

## Transfer of Development Rights

By John P. Brunner

Governor McGreevey signed the Transfer of Development Rights Act into law on March 29, 2004, adding a potentially potent weapon to an arsenal of tools aimed at halting the advance of suburban sprawl.

Transfer of Development Rights (TDR) enables a municipality (or regional grouping thereof) to establish sending areas and receiving areas. Sending areas are lands targeted for watershed protection, open space and farmland preservation. Receiving areas are lands deemed more suitable for development due to existing infrastructure or fewer environmental constraints such as steep slopes or wetlands.

A landowner in the sending area can obtain "development credits" for the development value of the land and in turn can sell the development credits to a developer building in the receiving area (often at increased densities). Preserved land is deed restricted, preventing future development in perpetuity.

When it works as intended the law allows municipalities the flexibility to adopt a TDR program that meets growth and preservation needs in a manner that is equitable for landowners.

### Devilish Details

While TDR can be a most effective growth management tool, it is not one that will come easy to all municipalities.

As with other smart growth initiatives the TDR law requires local governments to take several mandated actions in order to set up a town or regional TDR program. Towns are required to adopt a Development Transfer Plan (DTP) element in the master plan and conduct a real estate market analysis.

Towns must also adopt a Utility Service Element in the master plan and establish a Capital Improvement Program for their receiving zone(s).

Ultimately, towns must obtain approval from both the county planning board (to ensure consistency with regional plans) and the State Planning

Commission, which must approve an amended master plan endorsement. The approval process forces towns to conform to county and state plans.

The TDR certification process will require an extraordinary degree of cooperation between property owners and communities. In particular, identifying receiving areas can be controversial.

#### TDR and the Musconetcong Watershed

The Highlands Task Force Action Plan recommends the establishment of a regional TDR system. TDR has the potential to address some of the problems associated with traditional zoning, especially in terms of natural resource protection. But as of this writing the proposed Highlands Regional TDR slices the lower Musconetcong River watershed in half along its length. The Hunterdon County side is generally within the preservation area, while the Warren County side is mostly within the planning area.

Such a county-line approach flies in the face of basic watershed management principles. Towns in one half of the watershed will be encouraged to preserve land, protect stream corridors and aquifers. High-density zoning will be encouraged in the other half of the watershed.

For most municipalities in New Jersey, going down the TDR road will require a great leap of faith and initiative. Many municipalities have bungled a far less complex land use regulatory system. Will townships be able to design a fair and acceptable TDR plan? How will the real estate market respond to such a radical departure from the old way of doing things?

For municipalities within the Highlands, TDR may not be optional, thus the same questions would apply to the regional entity that is charged with implementing a program in a region that encompasses about 13 percent of the state's geographic area.

It appears that the Highlands Legislation is highly biased towards protecting major drinking water supplies. Although the Musconetcong is the only river in New Jersey to fall entirely within the Highlands Region, it is not a major drinking water supply.

What is usually forgotten is this: although the Musconetcong watershed is not directly a major surface water supply, the lower valley is underlain by a

large sole source aquifer. The aquifer directly feeds the river and its tributaries. In terms of flow, the Musconetcong River is northern New Jersey's most important feeder to the Delaware River. The wing dam at Bulls Island State Park diverts Delaware River water into the Delaware & Raritan Canal, which in turn is a major source of drinking water for New Jerseyans all the way down to the Raritan Bay. So in a sense, the Musconetcong is a major surface water supply via the Delaware River.

#### TDR's FUTURE

TDR places a potent growth management tool within the grasp of every municipality in New Jersey. It also appears that TDR is about to be extended to the Highlands regional entity to administered in a manner similar to the Pinelands Commission.

A downside is that TDR is easier to talk about than it is to implement. Those who decide to take the TDR route may encounter a few legal potholes along the way.

On the positive side TDR offers a wonderful opportunity for communities and entire regions to protect natural resources from the ravages of sprawl. TDR along with the new stormwater management rules will encourage builders to turn to existing built environments for new construction projects, and more rural communities will be able to allow a conservative amount of growth to occur without compromising environmental quality for future generations.