

Noncontiguous Parcel Clustering:
A New Technique for Planned
Density Transfers

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SUMMARY

Noncontiguous parcel clustering is a new planning technique under New Jersey's Municipal Land Use Law that allows one parcel to be preserved while its density is transferred and developed instead on a different, noncontiguous parcel.

This new technique, first authorized in early 1996, allows a municipality to approve "planned developments" consisting of two different parcels, where the "sending area" parcel is preserved, for example, as farmland or open space, and the "receiving area" parcel is developed at a higher than otherwise normally permitted density. The development rights from the "sending area" parcel are transferred to and combined with the existing development rights at the "receiving area" parcel. The different parcels may be miles apart.

Some New Jersey municipalities have already adopted ordinances using this new technique to preserve farmland and open space, and acted to preserve specific parcels and transfer density. Three critical players must reach agreements for a density transfer based on this technique to take place: the municipality, landowners, and the developer.

Noncontiguous parcel clustering has some potential to assist municipalities in implementing the *New Jersey State Development and Redevelopment Plan*, by protecting the "Environs" of "Centers." However, this voluntary, market-driven technique is a tool, not a panacea. To be effective in using this technique, municipalities should take three key steps:

- Plan seriously and systematically for density transfers
- Offer realistic incentives for density transfers, especially the amount of transferable density and available infrastructure to support higher density development
- Build trust and mutual respect among the players in density transfers

Definitions of Types of Density Transfers

Cluster Development	A planning technique that reduces the lot area and bulk requirements in a development, provided there is no increase in the number of lots otherwise permitted or no increase in the overall density, and provided the remaining land is preserved as open space.
Lot Averaging	A planning technique that permits some lots in a subdivision to be undersized, provided the same number of lots are oversized by an equal or greater land area.
Noncontiguous Parcel Clustering	A planning technique that allows one parcel to be preserved while its development rights are transferred to a different, noncontiguous parcel which is developed at a higher density than otherwise permitted, provided both parcels are considered together as a single cluster development.
Transfer of Development Credits	Similar to Transfer of Development Rights, but typically a voluntary density transfer program.
Transfer of Development Rights	A program that severs the right to develop from land in one zoning district and requires (or allows) the transfer of that right to develop to land in another zoning district.

Note: Based on Harvey S. Moskowitz and Carl G. Lindbloom. *The New Illustrated Book of Development Definitions*. New Brunswick, N.J., Center for Urban Policy Research, 1993.

Implementing A Density Transfer By Noncontiguous Parcel Clustering: Key Actions Required

1. Identify the parcel to be preserved (“sending area”).
2. Identify the “receiving area” parcel to be developed, i.e., where the density of the “sending area” parcel is to be transferred.
3. Establish the transferable density or development rights of the “sending area” parcel, i.e., the allowable density that may be transferred to the “receiving area” parcel.
4. Reach purchase agreements among the landowners of the “sending area” parcel, the “receiving area” parcel, and the developer of the “receiving area” parcel.
5. Prepare and review a concept plan for development of the “receiving area” parcel.
6. Establish the preserved use of the “sending area” parcel once its development rights are transferred.
7. Provide sufficient infrastructure (water, sewer, roads, etc.) for the “receiving area” parcel to be developed at the higher density that includes the transferred developed rights.
8. Propose and adopt a municipal planned development ordinance that allows density transfers between the identified “sending area” parcel and the identified “receiving area” parcel.
9. Review and approve a single development application for the “sending area” parcel and the “receiving area” parcels.
10. Deed restrict the “sending area” parcel to its preserved use.

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Noncontiguous Parcel Clustering: A New Technique for Planned Density Transfers

A. Introduction

For more than two decades, New Jersey local government officials, planners, land use lawyers, the courts, landowners, developers, and legislators have debated vigorously, pioneered cautiously, and eyed longingly programs to achieve equitable land use regulation that protects specified land areas by transferring their authorized density to other specified areas where higher density development is encouraged. Transfer of development rights, or “TDR,” is the general term for these density transfer programs, typically intended to preserve farmland, open space, and environmentally sensitive lands, as well as historic places.

Since early 1996, New Jersey law has allowed the transfer of residential density and the intensity of nonresidential development from one parcel to another parcel, by the new technique of noncontiguous parcel clustering in a planned development. This report examines and explains this new, inelegantly named, but conceptually simple, technique of density and intensity transfers, as authorized by 1996 amendments to New Jersey’s Municipal Land Use Law.

This report begins by sketching the principles of density transfer programs and a brief history of efforts in New Jersey to establish and implement programs to transfer development rights. After outlining the basics of this new technique offered to municipalities, this report analyzes the few initial experiences in 1996-1997 with this density transfer technique. An important focus of this report is the applicability of this planning technique in implementing *The New Jersey State Development and Redevelopment Plan*, particularly in planning “Centers,” protecting their “environs,” and redeveloping developed areas. As at least one of the parcels in a density transfer typically requires higher density development, this report looks at the

infrastructure requirements of this density transfer technique. Finally, this brief report identifies the critical players in density transfers and the actions they need to take to make this technique work effectively, before offering some conclusions on the limitations and opportunities of this new density transfer technique.

B. Background: Principles and History of Density Transfer Techniques in New Jersey

The Principles of Density Transfer

Legal and planning principles form the twin foundations of density transfer techniques. The well-established legal principle is that ownership of land includes ownership of a bundle of different rights, including the right to the existing use of the land, for example for farming, as well as the right to develop the land, for example for a residential subdivision, to the extent allowed by existing land use and environmental law, particularly municipal zoning. These two rights can be separated. The planning principle is that some locations are better places for development according to community and regional planning goals, while other places should be protected from development and preserved, also according to community and regional planning goals.

