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**DEPARTMENT OF COMMUNITY AFFAIRS**

**OFFICE OF SMART GROWTH**

**Transfer of Development Rights Real Estate Market Analysis Rules**

**Adopted New Rule: N.J.A.C. 5:86**

Proposed: July 18, 2005 at 37 N.J.R. 2592

Adopted: December 7, 2005 by Charles Richman, Acting Commissioner, Department of Community Affairs

Filed: December 8, 2005 as R. 2005 d. XXX, **with substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

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**Full text** of the adoption follows (addition to proposal indicated in boldface with asterisks

**\*thus\***; deletion from proposal indicated in brackets with asterisks **\*[thus]\***):

CHAPTER 86

TRANSFER OF DEVELOPMENT RIGHTS REAL ESTATE MARKET ANALYSIS REPORT

SUBCHAPTER 1. GENERAL PROVISIONS

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5:86-1.1 Scope and Purpose

(a) This subchapter sets forth rules for the preparation of the real estate market analysis required prior to the municipal adoption or significant amendment to a transfer of development rights ordinance, pursuant to the State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 et seq.

(b) The rules are established to ensure that the required real estate market analysis portrays an accurate picture of the current and future land market, including the relationship between the development rights anticipated to be generated in a sending zone and the likelihood of their utilization in a receiving zone.

(c) **\*The real estate market analysis constitutes a review of the TDR program set forth by a municipality in the development transfer plan element, utility service plan element, capital improvement program and TDR ordinance pursuant to the State Transfer of Development Rights Act, N.J.S.A. 40:55d-137 et seq. The municipality is to supply the real estate market analyst with the base information set forth in the State TDR Act and this chapter.\*** The real estate market analysis is intended to confirm development rights and density calculations **\*proposed by a municipality in the development transfer plan element and associated documents\*** or otherwise alert a municipality to issues that may challenge **\*[a]\* \*the proposed\*** transfer of development rights **\*[project]\* \*program\*** and to give a municipality the opportunity to address said issues at the early stages of the planning process.

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(d) The real estate market analysis shall not be construed as a real estate appraisal, nor shall it be construed as establishing real estate market value. **\*Any value estimates made by the real estate market analyst are general in nature. Because the value estimates are not site specific, they cannot be used as a basis for future sales. The purpose of the value estimates is solely to provide a basis for determining whether the TDR program and associated transfer ratio(s) proposed by the municipality are viable.\***

#### 5:86-1.2 Applicability

The rules contained in this chapter shall apply to any municipality establishing a transfer of development rights ordinance, as authorized under N.J.S.A 40:55D-137 et seq., except a municipality located in Burlington County choosing to implement a transferable development rights program pursuant to the provisions of N.J.S.A. 40:55D-113 et seq., pursuant to N.J.S.A 40:55D-163. **\*TDR programs in the Pinelands Area adopted pursuant to N.J.A.C. 7:50-5.41 through 5.50 of the Pinelands Comprehensive Management Plan shall be exempt from this chapter.\***

#### 5:86-1.3 Definitions

The following words and terms, as used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

“Base zoning” means either the zoning in place as of one year prior to the municipal enactment of a transfer of development rights ordinance or the zoning in place less than one year prior to

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the municipal enactment of the transfer of development rights ordinance provided that the zoning was adopted by the municipality for purposes of achieving consistency with a master plan that has received initial or advanced plan endorsement from the State Planning Commission pursuant to N.J.A.C. 5:85-7.1.

“Bonus density” means in a receiving zone either the amount by which development can exceed base zoning or the right to develop a use not permitted under the base zoning with the use of TDR credits.

“Development right” means an interest in land, less than fee simple absolute title, which enables the owner to develop the land for any purpose allowed by ordinance.

“Environmentally constrained area” means an area in which development is precluded or significantly limited by existing environmental statutes or regulations.

