

## CONSENSUS REVISIONS

**Policy Consideration:** **Establishment of a Highlands TDR Program**  
**Status:** **For Consideration by the Highlands Council at  
the October 5, 2006 Work Session**  
**Date:** **October 3, 2006**

### EXECUTIVE SUMMARY

The Highlands Act, in Section 13, requires the Highlands Council to establish a transfer of development rights program that furthers the goals of the Regional Master Plan. This policy paper addresses the major issues required to be advanced in order to establish the transfer of development rights program for the Highlands (Highlands TDR Program).

Transfer of development rights (TDR) is a land use tool that permits a community to utilize market forces to encourage the transfer of development potential from areas that the community wants to preserve, called sending zones, to areas that are more appropriate to accommodate increased growth, called receiving zones. Landowners in the sending zones receive compensation for restricting development on their property. As a market-based system, payment for this lost development potential comes from purchasers who buy credits representing the lost development potential in the sending zones. The credits then entitle the purchaser to build in a receiving zone at a density greater than that permitted by the underlying zoning.

As recommended by the Highlands Council staff, the policies proposed below establish the general framework for the Highlands TDR Program. Specifically, this framework: (1) establishes a procedure that awards TDR credits called Highlands Development Credits or HDCs to designated sending zone property owners; (2) allows HDCs to be allocated to a lot based upon its lost development potential as of August 9, 2004, and adjusted for the real estate market variability across the Highlands Region; (3) allows HDCs to be sold on the private market to a developer who wants to construct within a designated TDR receiving zone at a higher density than that permitted by the underlying zoning; (4) establishes a Highlands TDR Bank that will serve as a buyer of last resort of HDCs, will serve as a seller of HDCs, will record and track all HDC activity, and will review annually the minimum HDC price established by the Highlands Council; (5) allows municipalities that have designated receiving zones to be eligible for an enhanced planning grant and a grant to offsets the costs of amending their municipal development regulations; and (6) authorizes municipalities to assess an impact fee of up to \$15,000 per unit for all new development within any designated receiving zone. Under the Highlands TDR Program, acceptance of any growth is strictly voluntary as ascribed by the Highlands Act.

This policy paper is divided into five sections. The first section sets forth the TDR-related policies recommended by Highlands Council staff to be included in the Regional Master Plan Policy Guidance Document. These recommended policies inform the further development of the Highlands TDR Program as well as program implementation. The second section of this policy paper describes staff's recommendations regarding the next steps the Highlands Council should take to complete development of the Highlands TDR program and begin its implementation. The third section discusses legislative proposals that the Highlands Council should explore that would facilitate achievement of the Highlands TDR Program's purposes and goals. The fourth section lays out the relevant statutory provisions from the Highlands Act that influence the Highlands TDR Program. Finally, the fifth section provides a glossary of important TDR-related terms.

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### I. STAFF POLICY RECOMMENDATIONS

[The following policies are to be included in the Policy Guidance Document that will serve to guide further development of the Highlands TDR Program. The Council will review the proposed language in the next several weeks when reviewing the draft Plan before release.]

1) The following policies regarding the Highlands TDR Program **Purposes and Goals** are recommended for inclusion in the Policy Guidance Document:

➤ **The purposes of the Highlands TDR Program shall be to:**

- **Serve as another land use tool to aid Highlands Region municipalities in the protection of the Region's unique resources, including its water resources, ecological resources, and agricultural resources;**
- **Provide a mechanism for property owners to sell the development potential of their lands where the Highlands Act has impacted development potential; and**
- **Serve as a catalyst to ensure proper planning for efficient development within designated receiving zones.**

Rationale: Section 13.a of the Highlands Act requires the Highlands Council to use the elements of the Regional Master Plan in order to establish the Highlands TDR program. The Highlands Act also requires that the Highlands TDR program be established in order to further the goals of the Regional Master Plan. The three essential and equally important purposes listed above provide guiding principles for the creation of a Highlands TDR Program that will achieve the goals of the Regional Master Plan and those of the program discussed below.

Although providing a mechanism for affected property owners to sell development potential is an important purpose of the program, it is not the only purpose as noted above. TDR is not the cure-all to the impacts of land use regulations. It simply represents another tool, in addition to the State preservation programs administered by the State Agriculture Development Committee and the Green Acres Program at the Department of Environmental Protection, to provide landowners with a means to extract equity out of their property. As noted by others, while TDR is a viable and legal response to the impacts of restrictive land use regulation, it is not, more than any other program, a perfect solution.

As important as providing a mechanism to sell development potential of affected lands is the use of TDR to achieve the preservation goals of the Highlands Act, particularly where the State does not have the ability to purchase all lands that are of important ecological, agricultural or historical value. TDR relies on the value of development to provide private dollars to achieve a public purpose. Using those dollars, TDR is another tool to preserve important lands that might otherwise be lost in the future.

➤ **The goals of the Highlands TDR Program shall be to:**

- **Use TDR as a mechanism to protect and enhance the significant values of Highlands Region resources;**

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- Develop a program that addresses affected land owners and the development market;
- Provide a predictable process that recognizes a fair return on the use and utility of land in the sending zones;
- Ensure that the program clearly describes, memorializes, and tracks the remaining uses of land permitted after TDR credits are severed from sending zone lots;
- Establish mechanisms that allow sending zone landowners to borrow against the value of certified TDR credits;
- Develop sufficient incentive mechanisms and broad-based stakeholder support to create the highest possible demand for credits, which in turn will maximize the value of credits from the sending zones;
- Provide sending zone landowners with an appeal mechanism to dispute and resolve differences of opinion regarding the assessment of TDR credit allocations;
- Ensure appropriately designated and designed voluntary receiving zones that do not exceed the carrying capacity, both ecological and infrastructure-related, of the land;
- Establish a process for voluntary receiving zones that will result in clearly articulated permitted development both with and without the use of TDR credits;
- Provide mechanisms for those developing with TDR credits in voluntary receiving zones to achieve prompt development approvals; and
- **Establish a Highlands TDR Bank that will foster implementation of the Highlands TDR Program.**

Rationale: Section 13.a of the Highlands Act establishes that the overall objective of the Highlands TDR Program is to further the goals of the Regional Master Plan. The Act does not set forth any specific goals for the Highlands TDR Program, however, other than the identification of 4% of the Planning Area as potential receiving zones. In the absence of such specific goals, it is important that goals for the program be framed that help achieve the program purposes described above. Through the input of the stakeholder groups and the TDR Technical Advisory Committee, as well as the review of the Highlands Act, the State TDR Act, and other TDR programs, the above goals have been identified. Like the program purposes, these goals should also guide the formation and implementation of the Highlands TDR Program.

- 2) The following **Highlands Sending Zone Policies** are recommended for inclusion in the Policy Guidance Document:
  - **Highlands Sending Zones shall include all lands in the Preservation Area within the Regional Protection Zone or the Regional Conservation Zone to the extent that those lands have had their development potential precluded or severely constrained by the restrictions imposed by the Highlands Act. Highlands Sending Zones shall not**

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include lands within Specially Planned Areas or other lands where development potential is permitted consistent with the Regional Master Plan.

- Highlands Sending Zones shall also include all lands in the Planning Area within the Regional Protection Zone or the Regional Conservation Zone with the exception of Specially Planned Areas or other development potential consistent with the Regional Master Plan. Eligibility for lots in the Planning Area is dependent upon the implementation of the Highlands Act.
- Determination of a Highlands Sending Zone lot's development potential change will be based upon an analysis of whether the property could have been developed as of August 9, 2004, based upon municipal zoning and land use regulations then in effect, and State and federal environmental laws and regulations then in effect, and a determination of whether development is precluded or severely constrained by the restrictions imposed pursuant to the Highlands Act.
- **The Highlands Council shall establish a method for prioritizing TDR sending zones during Pre-Conformance considering such factors as the presence of Highlands resources on a property and whether the property satisfies the requirements of Section 13.h(2) of the Highlands Act, which requires that the Highlands Council prioritize for inclusion in the TDR program those properties that had all local development approvals as of March 29, 2004 but were awaiting approval by the Department of Environmental Protection of a necessary State permit.**

Rationale: In accordance with Section 13.b of the Highlands Act, the Highlands Council adopted a resolution identifying sending zones through the following set of narrative criteria for the identification of lands within the Preservation Area that are appropriate as sending zones:

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

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

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

In addition to the need to identify Highlands Sending Zones in the Preservation Area under Section 13.b of the Highlands Act, Section 13.f anticipates the creation of Sending Zones within the Planning Area as those lands that are “designated for conservation” in the Regional Master Plan. Accordingly, Highlands Sending Zones in the Planning Area should include the lands

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designated for conservation including lands in the Regional Protection Zone or the Regional Conservation Zone with the exception of Specially Planned Areas.

The owner of a lot in a Highlands Sending Area is eligible to apply to the Highlands Council for a determination as to how many TDR credits (called Highlands Development Credits or HDCs) that particular lot is entitled to. The number of HDCs allocated to a particular lot represents the lost development potential of that lot adjusted for property location, underlying zoning, and the existence of any exceptional ecological or agricultural resources on the property. In addition, Section 13.h(1) requires the Highlands Council to establish the initial value of a development right considering the NJDEP rules and regulations in effect on August 9, 2004.