Density transfer techniques provide a mechanism to preserve some parcels (the preservation zone or “sending area”) by transferring density, or the rights to develop, to other parcels (the transfer zone or “receiving area”), as shown in Figure 1. As part of this transaction, development of the parcel whose rights to develop are transferred are also then permanently restricted by filing a deed restriction or conservation easement. The right to the existing, undeveloped use of the land remains untouched.

Figure 1: Sketch of Concept of Transferring “Rights to Develop”

Graphic by Roger K. Lewis, reprinted with permission of MSM Regional Council, Inc., from *The Growth Management Handbook*, 1989

The rights to develop associated with a parcel may be sold and transferred under a density transfer program, providing a mechanism for landowners in a sending area to realize the equity in the development potential of their land, without selling or developing the land. Consequently, density transfer programs can provide economic incentives and mechanisms for preserving designated sending areas, without diminishing the property rights of landowners.

Early Transfer of Development Rights and Transfer of Development Credits Programs

Both mandatory and voluntary density transfer programs have been pursued in New Jersey since the early 1970s, when a research team at Rutgers University-Cook College developed specific proposals for TDR programs, drafted enabling legislation, and explored the TDR concept in a pilot project in South Brunswick Township (Middlesex County). This Rutgers team envisioned TDR as a mechanism to preserve large tracts of farmland and open space in an increasingly suburbanizing state and withstand a “taking” legal challenge by providing a means of compensating owners of preserved land.

Beginning in the mid 1970’s, several municipalities in New Jersey adopted innovative ordinances authorizing voluntary density transfers, described as “transfer of development credits,” or “TDC,” programs, specifically Chesterfield (Burlington County), Colts Neck (Monmouth County), East Amwell (Hunterdon County), Freehold Township (Monmouth County), Hillsborough (Somerset County), Lawrence (Mercer County), and Mount Olive (Morris County). The preservation of farmland and open space was the community planning goal that prompted most of these municipal initiatives, which carefully avoided using the term “development rights,” as specific TDR enabling legislation had not yet been enacted.

The permitted residential density in the sending areas under these TDC ordinances typically ranged from one dwelling unit per three acres to one dwelling unit per 10 acres. In more than two decades, less than a handful of density transfers have taken place in these municipalities, with isolated transactions reported only in Hillsborough, where a township tree farm was established through a transfer and in Mount Olive, where a 60 acre Township park was created by a density transfer from noncontiguous parcels. Some of these early density transfer ordinances were challenged and invalidated. Others were simply ignored by landowners and developers.

East Windsor (Mercer County) adopted a TDR ordinance in the early 1980's as a development option to preserve farmland, but was challenged and its ordinance invalidated, as the courts ruled in 1984 that TDR was not authorized under the Municipal Land Use Law.¹

Pinelands Development Credits Program

Meanwhile, the Pinelands Protection Act, enacted in 1979, explicitly authorized “transfer of development rights” as a technique to be used, together with zoning, land use regulation, and other techniques, to protect and manage the nearly one million acres of New Jersey Pinelands.² The Pinelands Commission then developed and adopted in 1980 a Pinelands Development Credits Program, as an integral component of the Pinelands *Comprehensive Management Program*.³ To be certified by the Pinelands Commission, municipal master plans and land use ordinances must implement the Pinelands Development Credits Program. This program established Pinelands Development Credits in different ratios for different sending areas. For example, forested uplands in the core of the Pinelands are allocated one Pinelands Development Credit per 39 acres, while agricultural lands are allocated one credit per 19.5 acres.

Each Pinelands Development Credit transfers the right to build four houses as a density bonus over the assigned based density in residential zones in designated receiving areas (“Regional Growth Areas”) in the Pinelands. These credits may be sold, purchased, donated, held, or redeemed, either by private landowners and developers, or by two specialized public agencies chartered and capitalized to facilitate implementation of this

¹ *Centex Homes v. Township of East Windsor*, unpublished opinion of the Appellate Division, Superior Court, rendered April 13, 1984 (Docket No. A-5144-82T1).

² *N.J.S.A. 13:18A-8.d.(1)*.

³ *N.J.A.C. 7:50-5.41 through 5.47*.

program. During the program's first fifteen years, 13,364 acres of land in the Pinelands were permanently protected by deed restrictions by severing 1,556 development rights. In the same period, developers redeemed 483 transferred development rights, sufficient for 483 houses, for density bonuses for residential development projects in the several Regional Growth Areas in the Pinelands.

Burlington County Demonstration Development Transfer Programs

In 1989, the next legislative step on density transfers took place, with enactment of the Burlington County Transfer of Development Rights Act.⁴ This amendment to the Municipal Land Use Law authorized municipal development transfer programs in Burlington County only, and only after completion of prescribed plans and detailed studies and approval of the proposed municipal development transfer ordinance by the Burlington County Planning Board. Before authorizing development transfer programs statewide, the Legislature found it necessary to demonstrate the feasibility of this technique on a pilot basis in an area with experience with development easement purchase and transfer.