“Market value restricted” means the value of a property based on its agricultural, environmental or historical resource and its other remaining inherent property rights, but does not allow the owner to develop the land for any other purpose except as expressly authorized by the transfer of development rights ordinance.

“Real estate market analysis” or “market analysis” means the report required pursuant to N.J.A.C. 5:86-2.

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“Receiving zone” means an area or areas designated in a master plan and zoning ordinance, adopted pursuant to N.J.S.A. 40:55D-1 et seq., within which development may be increased, and which is otherwise consistent with the provisions of N.J.S.A 40:55D-145.

“Sending zone” means an area or areas in a master plan and zoning ordinance, adopted pursuant to N.J.S.A. 40:55D-1 et seq., within which development may be restricted and which is otherwise consistent with the provisions of N.J.S.A 40:55D-144.

“TDR credit” means the development right that can be utilized in a receiving zone to achieve the bonus density, the number of TDR credits is determined based on the transfer ratio and the number of transferable development rights being conveyed from the sending zone to the receiving zone.

“TDR zoning” means the zoning authorized in the receiving zone when TDR credits are utilized or in the sending zone once development credits have been relinquished.

**\*“Transfer of development rights (TDR)” means the program set forth in N.J.S.A. 40:55D-137 et seq.\***

“Transferable development right \*[(TDR)]\*” means a unit of development permitted by the base zoning\*, **considering environmentally constrained areas when deemed appropriate by the municipality,\*** which can be transferred from a property in the sending zone.

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“Transfer ratio” means the number of transferable development rights that can be transferred from a sending zone property divided by the \*[additional]\* units of development that can be built on the receiving zone property through the use of TDR credits.

“Unit of development” means \*[an additional]\* **\*a\*** right to build on a particular piece of property as determined by zoning ordinance; which may \*[include]\* **\*be measured by\***, but is not limited to acre, square foot, residential unit, floor **\*area ratio\***, **\*or\*** height\*[, etc]\*.

## SUBCHAPTER 2. MARKET ANALYSIS REPORT

### 5:86-2.1 Report required

(a) Prior to the adoption of or significant amendment to a development transfer ordinance, a real estate market analysis shall be prepared pursuant to this subchapter.

(b) The market analysis shall not be concluded until a draft development transfer plan element, meeting the requirements of N.J.S.A. 40:55D-140 and 141, has been presented at a planning board meeting and made available for public comment for no less than 10 days.

### 5:86-2.2 Qualifications of analyst

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The market analysis shall be performed by a real estate consultant or land economist qualified to conduct economic analyses of the real estate market.

5:86-2.3 Required contents

(a) The market analysis report shall be specific to the proposed transfer of development rights program and shall include at least the following:

1. A summary;
2. General information;
3. An analysis of the receiving zone;
4. An analysis of the sending zone;
5. A discussion of the viability of the transfer of development rights program.

(b) The requirements for each section of the market analysis report are described in N.J.A.C. 5:86-2.4 through 2.8.

5:86-2.4 Summary

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(a) The summary section of the report shall contain at least the following:

1. A letter of transmittal that includes a statement of the value range of development rights expressed as an expected per credit and per unit of development. It shall be clearly stated that the value range is based on current market conditions and may not reflect future values, which can be affected by different market conditions; and

2. A summary of salient facts and important conclusions that shall include any other information that the analyst deems relevant.

#### 5:86-2.5 General information

(a) The general information section of the market analysis report shall contain the following:

1. The purpose of the market analysis;
2. A statement of the rights being valued;
3. A section defining the legal and technical terms used in the report;
4. Any assumptions and limiting conditions;



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5. A section identifying the subject sending and receiving zones by municipal tax map block and lot or other means, as well as the following:

- i. A brief description of the subject zones and their current land uses; and
- ii. A map depicting the sending and receiving zones.

