



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Department of Administration
DIVISION OF PLANNING
One Capitol Hill
Providence, RI 02908-5870

March 9, 2015

Mr. Philip L. Hervey
Town Planner
283 County Road
Barrington, RI 02806

Subject: Draft Comprehensive Plan – Review of Revised Chapters and of Land Use and Implementation Chapters

Dear Mr. Hervey:

I am pleased to notify you that our office has completed its review of the Land Use and Implementation chapters of the draft Comprehensive Plan. In addition, we have reviewed the revisions to the eight other chapters of the draft Plan which had been previously submitted for review. As part of this review, we also solicited comments from other relevant State agencies. The following constitutes our evaluation of the draft material that you provided to our office. As with our previous reviews, this is a preliminary evaluation and does not constitute official findings.

Most importantly, our review is intended to alert you to any aspect of the draft that could prevent its receiving State approval. This includes any potential conflicts with elements of the State Guide Plan or the goals and policies of State Agencies, any internal inconsistencies within the Plan, and any missing material that is required to be included in a comprehensive plan by the Comprehensive Planning and Land Use Regulation Act. Our understanding is that the Town intends for this plan to meet the requirements of the Act as amended in 2011 and thereby qualify for a ten-year State approval.

What follows is divided into three sections. Section I specifies the standards for State approval of local comprehensive plans as outlined in the Act and supplemented by the Division of Planning. Section II sets forth concerns with the draft plan that relate to approvability issues, and Section III presents other suggestions that, although not directly related to the review requirements, could improve the plan's overall accuracy, readability, and usability if addressed.

I. Standards for State Approval

The State review is intended to ensure that comprehensive plans comply with the requirements of the Comprehensive Planning and Land Use Regulation Act (the Act). These include that:

- 1) the intent and goals of the Act as stated in § 45-22.2-3(b)(1) and (c)(1) through (10) have been met;
- 2) the plan is internally consistent and complete as required by § 45-22.2-6;
- 3) the plan or amendment is consistent with, and embodies, the goals and policies of the State and its departments and agencies as contained in the State Guide Plan and the laws of the State;
- 4) municipal planning activities have been coordinated according to the provisions of section 45-22.2-7;
- 5) the plan or amendment has been officially adopted and submitted for review in accordance with §45-22.2-8 and other applicable procedures;
- 6) the plan or amendment complies with the rules and regulations adopted by the State Planning Council necessary to implement the standards established by the Act; and, that
- 7) adequate, uniform, and valid data have been used in preparing the plan or amendment.

Although all of the above will be considered in the final review of the Plan once it has been adopted by your Town Council, at this stage of the process, item 5) does not apply and is not evaluated in this review.

In addition to these general requirements, the Division of Planning is currently in the process of developing a Comprehensive Plan Guidance and Standards Manual that will offer both guidance on the development of comprehensive plans and set detailed standards relating to the above requirements for receiving State approval of comprehensive plans. However, until the Manual is adopted by the State Planning Council, which is anticipated for later this year, the review standards in force are the *interim* standards that were shared with all municipalities in 2013. Therefore, the comments included in this correspondence relating to State approval are presented in two categories, those comments relating to the current (interim) review standards and those comments relating to additional draft standards included in the Comprehensive Plan Guidance and Standards Manual. Please note that the draft standards used in this review are subject to change as the Manual is reviewed, finalized, and adopted by the State Planning Council.

Any municipally-adopted plan submitted before the adoption of the new Comprehensive Plan Guidance and Standards Manual by the State Planning Council must satisfactorily address the comments identified under the Interim Standards in order to receive State approval. Any municipally-adopted plan submitted after the adoption of the new Manual may also need to address the concerns identified under the Draft Standards.

II. State Approval Concerns

The draft Land Use and Implementation chapters do not appear to contain any State Approval concerns for items 1), 3), 6), or 7). Our comments for items 2) and 4) appear below. We also have one comment (Comment 6) that also relates to a comment that had been previously provided in our review of the Community Services and Facilities chapter.

Land Use Chapter

Comment 1 – Under the current Standards, the draft Land Use chapter does not appear to be internally consistent in terms of its population projections. Specifically, the draft Plan cites a population projection provided by the Statewide Planning Program of 15,569 in 2040 (page 139). However, the draft also cites differing population projections based on the Town’s build-out analysis on pages 140 and 141, including Table 6: Housing Development and Build-out Projections – Units, Population. These projections include:

- 17, 375 in 2035
- 17, 444 “at build-out around 2040”
- 17, 814 in 2035
- 18,050 at build-out

While the Town is not required to accept the Statewide Planning population projection, the Plan must be consistent in the population projection that it uses.

Suggestion – The Plan will need to reconcile the different figures cited within the text with those provided in Table 6. Please be sure that all needs analyses within the Plan (housing, recreation, services and facilities, etc.) are based on the same population projection.

While not an approvability issue, it would be helpful to the reader to add a statement in the section “Population Projections” (page 139) that the Town has chosen to use its own projection based on the build-out analysis that follows in subsequent sections of the Plan.

Comment 2 – Under the draft Standards, the following may apply. The Plan must consider the consistency between its proposed future land uses and the future land uses identified by contiguous municipalities.

Suggestion – Discuss any inconsistencies that exist between the desired future land uses illustrated on the Future Land Use Map and the Plans of contiguous municipalities by including, for each area in which a conflict is identified:

- Identification of the conflicting future land use designations;
- Discussion of the conflict that seems to exist; and
- A brief synopsis of why the future land use was selected for the area.

The Town should consider actions that could be included in the Implementation Program for minimizing conflicting land uses with contiguous municipalities. If no inconsistencies are found, the Plan must include a statement to this effect.

Implementation Plan

Comment 3 – Under the draft Standards, the following may apply. The Implementation Program must identify those projects that are already included in the Town’s current Capital Improvement Program.

Suggestion – The structure of Implementation Plan is one of the best we have seen. Since one of the columns provided in the table is “Priority/Cost” we suggest that you simply note in that column any projects already in the Capital Improvement Program.

Comment 4 – Under the current Standards, the following must be addressed. The draft Land Use chapter includes Map LU-7, Zoning Future Land Use Analysis. It appears from this analysis that there are several areas of the Town that may require a zone change to conform to Map LU-6, Future Land Use. If this is the case, the Implementation Program must include actions for amending the zoning ordinance and map to make them consistent with the Future Land Use Map as follows:

- Specify the amendments that will be undertaken within the first twelve (12) months after adoption of the comprehensive plan that are related to any desired development moratoriums;
- Specify, in 2-year increments, the amendments will be undertaken to bring consistency with the comprehensive plan;
- Propose all amendments to be completed within the 10-year period subsequent to the adoption of the comprehensive plan.

Suggestion – Add the appropriate actions for amending the zoning ordinance and map or clarify the analysis to explain why such amendments are not necessary.

Comment 5 – Under the draft Standards, the following may apply. The Implementation Program must include actions for promoting water conservation and the efficient use of water in both the public and private sectors.

Suggestion – Add appropriate actions such as:

- Implement water efficient municipal practices (building maintenance, etc.), particularly in the summer.
- Adopt outdoor watering ordinances that are more effective than odd/even watering days, such as twice a week watering, watering prohibitions during summer months and limiting the number of automatic sprinklers for new developments.
- Work with land trusts and others holding conservation easements to encourage agricultural producers leasing these lands to develop and implement water use conservation plans for their operations.

Comment 6 – Under the draft Standards, the following may apply. The Implementation Program must include provisions for planning and preparing for drought conditions. Page 49 of the draft Natural Hazards chapter notes, “Bristol County Water can address drought impacts through enactment of water restrictions when necessary”. In addition to water suppliers, municipalities also have a role and responsibilities in addressing drought

Also related to the issue of drought, we had previously issued the following comment and suggestion in our review of the draft Community Services and Facilities chapter:

Comment: The draft Community Services and Facilities chapter does not contain a description of how Barrington addresses their municipal drought mitigation responsibilities including coordination and the communication responsibilities’ of the Town with the Water Resources Board (WRB) in the event of a long-term drought.

Suggestion: Add a discussion of how the Town currently addresses this issue and, if one is not already in place, add an implementation action to establish a municipal drought management response strategy to coordinate with the WRB during times of drought for the entire community. More information may be found in *Water 2030*, available on our website at www.planning.ri.gov/landuse/RI%20Water%202030_06.14.12_Final.pdf. (If you use the online pdf, the role of Municipal Government can be found on page 127 and Drought Mitigation Policies and Strategies can be found on page 164).

In your response to this comment, you noted that the Natural Hazards chapter (page 129) mentions drought and that Action NH-4 - B to conduct community outreach on natural hazard mitigation, preparedness, and response would include drought. While this is commendable, it does not adequately address this issue.