It is important that the Highlands Council establish a method for prioritizing identified sending zones because of the voluntary nature of receiving zones and finite funding of a Highlands TDR Bank. As discussed below, demand for TDR credits (termed “Highlands Development Credits”) will be based upon the number of designated receiving zones in which those credits may be used. Demand will build over time, but at the outset of the program will likely be limited. In addition, because initial funding of the Highlands TDR Bank will be limited, the ability of the bank to purchase TDR credits will be restricted. Both of these facts necessitate a means of controlling the supply of credits available for sale at any given time. Prioritization of sending zones will be used to determine the extent of Highlands Development Credits available for sale based upon availability of receiving zone opportunities and Highlands TDR Bank funds.

The sending zone prioritization method will be based upon the results of the Land Use Capability Map and the corresponding resource value of the underlying land area. Lands deemed most critical to meet the goals of the Highlands Act would likely be acquired outright and would be deemed Tier 1 lands. Those lands important for conservation or preservation of Highlands resources but not viewed as critical would be identified as sending zones to be conserved through TDR. These lands would be considered Tier 2 lands. Within Tier 2, a further ranking of sending zones would be established again based upon the presence of Highlands resources.

In addition to ranking of properties according to their resource value, ranking of sending zones will also reflect the requirements of section 13.h(2) of the Highlands Act. This section states that the Highlands Council shall give priority consideration for inclusion in the TDR program any lands that just missed being grandfathered under the Act under Exemption No. 3. These are properties that had all local development approvals as of March 29, 2004, but were awaiting State permits. A lot that falls within this category would be given priority over another lot with a similar Highlands resource value. However, the resource value of the sending zone property will have primacy.

After prioritization of sending zones is complete, the extent of sending zones that could sell their credits will be based upon the number of designated receiving zones then available to accept credits and the extent of available funds in the Highlands TDR Bank.

- **The Highlands TDR Program will establish a Highlands Development Credit (HDC) allocation method that recognizes and accounts for the significant real estate market variability in the Highlands Region and the relative value of Highlands Resources.**

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- The number of HDCs to be allocated to a given sending zone lot shall be based upon the municipal zoning and land use regulations in place as of August 9, 2004, and the federal, State and municipal environmental laws, regulations and ordinances in place as of August 9, 2004.
- Adjustments to the number of credits allocated to a sending zone lot shall be made based upon (a) the location in the Highlands Region, (b) the end-use to which that lot could have been developed, and (c) the relative value of Highlands Resources on the lot.

Rationale: A key component of any TDR program is the allocation of transferable development rights to properties in the designated sending zones. Allocation consists of defining what these rights are and how many rights should be given to a particular lot. As noted in the *TDR Background and Program Development* technical memorandum, transferable development rights are often expressed in the form of credits which serve as a proxy for the development potential that is restricted on sending zones lots.

The Highlands Act does not specify how HDCs are to be allocated to sending zone lots. As such, the allocation methods used by other TDR programs both within and without the State were examined. Generally, there are three means of allocating credits: (1) based upon the gross acreage of given land characteristics (e.g. wetlands or uplands); (2) based upon the value of the lost development potential; or (3) based upon the number of lost units or square footage.

Based upon the review of other TDR programs and recognizing the significant real estate market variability that exists in the Highlands Region, it is recommended that HDCs be allocated based upon the number of lost residential units or lost commercial square footage occurring as a result of restrictions on sending zone property.

Under this method, the number of HDCs allocated to a sending zone lot would be based upon the zoning in place as of August 9, 2004, as well as any environmental laws and regulations applicable to the lot at that time minus any units that remain developable after applying the requirements of the Highlands Act and any restrictions resulting from the implementation of the Highlands Act. For example, assume prior to passage of the Highlands Act, an undeveloped five-acre lot in the Preservation Area is residentially zoned at one single family house per acre. Assume further that, due to wetlands present on the lot, one acre cannot be developed. This results in four acres being available for development prior to enactment of the Highlands Act. After passage of the Highlands Act, only one single family house may be built on the lot under the exemption for construction of a single family house on a lawfully existing lot that was in existence on August 10, 2004. In this example, the lot would have lost 3 single family housing opportunities as a result of the Highlands Act (4 acres at 1 unit/acre minus 1 unit under exemption = 3 lost units). In turn, these lost housing opportunities can be transformed to HDCs that can then be sold to a developer who will utilize those credits to construct additional units in a voluntary receiving zone.

Although this allocation method is fairly simple to understand, it does not account for two important variables. First, it does not account for great differences in real estate market values that exist across the Highlands Region. For example, two 10-acre lots, similarly zoned at one single family house per acre, do not have the same value where one lot is located in Warren County and the other is situated in Bergen County. Generally, the lot in Bergen County, with

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the same amount of development potential, will be worth more on a per acre basis. Second, the type of use of property in sending zones also influences the value of the lost development potential. Residential development has value different from commercial development. And even with development that is residential, development of a lot based on detached single family homes has a different value than if that same lot could be developed with attached townhouse units. Consequently, for this allocation method to be fair to sending zone property owners and attractive to receiving zone developers, it must incorporate some measures to account for these variables.

Allocating HDCs based on lost development potential, expressed in the number of lost residential units or lost commercial square footage, and adjusted for the variables discussed above, is the most appropriate allocation method for use in the Highlands Region. It is simple to understand, and is a generally accepted credit allocation method. It is a fair allocation method provided that the above variables are accounted for. It makes the transfer of credits to receiving zones much easier because municipalities understand what number and type of units they are willing to accept and developers know what number of units they will be able to build. It is also important to note that transferring development potential expressed as a number of units or commercial square footage is generally consistent with other TDR programs in the State, including the Pinelands, Chesterfield and Lumberton.

- **The Highlands TDR Program will establish and periodically update real estate Market Factors and End-Use Factors for use in allocating Highlands Development Credits (HDCs) that account for regional real estate market variability in the Highlands Region.**

Rationale: To account for the Highlands Region's real estate market variability and differences in value of unit types, the Highlands Council will need to develop two factors: a real estate **Market Factor** and an **End-Use Factor**. With respect to the market factor, the Highlands Council will need to devise a municipally-based factor to be applied to the sending zone HDC allocation process. This approach would, in part, help to address the concern that high-value projects would only pursue credits in lower-value sending markets because use of a market based factor has the potential to balance credit allocations.

It is envisioned that the Market Factor will be established based on median real estate market values for each municipality in the seven Highlands counties on a per acre basis. In turn, these median values will be used to determine the median per acre value for the seven counties. Derivations from this median per acre value will then be developed for each municipality resulting in the Market Factor to be applied in the HDC allocation process.

Similarly, an End-Use Factor will be developed for the following land use types: large, single-family detached home (> 5,000 sq. ft.); medium, single-family detached home (between 5,000 sq. ft. and 2,500 sq. ft.); small, single-family detached home (< 2,500 sq. ft.); attached town home; apartment/condo; commercial – office; commercial – retail; and industrial. Like the real estate Market Factor, the End-Use Factor will utilize existing real estate data to derive the relative value of each of the above end-uses within representative municipalities. These values per municipality will then be compared to establish a median per end-use value that will be applied to the HDC allocation process.

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- **The Highlands TDR program shall permit the use of a Resource Value Factor for use in allocating Highlands Development Credits (HDCs) to encourage the protection and stewardship of important resource lands in the Highlands Region.**

Rationale: This factor allows for the award of a credit “bonus” for those property owners that voluntarily accept additional deed restrictions on use of property necessary to protect, restore or enhance a critical Highlands ecological or agricultural resources. This **Resource Value Factor** was suggested by many of our stakeholder groups, and is specifically authorized under Section 144.c of the State TDR Act. In essence, the Resource Value Factor awards a bonus to lots to be identified by the Highlands Council in the Regional Master Plan as lands of exceptional resource value. This bonus would be applicable to lots that have either exceptional ecological value or exceptional agricultural value. In either case, the application of a bonus factor is meant to encourage property owners to enroll their property in the Highlands TDR Program and provide additional incentives to manage resources consistent with the goals of the Regional Master Plan. The Resource Value Factor will be based on the Land Use Capability Map.

- **The Highlands TDR Program will allow a sending zone property owner to submit an application to the Highlands Council for a HDC determination.**

Rationale: The Highlands TDR Program must include a process that sending zone property owners will follow to have an HDC determination made for their property. This process would certify the number of credits that a property is entitled to without requiring the sale of those credits. The process proposed below is similar to the process followed by the New Jersey Pinelands Commission in its PDC program and other programs around the country.

1. Property owner submits an HDC Determination Application.
  - In the application, property owner specifies the following information:
    - Property owner’s contact information;
    - Property location by address and block & lot;
    - Number of acres;
    - State whether there are any existing structures on the property;
    - If property undeveloped, state whether property owner wishes to reserve the right to construct one home or maintain other uses of property (e.g. agriculture);
    - State whether any commercial activities take place on the property;
    - State whether there are any easements or deed restrictions applicable to the property; and
    - State whether property owner was in process of securing development approval at the time Highlands Act passed, and what State and municipal approvals were secured as of March 29, 2004, and what approvals were pending as of that date.
  - Property owner provides copies of the following documents:
    - Deed to property;
    - Tax map depicting property location; and
    - Sixty year title search.

