Preservation Area and voluntary receiving zones in the Planning Area. See N.J.S.A. 13:20-13.b and c. Section 13.b requires that:

In consultation with municipal, county, and State entities, the council shall, within 18 months after the date of enactment of this act, and from time to time thereafter as may be appropriate, identify areas within the preservation area that are appropriate as sending zones pursuant to P.L.2004, c.2 (C.40:55D-137 et seq.).

Section 13.c requires that:

In consultation with municipal, county, and State entities, the council shall, within 18 months after the date of enactment of this act, and from time to time thereafter as may be appropriate, identify areas within the planning area that are appropriate for development as voluntary receiving zones pursuant to P.L.2004, c.2 (C.40:55D-137 et seq.) considering the information gathered pursuant to sections 11 and 12 of this act, including but not limited to the information gathered on the transfer of development rights pursuant to paragraph (6) of subsection a. of section 11 of this act.

## **TDR SENDING AND VOLUNTARY RECEIVING ZONE CRITERIA**

To satisfy the legislative mandate that the Highlands Council identify TDR sending zones in the Preservation Area and voluntary TDR receiving zones in the Planning Area within 18 months of the enactment of the Highlands Act, the Highlands Council adopted the use of narrative criteria. These narrative criteria serve two important objectives. First, with respect to sending zones, it ensures that those properties in the Preservation Area that have been affected by the Highlands Act and its implementing regulations will be able to participate in the TDR program. Second, with respect to voluntary receiving zones, it enables municipalities to understand what types of areas in Planning

Area are appropriate to become voluntary receiving areas despite the fact that the information and data to support those determinations is still in development. These two objectives are discussed below.

### ***Sending Zones***

The use of narrative criteria for the identification of lands within the Preservation Area that are appropriate as sending zones enables the Highlands Council to capture all of those properties affected by the Highlands Act and its implementing regulations without having to draw boundaries on a map. In this way, the largest number of properties in the Preservation Area is available to serve as sending zones.

It is important to note that the sending zone criteria serve as the first step in a process to determine whether a particular property is entitled to receive TDR credits. Prior to adoption of the Highlands Region TDR Program, the Highlands Council will have to consider how TDR credits are allocated to a property, how those credits are valued, and how a particular property's TDR credits should be prioritized for acquisition.

In addition to Preservation Area properties, the Highlands Council is also charged with providing assistance to municipalities that wish to create additional sending zones on any properties within the Planning Area portion of their boundaries and which are designated for conservation in the Regional Master Plan. (N.J.S.A. 13:20-13.f) Once these areas are designated by a municipality and certified by the Highlands Council, these properties will also be eligible to participate in the Highlands TDR program as sending zones.

### ***Voluntary Receiving Zones***

As noted above, development of the TDR program is to be premised on “regional master plan elements prepared pursuant to sections 11 and 12 of this act, including the resource assessment and the smart growth component . . . .” See N.J.S.A. 13:20-13.a. The data and information derived from these two elements of the Regional Master Plan are essential to determining which areas in the Planning Area are appropriate as voluntary receiving zones. This data and information includes the location and capacity of existing water supply and wastewater infrastructure, as well as the extent of ecological resources for a given area. Only with such data and information sufficiently developed

will the Highlands Council, in consultation with municipalities and counties, be able to assess the carrying capacity of lands in the Planning Area. “A carrying capacity analysis assesses the ability of a built resource (such as roadways, wastewater treatment plants, municipal swimming pools) or natural resources (such as aquifers, surface water bodies, or coastal estuaries) to absorb population growth and related physical development without degradation. Without such an analysis, a system could fail to perform as designed, or, in the case of a natural resource, diminish in health or productivity.” (Witten, 2001).

To date, staff and the consultants retained by the Highlands Council are still developing the data and information to support the carrying capacity analysis. Without sufficient data and information, a carrying capacity analysis cannot be completed, and identification of voluntary receiving zones premature. It is important to note, however, that the use of narrative criteria aids the Highlands Council, municipalities, and counties in assessing the types of Planning Area lands that may be appropriate as voluntary receiving zones once the data and information are complete.

### ***Criteria Development***

Staff developed the criteria set forth below based upon the provisions of the Highlands Act and State TDR Act, N.J.S.A. 40:55D-137 et seq.