Suggestion - Within the Community Services and Facilities chapter add a brief discussion of the role of municipal government during drought conditions. Within the Implementation Program, add appropriate actions relative to how the Town can coordinate with the BCWA and the Water Resources Board in the event of a drought and implement municipally sponsored actions if necessary. For example:

- Establish a municipal drought management response strategy between the Town and the BCWA, in conjunction with the Water Resources Board and in compliance with the State Guide Plan Element 721: Rhode Island Water 2030.
- Review current drought management coordination and processes, identify problem areas, and implement recommendations for more effective drought planning, coordination, and response.
- Implement water reduction strategies that deal with dry summers and droughts in coordination with major public water suppliers and the RI Water Resources Board.

If you need additional assistance on this matter, please contact Kathleen Crawley of the Water Resources Board at 222-6696 or Kathleen.Crawley@wrb.ri.gov.

Comment 7 - Under the draft Standards, the following may apply. The Implementation Program must include provisions for responding to water emergencies.

Suggestion - Add appropriate actions such as:

- Review current water emergency response procedures, identify problem areas and develop recommendations for more effective water emergency response.
- Begin periodic communication with major public water suppliers to be sure of individual agency roles in water emergencies.
- Develop a water emergency response plan, including roles and responsibilities of the various entities involved and communication with the public.

Comment 8 - Under the current Standards, the following may apply. If any inconsistencies exist between the desired future land uses illustrated on the Future Land

Use Map and the Plans of contiguous municipalities (see Comment 2), the Implementation Program must include provisions for minimizing those conflicts.

Suggestion – Add appropriate actions.

III. Comments and Suggestions to Enhance Accuracy, Readability, and Usability

Land Use Chapter

Comment 9 – There are a couple of small discrepancies between the percentages of residential land use categories listed on Table 1: Barrington Land Use (page 134) and the text on “Residential Density” on page 135. In particular, High Density Residential is reported as 1.2% and 0.4% respectively. The percentages for Medium Low and Low Density Residential also appear to differ between the Table and the text.

Suggestion – Consider revising the draft to eliminate or explain the discrepancy.

Comment 10 – The Land Use chapter contains a section titled, “Zoning Districts” on page 135. This section provides a list of the various zoning districts but does not provide descriptions or definitions of the districts.

Suggestion – Consider adding a brief description of each zoning district.

Comment 11 – In Table 6: Housing Development and Build-out Projections – Units, Population (page 141), the net change for the 2015 projection should be 12 instead of 8. This would also mean that the 2015-2035 total should be 804 instead of 800.

Suggestion – Consider revising the table to show the corrected calculations.

Comment 12 – Map LU-6, Future Land Use includes a depiction of “Water Use Classifications” but does not identify the source of those classifications.

Suggestion – Consider revising the legend to read: CRMC Water Use Classification.

Comment 13 – We note that the draft Plan places great emphasis on the Town’s desire to protect agriculture in the George Street area. There are additional approaches that the Town should consider to support this objective.

Suggestion – Consider adopting a transfer of development rights (TDR) ordinance to direct growth to areas of the town that can better support it. The *RI Transfer of Development Rights Guidance Manual* has a very detailed discussion of different options to move forward with TDR. A copy of this manual is attached and will soon be available on the Division of Planning’s website at www.planning.ri.gov. In addition, consider the guidance DEM developed in *Community Guidance to Maintain Working Farms and Forests*, available at www.dem.ri.gov/programs/bpoladm/suswshed/pdfs/farmfor.pdf to give farmers more flexibility to use their land for appropriate businesses and the *Vision for Rhode Island Agriculture: 5-Year Strategic Plan*, available at www.planning.ri.gov/documents/LU/CompleteAgplan_2001.pdf.

Comment 14 – The draft Plan notes that the last remaining Light Manufacturing zone is located in a highly sensitive environmental area (Allin’s Cove) and calls for re-evaluation of this zoning.

Suggestion – As part of this re-evaluation, the Town should explore the possibility of zoning a more suitable area for Light Manufacturing so as to allow for possibility of future economic development in this important business sector.

Implementation Plan

Comment 15 – Action NH-1 – D is commendable but we believe it could be strengthened.

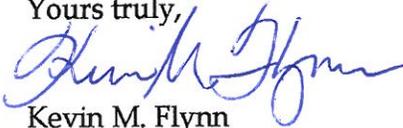
Suggestion – Consider revising the Action as follows: “Provide support for property owners to help take advantage of funding opportunities that assist with covering the cost of mitigating risk, such as elevating ~~properties out of flood zones~~ or retrofitting existing structures located in designated floodplains, or acquisition and relocation of structures outside the high risk zone.”

In addition to the above comments, the Rhode Island Emergency Management Agency would like the Town to be aware that Action NH-4 – C, “Establish a process to directly contact special populations such as those who are particularly vulnerable, due to location or age and infirmity, to ensure their understanding of procedures immediately before and after an event” should be done in coordination with the Local Emergency Management Director.

I would also like to take this opportunity to commend the Town for the thoroughness in which the comments that we previously provided on the other chapters of the Comprehensive Plan were addressed in the revised version that you provided to us. We especially appreciate the fact that the Town took the opportunity to address not only the required material but also incorporated a wide array of optional suggestions.

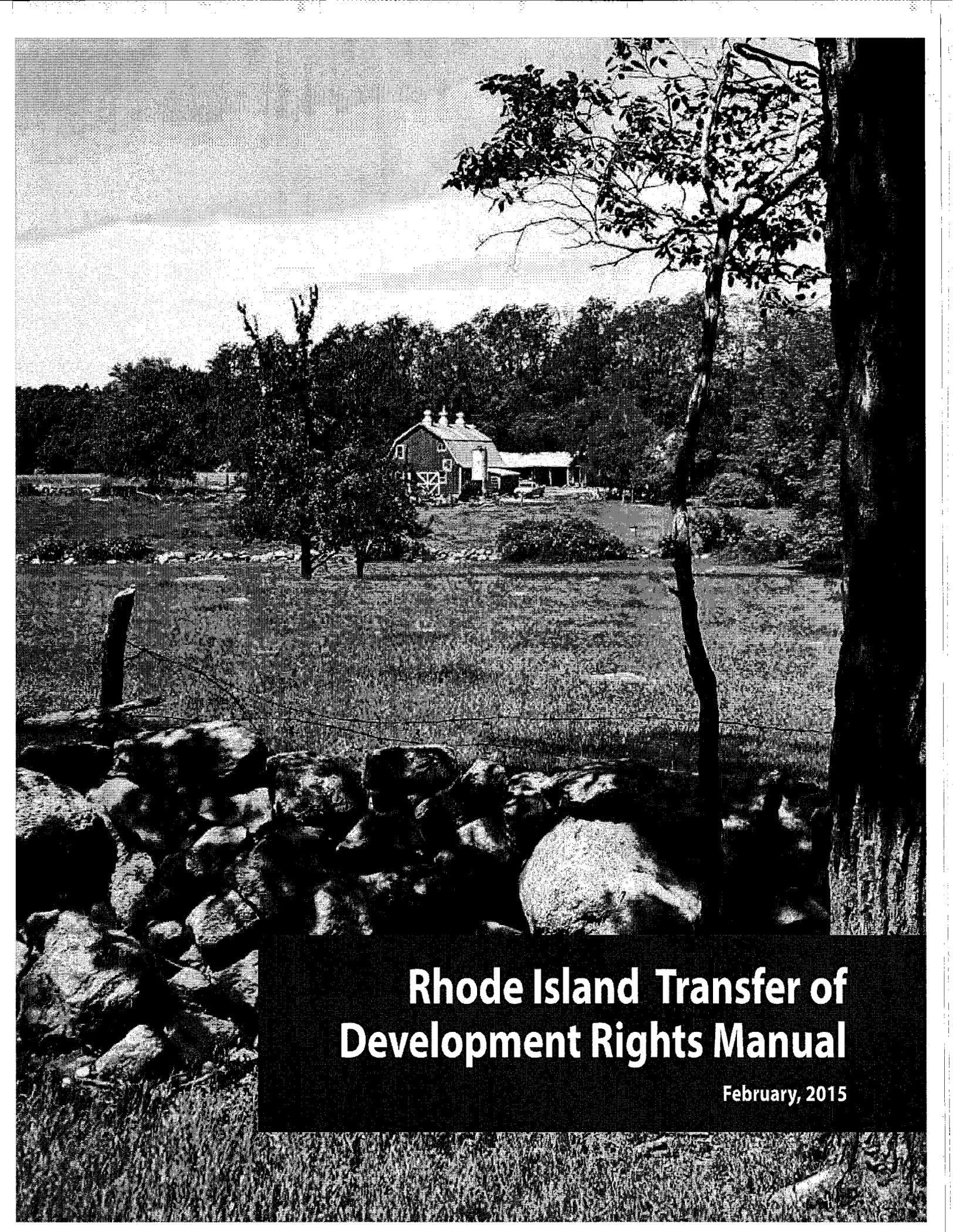
As previously mentioned, this is a preliminary review. At the appropriate time, we encourage the Town to provide us the final draft, incorporating revisions made to the current draft. As always, please feel free to contact Kevin Nelson, Supervising Planner with any questions, concerns, or requests that you may have at 222-2093 or at kevin.nelson@doa.ri.gov.