6. Zoning assessment information; and

7. Information detailing community and neighborhood data. This shall include, but not be limited to, the character of the community, land use **\*and property value\*** trends, degree of development pressure in the area and any other information that may affect the market value of a TDR credit.

#### 5:86-2.6 Receiving zone analysis

(a) The receiving zone analysis section of the market analysis report shall contain at least the following:

1. **\*[A determination of the receiving zone's highest and best use based on] \*\*An analysis of the extent and types of development authorized by the base zoning of the receiving zone\* \*and its\* physical characteristics as provided \*for\* in the draft development**

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transfer element prepared pursuant to N.J.S.A. 40:55D-141 \*[,which]\*\*. **Said analysis\*** shall include, but not be limited to;

i. Consideration of the receiving zone's topography, publicly or privately held open space or conservation easements, configuration, existing development patterns, transportation access, environmentally constrained areas and other appropriate characteristics; and

ii. All **\*major\*** subdivision and site plan applications involving land in the receiving zone that were \*[submitted to]\* **\*approved by\*** the appropriate land use board during **\*at least\*** the preceding \*[five-year]\* **\*two-year\*** period \*[including any action taken thereon]\*; and

2. \*[A determination]\* **\*An opinion\***, based on economic modeling, as to whether the density and uses proposed in the receiving zone in the municipality's draft development transfer element can be supported by the market. Said \*[determination]\* **\*opinion\*** shall take into consideration the past and current and **\*anticipated\*** future demand for real property at the zoning proposed for the receiving zone. The population and economic growth estimates and analysis incorporated in the municipality's draft development transfer element shall serve as the basis for the evaluation of future demand.

5:86-2.7 Sending zone analysis

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(a) The sending zone analysis section of the market analysis report shall contain at least the following:

1. A range of values realistically attainable at the given time and market conditions;
2. [A determination of the sending zone's highest and best use based on the existing] **\*An analysis of the extent and types of development authorized by the base\*** zoning of the **\*[property] \*sending zone\*** and its physical characteristics as provided in the draft development transfer element prepared pursuant to N.J.S.A. 40:55D-141\*[, which]\* **\*. Said analysis\*** shall include, but not be limited to;
  - i. Consideration of the sending zone's topography, publicly or privately held open space, configuration, existing development patterns, transportation access, environmentally constrained areas and other appropriate characteristics; and
  - ii. All **\*major\*** subdivision and site plan applications involving land in the sending zone that were **\*[submitted to] approved by\*** the appropriate land use board during **\*at least\*** the preceding **\*[five-year] \*two-year\*** period **\*[including any action taken thereon]\***;
3. An analysis of land values in the sending zone at base zoning, given the physical characteristics set forth in (a)2 above, which shall include the following:

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- i. An evaluation of the past and current demand for real property at the base zoning;  
and
  - ii. A value *\*[conclusion]\*\*estimate\** that identifies a range of market values in the sending zone at base zoning and a discussion of how the *\*[conclusion]\*\*estimate\** was determined. The valuation shall be submitted on a per unit of development basis. The method of valuation shall be chosen at the analyst's discretion taking into consideration the base zoning and the characteristics of *\*[the property in]\** the sending zone; and
4. An analysis of what land values in the sending zone will be after the transferable development rights have been severed *\*[from a property]\** and the TDR deed restriction has been imposed (market value restricted), which shall include the following:
  - i. An evaluation of the proposed TDR deed restrictions and their effect on *\*[the subject]\** property ***\*in the sending zone\****, the *\*[subject property's]\** ***\*sending zone's\**** adaptability for alternative uses that are not in conflict with the TDR deed restrictions and other items which are significant to the valuation of the *\*[property]\** ***\*sending zone\****;

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ii. Consideration of the sending zone's *\*[highest and best]\****authorized density** **and\*** use as encumbered by the TDR deed restrictions provided in the draft development transfer element pursuant to N.J.S.A. 40:55D-141. The *\*[highest and best use]\** analysis shall consider the following:

(1) The ability to establish the use consistent with applicable statutes, regulations and ordinances;

(2) The physical possibility of establishing the use;

(3) The probability or likelihood of establishing the use; and

(4) The economic feasibility of establishing the use; and

iii. A value *\*[conclusion]\****estimate\*** that identifies a range of market values of the lands in the sending zone once the required deed restriction is imposed and a discussion of how the *\*[conclusion]\****estimate\*** was determined. The method of valuation shall be chosen at the analyst's discretion taking into consideration the characteristics of *\*[the property in]\** the sending zone.