As noted in the above statutory provisions, both Sections 13.b and 13.c of the Highlands Act require that the respective sending zones and voluntary receiving zones be identified “pursuant to P.L.2004, c.2 (C.40:55D-137 et seq.),” the State TDR Act. Section 144 of the State TDR Act sets forth criteria to be used in determining what types of land may serve as sending zones.<sup>1</sup> Similarly, Section 145 of

---

<sup>1</sup> Section 144.a states “sending zones shall be composed predominantly of land having one or more of the following characteristics:

- (1) agricultural land, woodland, floodplain, wetlands, threatened or endangered species habitat, aquifer recharge area, recreation or park land, waterfront, steeply sloped land or other lands on which development activities are restricted or precluded by duly enacted local laws or ordinances or by laws or regulations adopted by federal or state agencies;
- (2) land substantially improved or developed in a manner so as to present a unique and distinctive aesthetic, architectural, or historical point of interest in the municipality;

the Act sets forth criteria to be used in determining what types of land may serve as receiving zones.<sup>2</sup> Staff examined these provisions in light of the objectives of creating a regional TDR program. To extent that these provisions are consistent with the need to establish a regional TDR program and other requirements of the Highlands Act, they are incorporated into the attached narrative criteria.

Based upon staff's recommendation, the Highlands Council adopted the following criteria:

Sending Zone Criteria:

In consultation with municipal, county and State entities, the Highlands Council may identify any land in the Preservation Area as an area appropriate as a TDR sending zone provided that the land could have been developed as of August 9, 2004, based upon municipal zoning and land use regulations then in effect, and State and federal environmental laws and regulations then in effect, but which development is now precluded or severely constrained by the restrictions imposed pursuant to the Highlands Act.

- 
- (3) other improved or unimproved areas that should remain at low densities for reasons of inadequate transportation, sewerage or other infrastructure, or for such other reasons as may be necessary to implement the State Development and Redevelopment Plan . . . and local or regional plans.”

<sup>2</sup> Section 145 states:

a. A receiving zone shall be appropriate and suitable for development and shall be at least sufficient to accommodate all of the development potential of the sending zone, and at all times there shall be a reasonable likelihood that a balance is maintained between sending zone land values and the value of the transferable development potential.

b. The development potential of the receiving zone shall be realistically achievable, considering: (1) the availability of all necessary infrastructure; (2) all of the provisions of the zoning ordinance including those related to density, lot size and bulk requirements; and (3) given local land market conditions as of the date of the adoption of the development transfer ordinance.

c. The development potential of the receiving zone shall be consistent with the criteria established pursuant to subsection b. of section 13 of P.L.2004, c. 2 (C.40:55D-149).

d. All infrastructure necessary to support the development of the receiving zone as set forth in the zoning ordinance shall either exist or be scheduled to be provided so that no development requiring the purchase of transferable development potential shall be unreasonably delayed because the necessary infrastructure will not be available due to any action or inaction by the municipality.

e. No density increases may be achieved in a receiving zone without the use of appropriate instruments of transfer.

The Highlands Council may deem land within the Preservation Area inappropriate as a sending zone where that land is appropriate for redevelopment as either a brownfield site designated by the Department of Environmental Protection or a site at which at least 70% of the area thereof is covered with impervious surface, or such land otherwise qualifies for an exemption or waiver from strict compliance with the standards at N.J.A.C. 7:38.

The above criteria are preliminary and do not preclude the Highlands Council in the future from modifying these criteria or identifying other areas within the Highlands Region as TDR sending zones.

Voluntary Receiving Zone Criteria:

Any area in the Planning Area that is appropriate and suitable for development utilizing existing resource assessment information and exhibits one or more of the following characteristics may be appropriate as a voluntary TDR receiving zone provided that it has been approved by the Highlands Council in consultation with municipal, county and State entities:

- (1) Land with access to multi-modal transportation utilizing the existing transportation network;
- (2) Land that is proximate to existing areas of concentrated development patterns and existing population centers; or
- (3) Land that is underutilized or previously developed.

In addition, a voluntary TDR receiving zone must demonstrate access to available water supply and wastewater infrastructure with the capacity to support increased development, and the proposed zoning must be economically viable and be shown to be able to accommodate an increase in density above that allowed in municipal zoning in place at the time of adoption of a voluntary TDR ordinance. The Highlands Council will work with municipalities and the State Planning Commission to identify centers, designated by the State Planning Commission, as voluntary receiving zones for the transfer of development rights program.

The above criteria are preliminary and do not preclude the Highlands Council in the future from modifying these criteria or identifying other areas within the Highlands Region or within the seven Highlands counties as voluntary TDR receiving zones.

## **REFERENCES**

Witten, J. (2001). Carrying Capacity and the Comprehensive Plan: Establishing and Defending Limits to Growth, *Boston College Environmental Affairs Law Review* 28, 583-608.

### New Jersey Statutes

Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq.

State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 et seq.