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2. Highlands Council Staff determines number of HDCs allocated to property based upon the following formula:

$$\text{Number of Buildable Lots} - \text{Reserved Lot (if any)} \times \text{Real Estate Market Factor} \times \text{End-Use Factor} + \text{Resource Value Factor} = \text{number of HDCs}$$

3. Property owner receives an HDC Determination Letter from the Highlands Council indicating the number of HDCs allocated to the property.
4. If property owner disputes the number of HDCs allocated, the owner must submit a "Notice of HDC Appeal" in writing to the Highlands Council. Along with the notice of appeal, the property owner should submit a proposed subdivision plat, prepared by a professional engineer, demonstrating that the property's lot yield is greater than that calculated by the Highlands Council. The Highlands Council will review the submitted information and make a determination within a reasonable time. If the property owner continues to dispute the number of HDCs allocated to the property, the property owner may appeal the decision of the Highlands Council.
5. Once the number of HDCs becomes final, the credits may not be made available for sale until the requisite conservation restriction is recorded with the County deed office and a copy of the recorded conservation restriction is filed with the Highlands Council and the Highlands TDR Bank. At that time, HDC Certificates (discussed below) will be provided to the property owner for each HDC allocated listing the owner of record, the Block and Lot of the lot, the HDC Certificate serial number, and the date of issuance.

An HDC Determination Letter is valid for two years. If after that period the property owner has not recorded a conservation restriction for the property (discussed below), the property owner must reapply for an HDC determination.

- 3) The following policies regarding **Voluntary Receiving Zones** are recommended for inclusion in the Policy Guidance Document:

➤ **Potential TDR Voluntary Receiving Zones within the Highlands Region shall include all lands within the Regional Development Zone or Specially Planned Areas identified in the Regional Master Plan or as approved by the Highlands Council.**

Rationale: The Highlands Council is charged with identifying areas within the Highlands Region that are appropriate to serve as receiving zones and establish an appropriate density for those identified areas. (Sections 8 and 13.c) Similar to sending zone identification, the Highlands Council adopted a resolution establishing a set of narrative criteria for identification of voluntary receiving zones. The receiving zone narrative criteria are as follows:

*Any area in the Planning Area that is appropriate and suitable for development utilizing existing resource assessment information and exhibits one or more of the following characteristics may be appropriate as a*

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*voluntary TDR receiving zone provided that it has been approved by the Highlands Council in consultation with municipal, county and State entities:*

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

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

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

Based upon the Resource Assessment and Smart Growth components of the Regional Master Plan, TDR receiving zones include those lands within the Regional Development Zone or within Specially Planned Areas identified in the Regional Master Plan or as approved by the Highlands Council. Identification of these areas is consistent with the above criteria and the requirements of the Highlands Act.

- **The Highlands Council shall establish a process for designating voluntary receiving zones within the Highlands Region and the seven Highlands counties, which process shall allow for significant public input.**
- **A voluntary TDR receiving zone must demonstrate access to available water supply and wastewater infrastructure with the capacity to support increased development, is consistent with the resource protection goals of the Regional Master Plan, and the proposed zoning must be economically viable and be shown to be able to accommodate an increase in density above that allowed in municipal zoning in place at the time of adoption of a voluntary TDR ordinance.**
- **The Highlands Council will work with municipalities and the State Planning Commission to identify centers, designated by the State Planning Commission, as voluntary receiving zones for the transfer of development rights program.**

Rationale: The Highlands Council is not authorized to require conforming municipalities to accept its recommendations concerning the location of voluntary receiving zones. Whether these identified areas, and others outside of the Highlands Region but within the seven counties, serve as voluntary receiving zones is left to the determination of the municipalities themselves. As such, once the Highlands Council has identified areas that may be appropriate as voluntary receiving zones in the Regional Master Plan, it will then need to work with municipalities during the conformance process to have them become designated TDR receiving zones. This is not the

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ideal situation for establishing a regional TDR program, but it recognizes the importance of home rule and that growth receiving aspects of the Regional Master Plan are voluntary. The process being proposed seeks a significant level of commitment and cooperation by municipalities, which are important to the success of this program.

The Highlands Council will approach those municipalities within the Regional Development Zone and Specially Planned Areas identified in Land Use Capability Map, as well as those communities recognized as PA1, PA2 or designated centers in the State Development and Redevelopment Plan within the seven counties but outside of the Highlands Region, to examine whether they may serve as voluntary receiving zones. As part of Plan Conformance, the Highlands Council will work with interested municipalities to articulate the vision the municipality has for its proposed receiving zone or zones. The municipality will explore the proposed receiving zone's existing density and look at ways it can promote more compact development that supports a mix of uses in light of the local real estate market recognizing development limitations based on ecological and infrastructure capacity.

The designation process begins with a municipality holding a public hearing to discuss the advantages and disadvantages of designating a voluntary TDR receiving zone within its municipal boundary. If at the conclusion of that public hearing (or hearings), the municipality wishes to move forward with exploring receiving zone designation, it shall adopt a municipal resolution stating the municipality's interest. The municipality must then conduct a receiving zone feasibility assessment (discussed below) to determine whether the potential receiving zone has the ecological and infrastructure capacity to accept additional density, and ensure that the local real estate market can absorb an increase in development.

If the results of the feasibility assessment demonstrate that the proposed voluntary receiving zone is able to accommodate additional density, then the municipality may move forward with seeking designation of that receiving zone. This designation process will require the Highlands Council to review the results of the feasibility assessment and verify the determination reached by the municipality. Assuming there is no omission of essential information, the Highlands Council will designate the proposed receiving zone and approve its use in the Highlands TDR Program. This process will ensure that designated receiving zones are within the carrying capacity of the area, that the TDR density within the zone is economically feasible, and that the vision of the municipality for development within the receiving zone is clearly articulated.

The designation process will also permit a municipality to petition to include a property not otherwise identified in the Regional Master Plan as a proposed receiving zone. In this situation, a municipality may identify a property and seek receiving zone designation provided that (1) the municipality can demonstrate that the property can accommodate additional density, and (2) allowing additional density on that property conforms to the goals of the Regional Master Plan.

### ➤ **The Highlands TDR Program shall establish a Voluntary TDR Receiving Zone Feasibility Grant Program.**

Rationale: Before any municipality may designate a TDR receiving zone, it will have to assess the feasibility of any potential receiving zone to accommodate the attendant growth impacts occasioned by increasing density. These impacts include water supply needs, wastewater generation, school children, affordable housing obligations, and traffic generation. This

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assessment also requires an examination of natural resource constraints within the proposed receiving zone, and the local and regional real estate markets' ability to bear the level of development proposed for the receiving zone.

Section 13.e of the Highlands Act directs the Highlands Council to assist municipalities in analyzing the capacity of voluntary receiving zones. In addition, sections 13.k and l, and 18.b authorize the Highlands Council to provide grants to municipalities to assist them in the implementation of the TDR program.

Using the above authority the Highlands TDR Program will allow any municipality within the seven Highlands counties that is interested in petitioning the Highlands Council to designate a TDR Receiving Zone to be entitled to grants and technical assistance. Under this program, a municipality will be required to assess the infrastructure and ecological capacity of a proposed receiving zone in the context of its municipality and the Highlands Region, as well as examine the local real estate market. Required elements of the feasibility assessment will include: (1) a preliminary identification of potential receiving zones; (2) an inventory of important natural resources; (3) an analysis of sewer and water supply capacity; (4) a build-out analysis of the proposed receiving zone(s); (5) a simple fiscal impact analysis; and (6) for municipalities outside of the Highlands Region but within the seven counties, a real estate market analysis pursuant to the rules promulgated by the Office of Smart Growth. For communities within the Highlands Region, much of the baseline data and information sought above will have already been examined by the Highlands Council through development of the Regional Master Plan. This information will be shared and discussed with the municipality. For those municipalities outside the Highlands Region but within the seven counties, much of this information may be gathered from existing sources, including municipal and county planning departments.

- **The Highlands TDR Program shall provide assistance to municipalities with designated receiving zones in preparation and adoption of a TDR overlay ordinance that will implement the municipalities' participation in the Highlands TDR Program.**

Rationale: Upon approval by the Highlands Council of a designated voluntary receiving zone, the municipality will need to adopt a TDR ordinance, which will serve as an overlay atop the area's existing zoning. This TDR overlay ordinance will identify the boundaries of the receiving zone, specify the bonus density permitted within the receiving zone, establish any site and architectural design criteria required by the Regional Master Plan, and set forth the number of HDCs required to develop at the bonus density (i.e. TDR density). The TDR ordinance will also explain the process for recording the use of HDCs and ensuring that those HDCs are retired and ineligible for future use.