To date, only one municipal development transfer program has been approved and is in operation under this 1989 law, the Lumberton Township Voluntary Transfer of Development Rights Program, approved in 1996 after three years of effort. Its stated purpose is to conserve the rural, predominantly agricultural resources of Lumberton Township. The base zoning in Lumberton's sending area was one dwelling unit per two acres of land. The permitted densities in the receiving areas range from 0.5 units per acre to 4.0 units per acre.

Two other municipalities in Burlington County are pursuing development transfer programs under this law. Beginning in 1989, Chesterfield has been developing a new density transfer program to preserve farmland in its agricultural zone, whose current base zoning is

one dwelling unit per three acres of land. Springfield Township is developing a mandatory TDR program to protect its farmland; its current base zoning in the potential sending area is also one dwelling unit per three acres of land. Mansfield Township may pursue a density transfer program in the near future.

The Burlington County Transfer of Development Rights Act authorizes both voluntary and mandatory municipal programs to transfer development potential, i.e., the allowable residential density or nonresidential intensity, from a parcel in a sending zone to a parcel in a receiving zone. This enabling legislation does, however, require that various detailed prerequisite studies be performed, including:

- an estimate of anticipated population and economic growth in the municipality for the next 10 years,
- an identification and description of all prospective sending and receiving areas,
- an estimate of the development potential of the prospective sending and receiving areas,
- an estimate of the typical land values of the proposed sending zone,
- an estimate of existing and proposed infrastructure of the proposed receiving zone, a presentation of the procedure and method for issuing the legal instruments necessary to convey the development potential from the sending zone to the receiving zone, and
- an infrastructure plan for the receiving zone.

The law also requires that the municipal master plan and development regulations be amended to provide explicit planning objectives and design standards for the receiving zone, so that development applications with transferred development potential may be expedited. These detailed requirements for estimates and plans, intended to insure the economic feasibility of the density transfer programs, may somewhat account for the long gestation period for these few municipal initiatives in Burlington County.

⁴ L. 1989, c. 86; *N.J.S.A.* 40:55D-113 through -129.

Municipal Initiatives in Density Transfers in the 1980's and 1990's

In addition to the formal Pinelands and Burlington County municipal density transfer programs, several municipalities approved density transfers between noncontiguous parcels in the late 1980's and through the 1990's to order to attain diverse municipal objectives. While some observers might question their legal authority, these creative municipal experiences provide insights for establishing and implementing density transfer programs.

In West Windsor Township (Mercer County), a 125 acre private golf course, slated for residential development, was preserved as privately-owned, publicly-accessible open space by the conversion and transfer of its residential development rights into more intensive office development rights along the Route 1 corridor. Settlement of litigation over allegedly lapsed approvals for the residential subdivision provided the mechanism to approve the transfer.

In Hainesport (Burlington County), the planning board approved a single development application that transferred the allowable density from a farm, granted increased density to a nearby residential development, and preserved the farm through a deed restriction.

In Weymouth (Atlantic County), the Weymouth Township Homestead Exchange Program provides a mechanism to transfer the development rights from isolated or environmentally sensitive parcels to more suitable parcels that contain less than the 10 acre minimum required lot area for a single family detached dwelling unit. With a transfer of density, a house may be built on a five acre lot, provided that a deed restriction precludes development of a separate five acre parcel. The base zoning in the isolated or environmentally sensitive areas of Weymouth, i.e., the sending area, is either one unit per 20 acres or one unit per 25 acres. Under this program, the property tax assessments for the noncontiguous, deed restricted parcel and the land to be developed are combined. Since the mid 1980's, more than 15 homestead exchanges have taken place scattered about Weymouth

under this density transfer program, which was adopted by ordinance and certified by the Pinelands Commission.

In Brick Township (Ocean County), the municipal housing element and fair share plan provided an opportunity for a developer to transfer density between two noncontiguous parcels, resulting in one parcel zoned for single family housing and the second zoned for multifamily housing with a density bonus. A developer's agreement with the municipality and certification of the plan by the New Jersey Council on Affordable Housing were the approval mechanisms for this density transfer rezoning.

Noncontiguous Parcel Clustering in the Pinelands in the 1990's

In addition to the system of Pinelands Development Credits, other density transfers have been proposed in the Pinelands, to achieve the natural resource protection objectives of the Pinelands Protection Act. For example, in 1996 the Pinelands Commission authorized a pilot program of "off-site clustering" in Galloway Township and Egg Harbor City (Atlantic County) to test whether the existing developed corridor along the White Horse Pike (Route 30), an area with a long-standing commercial vineyard and near access to sewer infrastructure, could be developed more intensively than otherwise permitted, through the permanent protection of off-site forest and agricultural lands. The pilot program established specific relationships between proposed land uses and the land area required to be protected, e.g. 0.24 acre preserved for each 100 square feet of planned development and 1.9 acres preserved for each acre devoted to golf course or other outdoor recreation use.

With the assistance of a neutral nonprofit intermediary, The Nature Conservancy, a bold transfer between municipalities in two different counties of the right to build 350 units in exchange for the protection of 4,200 acres of land is nearing final implementation in the Pinelands. The development potential of the sending area, calculated at 350 units for a vast

expanse of forest threatened by development in Berkeley Township (Ocean County) is to be transferred to Southampton Township (Burlington County) to enable construction of 350 additional units to complete a decades-old senior citizen community at a already disturbed building site with adequate existing infrastructure. The sending area parcel will be permanently protecting and managed as additions to a State park and a State wildlife management area. The noncontiguous parcels are almost 20 miles apart!