5:86-2.8 Viability of transfer of development rights program

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(a) The analyst shall provide a value **\*[conclusion]\*\*estimate\*** that identifies a range of raw land value a developer is willing to pay per unit of development in the receiving zone, and discusses how the **\*[conclusion]\*\*estimate\*** was determined, including a demonstration that at least the following factors have been taken into consideration:

1. The infrastructure needs in the proposed receiving zone identified in the Capital Improvement Program and Utility Service Plan developed pursuant to N.J.S.A. 40:55D-140 and the effect of said needs on development potential in the receiving zone. The discussion shall, at a minimum, include:

i. The availability and need for infrastructure; and

ii. The cost of providing needed infrastructure, including consideration of who will bear the cost of providing said infrastructure;

2. The costs associated with demolition, reconstruction or reuse of the existing built environment, if the receiving zone includes areas that could be redeveloped or brownfields;

3. The effect of including the number of affordable housing units proposed in the draft development transfer element in the receiving area; **\*[and]\***

4. The costs associated with any impact fees that the municipality has established pursuant to statute in the receiving zone **\*[.]\*\*; and\***

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**\*5. The costs associated with the site plan, subdivision, and TDR credit utilization processes set forth in the municipality's development transfer plan element, if said costs are deemed to be above and beyond typical costs associated with attaining development approvals.\***

(b) An analysis of sending zone transferable development rights and receiving zone TDR credit values shall include at least the following:

1. A range of values realistically attainable for the sale of transferable development rights at the \*[given]\* **\*current\*** time and market conditions;

2. An estimated range of transferable development right values, which is derived from the difference between the base zoning market value and the market value restricted and reported as a per unit of development value. If available, past comparable sales may also be used in determining a range of transferable development right values;

3. An estimated range of TDR credit values based on either a conversion of the above per unit of development right value and the transfer ratio or past comparable sales of credits.

4. A discussion of the rights represented by the value \*[conclusion]\*\***estimates\*** and resultant changes in the \*[highest and best]\* **\*authorized density and\*** use of the unrestricted versus the restricted property;

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5. A discussion of the market conditions that would cause deviation from the estimated average TDR credit value; and

6. A summary of major points, which support the transferable development rights and TDR credit value ranges.

(c) Given the analyses of the receiving and sending zones conducted pursuant to N.J.A.C. 5:86-2.6 and 2.7, the report shall address the viability of the transfer of development rights program and shall include, but not be limited to, the following:

1. \*[A determination]\* **\*An opinion\*** as to whether the receiving zone can accommodate the number of TDR credits that will be generated based on the number of transferable development rights allocated in the sending zone and the transfer ratio;

2. \*[A determination]\* **\*An opinion\*** as to whether existing or **\*anticipated\*** future market demand supports the proposed use and density in the receiving zone;

3. \*[A determination]\* **\*An opinion\*** as to whether the market in the receiving zone can bear a value for the TDR credits that \*[will]\* **\*“is likely to”\*** provide most sending zone property owners with the market value of the transferable development rights;



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4. \*[A determination]\* **\*An opinion\*** as to whether the purchase of all of the TDR credits that will be generated from the sending zone is economically feasible given the **\*past, current and anticipated future\*** market demand for the density and use proposed in the receiving zone;