Determining the number of HDCs required to build at TDR density will be calculated by taking the number of additional units and/or commercial square feet to be permitted in the receiving zone and then multiplying that number(s) by the relevant real estate market factor and end-use factor. The result will dictate how many HDCs must be purchased to build in the receiving zone at the TDR density. By looking at the then going rate for credits, a developer will be able to build in the cost of the credits and any per unit impact fee into its pro forma. Additionally, by specifying the type of development the community is looking to encourage, the development is less likely to face opposition and municipal approval is likely to occur more expeditiously.

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Section 13.f of the Highlands Act directs the Highlands Council to assist municipalities in developing ordinances to implement the TDR program, including developing advisory or model ordinances. During Pre-Conformance, a model TDR overlay ordinance shall be developed that will serve as a template for municipalities that designate a voluntary receiving zone.

- **Municipal conformance with the Regional Master Plan and/or participation in the Highlands TDR Program shall include a requirement for the purchase of HDCs for any variance granted by the participating municipality.**

Rationale: Conformance with the Regional Master Plan and the requirements established for a TDR overlay ordinance will specify that any variance granted by the zoning board of adjustment for development within the receiving zone will require the use of HDCs. A schedule will be established specifying the number of HDCs required per type of variance and the extent of the variance. This recommendation is important to ensure that any new development above base density in a voluntary receiving zone secure HDCs to build. By requiring HDCs for any variance to develop in the receiving zone, a zoning board of adjustment is prevented from granting variances that would allow development to exceed base density and thereby thwart demand for HDCs.

- **Upon adoption of a TDR Ordinance, a municipality that designates voluntary receiving zones will be permitted to assess impact fees of up to \$15,000 per unit for all new development with the receiving zone.**

Rationale: Section 13.m of the Highlands Act, authorizes a municipality to impose up to a \$15,000 per unit impact fee on new development within a receiving zone to offset the costs of capital improvements or facility expansions necessitated by the new development. These fees may be charged against all new development within the receiving zone and not just the units or square footage that represent the bonus density allowed within the zone. The impact fees are paid by the developer constructing within the receiving zone and are paid directly to the municipality. The impact fee may not be assessed against any low or moderate income housing unit within an inclusionary development.

To impose the impacts fees, a municipality must adopt an impact fee ordinance. The ordinance must define the service unit and set forth the specific purposes for which the impact fee revenues may be expended. The ordinance must also delineate the service area for each capital improvement or facility expansion to be funded out of the impact fee; establish a fee schedule setting forth the amount of the fee charged for each service unit; and lay out a payment schedule. Importantly, the improvements and expansions for which an impact fee is to be imposed must bear a reasonable relationship to the needs created by the new development in the receiving zone. (Section 13.m(4))

- **The Highlands Council shall allow a Planning Area municipality to participate in the Highlands TDR Program without conforming to the Regional Master Plan.**

Rationale: Allowing a Planning Area municipality to participate in the Highlands TDR Program without conforming to the Regional Master Plan recognizes the true voluntary nature of receiving zones. Additionally, allowing participation without plan conformance supports the Highlands Council's position that municipalities have the option of accepting aspects of the

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Regional Master Plan that foster growth. However, no approval for participation in the Highlands TDR Program will be permitted if it contravenes the stated resource protection goals and standards of the Regional Master Plan.

A Planning Area municipality that agrees to participate in the program without conforming, however, is ineligible for the benefits and incentives provided to voluntary receiving zones under the Highlands Act TDR provision. Section 13.l of the Highlands Act states that, to be eligible for voluntary receiving zone benefits, the Planning Area municipality's "master plan and local development regulations [must] have been approved by the council to be in conformance with the regional master plan . . . ." In this situation, a Planning Area municipality would not be authorized to assess an impact fee or be eligible to receive an enhanced TDR planning grant of up to \$250,000, for example.

Despite the eligibility requirement imposed by the Highlands Act, the Highlands Council should provide grants and other technical assistance to Planning Area municipalities that want to designate voluntary receiving zones but not conform to the Regional Master Plan. Section 18.b of the Highlands Act authorizes the Highlands Council to "make available grants and other financial and technical assistance to municipalities . . . for implementation of a transfer of development rights program pursuant to this act." Given this authority, the Highlands Council should allow Planning Area municipalities to be eligible to participate in the Highlands TDR Program and be eligible for grant and technical assistance with preparation and adoption of a TDR overlay ordinance. Additionally, the Highlands Council may use this authority to provide any other benefits it deems appropriate in the future.

- 4) The following policies regarding establishment and operation of a **Highlands TDR Bank** are recommended for inclusion in the Policy Guidance Document:
  - **The Highlands Council shall establish a Highlands TDR Bank that, along with the Highlands Council, will administer the Highlands TDR Program. The Bank shall be governed by a five-member board of directors.**

Rationale: Section 13.i of the Highlands Act empowers the Highlands Council to use the State TDR Bank or to establish a Highlands TDR bank to facilitate the transfer of development potential in accordance with the Regional Master Plan. In consideration of the requirements of the State TDR Bank Act and the State TDR Bank's regulations, establishment of a separate Highlands TDR Bank is more likely to achieve the goals of the Highlands TDR Program.

The State Legislature established the State TDR Bank in 1993. (N.J.S.A. 4:1C-49 et seq.) With the adoption of the State TDR Act in 2004, the State TDR Bank took on an expanded role of seeking to facilitate municipal TDR programs throughout the State. The State TDR Bank's primary functions are to issue planning assistance grants, purchase and sell development rights, provide loan guarantees secured with development potential as collateral, and maintain a registry of development credits and transfers. (38 N.J.R. 363(a)) The State TDR Bank's procedures are governed by the State TDR Bank Act, and more specifically by its recently adopted amended regulations at N.J.A.C. 2:77-1 et seq.

The Bank's regulations establish the standards and procedures for all its functions. Although these regulations are crucial to the State TDR Bank's operations, they may impose requirements

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that would hinder implementation of a regional TDR program.<sup>1</sup> For example, before the State TDR Bank may undertake any of its functions in relation to a municipal TDR program, the Bank must determine that the municipal TDR ordinance is “viable.” One requirement of viability is that the municipality has complied with all requirements of the State TDR Act, including conducting a real estate market analysis pursuant to OSG’s rules. (N.J.A.C. 2:77-3.1(b)1) Another requirement is that the municipality has its municipal master plan endorsed by the State Planning Commission. (N.J.A.C. 2:77-3.1(b)1.i) The difficulty of complying with these and other aspects of the State TDR Act were discussed in the *TDR Background & Program Development* technical memorandum. Consequently, the State TDR Bank’s viability requirement as currently written could prevent the Bank from undertaking certain functions where it was serving as the TDR bank to the Highlands TDR Program.

Given the potential limitations of utilizing the State TDR Bank, establishing a separate Highlands TDR Bank is recommended. Section 13.i(3) of the Highlands Act requires that the bank “operate in accordance with provisions of general law authorizing the creation of development transfer banks by municipalities and counties.” The general law is section 158 of the State TDR Act.

Section 158 authorizes municipalities and counties to establish a TDR bank for the purchase, sale, or exchange of development transfer. (N.J.S.A. 40:55D-158) Where such a bank is established, it must be governed by a board of directors comprising five members who have expertise in banking, law, land use planning, natural resource protection, historic site preservation or agriculture. In the case of a Highlands TDR Bank, the Highlands Council would establish the bank by resolution, and appoint a five member board of directors. In turn, the board of directors will adopt bylaws governing its activities.

- **The Highlands TDR Bank shall be authorized to serve four essential functions: (a) as an information clearinghouse; (b) as a buyer of last resort of HDCs, and a seller of HDCs; (c) as the agency charged with recording and tracking all HDC activity; and (d) as the agency responsible for reevaluating the minimum HDC price on an annual basis and make recommendations to the Highlands Council for its adjustment.**

Rationale: Where the Highlands TDR Bank purchases, sells or otherwise conveys development potential, its activities are governed by section 159 of the State TDR Act. Section 159 allows a TDR bank to purchase development potential provided (1) it has adequate funds for this purpose, and (2) the sending zone property owner demonstrates marketable title to the property and is empowered to restrict that property. (N.J.S.A. 40:55D-159.a) The TDR bank may also sell any development potential that it has purchased, provided that the sale “does not substantially impair the private sale or transfer of development potential.” (N.J.S.A. 40:55D-159.b)

Other than the requirements outlined above, the provisions of the State TDR Act governing a TDR bank are fairly fluid and provide flexibility for the Highlands TDR Bank to adopt methods and procedures to achieve the goals of the Highlands TDR Program. Being mindful of these

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<sup>1</sup> Keep in mind that the State TDR Bank’s chief focus is on facilitating municipal TDR programs where TDR credits are not transferred outside of municipal boundaries. The State TDR Bank’s regulations are drafted from this perspective.

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requirements, the Highlands TDR Bank should serve four essential functions: as an information clearinghouse; as an HDC buyer of last resort, and seller of HDCs; as the agency charged with recording and tracking all HDC transactions; and as the agency empowered to reevaluate the minimum HDC price on an annual basis and make recommendations to the Highlands Council for its adjustment.