The Ogden Amendment to the Municipal Land Use Law, 1995-1996

On May 2, 1994, former Assemblywoman Maureen Ogden (Millburn, Essex County) introduced a concise bill in the General Assembly, A-1684. The bill changed the definition of and standards governing “planned developments” to allow clustering among noncontiguous parcels under the Municipal Land Use Law.

Viewed by some observers as a simpler alternative to the more complex approach to density transfers established by the Burlington County Transfer of Development Rights Act, the bill eventually passed quietly a year and a half later, without amendments in the legislative process. The Governor approved the legislation on January 5, 1996. Appendix A reproduces the law as enacted, which took effect immediately.

C. The Basics of the New Technique under the Municipal Land Use Law

Noncontiguous parcel clustering has twelve key elements as a density transfer technique, as authorized for all New Jersey municipalities by the 1996 amendments to the Municipal Land Use Law.

First, the law is permissive. The decision whether to use this technique is up to the discretion of a municipality.

Second, municipal zoning ordinance standards governing the type and density, or intensity, of land use in districts for planned developments may provide for the clustering of development between contiguous and noncontiguous parcels.⁵ In its simplest terms, development, either residential or nonresidential, or both, may be concentrated on one parcel and the cluster's open space may be concentrated on a separate, noncontiguous parcel.

Third, the law allows both contiguous and noncontiguous lands to count towards the minimum land area required for all four types of "planned developments" previously authorized by the Municipal Land Use Law.⁶ This means that a residential planned development must have a minimum of 5 acres or more of contiguous or noncontiguous land, while a planned unit development, which includes nonresidential as well as residential uses, must have a minimum of 10 acres or more of contiguous or noncontiguous land.

Fourth, the law now allows a "residential cluster" in a planned development to be developed as a contiguous or a noncontiguous area. This means an area with dwelling units and required common or public open space may be developed with housing on one parcel and its common or public open space on another parcel.

Fifth, the type and density, or intensity, of land use in a planned development may vary, based on the amount, location, and proposed use of the open space, which need not be "common" open space.

Sixth, some clusters in a planned development may have a different density, or intensity of use, from the overall density, or intensity of use, established for an entire planned development.

⁵ *N.J.S.A. 40:55D-65.c.*

⁶ The Municipal Land Use Law authorizes a "planned commercial development," a "planned industrial development," a "planned unit development," and a "planned unit residential development." *N.J.S.A. 40:55D-12.*

Seventh, noncontiguous parcel clustering may be used with planned developments of any scale that meets the statutory requirements, for example, from 5 acres for a simple residential cluster to more than 100 acres for a more complex project with a multi-year build out, while a planned commercial development need only meet the minimum land area required by municipal ordinance.

Eighth, planned developments proposed with noncontiguous parcel clustering must still conform with the long-standing requirements of the Municipal Land Use Law for planned developments, including the five findings that a planning board is required by statute to make prior to approval of a planned development application.⁷

Ninth, large planned developments of 100+ acres proposed with noncontiguous parcel clustering may utilize the general development plan provisions of the Municipal Land Use Law to gain the vested right to seek preliminary and final subdivision/site plan approvals consistent with the plan for sections of the development for up to 20 years following the initial plan approval.⁸

Tenth, municipalities seeking to utilize the noncontiguous parcel clustering technique should identify areas for planned developments with noncontiguous clusters in the land use elements of their master plans and must provide districts for such planned developments in their zoning ordinances.

Eleventh, to avoid ambiguity, the planned development density transfer provisions of a zoning ordinance should specify the mechanism for implementing and recording the density transfer from the sending parcel, such as a deed restriction or conservation easement for the common or public open space that is to be protected through the transfer.

⁷ *N.J.S.A. 40:55D-45.*

⁸ *N.J.S.A. 40:55D-45.1 through .8.*

Twelfth, noncontiguous parcel clustering does not require the detailed planning studies, infrastructure plans, population and economic growth estimates, and land value estimates required for the experimental municipal density transfer programs established under the Burlington County Transfer of Development Rights Act. Rather, this new statewide density transfer technique requires basically a “deal,” an agreement among three parties:

1. A landowner willing to sell and transfer development rights from a sending parcel,
2. A landowner-developer willing to buy and use those development rights to develop a receiving parcel at higher than the otherwise permitted density or intensity of use, and
3. A municipality willing to preserve the sending parcel and accept its deed restriction, and allow the receiving parcel to be developed more intensively than otherwise permitted.

Such an agreement would typically take the form of a purchase agreement for the development rights, a planned development density transfer ordinance in place, and a perceived willingness of a municipal planning board to approve a development application confirming the density transfer and approved the development of the receiving area parcel with the transferred density. Without such an agreement, no noncontiguous parcel clustering will take place.

D. Initial Experiences with the New Technique, 1996-1997

Several municipalities have pioneered and adopted planned development ordinances incorporating the noncontiguous parcel clustering technique now authorized under the Municipal Land Use Law. Others have expressed interest in the technique, while most have

ignored or are unaware of the concept. These initial experiences offer insights on how this new technique might best be used in other municipalities.