Yours truly,



Kevin M. Flynn
Associate Director

cc: Jared Rhodes
Kevin Nelson



Rhode Island Transfer of Development Rights Manual

February, 2015

Rhode Island Transfer of Development Rights Manual

February, 2015

Principal Author:

**Nathan Kelly, AICP, NCI
Horsley Witten Group, Inc.
55 Dorrance Street, Suite 403 Providence, RI 02903
www.horsleywitten.com**

Editing & Publication Design:

**Dodson & Flinker, Inc.
463 Main Street, Ashfield, MA 01330
www.dodsonflinker.com**

**All plans, photos and other graphic material
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The project would not have been possible without the invaluable participation and input from a project advisory committee:

Michael Abbott, Northeast Collaborative Architects

Tony Avant, Rhode Island Housing

Jeff Davis, Rhode Island Statewide Planning

Stephen Devine, Rhode Island Department of Transportation

Bob Erickson, North Smithfield Town Planner

John Flaherty, Grow Smart Rhode Island

Nancy Hess, Rhode Island Statewide Planning

Tom Kravitz, Burrillville Town Planner

John Marcantonio, Rhode Island Builders Association

Ariana McBride, formerly with Orton Family Foundation

Doug McLean, South Kingstown Planner

Vincent Murray, South Kingstown Town Planner

Jon Reiner, former North Kingstown Town Planner

Maura Sayre, formerly with Washington County Regional Planning Council

Denise Stetson, Richmond Town Planner

David Schweid, former Exeter Town Planner

Nancy Tierney, Rhode Island Housing

Jennifer West, Narragansett Bay National Estuarine Research Reserve

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Summary

Transfer of Development Rights (TDR) is a land use technique that **can help to preserve meaningful open space as land is developed** and has been **successfully used in approximately 200 programs nationwide**. This report examines the key factors that need to be in place to have a successful TDR program in Rhode Island. It also describes how recent changes to Rhode Island market conditions, favorable fiscal analyses as well a simpler approach eliminate past obstacles to implementing TDR. The report also contains regulatory guidance to assist communities to adopt a successful TDR ordinance.

KEY FINDINGS:

1. Market conditions and fiscal advantages support TDR in Rhode Island. The soft market for new single family homes on large lots coupled with a strong demand for apartments and multi-family units provides favorable market conditions for TDR. Moreover, recent fiscal analyses show that apartments and multi-family units can be very positive for a community's tax base. There is currently a demand for bonus density in receiving areas where developers perceive a market for higher density, which are the two most important elements for a successful TDR program.

2. The simplicity and certainty of TDR has been improved by allowing developers to purchase density bonuses directly from the town with funds being restricted to community land acquisition programs. In the past developers needed to negotiate with private land owners to purchase their development rights to transfer them to gain bonus density in another location. This was a very time consuming and uncertain process that discouraged TDR use.

3. Small scale TDR is a viable option which can be similar to a mixed use conservation development that can involve one or more parcels. This option can work well in towns without a receiving area that can support large scale density.

4. There are three ways to implement TDR in Rhode Island: local, interlocal and a statewide program. The local program is structured to transfer development rights within an individual community. The interlocal can involve two or more communities, while the statewide TDR program can transfer development rights from any communities identified as sending areas into designated growth centers. The local is the easiest to administer while the interlocal and statewide programs present more administrative challenges but greater potential to implement more transfers of development.

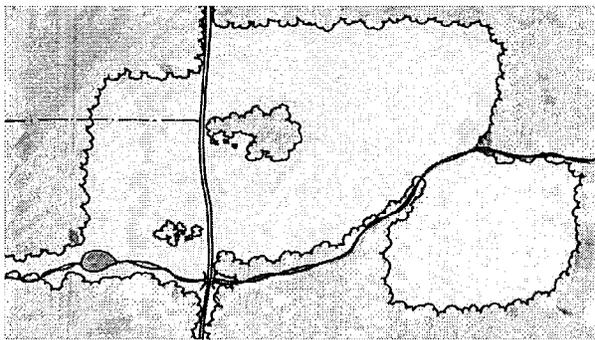
5. State enabling legislation should be revised to make it clear all Rhode Island communities have the authority to establish a TDR program; to enable the developers to purchase density bonuses from the community; and to allow interlocal and statewide TDR programs

I. Transfer of Development Rights

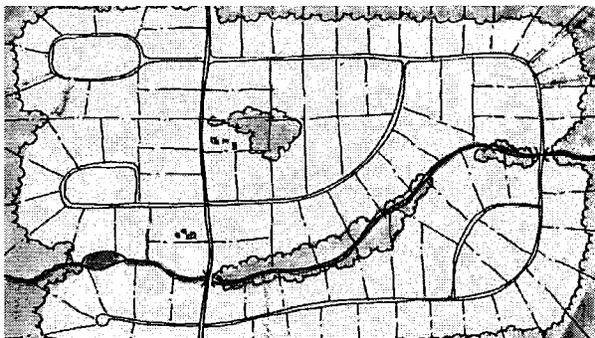
Transfer of Development Rights (TDR) represents an innovative way to direct growth away from lands that should be preserved to locations well suited to higher density development. There are over 200 TDR programs in place across the country today. While most of these are geared to the preservation of open space or farmland, many communities are now considering the role of this tool in addressing impacts from climate change and hazard mitigation. Areas that may be appropriate

for preservation through TDR are properties experiencing chronic or severe flooding, or those that could otherwise play an important role for flood mitigation on a watershed scale.

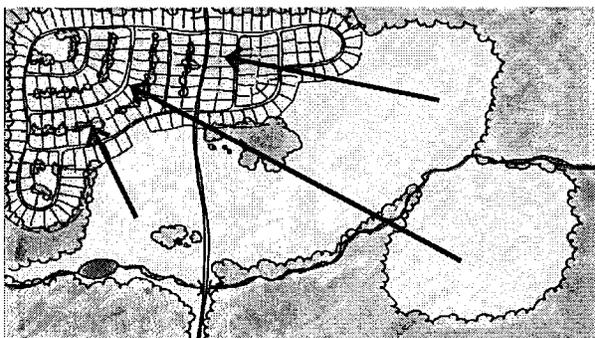
The use of TDR begins with planning processes that identify specific preservation areas as “sending areas” and specific development districts as “receiving areas”. Once these areas are identified, Zoning Ordinance amendments can be adopted which authorize landowners in the sending areas to sell their development rights to landowners in the receiving areas. The amount of money required to purchase these development rights is influenced by the ordinance provisions, but is generally negotiated between the landowners. This approach allows market forces to enter into the transaction and requires land owners to negotiate the final value of development rights. In other models, as discussed below, the local government can set a fixed value for density bonuses and have developers contribute to an open space fund in exchange for density bonuses.



Existing site before development



Site developed under conventional large-lot zoning.



Site developed using TDR to transfer density from “sending areas” to a village “receiving area.” Increasing density in one location helps fund conservation of farmland and other open space adjacent to the site or across town.

In return for the purchase, landowners in the sending area place a restriction on their property, which is generally recorded as a conservation easement. This easement can be determined through explicit zoning provisions or can be negotiated as part of the permitting process. Restrictions can limit the level of potential development, the type of development, or some combination of both.

Definitions, mechanics, procedures, and elements of TDR have been exhaustively researched (Pruetz, 2003) and there are many different types of programs across the country. GrowSmart RI provided a useful research document with their 2007 white paper “Transfer of Development Rights: A Study of Its Use in Other States and the Potential for Use in Rhode Island” (Sheehan, 2007). In this paper, TDR is defined as follows:

“TDR is a voluntary and market-based land use tool used by communities to direct development away from rural, open space, and farm lands and towards areas most appropriate for growth. The goal of the program is to help to implement community land-use goals by having an exchange take place: the permanent preservation of lands that a community wants to save is exchanged for extra development in areas a community has designated for growth.”

While the full breadth of TDR programs is more complex than the GrowSmart definition, the definition does

accurately describe the vast majority of models in the country today. This research paper provides an excellent summary of the key elements of TDR programs as well as guidance on how to navigate the complex path to implementation at the local level. Rather than restating all the fundamental aspects of TDR which are well-organized in the GrowSmart publication, readers not familiar with the basic components of TDR are encouraged to read this document before delving further into this manual: <http://www.growsmartri.com/pdfs/FINAL%20TDR%20whitepaper.pdf>.

KEY ELEMENTS FOR A SUCCESSFUL TDR PROGRAM

TDR programs can have many moving parts and, for those just beginning to consider implementation, it can be difficult to determine what elements are necessary or important for success. The Journal of the American Planning Association published a short research article in the Winter 2009 issue entitled *What Makes Transfer of Development Rights Work?* (Pruetz and Standridge, 2009). This research piece examined the 20 most successful TDR programs in the nation at that time to see which elements were consistent over multiple programs. The results are summarized below. It should be noted that the first two elements are considered by Pruetz and other national experts as “essential” to the success of any program. The next three are considered “important”, and the remaining are considered “helpful.” Readers are encouraged to access the original article to learn more about the study methodology and findings.