The Highlands TDR Bank's first function is to act as an information clearinghouse, particularly bringing buyers and sellers together to engage in HDC transactions. In this role, the bank would maintain an online registry of HDCs available for purchase (discussed below), which registry would list the HDC certificate number and its price. Potential purchasers would review the HDC registry and contact the bank for the seller's contact information to begin negotiations. This is similar to the role currently assumed by the Pinelands Development Credit Bank. Additionally, along with the Highlands Council, the Highlands TDR Bank would provide information to the public about the Highlands TDR Program, and the bank's role in the program.

At the outset of the Highlands TDR Program, the Highlands TDR Bank would purchase HDCs from sending zone property owners while receiving zones are being established. The bank would make HDC acquisitions in light of the prioritization consideration established by Section 13.h(2).<sup>2</sup> It would also make purchases from those sending zone property owners facing a hardship situation but would not otherwise qualify for prioritization.<sup>3</sup> Because of the lack of receiving zones at the outset of the program, the Highlands TDR Bank would purchase HDCs from sending zone property owners at 100% of the minimum HDC price for the first two years of the program's implementation or until a designated receiving zone is established, whichever comes later. After this initial period, the Highlands TDR Bank would purchase HDCs solely as a buyer of last resort, and at a reduced HDC price so that the bank does not operate at a deficit. The price would decrease by 5% per year over the following three years until the bank purchases HDCs at 85% of the then established minimum HDC price.

Given the need for the Highlands TDR Bank to make HDC purchases during the first phase of the program, an adequate amount of initial acquisition capital for the Highlands TDR Bank is essential to its ability to instill confidence in the Highlands TDR Program. Based on initial projections, in light of data from the State Agriculture Development Committee, the Green Acres Program, and the current real estate market, it is estimated that the Highlands TDR Bank requires an initial capitalization of \$50 to \$70 million. Without sufficient funds in the bank at the outset of the program, the program will lack credibility because sending zone property

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<sup>2</sup> Section 13.h(2) states "The council shall give priority consideration for inclusion in a transfer of development rights program any lands that comprise a major Highlands development that would have qualified for an exemption pursuant to paragraph (3) of subsection a. of section 30 of this act but for the lack of a necessary State permit as specified in subparagraph (b) or (c), as appropriate, of paragraph (3) of subsection a. of section 30 of this act, and for which an application for such a permit had been submitted to the Department of Environmental Protection and deemed by the department to be complete for review on or before March 29, 2004."

<sup>3</sup> Purchase of HDCs in this situation would be conditioned on the existence of a demonstrated financial hardship such as pending bankruptcy or medical emergency necessitating sale of HDCs.

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owners will not have a ready buyer to purchase their HDCs until receiving zone demand is established.

The Highlands TDR Bank would also sell HDCs it acquires to anyone who wishes to utilize credits for future development or to retire HDCs. As noted above, a requirement of any sale or conveyance of development potential by the Highlands TDR Bank is that its actions do not “substantially impair the private sale or transfer of development potential.” This provision suggests that where the bank is selling HDCs, it sell them at a premium of the then going rate (e.g. 115% of going rate). In the case of a developer, he or she would have the options of negotiating directly with property owners to acquire their HDCs, purchasing HDCs from the Highlands TDR Bank but at a premium, or purchasing HDCs from both sources to satisfy the developer’s credit requirement.

Another essential function of the Highlands TDR Bank will be to record and track all HDC transactions. This will require working cooperatively with the Highlands Council during the HDC allocation process to ensure that all credit determinations are recorded in an HDC registry. Each individual HDC will be assigned a serial number and those credits will be logged with the registry. As an HDC is sold, transferred and utilized in a receiving zone, the Highlands TDR Bank will record the activities of the credit.

Finally, the Highlands TDR Bank will reevaluate the established minimum HDC price on a yearly basis to ensure that the value established by the Highlands Council does not negatively affect either the private TDR market or the Highlands TDR program generally. Where the Highlands TDR Bank believes the minimum HDC price should be adjusted, it will make its recommendation to the Highlands Council for consideration.

➤ **The Highlands TDR Bank shall record and track all HDC activity.**

Rationale: As noted above an essential function of the Highlands TDR Bank will be to record and track all HDC activity. These activities are governed by section 147 of the State TDR Act, which mandates that restrictions on the sending zone lot be noted and recorded, and that a record of the development potential severance and its transfer be provided to the State TDR Bank.

The Highlands TDR Bank shall be tasked with maintaining an HDC registry and tracking all HDC transfers. The registry and tracking system would be similar to that utilized by the Pinelands Development Credit Bank that was developed by Applied GIS, Inc. This tracking module is compatible with the Highlands Council Information System that Applied GIS has developed for the Highlands Council. HDC information maintained by the bank through its tracking module will be placed online so that potential purchasers can review the HDCs available and their minimum price. To maintain the privacy of sellers, however, HDCs would be listed online by their certificate number only. A potential purchaser would have to contact the Highlands TDR Bank directly to receive the potential seller’s information.

➤ **The Highlands TDR Bank will issue an HDC certificate that will be provided for each credit allocated to a sending zone lot.**

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- The HDC certificate shall list the owner of record, the block and lot of the lot from which the credit is generated, the date of issuance, and a specific number for that HDC.
- The Highlands TDR Bank shall allow HDCs to be encumbered by their owner by pledging HDCs as collateral for financing. In this situation, the Highlands TDR Bank simply places a notation on an HDC certificate stating that the certificate has been pledged as collateral to secure financing, and that the certificate is encumbered. The notation further states that the certificate cannot be transferred until a release is given by the requisite lending institution. In the event of a default, the Highlands TDR Bank lists the lending institution as the holder of the HDC certificate in its registry of available HDC certificates for purchase.

Rationale: To ensure that all HDCs allocated to sending zone property owners are properly tracked, it is necessary to issue an instrument that represents the HDCs allocated. Issuance of a certificate for each allocated HDC, which certificate is then listed and tracked in the HDC registry by the Highlands TDR Bank, will achieve this objective.

Additionally, an important goal of the Highlands TDR Program is that HDCs have the ability to serve as collateral for securing loans from private lending institutions. A TDR bank established by the Highlands Council does not have the authority to specifically guarantee loans, however. The only TDR banks with this authority are the State TDR Bank and the Pinelands Development Credit (PDC) Bank, and to date, neither entity has exercised this authority. The PDC Bank does allow PDCs to be encumbered by their owner by pledging PDCs as collateral for financing. In this situation, the PDC Bank simply places a notation on a PDC certificate stating that the certificate has been pledged as collateral to secure financing, and that the certificate is encumbered. The notation further states that the certificate cannot be transferred until a release is given by the requisite lending institution. In the event of a default, the PDC Bank lists the lending institution as the holder of the PDC certificate in its registry of available PDC certificates for purchase. It does nothing more than this administrative function with respect to loans. (personal communication, Guillermo Vivas, Executive Director, Pineland Development Credit Bank, August 16, 2006)

While the Highlands Council continues exploring ways of meeting the goal of HDC collateralization, the Highlands TDR Bank should be authorized to encumber HDCs in the same manner that the PDC Bank encumbers PDC certificates. Should a holder of an HDC certificate default on any mortgage obligation, the Highlands TDR Bank will place the mortgage holder on the list of owners that have HDCs available for sale.

- **The award of an HDC certificate by the Highlands TDR Bank will require the recordation of a conservation restriction that will be used to record the severance of development potential from a sending zone lot.**

Rationale: Section 147 of the State TDR Act requires that when development potential is being separated from a given sending zone lot, the encumbrance on the lot and the remaining uses that are permitted must be attached to and recorded with the lot's deed. This instrument must also state that any development inconsistent with its conditions and restrictions is expressly prohibited and that all conditions and restrictions run with the land and are binding upon the property owner and any successor in interest. Furthermore, the instrument's restrictions are

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enforceable by the municipality and county in which the lot is located, as well as the State of New Jersey.

The Highlands Council shall draft a model conservation restriction that satisfies the above requirements. The conditions and restrictions set forth in the conservation restriction will vary depending upon the underlying use of the property. Thus, the conditions and restrictions applicable to property that is residentially or commercially zoned will be different from those used for property that is in active agriculture. Regardless of the underlying property use, however, the conservation restriction must account for the environmental standards applicable to the overlay zone in which a lot is located. Lastly, the conservation restriction will also clearly state all uses remaining in the property.

The conservation restriction will be signed and recorded at the time a sending zone property owner wishes to have the ability to sell or convey his or her development potential. After receiving a final HDC determination letter from the Highlands Council, a property owner may elect to record the requisite conservation restriction or simply hold onto the HDC determination letter. Where the property owner chooses not to record the requisite conservation restriction, the HDC determination letter will remain valid for two years. If no conservation restriction is recorded prior to the expiration of the HDC determination letter, the property owner must re-apply to the Highlands Council for an HDC determination.

It is important to note that only one conservation restriction will be recorded per lot. Consequently, even if a property owner wishes to sell or convey only one HDC of several that he or she owns, a conservation restriction must be recorded at that time for the entire lot before that first HDC may be sold.