The Borough of Roosevelt (Monmouth County), a small, historic 20th century planned community, adopted a Planned Community Development ordinance in 1996 in an effort to concentrate new development on small lots and preserve the farmland and open space that defines the character of the northern environs of this compact settlement. The ordinance, adopted intentionally in light of the noncontiguous parcel clustering amendments to the Municipal Land Use Law, creates incentives for a developer to reach purchase agreements with multiple landowners in a 500 acre expanse of farmland and wood lands, long zoned for one dwelling unit per 10 acres, in order to be able to develop a specified number of one-quarter acre lots, the prevailing pattern in the community, as a limited extension of a designated part of the community's built-up area. The transfer of density allows, in effect, a 2½ times increase in the otherwise overall allowable number of dwelling units in the sending area, while concentrating development in a designated receiving area, and preserving more than 80% of the farmland and open space the surrounds the community. To date, one developer has begun discussing a density transfer development proposal with the local planning board.

Washington Township (Mercer County) adopted in early 1997 its Town Center Zoning and Design Regulations, which seek to create a pedestrian-oriented, mixed-use, neo-traditional Town Center on a 330 acre area of mostly farmland around the existing village of Robbinsville, where Routes 33 and 130 intersect. The ordinance includes a density transfer provision that allows a doubling of density in specified receiving areas, where the base zoning allows development of houses on small lots on only one side of a street. With density transfers from a 300 acre sending area of farmland, where the existing zoning allows one unit

per two acres, a developer may build small lot houses on both sides of streets in the specified receiving area neighborhoods of the Town Center. A developer currently has an option on the receiving area and is seeking to acquire development rights in the sending area.

Plainsboro Township (Middlesex County) in 1997 amended its Rural Residential Planned Village Clusters ordinance specifically to permit a density transfer from noncontiguous properties. Under the specific proposal that prompted the ordinance, 100 acres of land near a former sand quarry and existing 550 acre public open space preserve will be preserved by transferring its allowable density of 30 houses to another area of the township where the houses will be developed on a 28 acre parcel. It is important to note that the receiving area for this transfer has a zoned low base density of one unit per 6 acres, which makes this an unusual transfer. A single land owner owned both the sending area parcel and the receiving area, and had purchase agreements with a builder eager to purchase and transfer the development rights.

Other municipalities have explored, but not yet adopted, density transfer programs based upon the newly authorized technique of noncontiguous parcel clustering. For example, East Amwell Township (Hunterdon County) suggests, in its 1997 draft *Land Use Plan Amendment for the Amwell Valley District*, that this technique be used to move non-farm development away from the township's agricultural area. Chesterfield Township (Burlington County) cites this new density transfer technique in its 1997 draft *Master Plan*, as part of the legal authority, together with the Burlington County Transfer of Development Rights Act, for its proposed voluntary "state-of-the-art agriculture preservation program" using transfers of development credits.

A detailed proposal, *PLAN for the ENVIRONS of a center*, using this technique has been developed for Woolwich Township (Gloucester County), a farming community zoned

largely for one and one-half acre lots which lies in the path of regional suburban growth and surrounds the compact separate municipality of Swedesboro. The proposal relies on density transfers to preserve farmland and open space, provide more housing type options, create real communities, and provide farmers with increased opportunities to sell their land. Specifically, the proposal calls for a Rural Development Overlay District amendment to the zoning ordinance, to permit residential development on smaller lots and provide 15%-30% more bonus lots for compact developments in the form of villages and hamlets. Each property owner would be allocated "Density Credits" based on a build-out analysis of the underlying zoning plus the incentive bonus lots. To encourage landowners to participate in this program, the proposal calls for "development compacts" among neighboring farmer-landowners to be established, with further bonus density credits as incentives for adjacent landowners to cooperate, sell, and transfer their pooled, allocated density credits to developers of compact villages.

In West Milford (Passaic County), the Regional Plan Association recommended in 1996 that noncontiguous parcel clustering be used to achieve long-term protection for regionally-important reservoir watershed lands, a type of open space "Environs" located outside of "Centers." The Regional Plan Association demonstration project suggested that significant development credits from a 2,300 acre watershed parcel, owned by the Newark Watershed Conservation & Development Corporation, with the potential for 700 houses to be developed, could be transferred to an expanded, redesigned West Milford Town Center, and establish a replicable model for open space protection and centered, compact development in the New Jersey Highlands. A "Center" designation pending is pending at the State Planning Commission for the proposed Town Center, but without the density transfer component.

Finally, planners, lawyers, and their developer and public clients have considered explicitly using the new noncontiguous parcel clustering for specific transactions to preserve and develop particular parcels, in a variety of municipalities, from Florence (Burlington County) to South Brunswick (Middlesex County) and Union Township (Hunterdon County). Some of these initial proposed density transfers have failed to take place for reasons of timing, trust, economics, and aversion to the higher density proposed in the receiving area.

For example, in Union Township a builder negotiated purchase agreements for two noncontiguous parcels, developed a density transfer concept, and presented the concept informally to the municipal planning board during the 120 day “due diligence” period under the purchase agreements. For the sending area parcel to be preserved as farmland, the developer proposed a 161 acre farm with one house and an allowable transferable density of about 62 lots. For the receiving area, the developer proposed a 83 parcel with existing development approvals for 46 houses on one-half acre lots and significant on-site open space. The developer proposed to decrease the lot size to 12,000 square feet ($\frac{1}{4}$ acre) lots, increase the total number of lots to about 108 lots, using the transferred density, and still maintain more than one-half of the receiving area parcel as open space. The proposed sending area was in the municipality’s agricultural preservation zone. The proposed receiving area parcel had access to sewer infrastructure and was adjacent to existing development near Clinton. However, the municipal planning board balked at the proposed number and density of the lots proposed for the receiving area. The planning board was unwilling to accept the tradeoff of farmland preservation for higher density lots. The developer abandoned the proposal.

