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OFFICE OF SMART GROWTH

Transfer of Development Rights Real Estate Market Analysis Report

Proposed Readoption: N.J.A.C. 5:86

Authorized By: Lori Grifa, Commissioner, Department of Community Affairs.
Authority: N.J.S.A. 40:55D-148.c.
Calendar Reference: See Summary below for explanation of exception to calendar requirement.
Proposal Number: PRN 2011-036.

Submit written comments by April 8, 2011 to:

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The agency proposal follows:

Summary

Pursuant to N.J.S.A. 52:14B-5.1c, N.J.A.C. 5:86, the rules regarding creating a Transfer of Development Rights (TDR) Real Estate Market Analysis (REMA) Report, is scheduled to expire on July 2, 2011. The Department has reviewed this chapter and finds that it continues to be necessary and appropriate for successful implementation of the State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 et seq., and is therefore proposing that the rules be readopted without amendment.

Subchapter 1 contains general provisions. It discusses the purpose and scope of the rules, which are to prepare a REMA report as part of development of a State TDR Act compliant TDR program. It describes the applicability of the rules, which is any municipality establishing a TDR program except for those Burlington County municipalities choosing to implement a program pursuant to the Burlington County TDR Demonstration Act. Subchapter 1 also contains definitions.

Subchapter 2 sets forth the prerequisite for preparing a REMA report, which is to prepare a TDR plan element consistent with N.J.S.A. 40:55D-140 and 141 that has been presented at a planning board meeting and made available to the public for comment for at least 10 days. It also sets forth the qualifications necessary for the entity performing the analysis. In addition, it explains the required contents of the report generally as well as specific requirements for analyzing the receiving zone and the sending zone.

Subchapter 2 also provides criteria for assessing the likely viability of the proposed TDR ordinance, including addressing factors such as infrastructure availability and needs, costs associated with providing said infrastructure, the effect of including the proposed number of affordable housing units, the costs associated with any impact fees and costs relating to preparing relevant materials, especially those deemed above and beyond those associated with attaining ordinary development approvals (that is, not associated with TDR and credit purchases, etc.). In addition, Subchapter 2 requires the report include an opinion as to the viability of the TDR program regarding specific aspects of the program, including providing an estimate of the range of transferable development right and TDR credit values that are reasonably likely to result in participation by sending area land owners and an opinion as to whether the transfer ratio considers appropriate factors including land values in the sending zone and varying uses and densities in the receiving zone. Finally, Subchapter 2 sets forth a requirement that the report findings and opinions result in a conclusion that there is a reasonable basis to believe that the proposed program as designed will succeed in transferring development potential from the sending zone to the receiving zone.

Subchapter 3 sets forth procedural requirements for providing advance copies of the REMA report to the Office of Smart Growth, for reviewing of the report at a public hearing of the relevant planning board and for the Office of Smart Growth to incorporate the REMA report analysis into its report to the State Planning Commission.

Subchapter 4 sets forth the standards for performing a REMA when the program involves transfer of credits from the Highlands preservation area.

As the Department has provided a 60-day public comment period on this notice of proposal; this notice is exempted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The State TDR Act, which these rules help implement, provides an innovative way to preserve and protect farmland and other valuable environmental and/or historic resources, which would otherwise be susceptible to undesirable sprawl development, while also providing equity to impacted landowners. Traditional zoning is limited in its ability to protect valuable land-based resources. Land that is downzoned is still developed, often in land consumptive patterns, such as large lot residential subdivisions, which increases greenhouse gas production and can fragment viable endangered species habitat or interrupt contiguous farming operations. In addition, downzoning can risk loss of value to landowners because development potential of the land is often diminished. Some negative impacts of downzoning can be mitigated through clustering requirements. In addition, some land may be acquired as open space using the DEP Green Acres and other funding sources. However, the ability to protect the resources using these tools is limited.

TDR uses the private market to fund acquisition of resources rather than rely exclusively on public funds. In a TDR program, the right to develop is transferred from land in a sending zone to land in a receiving zone. The sending zone development rights are converted to “credits” which may be purchased as a commodity by developers for use in the receiving zone. The credits provide for enhanced development potential there through higher densities.