5. \*[A determination]\* **\*An opinion\*** of whether the estimated range of transferable development right and TDR credit values\*, **taking into consideration any fees associated with the transfer process set forth in the municipality's development transfer plan element,\*** are reasonably likely to result in participation by sending area landowners;

6. \*[A determination]\* **\*An opinion\*** as to whether the \*[proposed]\* transfer ratio\*,**set forth in the municipality's development transfer element,\*** supports both the sending and receiving zones, including;

i. Consideration of what land value a TDR credit represents in the sending zone;

ii. Consideration of the varying uses and densities that can be achieved by using TDR credits in the receiving zone; and

iii. If the transfer of development rights program includes multiple municipalities, differences in land values among the participating municipalities shall be reflected in the \*[proposed]\* transfer ratio\***set forth in the municipality's development transfer element\*** and shall be a consideration in the market analysis report; and

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7. An analysis of whether the proposed sending and receiving zones are of an adequate size and distribution of ownership to prevent either zone from having an unfair market advantage.

(d) For a transfer of development rights program to be deemed viable, the results of the real estate market analysis shall ensure that there is a reasonable basis for concluding that the proposed system will succeed in transferring development potential from the sending zone to the receiving zone. If said conclusion cannot be made, the community shall investigate modifications to the transfer of development rights program so that will be successful in transferring development potential.

### SUBCHAPTER 3. REVIEW OF MARKET ANALYSIS REPORT

#### 5:86-3.1 Municipal obligation

Pursuant to N.J.S.A. 40:55D-148, the planning board shall hold a hearing on the real estate market analysis prior to the meeting at which the development transfer ordinance receives first reading.

#### 5:86-3.2 Office of Smart Growth

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(a) Two paper copies and one electronic copy of the final market analysis report shall be sent to the Office of Smart Growth no later than 10 days after its completion, and at least 15 days prior to planning board hearing required pursuant to N.J.S.A. 40:55D-148.

(b) The Office of Smart Growth shall be officially notified of the planning board hearing required pursuant to N.J.S.A. 40:55D-148 at least 15 days prior to said hearing.

(c) The Office of Smart Growth's evaluation of the proposed TDR program will consider the findings of the real estate market analysis report, and the results of said analysis will be incorporated into its report to the State Planning Commission regarding the municipality's petition for plan endorsement pursuant to N.J.S.A. 40:55D-140(e) and N.J.A.C. 5:85-7.

#### 5:86-3.3 Pinelands Commission

(a) For any municipality located in whole or in part in the Pinelands Area, two paper copies and one electronic copy of the final market analysis report shall be sent to the Pinelands Commission no later than 10 days after its completion, and at least 15 days prior to planning board hearing required pursuant to N.J.S.A. 40:55D-148.

(b) For any municipality located in whole or in part in the Pinelands Area, the Pinelands Commission shall be officially notified of the planning board hearing required pursuant to N.J.S.A. 40:55D-148 at least 15 days prior to said hearing.

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#### SUBCHAPTER 4. REAL ESTATE MARKET ANALYSIS IN THE HIGHLANDS

##### 5:86-4.1 Applicability

(a) If the transfer program involves credits from the Highlands preservation area and is established prior to the Highlands Council creating a Regional TDR Program pursuant to N.J.S.A. 13:20-13, the initial value of the Highlands preservation area development rights shall be set considering the Department of Environmental Protection rules in effect the day before the date of enactment of the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq.

(b) If the transfer program involves TDR credits from the Highlands preservation area and is established after the Highlands Council creates a Regional TDR Program pursuant to N.J.S.A. 13:20-13, the initial value of the Highlands preservation area development rights shall be the value set by the Council.

**\*(c) If the municipality is proposing a TDR program that is voluntarily participating in the Highlands Regional TDR Program and is established after the Highlands Council creates a Regional TDR Program pursuant to N.J.S.A. 13:20-13, the initial value of the Highlands Region transferable development rights shall be the value set by the Council.\***