1. Demand for Bonus Development: The amount of density a developer can receive using TDR must be an attractive alternative to the density they can achieve by right. If the by-right density produces a product just as profitable as one with TDR, and it fits within the existing market demand, developers will have little incentive to pursue any transfers. However, if the allowable density bonus will increase developer profit and is a better fit for pent up market demand, the TDR program has a good chance of being viable. Although bonus density is the most common motivation for developers to buy TDRs, many jurisdictions offer other incentives including additional lot coverage (Warwick Township, Lancaster County, PA), floor area ratio (San Francisco, CA), floor area within an individual dwelling unit (Pitkin County, Colorado), and expedited issuance of building permits (Tahoe Regional Planning Agency, CA/NV).

2. Customized Receiving Areas: The following five receiving area attributes are important to encourage TDR:

Factors that Make TDR Successful

As part of the Village Project, Rick Pruetz, perhaps the nation's foremost expert in the use of TDR, and Bill Fulton of Smart Growth America, headlined a two-day conference on the potential for TDR in Rhode Island. They presented ten factors that will determine whether TDR is ultimately successful here. The first two are considered as essential, the next three important, and the remaining are considered helpful.

- Supporting infrastructure to support the additional development (water supply, roads, wastewater disposal, etc.
- Political acceptability
- Clear designation of receiving area
- Consistency with the community comprehensive plan
- Location where developers perceive a market demand for higher density

There are many possible receiving area options for jurisdictions to consider. Some communities succeed at locating receiving areas for TDRs from rural sending areas at infill sites within previously-developed urban areas including downtowns (South Lake Tahoe, CA). More commonly, receiving areas are found at the urban fringe where adopted plans may already call for continued growth since the new development would be close to existing jobs, schools and shopping as well as infrastructure (Montgomery County, MD). Some communities have overcome the potential for resident opposition to development by locating receiving areas in new towns or new villages that are not contiguous with existing development (Collier County, FL). Other communities have found that low density receiving areas are best for them where developers can use TDR to achieve densities that fit the community.

3. Strict Sending Area Development Regulations: Landowners may be more apt to participate in a TDR program if development in the sending area is constrained by environmental factors such as wetlands or steep slope, or lack of infrastructure. However, Pruetz and Standridge found that most TDR studies emphasize the importance of sending area zoning that is strict or at least demonstrates that the community is serious about implementing its stated goals for preserving sending areas. In their

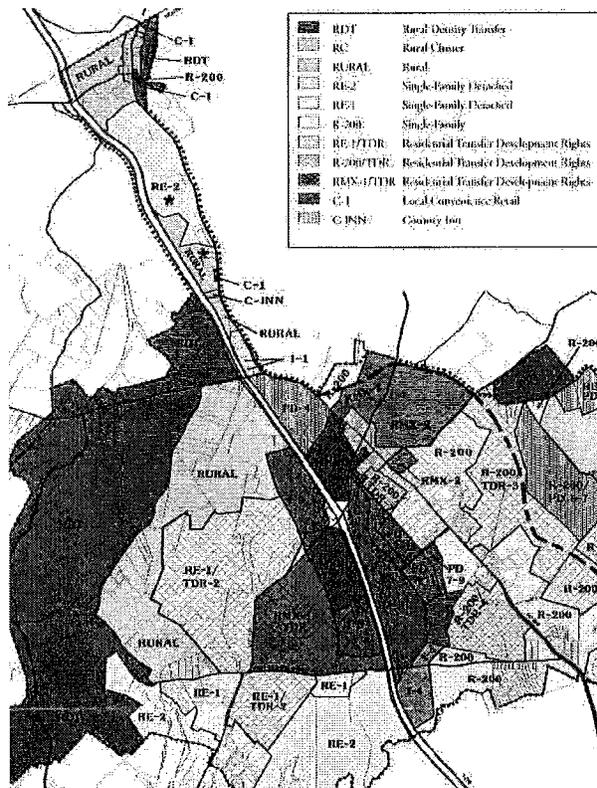
research, "strict regulations" were those that prohibited densities greater than one unit per five acres. However, some TDR programs had densities that were greater than one unit per five acres.

Some communities have permissive zoning in their sending areas, and may find it necessary to down-zone to implement a TDR program as well as create consistency between zoning regulations and planning goals. This has its risks, and Pruetz and Standridge rightly caution communities to consider the implications of down-zoning, particularly as it relates to accusations that the new zoning takes private property for public use without just compensation, which is in violation of the Fifth Amendment of the U.S. Constitution. Whether or not a regulation will be found to be a taking depends on specific circumstances, but the most commonly cited rule comes from a 1992 U.S. Supreme Court decision: a regulation that eliminates all economic use of a property is a taking per se unless the use would have been prohibited by the state's underlying property and nuisance law. Jurisdictions are advised not to rely on the availability of TDR as their only legal defense against a regulatory taking claim because the U.S. Supreme

Court has not yet resolved the role of TDR compensation in these cases.

4. Few Alternatives to TDR: The most effective TDR programs offered developers few alternatives to utilizing TDR. Pruetz and Standridge noted that many communities may be inclined to offer a menu of incentives for development in desired growth areas. These could include density incentives for clustering, on-site open space dedication, streetscape improvements, design features, and other amenities. While these incentives may yield increased investment or public improvements, they will likely compete with TDR as an incentive vehicle and provide what developers perceive to be a simpler path to increased density.

5. Market Incentives, Transfer Ratios and Conversion Factors: TDR program transfer ratios determine the value of transferring one dwelling unit from a sending area to a receiving area. Many communities may try to use a one-to-one ratio, meaning that each unit from a sending area is equal to one bonus unit in the receiving area. However, it is likely that the profit yielded to the developer in the receiving area for one extra unit may



In Clarksburg in Montgomery County, MD, (above) the zoning map designates sensitive areas (green) as sending zones and establishes receiving areas nearer to existing jobs, schools and shopping as well as infrastructure. The use of TDR supports creation of a mixed use village center that will provide a focus within an area that was becoming a shapeless suburb. For more information see the Village Guidance Manual. (Map courtesy Montgomery Co. Planning Dept., Photos by Rick Pruetz)

not equal the profit reduction caused by preserving a large amount of land in the sending area. As a result, it is critical for any TDR program to identify a viable ratio between development rights in the sending area and bonuses in the receiving area.

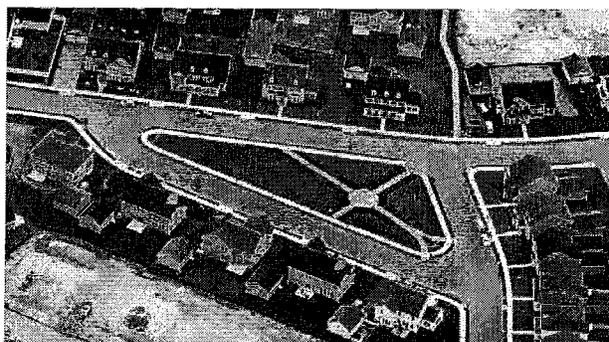
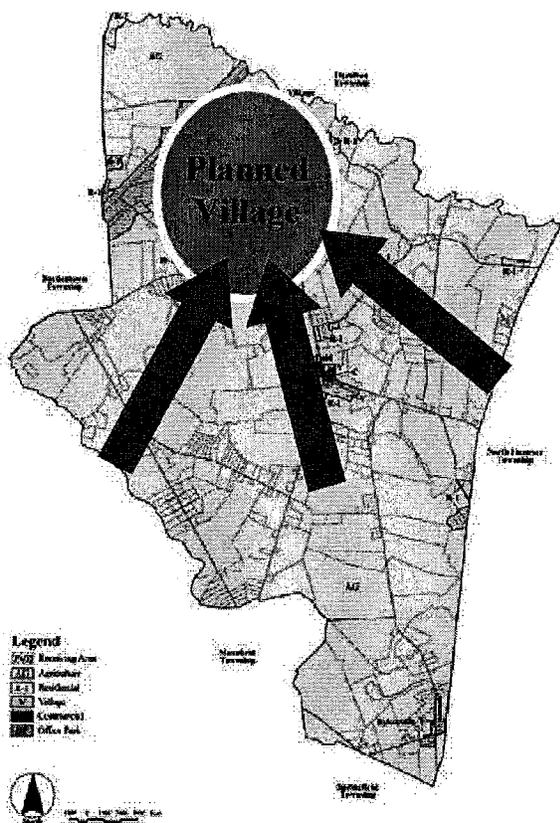
In an effort to create market incentives, viable TDR programs offer an “enhanced transfer ratio,” where more than one additional dwelling unit is allowed in the receiving area for each unit transfer from the sending area. Some communities also implement conversion factors, in which a TDR dwelling unit from a sending site can be converted to an increase in some other development potential at a receiving site, such as commercial floor area, building height or lot coverage.