E. Planning Centers and Protecting Environs with the New Technique

The *New Jersey State Development and Redevelopment Plan*, as adopted in 1992 and as proposed for revision in the 1997 *Preliminary Plan* now in the cross-acceptance process, stresses the concept of “Centers” and their surrounding “Environs” as the preferred mechanism for accommodating growth in New Jersey. Whether an “Urban Center,” “Town,” “Regional Center,” “Village,” or “Hamlet,” the five types of “Centers” encouraged by the *State Development and Redevelopment Plan*, this newly-authorized density transfer technique has positive, although limited implications for planning “Centers” and protecting their “Environs.”

In the Fringe, Rural, and Environmentally Sensitive Planning Areas (PA 3, PA 4, and PA 5) of New Jersey, as mapped in the *State Development and Redevelopment Plan*, the “Environs” of “Centers” should be open lands, consisting largely of large, contiguous expanses of woodlands and farmland, according to the 1997 *Preliminary Plan*. These “Environs” should be protected from the development that should instead be channeled to “Centers,” according to the 1997 *Preliminary Plan*.

This new density transfer technique provides a useful, but only partial, mechanism for protecting these “Environs,” if these surrounding open lands are designated as a sending area, and if their development rights are transferred to receiving areas in “Centers.” The process of density transfers using noncontiguous parcel clustering relies upon voluntary transactions between landowners of parcels in sending areas and receiving areas. A plan for a “Center” with protected “Environs” is likely to be a comprehensive plan requiring numerous such voluntary transactions to implement fully the plan. If some landowners, in either the sending areas or the receiving areas, decline to participate in the density transfer program, then the “Environs” will not be fully protected and the “Center” will not be fully developed according to the plan.

Other complementary planning techniques are desirable, specifically incentives for joint ventures, in addition to and as part of a noncontiguous parcel clustering scheme, to encourage all relevant landowners in a sending area to participate in implementing a plan for a “Center” with protected “Environs.” For example, the Woolwich Township (Gloucester County) *PLAN for the ENVIRONS of a center* recognizes this problem and proposes increased transferable density bonuses for sending area landowners who agree to cooperate and combine their development rights for transfer as a package of development rights for use for designated village developments. The Borough of Roosevelt (Monmouth County) also offers an incentive for joint ventures by triggering its density transfer small lot development option only when a high percentage of the sending area’s acres have been amalgamated for the purpose of the density transfer.

Otherwise, in the absence of sufficient incentives for disparate sending area landowners to collaborate, a plan for a Center with protected Environs may only be partially implemented, resulting in a patchwork of developed and preserved lands in the Environs and an incomplete or underdeveloped Center.

F. Using the New Density Transfer Technique in Developed Areas

A classic example of the use of density transfers in developed areas is the transfer of the development rights above the landmark Grand Central Terminal in New York City, sufficient to build a 55 story office tower, to enable nearby blocks to develop with higher skyscrapers than otherwise permitted. While the land values that make such density transfers economically attractive exist no where in New Jersey, noncontiguous parcel clustering could be used in New Jersey to support various goals, strategies, policies, and policy objectives in

the *State Development and Redevelopment Plan* for the more developed areas of New Jersey, particularly in the Metropolitan Planning Area and the Suburban Planning Area.

In theory, this technique could be used to preserve historic structures and districts, achieve planned redevelopment, promote revitalization of neighborhoods, and protect remaining green spaces in built-up areas. For example, instead of demolishing an historic structure, the development rights to its site could be transferred elsewhere and the future development of the site of the historic structure constrained by an historic preservation restriction on the property. Remaining open space and wood lands in urban areas could be preserved by transferring the development rights of such a sending area to a receiving area slated for more intense development or redevelopment.

The challenge in any density transfer is, in the first instance, to identify and bring together three ingredients: (a) a parcel to preserve by transferring its development rights, (b) an acceptable receiving area to accommodate increased density from the transfer, and (c) a willing landowner-developer in the receiving area to make sound economic use of the transferred density. Whether a density transfer takes place boils down to politics and economics, whether in developed areas or elsewhere. Whether noncontiguous parcel clustering will be used widely in developed areas depends upon the imagination of public and private entrepreneurs and their assessments of the planning and economic advantages in using this technique.

G. Infrastructure Required for Realistic Noncontiguous Parcel Clustering

The fundamental premise of density transfers is, obviously, that density is being transferred, resulting in a sending area with a lower density and a receiving area with a higher

density. To be realistic and attract density transfers, a receiving area will typically require certain infrastructure to support compact, higher density development.

For example, depending upon local soils conditions, a one acre lot is typically the minimum lot size that can support an individual on-site wastewater (septic) system. As the resulting density of a receiving area will most likely be greater, or even far greater, than one dwelling unit per acre, higher density residential development typically requires access to either community wastewater systems discharging to groundwater or regional wastewater collection and treatment systems. Individual wells may be a sufficient source of potable water for individual one acre lots, but higher density development may require a public water supply system. Higher density development will also need other infrastructure, such as stormwater management systems and transportation systems (pedestrian paths, bikeways, transit, and roads), in order to be realistic.

An important part of the challenge of using density transfers effectively is convincing developers that a receiving area can realistically accommodate transferred density. If developers are not convinced, they will not purchase development rights from sending areas and development sites in receiving areas. Municipalities with farmland or open space protection strategies based on voluntary density transfers may need to invest up front in the infrastructure necessary to support higher density development in order to establish realistic density transfer programs. These municipalities may need to prepare and amend wastewater management plans, authorize and finance wastewater collection and treatment systems, grant franchises to water purveyors, establish transportation development districts, and take other positive steps to make infrastructure readily available in designated receiving areas.