- **A minimum HDC price will be established at the outset of the Highlands TDR Program that recognizes the need to balance sending zone lot owners' interests with those of the development community.**

Rationale: Section 13.h(1) of the Highlands Act mandates that the Highlands Council establish the initial value of a development right. Establishing this price requires balancing two critical interests. First, the minimum HDC price must be sufficient so that a sending zone property owner realizes a true economic return from the sale of credit. Second, the minimum HDC price cannot be so great that it reduces a developer's profit to such an extent that a proposed project is rendered uneconomical. Only by finding a balance between these two competing interests will an appropriate initial HDC price be established.

The dollar value of an HDC will depend on the profitability of the bonus density provisions for developers who construct in the voluntary receiving zones. A fundamental principle of the Highlands TDR Program is that, for each additional unit on a given lot, the increase in revenues will be greater than the increase in costs. While costs savings are attributable to lower per unit infrastructure costs (streets, sidewalks, sewers, utilities, etc.) and other economies of scale, the principal source of savings is reduced land costs. Consequently, residential and commercial land values per unit are a significant factor that will influence the value of HDCs.

Also important to the value of HDCs is the recognition that there is great variability in per unit land costs depending upon the particular end use of a lot. Residential land costs per unit differ

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greatly when comparing single family home development with that for townhouses or apartments. Similarly, commercial land costs per unit differ significantly between office, retail and other commercial uses. Generally, the higher the permitted density (in the case of residential housing) or intensity (in the case of commercial use) of a given lot, the lower the per unit land costs.

Notwithstanding the Market Factor and End-Use Factor discussed above, the minimum HDC price will be established by estimating the land value increments associated with higher density/intensity development per end-use and then comparing these figures. A value will then be chosen that satisfies the balancing of the two critical interest discussed above.

➤ **Purchase of an HDC may be made by any person or entity.**

Rationale: The Highlands Act does not limit who may purchase HDCs. By enlarging the number of potential purchasers, demand for HDCs should be theoretically greater. In doing so, the Highlands Council would recognize HDCs as a commodity to be sold or transferred to anyone so long as the property owner of the sending zone lot from which the HDCs are generated has recorded the appropriate conservation restriction prohibiting future development of that lot. This policy would likely encourage land trusts, property owners who want to protect themselves from adjacent development, and even investors to purchase HDCs.

**5) The following policy regarding review and assessment of the Highlands TDR Program is recommended for inclusion in the Policy Guidance Document:**

➤ **The Highlands Council shall review and assess the success of the Highlands TDR Program at the end of the first five years of program implementation.**

Rationale: Sections 155 and 156 of State TDR Act require that any adopted municipal TDR program be reviewed and assessed to determine whether it is meeting the goals of the program. These reviews occur at the third and fifth anniversaries of the program's adoption. Although not specified by the TDR provision of the Highlands Act, a similar review of the Highlands TDR Program should be conducted. Unlike the reviews required by the State TDR Act, however, this review would occur at the fifth anniversary of the program's adoption because of the program's scope and voluntary nature of the receiving zones.

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

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

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1. immediately requiring the Highlands TDR Bank to acquire or provide for the private purchase of the difference between the HDCs already transferred and 15% of the total HDCs created in the Highlands Region sending zones; or
  2. demonstrating that low levels of HDC transfer activity is due, not to the program's failure, but to low levels of development demand in general throughout the seven Highlands counties.
- 6) **The following policies, which require coordination with other State agencies, are recommended for inclusion in the Policy Guidance Document to promote implementation of the Highlands TDR Program:**
- **Coordinate with the Garden State Preservation Trust and State Transfer of Development Rights Bank to secure initial capitalization of the Highlands TDR Bank.**

Rationale: Section 13.i(2) of the Highlands Act states that the Highlands Council may seek the technical assistance of the State Transfer of Development Rights Bank in establishing and operating a Highlands development transfer bank. Additionally, under a provision of the State Transfer of Development Rights Bank Act, specifically, N.J.S.A. 4:1C-52.p, the State Transfer of Development Rights Bank is to provide funding to the Highlands TDR Bank for the purchase of development potential.

As discussed above, an important function of the Highlands TDR Bank, particularly during the period before voluntary receiving zones are designated, will be purchasing HDCs from sending zone lots that either (a) are required to be prioritized for participation in the program, or (b) the owner of such lot faces a hardship situation. In either case, for the Highlands Council to make such purchases, it will have to have money available. Seeking funding from the State Transfer of Development Rights Bank for this purpose will be necessary.

- **Coordinate with the Office of Smart Growth and other State agencies to devise an expedited State Development and Redevelopment Plan Endorsement process for Highlands TDR Receiving Zones.**

Rationale: Section 13.l of the Highlands Act requires that before any municipality that is outside of the Highlands Region but within the seven counties is eligible to serve as a voluntary receiving zone, that municipality must have received State Plan endorsement from the State Planning Commission. As currently conducted, the municipal master plan endorsement process takes significant time, often requiring a year or more of planning efforts. Because few municipalities within the seven Highlands counties are State Plan endorsed, it may be two years or more before municipalities in the Highlands Region are able to finalize a TDR ordinance. In turn, this delays demand for HDCs because potential receiving zones are not finalized. To address this concern, it is recommended that Council staff work with the Office of Smart Growth and other State agencies in establishing a more expedited plan endorsement process for potential TDR receiving zones.

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- **Coordinate with the Department of Environmental Protection to expedite State environmental and land use permits required for construction in a designated voluntary receiving zone.**

Rationale: As a means to ensure developer participation in the Highlands TDR Program, it is essential that the development application process to build in a voluntary receiving zone be streamlined. Developer efforts to engage in receiving zone projects should be recognized and encouraged, particularly where such development will achieve smart growth objectives and the Council's Regional Development Principles. By reducing the time for development application approval, developers may realize significant soft costs savings that will aid them in offsetting the costs of HDC acquisition and impact fees.

By sharing the information and data developed for the Regional Master Plan, the Highlands Council may assist the Department in expediting State land use and environmental permit approvals. The areas identified as potential voluntary receiving zones by the Highlands Council will have undergone extensive review and analysis, including assessment of water supply and sewage capacity. With this information in hand, the Department should be able to quickly assess a receiving zone project's environmental impact without having to undertake further study.

- **Coordinate with the Department of Environmental Protection to require the purchase of HDCs as one means of mitigating damages to natural resources in the Highlands Region.**

Rationale: As discussed above, the designation of receiving zones is strictly voluntary under the requirements of the Highlands Act TDR provision. Due to this situation, the designation of specific receiving zones will not occur at the time of Regional Master Plan adoption, but over time. Consequently, the demand for HDCs will take time to develop as more receiving zones become available.

In an attempt to address the lack of HDC demand at program outset, it is recommended that HDCs be used to offset damages to natural resources occasioned by releases of hazardous or toxic material. The Department of Environmental Protection established an Office of Natural Resource Restoration which administers the State's Natural Resource Restoration program. The program was created in the early 1990s to restore natural resources damaged by multiple oil spills and discharges. (<http://www.nj.gov/dep/nrr> visited on July 14, 2006) Where the Natural Resource Restoration Program requires natural resource mitigation, the program could call for the responsible party to purchase HDCs as part of its restoration efforts. The purchase of HDCs would have to be tied specifically to natural resource damages occurring in the Highlands Resources.

- 7) **The following policy is recommended for inclusion in the Policy Guidance Document to promote local understanding of, support for and participation in the Highlands TDR Program by municipalities:**
  - **The Highlands Council shall develop a Highlands TDR Program public outreach and education agenda.**

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- **Develop and Implement a Voluntary TDR Receiving Zone Feasibility Grant Program to encourage interested municipalities to petition the Highlands Council for approval of TDR Receiving Zones**

Rationale: The concept of transferring development rights is not easy to understand. Moreover, the Highlands TDR Program is quite complex because of the program’s scope and the necessity of addressing regional real estate market variability. Public outreach and education will be vital to gaining municipal participation as voluntary receiving zones and sending zone lot owner participation in the sale of HDCs.

## II. STAFF’S RECOMMENDATIONS FOR NEXT STEPS

As is evident from the above discussion, further work is required to establish an implementable Highlands TDR Program. It is anticipated that the following tasks will be completed within six months of adoption of the Regional Master Plan.

<u>Step</u>	<u>Rationale</u>
Implement a Voluntary TDR Receiving Zone Feasibility Grant Program	It is important to have this program in place as soon as possible so that the Highlands Council can begin to work with identified municipalities in assessing the likelihood that a voluntary receiving zone may be designated
Approval of Conservation Deed Restrictions depending on underlying property use	The Conservation Restriction will be used to record the severance of HDCs from a sending zone lot
Establish Highlands TDR Bank (or use some other interim mechanism, such as the Highlands Council) including the appointment of a 5-member board of directors and the adoption of by-laws	The Highlands TDR Bank will record and track all HDC transactions.
Establish Resource Value Factor	This factor awards bonus HDCs to a sending zone lot where important ecological or agricultural resources are present on-site
Completion of Real Estate Analysis	The real estate analysis informs establishment of the various factors to be applied in the HDC allocation process.
<u>Step</u>	<u>Rationale</u>
Establish Real Estate Market Factors	This factor adjusts for variability in the regional real estate market. It is informed by the Real Estate Analysis
Establish End-Use Factors	This factor adjusts for variability in the value of different

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	types of land uses. It too is informed by the Real Estate Analysis
Establish Minimum HDC Price	The Real Estate Analysis and the End-Use Factor will help determination of the minimum HDC price
Approval of HDC Certificate Program	For each HDC allocated to a sending zone lot, an HDC certificate will be given to the lot owner upon recording the requisite conservation restriction. This certificate allows the Highlands TDR Bank to track all HDC transactions.