The social benefits of using this market-driven planning tool are significant. Substantial public benefit is derived when private investment supplements public investment in resource protection. The benefit is shared with the private investor as the program is designed to provide a profit incentive to make the investment in credits worthwhile. In addition, beneficial quality of life impacts may be realized. Directing development into compact areas reduces sprawl, eases traffic congestion, saves the State’s large contiguous areas of open space, reduces energy consumption, improves air and water quality, creates cost savings across a wide range of factors, and enhances a sense of place. Well designed receiving areas are expected to host compact communities that offer easy access to public services and facilities and preferably mass transit and promote walking, bicycling, and other active recreation through well-planned, resource-efficient and beneficial growth and development patterns.

Finally, implementing TDR preserves landowner equity and thus provides a level of fairness that is not available through traditional downzoning. When visioning for a viable TDR program is successful, a community achieves consensus on future development patterns designed to serve all residents. This is a good alternative to pursuit of downzoning which can create a conflict between those seeking to protect a resource and those who own the land hosting the resource.

Economic Impact

There is a great unmet need in New Jersey to preserve important natural, farmland and historic resources. Recent vacant land analysis using 2007 aerial data shows that of the approximately five million acres of the State, a significant amount of undeveloped land remains in Planning Areas 3, 4, 4B, 5 and 5B, as well as the Meadowlands and the Pinelands. Although a substantial amount of this land is undevelopable as wetlands or other regulated feature or appropriate for accommodating future growth, there is still a great deal of land that has been identified in the State Development and Redevelopment Plan (State Plan) where generally growth is discouraged and conservation efforts are encouraged. Although part of this land may already be preserved, it is likely that a substantial amount of this undeveloped land hosts natural resources and farmlands that remain unprotected. These lands are vulnerable to development pressure. The following is a summary of land that was developed according to planning area in the five year period from 2002 through 2007:

Planning Area	Acres
Metropolitan (PA1)	16,340
Suburban (PA2)	28,046
Fringe (PA3)	5,769
Rural (PA4)	13,976
Rural Environmental (PA4b)	9,097
Environmentally Sensitive (PA5)	11,216

Efforts to protect open space and farmland have been ongoing for many years and the State, counties and municipalities remain strongly committed to these efforts. As of November 2009, all 21 counties have collected a dedicated open space tax which may be used to satisfy open space, farmland and historic preservation objectives. There are 237 municipalities that have adopted a dedicated open space tax to help fund preservation of open space, farmland and/or historical resources. In 2009, the Legislature passed the Green Acres, Water Supply and Floodplain Protection and Bond Act which authorized a ballot question that will enable the issuance of $400 million in State general obligation bonds over 10 years for: acquiring and developing lands for recreation and conservation purposes, preserving farmland, and funding historic preservation projects and water supply and floodplain management projects. The question was approved by the voters despite an enduring downturn in the economy and escalating concerns regarding taxes.

The Department of Environmental Protection (DEP) administers the Green Acres Program. Green Acres oversees acquisition of open space for preservation and recreation in concert with the Garden State Preservation Trust. To date, in partnership with public, not-for-profit and private entities, Green Acres has protected almost 650,000 acres of open space and provided hundreds of outdoor recreational facilities in communities around the State. Funds are also available for preservation of lands in floodways as well as for historic preservation.

The State Agriculture Development Committee (SADC), in but not of the Department of Agriculture, administers the Farmland Preservation Program. Land is eligible for the Program if it meets the SADC's minimum eligibility criteria, qualifies for farmland tax assessment and is part of an agricultural development area, an area where the County Agriculture Development Board has determined that agriculture is the preferred use of the land and where farming is viable over the long term. To date, in partnership with public, not-for-profit and private entities, the SADC has protected approximately 188,000 acres of farmland through either fee simple or conservation easement purchases.

Currently there are 17 counties and 43 municipalities participating in the SADC's County and Municipal Planning Incentive Grant programs. The comprehensive farmland preservation plans they developed target the preservation of an additional 200,000 acres of farmland over a 10-year period.

The New Jersey Historic Trust administers the Historic Preservation program which is overseen by the Trustees. The program administers preservation programs including providing planning and construction grants for historic preservation. In the past six years, the need for continued efforts has been reflected in the last three capital grant rounds where requests for preservation funding exceeded the availability three to one. The Trust offers a matching grant program; thus, it is leveraging private investment, creating jobs and employing skilled labor in the preservation of historic resources. Many of the historic sites restored under the Trust's program have become destinations for heritage tourists. As highlighted in the recently adopted Heritage Tourism Plan for New Jersey, June 2010, tourism is New Jersey's third largest industry, where every 160 visitors to the State create one New Jersey job. Development of the Fanwood TDR proposal and supporting documentation was funded in part through a grant from the New Jersey Historic Trust.