6. Certainty of TDR Use: Communities will improve their chances of implementing successful TDR programs if they can demonstrate to developers that there is assurance that they will receive bonus density if they comply with all receiving area regulations including, of course, transferring the required number of TDRs. This

can be achieved through zoning of the receiving area that eliminates or minimizes discretionary approvals, which can cause developer delays, unanticipated costs, and uncertainty if their project will be approved. Providing clarity in TDR regulations about what is required and what will be granted will also gain support of the development community in adopting a TDR program as demonstrated in Chesterfield Township, Burlington County, NJ.

7. Strong Public Preservation Support: TDR programs are successful if there is strong public support of overall preservation efforts. This is typically demonstrated by complementary preservation programs such as:

- Local funding of a purchase of development rights (PDR) program;
- Other conservation funding programs; or
- A TDR bank, in which a government entity purchases TDRs and holds them for resale to a developer: This



The village is designed according to traditional town planning principles, with walkable streets, rear garages, and a network of parks and greenways (photo courtesy bing.com).



In 2002, Chesterfield Township, NJ adopted a master plan that established a planned village where increased density would be implemented by transferring development rights from surrounding farmland. The successful village that resulted has already absorbed more than 75% of the township’s total potential development, preserving thousands of acres. For more information see the Village Guidance Manual. (Map courtesy Chesterfield Township, NJ.)

type of support can help communities overcome controversies that may arise over TDR components, such as locations of sending and/or receiving areas, which may be politically motivated. TDR programs last for decades, and elected officials will change over time. Ongoing public support is important to ensure that requests for exemptions to the TDR program do not erode its effectiveness.

8. Simplicity: TDR, when compared with other growth management tools, is inherently more complicated than most others. Crafting even a simple local program creates procedures and requires analyses that are new to most communities. To the greatest extent possible, keeping a TDR program's objectives and regulations clear and simple will help with its success. Simplicity leads to understanding and garners support from diverse groups, including elected officials, preservationists, developers, landowners, and the general public. A simpler program will also be easier to administer at the outset of implementation for everyone involved. The success of the TDR program in Montgomery County, MD can be partly credited to its simplicity.

9. Promotion and Facilitation: Keeping a TDR program visible and at the forefront of local land use discussions will help it succeed. Developers and landowners need to know it exists, how it works, and how it can help them. The public as well as local elected officials who make policy decisions need to understand its objectives to preserve land and other benefits. Promoting the program through a website or regular media coverage keeps the program in front of the public and maintains their continued support. Some jurisdictions, including the New Jersey Pinelands Commission, continually maintain ongoing public support for preservation by organizing educational and recreational programs in and about their sending areas.

10. TDR Bank: The final successful factor identified by Pruetz and Standbridge is the establishment of a TDR bank. A TDR bank is a mechanism used by a government entity to buy, hold and sell TDRs. While not critical to a successful program, TDR banks are helpful and can enhance a program by allowing the program to:

- Acquire TDRs from sending area landowners who cannot find private buyers;
- Establish and stabilize TDR prices;
- Facilitate transactions;
- Market the TDR program; and

- Create an ongoing preservation revolving fund by selling TDRs and using the proceeds to buy more TDRs.

Although the leading success factors for TDR were discussed individually, they are interdependent components that work together. For example strong demand for bonus development (factor 1) is most likely to result when the receiving area is customized to fit local circumstances as described in factor 2.

MARKET AND FISCAL TRENDS THAT SUPPORT TDR

Recent market studies and fiscal impact analyses indicate there is a strong demand for smaller housing units close to jobs, entertainment and other amenities associated with compact mixed use villages. Moreover the fiscal impacts of smaller dwelling units within a village setting provide positive fiscal impacts to a community. A 2013 market analysis done for North Kingstown determined that within a 20 minute drive of Wickford Junction there is a demand for approximately 9800 housing units by 2017 and nearly 17,000 units by 2027 with the strongest demand for smaller 1-2 bedroom units. A fiscal analysis done in Exeter in 2011 determined that a single family home on a large lot costs the town \$1025 per year. However the average village residential unit could generate an annual surplus of \$1649 or a net difference of \$2,647 per unit. For more information about these studies refer to the Rhode Island Village Guidance Manual village economics chapter.

DESCRIPTION OF TDR PROGRAMS

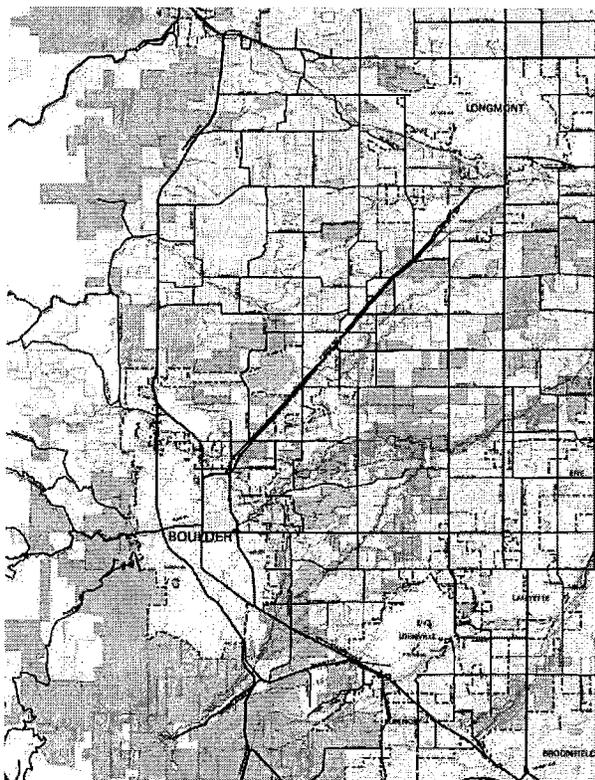
In the research and discussions that occurred for the RIDEM Villages/TDR project, the TDR programs considered by the Steering Committee vary widely in terms of scope and administration. A useful way to broadly categorize the different programs relates to the geographic scope of where sending areas are identified and where development rights are being received. In general, three different categories are considered in this report:

Local Programs: These TDR programs are structured to transfer development rights within an individual city or town. All administrative resources and permitting are handled within a single municipality. Local program incentives are generally limited to density bonuses in the receiving areas.

Interlocal Programs: Research across the country shows

that the term “interlocal TDR” is understood to mean any program where development rights are transferred from one jurisdiction to another. For example, transfers from county level government to individual cities are included in this category. For the purposes of this project, based on governmental structures in Rhode Island, interlocal will be used to describe a TDR program where one municipality can transfer development rights to another municipality through an inter-municipal agreement. These programs are administered exclusively by the two municipalities involved and a specific interlocal agreement is used to establish the parameters of the program such as location of sending and receiving areas and TDR transfer ratios. In addition to density bonuses, these interlocal programs may also include mitigation funds for the receiving community, which are calculated on a case-by-case basis.

Statewide Program: The project Steering Committee reviewed programs in other areas of the country where larger government entities (i.e., counties and regional agencies) administered programs that could disperse



Map of Boulder County, CO, sending areas. Boulder County is an example in which development rights from rural lands can be transferred to more urban cores by a county or regional agency. (Plan courtesy Boulder County Planning Dept.)

development rights to various cities. For example, King County, WA and Boulder County, CO administer TDR programs where development rights from rural lands can be transferred to their more urban core areas. In these cases, the county acts as an intermediary and can hold development rights in a TDR Bank. Transfers often require the development of a site-specific “interlocal agreement” that spells out the specific terms of the transfer. In these agreements, when considering a Rhode Island state-level program, density bonuses could be coupled with state-level incentives to further encourage receiving municipalities to accept development rights from other jurisdictions.

RELATIVE ADVANTAGES OF DIFFERENT TDR PROGRAMS

The most basic form of TDR programs across the country are local programs, those where a municipality or a county transfers development rights within its own borders and through the same administrative bodies. These programs are the most common for a variety of reasons and have the following advantages compared with interlocal or, as conceived in Rhode Island, a statewide program. However, there are some considerations for both preservation and economic growth that may be better addressed at a regional level and, therefore, an interlocal or statewide program may prove to be more effective at achieving those goals. This section looks at some of the challenges local, regional and state level planners should consider when weighing local, interlocal, or state level implementation of TDR.

Planning for TDR: TDR includes both a strong preservation component as well as a growth component that allows for the use of density bonuses. Both of these initiatives generally require considerable planning for the purposes of resource allocation (to preserve land), infrastructure provision (to ensure development capacity) and public acceptance (to increase density). Where TDR programs are implemented within a single community, these programs will have the support of existing Comprehensive Plans and other planning initiatives that may have examined specific issues related to sending and receiving areas. For example, neighborhood or district plans may provide a strong foundation for considering higher levels of density in targeted growth areas as demonstrated by the development of the plan for the new village of Old York in Chesterfield Township, Burlington County, NJ and its implementation through TDR.