**III. STAFF’S RECOMMENDATIONS FOR LEGISLATIVE PROPOSALS**

Based upon staff’s review of TDR programs both within and without the State, and its review of the Highlands Act and State TDR Act, there are two legislative proposals that staff recommends the Highlands Council explore. The first concerns extending potential receiving zones. Since TDR is a market-driven conservation tool, the greater the demand for TDR credits, in this case HDCs, the more likely sending zone lot owners will be willing to sell and place conservation restrictions on their property. Important to creating demand is establishing receiving zones in areas that developers want to build. The Highlands Council should explore amending the Highlands Act to permit any municipality in the State to participate in the Highlands TDR Program by becoming a receiving zone. If this proposal became law, it would allow communities in markets such as Hudson and Ocean Counties to establish receiving zones and accept HDCs. Along with such authorization, the proposal would allow municipalities that participate in the Highlands TDR Program to assess impact fees.

The second legislative proposal is to authorize any development transfer bank established by the Highlands Council to guarantee loans secured with HDCs as collateral. As noted above, a Highlands TDR Bank is not authorized to provide such guarantees at this time. This guarantee is important in that it allows a sending zone lot owner to collateralize their credits and secure financing from private lending institutions. This proposal would ensure that sending zone lot owners can tap into the value of their allocated HDCs when the necessity for a loan arises.

**IV. REQUIREMENTS OF THE HIGHLANDS ACT AND REGIONAL MASTER PLAN GOALS RELATED TO THE TRANSFER OF DEVELOPMENT RIGHTS:**

Goals of the Highlands Act:

In accordance with Section 10 of the Highlands Act, the overarching goal of the Regional Master Plan “with respect to the entire Highlands Region shall be to protect and enhance the significant values of the resources thereof in a manner which is consistent with the purposes and provisions of this act.” Section 10.a.

The Highlands Act does not include specific goals relating to the establishment of the Highlands TDR Program; however, numerous goals of the Act have substantial implications on timetable issues. Those goals with respect to the Preservation Area shall be to:

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- preserve extensive and, to the maximum extent possible, contiguous areas of land in its natural state, thereby ensuring the continuation of a Highlands environment which contains the unique and significant natural, scenic, and other resources representative of the Highlands Region. Section 10.b.(2).
- preserve farmland and historic sites and other historic resources. Section 10.b.(4).
- promote brownfield remediation and redevelopment. Section 10.b.(7).
- promote compatible agricultural, horticultural, recreational and cultural uses and opportunities within the framework of protecting the Highlands environment. Section 10.b.(8).
- prohibit or limit to the maximum extent possible construction or development which is incompatible with preservation of this unique area. Section 10.b.(9).

In addition, the goals with relating to protection of scenic resources with respect to the Planning Area shall be to:

- preserve to the maximum extent possible any environmentally sensitive lands and other lands needed for recreation and conservation purposes. Section 10.c.(2).
- promote brownfield remediation and redevelopment. Section 10.c.(8).
- encourage, consistent with the State Development and Redevelopment Plan and smart growth strategies and principles, appropriate patterns of compatible residential, commercial, and industrial development, redevelopment, and economic growth, in or adjacent to areas already utilized for such purposes, and discourage piecemeal, scattered, and inappropriate development, in order to accommodate local and regional growth and economic development in an orderly way while protecting the Highlands environment from the individual and cumulative adverse impacts thereof. Section 10.c.(9).

### Requirements of the Highlands Act:

#### *Powers of the Council*

Section 6n. To identify and designate in the regional master plan special areas in the preservation area within which development shall not occur in order to protect water resources and environmentally sensitive lands while recognizing the need to provide just compensation to the owners of those lands when appropriate, whether through acquisition, **transfer of development rights programs**, or other means or strategies. (emphasis added).

o. To identify any lands in which the **public acquisition of a fee simple or lesser interest** therein is necessary or desirable in order to ensure the preservation thereof, or to provide sites for public recreation, as well as any lands the beneficial use of which are so adversely affected by the restrictions imposed pursuant to this act as to require a guarantee of just compensation therefor, and to transmit a list of those lands to the Commissioner of Environmental Protection, affected local government units, and appropriate federal agencies. (emphasis added).

#### *Regional Master Plan*

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Section 8. a. The council shall, within 18 months after the date of its first meeting, and after holding at least five public hearings in various locations in the Highlands Region and at least one public hearing in Trenton, prepare and adopt a regional master plan for the Highlands Region. The Highlands regional master plan shall be periodically revised and updated at least once every six years, after public hearings.

The council shall not adopt the regional master plan unless it recommends receiving zones in the planning area and capacity therefor for each **receiving zone pursuant to the transfer of development rights program authorized in section 13 of this act.** (emphasis added).

### *Financial Component*

Section 11.a.(2) charges the Council with developing “[a] financial component; together with a cash flow timetable which:

(a) details the cost of implementing the regional master plan, including, but not limited to, property tax stabilization measures, watershed moratorium offset aid, planning grants and other State aid for local government units, **capital requirements for any development transfer bank**, payments in lieu-of-taxes, acquisition, within five years and within 10 years after the date of enactment of this act, of fee simple or other interests in lands for preservation or recreation and conservation purposes, compensation guarantees, general administrative costs, and any anticipated extraordinary or continuing costs; and

(b) details the source of revenue for covering such costs, including, but not limited to, grants, donations, and loans from local, State, and federal departments, agencies, and other governmental entities, and from the private sector. (emphasis added)

### *Smart Growth Component*

(6) A smart growth component that includes an assessment, based upon the resource assessment prepared pursuant to paragraph (1) of subsection a. of this section, of opportunities for appropriate development, redevelopment, and economic growth, and a transfer of development rights program which shall include consideration of public investment priorities, infrastructure investments, economic development, revitalization, housing, transportation, energy resources, waste management, recycling, brownfields, and design such as mixed-use, compact design, and transit villages. In preparing this component, the council shall:

(a) prepare a land use capability map;

(b) identify existing developed areas capable of sustaining redevelopment activities and investment;

(c) identify undeveloped areas in the planning area, which are not significantly constrained by environmental limitations such as steep slopes, wetlands, or dense forests, are not prime agricultural areas, and are located near or adjacent to existing development and infrastructure, that could be developed;

(d) identify transportation, water, wastewater, and power infrastructure that would support or limit development and redevelopment in the planning area. This analysis shall also provide proposed densities for development, redevelopment, or voluntary receiving zones for the transfer of development rights;

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- (e) **identify potential voluntary receiving zones in the planning area for the transfer of development rights** through the appropriate expansion of infrastructure or the modified uses of existing infrastructure;
- (f) issue model minimum standards for municipal and county master planning and development regulations outside of the preservation area, including density standards for center-based development to encourage, where appropriate, the adoption of such standards;
- (g) identify special critical environmental areas and other critical natural resource lands where development should be limited; and
- (h) identify areas appropriate for redevelopment and set appropriate density standards for redevelopment. Any area identified for possible redevelopment pursuant to this subparagraph shall be either a brownfield site designated by the Department of Environmental Protection or a site at which at least 70% of the area thereof is covered with impervious surface. (emphasis added)

### *Preservation Area*

12. In addition to the contents of the regional master plan described in section 11 of this act, the plan shall also include, with respect to the preservation area, a land use capability map and a comprehensive statement of policies for planning and managing the development and use of land in the preservation area, which shall be based upon, comply with, and implement the environmental standards adopted by the Department of Environmental Protection pursuant to sections 33 and 34 of this act, and the resource assessment prepared pursuant to paragraph (1) of subsection a. of section 11 of this act.

These policies shall include provision for implementing the regional master plan by the State and local government units in the preservation area in a manner that will ensure the continued, uniform, and consistent protection of the Highlands Region in accordance with the goals, purposes, policies, and provisions of this act, and shall include:

- a. a preservation zone element that identifies zones within the preservation area where development shall not occur in order to protect water resources and environmentally sensitive lands and which shall be permanently preserved through use of a variety of tools, including but not limited to **land acquisition and the transfer of development rights**.

### *Transfer of Development Rights*

The Highlands Act in Section 13 includes specific requirements relating to the establishment of the Highlands TDR Program.

Section 13.a. The council shall use the regional master plan elements prepared pursuant to sections 11 and 12 of this act, [FN1] including the resource assessment and the smart growth component, to establish a transfer of development rights program for the Highlands Region that furthers the goals of the regional master plan. The transfer of development rights program shall be consistent with the "State Transfer of Development Rights Act," P.L.2004, c. 2 (C.40:55D-137 et seq.) or any applicable transfer of development rights program created otherwise by law, except as otherwise provided in this section.