H. Three Critical Players in Noncontiguous Parcel Clustering Density Transfers: Municipality, Landowners, and Developers

To make noncontiguous parcel clustering happen, three critical players in the density transfer game must agree that one specific parcel is to be preserved and another specific parcel is to be developed at a higher than otherwise permitted density: the municipality, landowners, and developers.

The municipality must be a party to this agreement, at least through actions of the governing body in adopting or amending its planned development ordinance to authorize density transfers and actions of the municipal planning board in approving a single development application making the transfer and approving the development of the receiving area parcel. A municipality will most likely also be involved in registering or recording the transfer of development rights from the sending area parcel and in accepting a deed restriction for the sending area parcel. While a municipality has the responsibility for these actions, others may influence these municipal actions, such as the neighbors of the proposed receiving area or interest groups and organizations which may resist, oppose, or support the higher density development that will result from the transfer. A municipality may also need to be involved directly in making the receiving area realistic for the higher density development through municipal infrastructure investments.

At least two landowners will be involved in the typical simple density transfer transaction, the seller of the development rights from the parcel in the sending area and the seller of the development site in the receiving area. Both must be willing to sell, their rights and their property respectively, to the proposed developer at mutually agreeable prices, or no density transfer will take place. Furthermore, the seller of the development rights must also accept willingly the future restricted use of the property, after the development rights have

been transferred. As noncontiguous parcel clustering density transfers are voluntary, the seller of the development rights must also accept the uncertainty and risk that adjoining properties, if also located in a sending area, may or may not have their development rights purchased and transferred.

Developers are the third critical player in density transfers. Without a developer willing to purchase voluntarily and transfer the development rights, no density transfer will take place. The developer's task is twice as difficult as normal, as the developer must make deals with not one but two landowners in order to develop a project. Failure to reach a purchase agreement for either the development rights to be transferred or the development site itself will cause the proposed density transfer to collapse. The developer also assumes the standard risk of the municipal development application review process and satisfying any other regulatory requirements applicable to the development site.

While it is the developer and the landowners that must reach "arms length" agreements on the real estate transactions component of the density transfer, the municipality is also well positioned to influence the price of the development rights to be transferred, through the municipal power to zone. The municipality establishes, by zoning, the base density in the sending area, as well as any bonus density that may be transferred to a receiving area. The municipality also establishes, by zoning, the base density in the receiving area and the allowable additional bonus density that may be transferred there. These densities, together with market information on the availability of development rights and land for sale, influence these prices.

It is for this reason that some successful density transfer programs, such as the Pinelands Development Credit program, begin with downzoning the base zoning in the

sending area. The density transfer option then provides a mechanism to protect the equity of the sending area landowner.

In short, the municipality must offer realistic density transfer incentives, established by base zoning and bonus densities, when the density transfer option is invoked, to make density transfers feasible.

The municipality must also offer a simplified development review process, with clear design and bulk standards, for the single development application encompassing the density transfer transaction and approval of development of the receiving area parcel with the transferred density. Otherwise, developers will be reluctant to undertake the extra effort required to participate in a density transfer program.

It is not surprising that the first likely actual density transfer under a ordinance adopted under the legal authority of the 1996 amendments will take place under an even simpler scenario, in Plainsboro (Middlesex County). In this example, a single landowner owned both the sending area parcel and the receiving area parcel, and had a previous agreement with a developer eager to build the additional houses made possible by the density transfer. The municipality also had a strong interest in preserving the sending area parcel, as it adjoined a large mass of public open space. In brief, the fewer the players and the stronger the interests of the players in making the density transfer, the more likely it is that the density transfer will take place.

For more complex density transfers to take place, municipalities may need to serve as an informal broker which acts to bring together landowners and developers to make a density transfer deal. An even more aggressive municipal role would be to serve as a banker, to acquire transferable development rights and then sell the rights to a developer in the receiving area.

I. Conclusion: Limitations and Opportunities of the New Density Transfer Technique

The 1996 amendments to the Municipal Land Use Law authorizing noncontiguous parcel clustering offer municipalities a long-awaited helpful planning technique for preserving specific parcels from development or redevelopment, while also protecting the landowner's equity in the parcel. This new technique is not the full-fledged mandatory, comprehensive Transfer of Development Rights concept conceived in New Jersey in the early 1970's, and implemented somewhat in the Pinelands beginning in the early 1980's. Rather, this new technique of planned density transfers is a more limited tool, which presents both limitations and opportunities.

A Voluntary Technique

This density transfer technique is voluntary and market-driven by individual landowners, which is its key limitation. Once a municipality establishes a "planned development" zoning district with a sending area and a receiving area, and invites density transfers, the municipality has no guarantee that the landowners and a developer will ever actually cooperate, make deals, and transfer density.

Possibility of Patchwork Farmland and Open Space Preservation

As use of this voluntary density transfer technique is landowner-driven, the result may be a sending area with a patchwork pattern of scattered preserved and developed parcels, another important limitation. Preservation of meaningful, large contiguous expanses of farmland and open space may prove to be difficult to achieve, if a municipality acts passively in establishing a voluntary density transfers program. This limitation may be overcome if sufficient incentives can be fashioned by the municipality to encourage transfers from contiguous parcels and avoid merely scattered transfers. Two key incentives will be additional transferable bonus density for cooperating sending area landowners, to encourage their

cooperation in joint ventures and partnerships, and measures to increase the marketability of the receiving area, such as targeted infrastructure investments.