For an interlocal program, it will be necessary to ensure that each municipality involved shares similar preserva-

tion goals and acknowledges the desire to participate in a more regional approach to preservation and/or economic development. Incorporating these points into two separate Comprehensive Plans requires increased awareness of how regional assets can provide significant benefits, even if these assets lie outside of a particular municipality. For example, natural features like watersheds or aquifer formations often cross municipal boundaries and it may be in the interest of one community to accept development rights for the purposes of preserving land that lies within a shared resource. Fostering this type of regional awareness in the arena of local politics can be very challenging and may require several years of education, as demonstrated in King County, WA.

Summary: *It is generally easier to plan for and demonstrate the benefits of TDR within a single community. TDR programs that operate across political boundaries require consistency between different local Comprehensive Plans and, to a degree, Zoning Ordinances.*

Simplicity: As a regulatory tool for growth management, TDR is more complex than other tools related individually to either growth incentives or preservation. Not only does TDR combine both preservation and growth incentives into a single mechanism, but the tool must also adapt to local market conditions that change regularly based on factors outside of a municipality's control. Because of these inherent complexities, implementing TDR as a local program does have advantages from an administrative perspective. Keeping TDR within a single jurisdiction allows a local government to control the entirety of the process: identifying sending areas; establishing TDR ratios; tracking development rights; planning infrastructure; and reviewing receiving area development applications.

As TDR programs evolve to become interlocal, or where a statewide TDR program is considered, these programs become more complex. For each party that is involved (e.g., another municipality and/or the state), additional administrative procedures and resources must be added to the program. Developers, land owners, and officials in multiple government bodies are required to develop a shared understanding of a process that has many steps and one that will change from one proposal to another. For any multi-jurisdictional program, interlocal agreements are developed on a case-by-case basis, and these can include market and real estate value analyses more complex than those required for a local TDR Program. While there are many successful case studies around the country of interlocal programs, many of these programs required several years to mature. However, this time-consuming approach can yield success as shown by the

progression of the original TDR program in King County, WA from intra-jurisdictional to inter-jurisdictional and now to regional scope in a span of 18 years.

Summary: *Local TDR programs have the advantage of being simpler than interlocal programs or a statewide program because they deal with smaller areas of land and fewer government agencies.*

Public Perception: Local TDR programs are advantageous with regard to public perception for several reasons. First, related to the idea of simplicity, TDR implementation generally requires considerable public education. Programs that remain within a single jurisdiction will be easier to explain to stakeholders and political officials and, therefore, will be easier to adopt. Further, where interlocal TDR is proposed, stakeholders and political officials may question why development rights from one town should be transferred to their own. The perception of the receiving community is often that added density is increasing the burden for municipal services while not providing the offset of added open space. Land trusts and other non-governmental organizations can work with jurisdictions to remind receiving area residents and officials of the benefits of watershed conservation, environmental protection, outdoor recreation and other green infrastructure that lie outside their cities limits, as illustrated by the work of Forterra in the Puget Sound Region.

Summary: *Local TDR programs have an advantage over interlocal and a possible statewide TDR program because it is easier for the public to understand the benefits of saving local land to promote local growth.*

Sending Area and Receiving Area Capacity: An important long-term consideration for any local TDR program is the supply of development rights available in the sending area compared with the capacity of designated receiving areas to absorb development rights. For example, in more rural communities, it is likely that the supply of development rights that could be preserved is far greater than that which could be absorbed by a small village scale growth center. While modest demand for bonus development does not preclude a TDR program from being viable, a strictly local program functioning under these conditions will require a long time to produce a meaningful amount of preservation.

The issues of imbalanced "supply and demand" for development rights is one that can be more effectively addressed with interlocal programs, or even more so with a statewide program. Broadly speaking, a regional or statewide approach in Rhode Island will help to match

the high volume of farm and forest land development rights in the western area of the state with the capacity to absorb development rights in the eastern urban centers.

Summary: *Interlocal or statewide programs can more effectively match the capacity of receiving areas to absorb large volumes of development rights because of their regional focus.*

Regional Preservation and Economic Development: Another important issue to consider with TDR is the potential for this tool to assist with preservation of regional resources or to facilitate the development of regional economic centers. From the perspective of regional resources, large tracts of forest, green belts, aquifer formations, or farms that may straddle municipal boundaries are all examples of resources common to Rhode Island that could benefit from either interlocal programs or a statewide approach. The ability to apply TDR in this broader regional context would be more effective over time in preserving those resources that do not sit discreetly within a single municipality.

From an economic perspective, there are geographic areas in Rhode Island that serve (or will serve in the future) as regional economic hubs. These economic centers may include transit hubs, industrial parks, mill villages in outlying rural areas, or other similar assets. Because of their ability to provide housing or business development that would serve regionally, a TDR program that operates regionally would potentially be more effective in responding to market absorption capacity in

either a specific sector (e.g., manufacturing) or across a larger market capture area.

Summary: *Interlocal or statewide TDR programs can answer to regional planning objectives in a way that is not possible with local programs.*

THE MECHANICS OF IMPLEMENTING LOCAL TDR PROGRAMS IN RHODE ISLAND

The key elements (“top 10 elements”) of a successful TDR program provided on pages 2-5 of this report discuss the programmatic, market, and political conditions that are either necessary or helpful to success. Some of those elements are discussed here again in the context of local implementation. Once a community (or more than one community) decides to actually implement TDR—to put it “on the books”—the mechanics of the program must be addressed at a more detailed level. The points listed below provide the framework for a technical work plan at the local level.

1. Strong Comprehensive Plan Language

Every community in Rhode Island is required by law to adopt and maintain a Comprehensive Plan, which will serve as a guide to all policies related to land use over a specific time period. Once the plan is adopted, local ordinances and regulations must be consistent with the plan. This framework is the platform for implementing any innovative regulatory tool such as TDR. Therefore, it

Local TDR Program Component	Exeter	North Kingstown
Strong Comprehensive Plan Language	☺	☺
Strong Growth Management Framework	☺	☹
Clear Sending and Receiving Areas	☹	☺
Design Standards for Receiving Areas	☺	☺
Market-Based TDR Ratios	☹	☹
Density Transfer Credit Mechanism	☹	☹
TDR Bank	☹	☹

Table 1. Summary of TDR program mechanics and the degree to which these are addressed in Rhode Island programs.

is critical for any community considering the use of TDR to first examine the tool through the local comprehensive planning process. Beginning with a policy-based discussion, as opposed to tackling the ordinance first, will help to develop consensus on key questions related to TDR such as:

- What parts of the community will serve as sending and receiving areas?
- Are certain types of sending areas more important to the community (e.g., forest lands, aquifer protection districts, agricultural lands, etc.)?
- How much density is a community willing to accept in the receiving area?
- Should strict design standards be developed for the receiving area?
- What types of restrictions should be placed on sending area lands once the development rights are purchased?

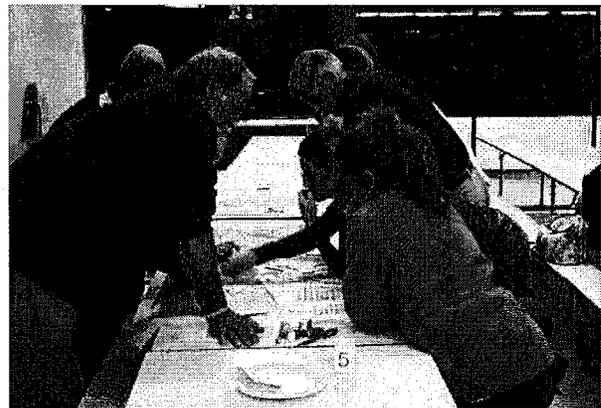
2. Clear Sending and Receiving Areas

TDR programs across the country vary as to how clearly sending and receiving areas are defined. In some cases, such as Chesterfield Township, New Jersey, jurisdictions are able to make the transfer process administrative by not only designating specific sending and receiving sites but also adopting non-discretionary receiving site zoning that incorporates all the development regulations including the TDR requirements. Developers are logically inclined to use programs of this nature because they do not have to endure the time, cost and uncertainty of a rezoning or other discretionary approval processes. However, in many other jurisdictions, including San Luis Obispo County, CA, sending and receiving sites can be proposed by applicants and approved according to how well the proposed sites meet predetermined criteria. San Luis Obispo County preferred this approach at least in part because of the size and diversity of the county. Each jurisdiction has to choose a path that fits local circumstances. These strategic decisions are less complicated within a jurisdiction than they are when two or more jurisdictions must coordinate and sign interlocal agreements. With local programs, because a single municipal entity can plan the full scope of TDR transactions, there is an opportunity to be very clear from the outset where development rights can come from, and where they can be used to yield density bonuses. In Rhode Island, the identification of these areas can occur in the Comprehensive Plan, in the body of the Zoning Ordinance, and on the Zoning Map.