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

c. In consultation with municipal, county, and State entities, the council shall, within 18 months after the date of enactment of this act, and from time to time thereafter as may be appropriate, identify areas within the planning area that are appropriate for development as voluntary receiving zones pursuant to P.L.2004, c. 2 (C.40:55D-137 et seq.) considering the information gathered pursuant to sections 11 and 12 of this act, including but not limited to the information gathered on the transfer of development rights pursuant to paragraph (6) of subsection a. of section 11 of this act. For the purposes of the council establishing a transfer of development rights program prior to the preparation of the initial regional master plan, the council in identifying areas appropriate for development as voluntary receiving zones shall consider such information as may be gathered pursuant to sections 11 and 12 of this act and as may be available at the time, but the council need not delay the creation of the transfer of development rights program until the initial regional master plan has been prepared. The council shall set a goal of identifying areas within the planning area that are appropriate for development as voluntary receiving zones that, combined together, constitute four percent of the land area of the planning area, to the extent that the goal is compatible with the amount and type of human development and activity that would not compromise the integrity of the ecosystem of the planning area.

d. The council shall work with municipalities and the State Planning Commission to identify centers, designated by the State Planning Commission, as voluntary receiving zones for the transfer of development rights program.

e. In consultation with municipal, county, and State entities, the council shall assist municipalities or counties in analyzing voluntary receiving zone capacity.

f. In consultation with municipal, county, and State entities, the council shall work with municipalities outside of the preservation area to assist these municipalities in developing ordinances necessary to implement the transfer of development rights. The council shall also establish advisory or model ordinances and other information for this purpose.

The council shall make assistance available to municipalities that desire to create additional sending zones on any lands within their boundaries which lie within the planning area and are designated for conservation in the regional master plan.

g. Notwithstanding the provisions of P.L.2004, c. 2 (C.40:55D-137 et seq.) to the contrary, the council shall perform the real estate analysis for the Highlands Region that is required to be performed by a municipality prior to the adoption or amendment of any development transfer ordinance pursuant to P.L.2004, c. 2.

h. (1) The council shall set the initial value of a development right. The Office of Green Acres in the Department of Environmental Protection and the State Agriculture Development Committee shall provide support and technical assistance to the council in the operation of the transfer of development rights program. The council shall establish the initial value of a development right

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considering the Department of Environmental Protection rules and regulations in effect the day before the date of enactment of this act.

(2) The council shall give priority consideration for inclusion in a transfer of development rights program any lands that comprise a major Highlands development that would have qualified for an exemption pursuant to paragraph (3) of subsection a. of section 30 of this act but for the lack of a necessary State permit as specified in subparagraph (b) or (c), as appropriate, of paragraph (3) of subsection a. of section 30 of this act, [FN2] and for which an application for such a permit had been submitted to the Department of Environmental Protection and deemed by the department to be complete for review on or before March 29, 2004.

i. (1) The council may use the State Transfer of Development Rights Bank established pursuant to section 3 of P.L.1993, c. 339 (C.4:1C-51) for the purposes of facilitating the transfer of development potential in accordance with this section and the regional master plan. The council may also establish a development transfer bank for such purposes.

(2) At the request of the council, the Department of Banking and Insurance, the State Transfer of Developments Right Bank, the State Agriculture Development Committee, and the Pinelands Development Credit Bank shall provide technical assistance to the council in establishing and operating a development transfer bank as authorized pursuant to paragraph (1) of this subsection.

(3) Any bank established by the council shall operate in accordance with provisions of general law authorizing the creation of development transfer banks by municipalities and counties.

j. The Office of Smart Growth shall review and coordinate State infrastructure capital investment, community development and financial assistance in the planning area in furtherance of the regional master plan. Prior to the council establishing its transfer of development rights program, the Office of Smart Growth shall establish a transfer of development rights pilot program that includes Highlands Region municipalities.

k. Any municipality in the planning area whose municipal master plan and development regulations have been approved by the council to be in conformance with the regional master plan in accordance with section 14 or 15 of this act, and that amends its development regulations to accommodate voluntary receiving zones within its boundaries which are identified pursuant to subsection c. of this section and which provide for a minimum residential density of five dwelling units per acre, shall, for those receiving zones, be: eligible for an enhanced planning grant from the council of up to \$250,000; eligible for a grant to reimburse the reasonable costs of amending the municipal development regulations; authorized to impose impact fees in accordance with subsection m. of this section; entitled to legal representation pursuant to section 22 of this act; [FN4] accorded priority status in the Highlands Region for any State capital or infrastructure programs; and eligible for any other appropriate assistance, incentives, or benefits provided pursuant to section 18 of this act.

l. Any municipality located outside of the Highlands Region in any county that has a municipality in the Highlands Region that has received plan endorsement by the State Planning Commission pursuant to the "State Planning Act," P.L.1985, c. 398 (C.52:18A-196 et al.), that establishes a receiving zone which provides for a minimum residential density of five dwelling units per acre for the transfer of development rights from a sending zone in the Highlands Region, and that accepts

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that transfer of development rights shall, for those receiving zones, be eligible for the same grants, authority, and other assistance, incentives, and benefits as provided to municipalities in the planning area pursuant to subsection k. of this section except for legal representation as provided pursuant to section 22 of this act and priority status in the Highlands Region for any State capital or infrastructure programs.

m. (1) A municipality that is authorized to impose impact fees under subsection k. of this section shall exercise that authority by ordinance.

(2) Any impact fee ordinance adopted pursuant to this subsection shall include detailed standards and guidelines regarding: (a) the definition of a service unit, including specific measures of consumption, use, generation or discharge attributable to particular land uses, densities and characteristics of development; and (b) the specific purposes for which the impact fee revenues may be expended.

(3) An impact fee ordinance shall also include a delineation of service areas for each capital improvement whose upgrading or expansion is to be funded out of impact fee revenues, a fee schedule which clearly sets forth the amount of the fee to be charged for each service unit, and a payment schedule.

(4) An impact fee may be imposed by a municipality pursuant to this subsection in order to generate revenue for funding or recouping the costs of new capital improvements or facility expansions necessitated by new development, to be paid by the developer as defined pursuant to section 3.1 of P.L.1975, c. 291 (C.40:55D-4). Improvements and expansions for which an impact fee is to be imposed shall bear a reasonable relationship to needs created by the new development, but in no case shall an impact fee assessed pursuant to this subsection exceed \$15,000 per dwelling unit unless and until impact fees are otherwise established by law at which time the impact fee shall be 200% of the calculated impact fee.

(5) No impact fee shall be assessed pursuant to this subsection against any low or moderate income housing unit within an inclusionary development as defined under P.L.1985, c. 222 (C.52:27D-301 et al.).

No impact fee authorized under this subsection shall include a contribution for any transportation improvement necessitated by a new development in a county which is covered by a transportation development district created pursuant to the "New Jersey Transportation Development District Act of 1989," P.L.1989, c. 100 (C.27:1C-1 et al.).

## V. GLOSSARY

**Conservation Restriction** – a deed of easement which limits future development of a given lot of property. Under the Highlands TDR Program, a sending zone lot owner must record a conservation restriction for his or her property before the HDCs allocated to that property may be sold.

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**Highlands Development Credit (HDC)** – an interest in land, designated as a credit, which is awarded to a sending zone lot owner representing the lost development potential of the lot. One credit is awarded for each lost unit to be expressed as a certain size detached single family home (or some percentage thereof for an apartment, condo or townhouse) or a certain amount of commercial square footage.

**HDC Certificate** – a document representing one HDC. Each HDC Certificate will list the lot by block and lot from which the HDC was separated, the lot owner's name, the date of award, and a specific identification number for that particular HDC.

**End-Use Factor** – a factor to be applied in the HDC allocation process that accounts for the relative value of the type of residential or commercial unit that could have been constructed on the property prior to enactment of the Highlands Act.

**Real Estate Market Factor** – a factor to be applied in the HDC allocation process that accounts for the relative value of the local real estate market in which a sending zone lot is located.

**Receiving Zone** – an area or areas designated in the Regional Master Plan, such as a Regional Development Zone or Specially Planned Area, within which development density/intensity may be increased.

**Resource Value Factor** – a factor to be applied in the HDC allocation process that awards a bonus to a given lot where exceptional Highlands ecological or agricultural resources exist as identified by the Land Use Capability Map.

**Sending Zone** - an area identified pursuant to the narrative criteria adopted by the Highlands Council within which development is restricted by application of the Highlands Act.

**Specially Planned Area** – a land area previously developed that may be appropriate for redevelopment, including infill and adaptive reuse, based on limited resource constraints due to past development patterns. Within the Preservation Area, a Specially Planned Area is limited to an area or site that contains at least 70% impervious surface or is a Brownfield site determined by the Highlands Council and the Department of Environmental Protection. (N.J.S.A. 13:20-9.b)

**TDR Density (bonus density)** – 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 HDCs.