Resistance to Accelerated, Higher Density Development in Receiving Areas

A further limitation to this technique is the resistance to accelerated, higher density development that may be inspired by development transfer proposals. Whether municipalities will be willing to accept more, and more intensive, development in targeted receiving areas is questionable in some communities, which may fear the acceleration of development that may be stimulated by planned density transfers. To the extent municipal decision-makers reflect on the fiscal consequences, in terms of municipal and public school costs, of their land use decisions, some municipalities may resist encouraging the higher density residential development that will most likely lead to increased local taxes.

While “higher density” development is a relative term, the density of development will by definition be higher in the receiving area, and there may be resistance in some rural communities to densities higher than the one unit per acre that is the general threshold for individual septic systems. If the resistance is not overcome, density transfers are not likely to take place.

Infrastructure Needed for Realistic Receiving Areas for Higher Density Development

Another limitation of this technique is that it is ordinarily dependent upon the provision of infrastructure. Once a municipality decides where to locate its receiving areas and concentrate higher density development, then the municipality must also take decisive steps to make those receiving areas realistic, by providing the necessary infrastructure, particularly wastewater treatment, potable water supply, and transportation. Otherwise, no developer will risk a density transfer. If the municipality views its investment in receiving area infrastructure

as an investment in preserving farmland and open space, then the municipality may be better equipped to achieve density transfers.

New and Sophisticated Municipal Roles

One of the challenges, or limitations, of this new density transfer technique is that to be effective in preserving land by making density transfers, a municipality must move beyond traditional passive planning and development review roles and become more entrepreneurial. Municipalities need to serve as brokers, to bring together landowners and developers to make a density transfer deal. Municipalities may even need to consider serving as a banker, to acquire and hold transferred development rights in order to preserve strategically-located parcels in sending areas, in advance of purchase and transfer of those rights by a specific builder.

To be effective in establishing density transfer programs, municipalities must establish densities in both sending and receiving areas, as well as density bonuses to be transferred, that are realistic in the marketplace. The zoning, design, and bulk standards in the receiving area must also allow a mix of development types as permitted uses that is flexible and responds to market realities.

A Tool Not A Panacea

Municipalities that rely on noncontiguous parcel clustering as a planning technique must understand that its fundamental limitation is that this density transfer technique is but one intriguing planning tool. It is not, however, a panacea for solving the decades-old challenge of preserving large expanses of contiguous farmland, woodlands, and other types of open spaces in a rapidly suburbanizing state, without costly public purchase of the fee simple or lesser interests in such private property.

Rather, this voluntary technique is most likely to be effective in targeted opportunities where municipalities seek the preservation of a particular parcel and where a local consensus also exists on where to transfer the density.

Simpler Than TDR

Noncontiguous parcel clustering is potentially simpler than TDR programs, as complicated balancing between the transferable development potential of a multiple-owner sending area or areas and the available density that may be accepted in a multiple-owner receiving area or areas is not required. Instead, the density transfer under this new technique is a comparatively simpler single transaction involving only two parcels.

The Opportunities of Noncontiguous Parcel Clustering

This new density transfer technique does present useful opportunities for preserving specific parcels of farmland or open space and protecting parts of the “Environs” of “Centers.” To realize these opportunities, municipalities must seize the initiative, or respond positively to density transfer proposals from developers, landowners, or land conservation organizations. Three main steps should be taken by such municipalities:

- ***Plan seriously and systematically for density transfers*** - Municipalities should adopt clear goals in a master plan on density transfers. Municipalities should amend their land development regulations to include planned development density transfer provisions with clearly mapped sending areas and receiving areas, together with simple and flexible design and development standards, as well as sample deed restrictions for sending area parcels whose density has been transferred. Municipalities should use the mandated six year master plan periodic reexamination report as an opportunity to examine whether any parcels should be preserved and whether and how noncontiguous parcel clustering could be an effective technique to achieve that objective. While advance planning is desirable,

municipalities should also respond promptly to density transfer proposals that may be initiated by developers or land conservation organizations.

- ***Offer realistic incentives for density transfers*** - Municipalities intent on using voluntary density transfers to achieve preservation objectives must offer diverse and realistic incentives, to both landowners and prospective developers. The key incentives are the amount of density that may be transferred and the infrastructure available in the higher density receiving area to make higher density development a reality. As developers often acquire land by short-term purchase agreements with landowners, which are contingent upon rezoning or development approvals, it is important to the developer that municipal decision-making on a proposed density transfer be prompt and that the cost of preparing the density transfer proposal be modest.
- ***Build trust and mutual respect among the critical players in density transfers*** - A municipality might be well advised to begin with a single, comparatively simple density transfer transaction, before embarking upon a more complex land preservation scheme relying upon voluntary density transfers, in order to build trust and respect among the critical players in this process. Success can be infectious and lead to further successes. As density transfers are still new and novel in New Jersey, trust must be built transfer-by-transfer and municipality-by-municipality for this new planning tool to assume a regular role in the tool kit of towns and citizens eager to achieve compact development, revitalized developed areas, and protected farmland and open space in the coming decades.

Appendix A: The Ogden Amendment to the Municipal Land Use Law, L. 1995, c. 364



Appendix B: References and More Information

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