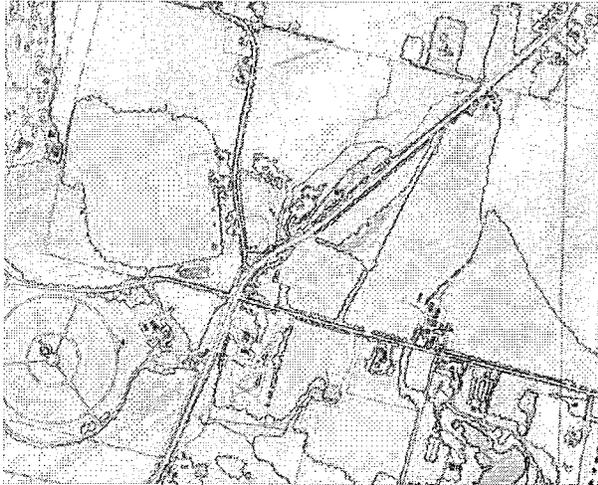
3. Design Standards for Receiving Areas

One of the primary functions of TDR is to increase density in a designated receiving area. Presumably, this density will take place in the form of larger buildings that can often incorporate mixed use, multi-family housing in communities that have not previously allowed high density development. Many communities looking to grant these higher levels of density may want some assurance that the development will incorporate a high quality of design. Many TDR programs apply design guidelines or design standards to their receiving areas as part of the program's regulatory component to provide these assurances. This approach is not only truly protective of community character, but can also be very effective in overcoming public fear of higher levels of development density.

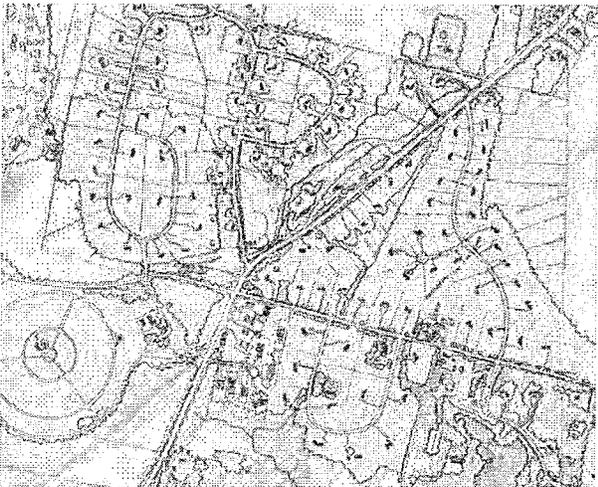
When considering the use of design guidelines or standards (especially if they are discretionary), it is important to remember that TDR programs create a development process that is inherently more complex than a standard by-right approach. The imposition of design standards can add another layer of complexity to the development process and, if too onerous or complicated, can create a significant disincentive for developers to pursue TDR. Communities must carefully consider how strict and/or detailed design standards can be in order to balance the need for high quality design with the need to remain attractive to the development community. However, specific development regulations and design requirements can be imposed using by-right zoning. While this non-discretionary approach may not fully dispel all concerns, it can strike a balance between motivating developers to use TDR and creating reasonable assurance that the receiving area developments will be a credit to the TDR program.



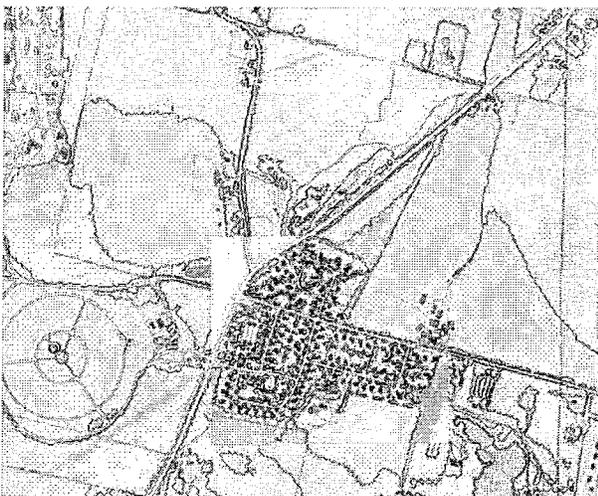
Workshop from the four year Vision for Exeter Project, which laid the foundation for the Town's TDR program.



Exeter: existing conditions plan.



Exeter: conventional development plan.



Exeter: recommended village with surrounding farmland preserved through TDR.

4. Market-Based TDR Ratios

In order for TDR to succeed, developers must want the bonus development that they can only get via TDR. If market demands are strong, developers are more likely to consider a more complex path to permit approval. Further, TDR is not a “break even” proposition for developers. The act of purchasing development rights will need to increase a developer’s profits beyond what would be realized without the use of TDR. To build this into the regulatory structure, TDR programs must identify a viable “TDR ratio.” A TDR ratio identifies the number of receiving area bonuses a developer receives for every development right (s)he purchases. For example, a TDR program might assign a single development right for every single family home that could be built in the sending area. For every one of these development rights that is extinguished through a developer’s purchase, the developer will then be able to build four additional multi-family units. In this simple example, the TDR ratio is “one to four.” Other programs across the country develop more innovative ratios to provide bonuses for building height, commercial floor area, floor-to-area ratio (FAR), and other similar items.

In order for a TDR program to be successful, the TDR ratio must be attractive enough to a developer from the perspective of his or her bottom line. Communities looking to TDR should consider specific market and/or real estate analyses that will identify a viable TDR ratio. The analysis that is most commonly used to identify this ratio is called a “residual land value” analysis. This analysis actually develops a basic development pro forma to identify how much developers should reasonably be able and willing to pay for a TDR. These analyses can also be used to identify the appropriate value of development rights for a particular receiving area. (For more information see the 2014 *North Kingstown Community Market Study*: http://www.northkingstown.org/sites/northkingstown.org/files/pdf-attachments/North%20Kingstown%20Market%20Study_Full%20Report.pdf.)

5. Density Transfer Credit Mechanism

Developers can be reluctant to participate in TDR programs because of the perceived difficulty of negotiating the purchase of development rights from landowners in “sending areas.” While governments are familiar with the process of purchase of development rights, it is not normally part of what developers do, and can add time and uncertainty to the process.

More recently, some TDR programs have used Density Transfer Credits as a way to simplify the mechanics of

transferring development rights. Instead of actually extinguishing development rights in the sending area as part of the permitting process, developers can simply purchase an appropriate number of Density Transfer Credits. The payment is held in an account dedicated to the preservation of open space. This account can be administered by the city or town, or by a newly appointed entity that is dedicated to purchasing development rights.

The use of Density Transfer Credits (sometimes also known as a fee-in-lieu option) makes the TDR process more predictable for the developer and gives the community the flexibility to purchase their top priority open space. The developer knows early in the process what they will have to pay for bonus development, allowing for a more informed business decision. The price of the credits can be modified by the town to adjust to changing markets and encourage the use of TDR. Finally, the community can pool payments from multiple projects and use the money as it sees fit, including as a way to leverage other sources of funding, such as state dollars, to purchase open space.

6. TDR within Conservation Development

Many Rhode Island towns already have Conservation Development ordinances which allow for the transfer of development from one part of a property to another. A simple way to adopt TDR is to allow for an increase in the Basic Maximum Number of dwelling

units in a proposed Conservation Subdivision *in return for preservation of land on a separate parcel*. See Section II, page 32 for example language.

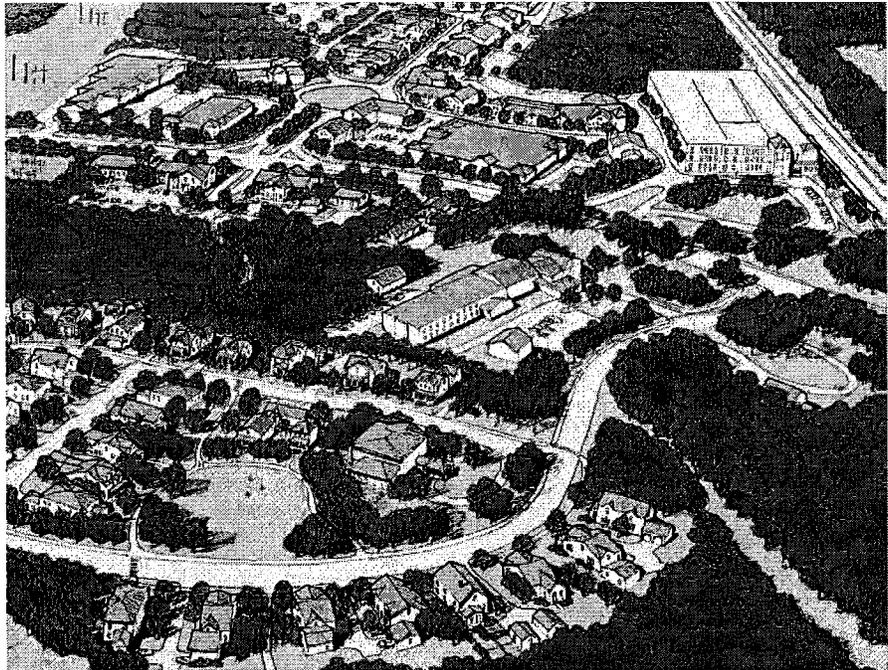
THE MECHANICS OF EXISTING LOCAL TDR PROGRAMS IN RHODE ISLAND

As discussed earlier in this report, there are currently two local TDR programs in Rhode Island: Exeter and North Kingstown. Brief summaries of the mechanics of these programs are provided below.