Despite these extraordinary efforts to protect vulnerable land, the funding available is only a small fraction of that needed to preserve land through fee simple or conservation easements that has been designated for protection in county, and local Open Space, Recreation and Farmland Conservation plans. Similarly, the funding available for historic preservation is also limited. Accordingly, an alternative mechanism to fill the funding gap is needed.

The New Jersey State TDR Bank Board, in but not of the SADC, was established pursuant to the State TDR Bank Act, N.J.S.A. 4:1C-51 et seq., to support development potential transfers. In coordination with the Office of Smart Growth, within the Department of Community Affairs, the Bank Board has provided a number of planning assistance matching grants to municipalities interested in considering TDR. Since the TDR Act was adopted in 2005, there have been a number of municipalities that investigated using TDR to protect a variety of resources, including historic structures, farmland and natural resources. The New Jersey State TDR Bank Board and the Office of Smart Growth have provided funding in an effort to offset planning costs for development of the TDR program and preparation of the REMA reports. The following is a summary of the status of municipalities that received the planning incentive grants and their progress:

County	Municipality	Visioning Performed and Sending Areas/ Receiving Areas Determined	Plan Endorsement Completed	REMA Report Adopted	TDR Ordinance Adopted
Burlington	Mansfield	No	No	No	No
Burlington	No. Hanover	No	No	No	No
Cumberland	Hopewell	Yes	No	No	No
Gloucester	Woolwich	Yes	Yes	Yes	Yes
Hunterdon	Alexandria	No	No	No	No
Mercer	Robbinsville	No	No	No	No
Ocean	Berkeley	Yes. Under development	Yes	In progress	No
Ocean	Ocean	Yes	Yes	In progress	No
Ocean	Stafford	Yes	Yes	No	No
Salem	Mannington	No	No	No	No
Somerset	Hillsboro	Yes	No	Yes	No
Somerset	Montgomery	No	No	No	No
Union	Fanwood	Yes	No	Suspended	No.

To date only one municipality, Woolwich Township, Gloucester County, has completed the process through adoption of a TDR ordinance. Costs associated with development of the appropriate planning documents, including addressing a builder's remedy lawsuit with respect to the provision of affordable housing and attempting to obtain appropriate wastewater service and related DEP approvals, have exceeded $1 million. These costs are most likely high due to the complexity of the planning issues and the difficulty in sorting out how to obtain the necessary sewer service and highway access. The Woolwich TDR program has the potential to preserve 4,100 acres with an estimated development potential value of more than $75 million dollars.

The rules proposed for readoption are expected to increase the fiscal impact on municipalities that choose to participate in the TDR program because the rules involve significant up-front investment in planning activities. However, the effort to update plans and direct growth into compact centers is expected to result in long-term cost-savings for the State in terms of providing more efficient infrastructure and may inure to the municipality in the long run. See The Costs and Benefits of

Alternative Growth Patterns: The Impact Assessment of the New Jersey State Plan, Center for Urban Policy Research, Rutgers University (September 2000). Full implementation of the State Plan, as opposed to trend (sprawling) development, is expected to result, *inter alia*, in a saving of $1.45 billion in water and sewer costs. See New Jersey State Development and Redevelopment Plan, pages 258-259, State Planning Commission (March 1, 2000). Costs to developers may increase over ordinary costs due to the need to purchase credits. It is anticipated these costs will be offset by savings related to avoiding much of the costs of the development application due to the great deal of up-front planning performed by the municipality for the receiving area(s) with respect to not only enhanced density and use zoning but also in crafting design specifications and resolving infrastructure issues.

Federal Standards Statement

No Federal standards analysis is required because these rules are not being proposed for readoption in compliance with, or in order to implement, any Federal law or rules or any State law referencing any Federal law or rules.

Jobs Impact

Implementation of the TDR process is expected to result in redirecting private investment into designated centers. According to the Impact Assessment of the State Plan prepared by Rutgers University, Center for Urban Policy Research in September 2000 (page 21), if the State Plan is fully implemented as intended "jobs will be created in all locations of the State, but especially in locations with the highest rate of unemployment." Additionally, adopting a TDR program is likely to spur investment in the receiving areas which will bring construction jobs to the area.

Agriculture Industry Impact

The rules, if readopted, are expected to have a positive impact on the agriculture industry in that the rules allow for another planning tool to be available for use by relevant governmental entities for farmland preservation and agricultural industry retention. According to the 2000 Impact Assessment of the State Plan performed by Rutgers University, "the [State] Plan scenario will save more than 50 percent of the agricultural lands that otherwise would be lost [under trend]." In addition, according to a July 2010 report "Changing Landscapes in the Garden State" prepared by Rowan University and Rutgers University, based on data from 1986-2007, "During the 2 decade analysis the Garden State loss substantial amounts of agricultural lands, wetlands and forest lands. Forest loss has been so significant during this time period that by 2007 urban land had surpassed forest land as the most prominent land type covering the state. As of 2007 the Garden State has more acres of subdivisions and shopping centers than it has of upland forests including forests in the Pinelands and all New Jersey's parks and reserves combined."

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required because the rules proposed for readoption do not impose reporting, recordkeeping or other compliance requirements on small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules primarily impact municipalities. While entities that qualify as small businesses could ultimately be affected by adoption of a TDR ordinance, these rules do not impose any requirements on such entities.

Smart Growth Impact

The rules proposed for readoption would have a positive impact on smart growth and the implementation of the State Development and Redevelopment Plan. The rules are a necessary precursor to evaluate the likelihood that a proposed TDR program will be viable. The rules are expected to allow a viable TDR program to advance. If the REMA report concludes that a proposed TDR program is viable, then a TDR program could be developed based on the findings in the report. Implementation of such a TDR program is anticipated to create a new development pattern that conserves important resources (such as farmland and natural resources) in a sending area while concentrating development in compact, less land consumptive (that is, sprawl-type) forms in a receiving area.

Housing Affordability Impact

The rules proposed for readoption provide a cost-benefit analysis of a proposed TDR program to assure it will be successful. If a TDR program is established based on the REMA findings, it is expected that the new development pattern in the receiving areas will provide at least the number of affordable housing that would have otherwise been available (applying growth share to base zoning). For example, once implemented, the Woolwich TDR program, developed based on the findings in its REMA report, will provide substantially more affordable units in the receiving area than would have been made available otherwise. The smaller units that are being made available, for example, single bedroom flat apartments, are necessarily more affordable than the single family homes that would otherwise be built.

Smart Growth Development Impact

The rules proposed for readoption will serve as a precursor and catalyst to establishing a more favorable development pattern consistent with smart growth principles as embodied in the State Development and Redevelopment Plan. Generally, TDR will be most effective in areas outside of smart growth areas where there is the greatest risk of sprawl-type single family home developments interspersed with commercial strip malls that may only be accessed by cars. These areas also host significant natural and farmland resources that are at risk of destruction from fragmentation caused by this unsustainable sprawl-type development. By facilitating development of TDR programs, a more rational and sustainable development pattern will result. This will be defined by designated centers or receiving areas newly designated as growth areas so as to contain the growth in a more beneficial pattern – one that is designed to accommodate a variety of housing types and mixed use development. For example, the Woolwich TDR program, when fully implemented, will include a wide variety of types of housing (as opposed to original single family homes) as well as a mixed use development (as opposed to exclusively residential development) in the receiving area. In addition, if all TDR credits are purchased in the sending area, then 4,000 acres of farmland will be conserved using private investment dollars without the need to use funding from the Green Acres Program.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 5:86.

ENVIRONMENTAL PROTECTION

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OFFICE OF THE COMMISSIONER

General Practice and Procedure

Proposed Readoption with Amendments: N.J.A.C. 7:1D

Authorized By: Bob Martin, Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:1D-1 et seq. and 53:14B-1 et seq.; and Executive Order No. 34 (1976).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

DEP Docket Number: 17-10-12.

Proposal Number: PRN 2011-027.

Submit written comments by April 8, 2011 to:

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The Department of Environmental Protection (Department) requests that commenters submit comments on disk or CD as well as on paper. Submittal of a disk or CD is not a requirement. Submittals on disk or CD must not be access-restricted (locked or read-only) in order to facilitate