Exeter Program: In Exeter, the TDR program was adopted as one of the final stages of the four-year Vision for Exeter project. The program includes significant revisions to the Comprehensive Plan that strengthen what was already a strong culture of growth control and preservation in the community. Consistent with this Comprehensive Plan language, a comprehensive zoning package was adopted with Planning Board regulations. The regulatory package includes clear incentives for TDR in the form of residential density bonuses that can result in density bonuses far greater than any Exeter has ever entertained. The “planned village development” that would result requires adherence to clear design guidelines, which are accompanied by a wealth of illustrated material.

The Exeter program identifies two potential receiving areas in the community and very broadly defines send-

Work that began in 2010 on village-scale planning in North Kingstown identified several areas for concentrated growth to serve as receiving districts. These include a future transit oriented development site at the new Wickford Junction commuter rail station.



ing areas as four of the residential districts. Importantly, the receiving areas are not delineated as clear districts on a Zoning Map, but rather as general locations on the Future Land Use Map in the Comprehensive Plan. While the community was able to agree on general receiving area locations, the exact location and physical extent of receiving areas is to be defined through a negotiated process with a developer, and finalized as a zoning change. With regard to the sending area, while this area is clearly defined on the map, it is quite large and the potential supply of development rights is significantly larger than the capacity of receiving areas to absorb those development rights.

Another challenge with the Exeter program is the fact that detailed real estate analyses, such as residual land value analyses, have not yet been performed. So while the program does include a fee-in-lieu option for developers, a clear value for that fee was not set as part of the first regulatory package. Instead, the regulations provide a methodology for determining the fee value that is less precise than a residual land value analysis.

With regard to a TDR bank, Exeter did not choose to establish one. However, the certification process for sending area development rights does allow for rights to be certified and available in advance of a potential buyer coming to the table. The lack of a TDR bank is not seen to be a barrier to success in Exeter.

North Kingstown: In North Kingstown, the TDR program was originally established as one component of the broader Post Road revitalization effort. Like Exeter, the planning and zoning effort targeted at the Post Road corridor began approximately ten years ago, including an independent element in the Comprehensive Plan and a stand-alone Post Road Corridor Plan. Implementation of this plan began in earnest in 2006 and has included:

- A sweeping zoning reform package that addressed basic barriers to redevelopment including allowable uses, dimensional standards, and parking reform;
- The approval of local bond funding to install a sewer collection system along the Post Road corridor;
- Illustrated design standards for redevelopment;
- A TDR program that can increase residential density to 30 units per acre; and
- Analyses performed as part of the implementation process included an assessment of real estate values between sending and receiving areas.

The sending areas identified by North Kingstown are clearly marked as an overlay district on the local Zoning Map, and their first receiving area was also clearly marked as the recently established Post Road District. Work that began in 2010 on village-scale planning in North Kingstown also identified areas for concentrated growth in the community. These include a series of smaller “village scale” areas as well as a future transit oriented development site at the new Wickford Junction commuter rail station. North Kingstown has included these new village areas as receiving districts with varying capacities to absorb density.

North Kingstown’s program contains many of the important components discussed in this section; however, there are several that were not yet addressed at the time this report was written. While North Kingstown continues to work toward establishing a more sustainable growth pattern in the community, there are still many developable areas that offer alternatives to TDR-based development and the Town continues to consider up-zoning and growth opportunities without the use of TDR. Given the economic conditions that prevailed at the time this report was written, it is not difficult to see why a community like North Kingstown would be welcoming of any economic activity. However, if it is easy for developers to find pathways to increased density without TDR, the program will likely not be used.

Other components to the local program that were not addressed through the original regulatory package included a fee-in-lieu mechanism, residual land value analysis, and the establishment of a TDR bank. With regard to the TDR Bank, like Exeter, North Kingstown uses a certification process to ensure that development rights can be available for purchase long before a buyer might be identified. To address the density transfer credit and residual land value analysis, North Kingstown recently received funding to have those components integrated into the program.

NEXT STEPS FOR IMPLEMENTING LOCAL TDR PROGRAMS IN RHODE ISLAND

The two communities that have tackled TDR on the local level in Rhode Island implemented many of the “best practices” observed by experts on a national level. The 2014 *North Kingstown Community Market Study*, for example, successfully addressed the key question of how to use residual land value analysis to designate appropriate values for Density Transfer Credits. In some of the areas where these programs might be improved, efforts

are underway to do so. Based on the experience of these communities to date, there are a few important recommendations specific to implementing local programs.

1. Revise State Enabling Legislation

Local TDR programs are enabled through Rhode Island General Laws in §45-24-46.2 and §45-24-46.3 for the Towns of North Kingstown and Exeter, respectively. Based on the findings in this report, specifically for local TDR programs, the statutes should be revised with the following objectives:

- As a matter of general housekeeping, the statute(s) should be revised to make it clear that all municipalities have the power to establish a TDR program.
- The legislation should provide for a broad interpretation of what could be preserved in a sending area. TDR programs across the country certainly preserve farm and forest land; however, some programs also preserve historic structures, air rights, and other important resources.
- The use of Density Transfer Credits should be specifically enabled.

2. Develop Educational Training for Local Commissions

As part of the recent Washington County TDR project (Horsley Witten Group, 2012), several introductory presentations were performed across Washington County as an educational component of the project. While these presentations were useful for introducing TDR to new audiences, including Town Council members across the county, more work is required to create a shared understanding of TDR's potential in communities across the state.

The trainings previously offered as part of the Washington County project were very introductory in nature, and the recent training provided as part of the TDR Summit was very intensive and advanced. Because TDR will be planned and debated first by local Planning Boards, a training session and/or materials should be developed specifically for these officials. This level of TDR training would need to be more detailed than those provided in the Washington County project in the sense that a clear "step by step" work plan should be provided showing all the essential policy questions and planning exercises required for a successful program. It is also important, however, that the training be packaged in a way that it can be performed during regularly scheduled Planning

A National Perspective on TDR

As part of the Village Project, Rick Pruetz, perhaps the nation's foremost expert in the use of TDR, and Bill Fulton of Smart Growth America, headlined a two-day conference on the potential for TDR in Rhode Island. This training was extremely useful for exploring a wide variety of case studies across the country, the essential aspects of successful programs, and eventually drilling down into some detailed discussions of implementing a statewide TDR program in Rhode Island.

Board sessions. A TDR training suitable for local officials was developed as part of this project. Contact Jen West from the Narragansett Bay Research Reserve for further information about this training program.

3. Develop Analyses for TDR Ratios and Density Transfer Credit Mechanisms

The descriptions of local TDR programs provided earlier in this report point out that Exeter had not developed any detailed real estate analyses as part of setting TDR ratios. Further, Exeter did not set a dollar value for their density transfer credits, but rather prescribed a methodology for the developer to follow for the purposes of determining that value. In North Kingstown, limited real estate analysis was performed as part of setting ratios for their initial TDR project for the Post Road Corridor. However, these ratios were not set using residual land value analysis and, further, the analyses that were performed occurred during the peak of the housing bubble.

Recognizing the value of these analyses, and equipped with state funding, North Kingstown recently completed a residual land value analyses for the potential expansion of their TDR program into Wickford Junction. The results of these analyses can serve as a starting point for other communities.

4. Consider Incentives to support TDR

Successful implementation of TDR requires that developers be willing to invest in a designated receiving area in return for higher density. Any incentives the town, state or other entity can provide to reduce the risk of such investment will encourage participation by the private sector in the program. As described in the chapter on "overcoming barriers" in the Village Guidance Manual, there are many possible incentives, but

the most effective are those that reduce development costs and/or increase the value of the designated development area:

- Grants for planning and pre-development work.
- Streamlined permitting process.
- Supportive zoning ordinances.
- Capital improvements to roads, sewers and other infrastructure.
- Tax incentives.

THE MECHANICS OF IMPLEMENTING INTERLOCAL AND STATEWIDE TDR IN RHODE ISLAND

TDR programs that move beyond a single jurisdiction can evolve into interlocal programs (transferring rights from one municipality to another) or might even operate as a statewide program. These programs carry many of the same features found in a local program: sending and receiving areas must be identified, TDR ratios must be set, and language within enabling legislation, Comprehensive Plans and local Zoning Ordinances must allow for the transactions to occur. Using such an approach, the towns of Exeter and North Kingstown established an intermunicipal TDR program that provides for transfer of development rights from a key property on the Exeter side of the towns' shared border to North Kingstown's Post Road Corridor. A model for an Intermunicipal TDR agreement may be found in Chapter 2 of this report.

Interlocal Agreements

TDR occurring across municipal boundaries creates the challenge of transferring development rights between two different regulatory, financial, and administrative structures. The communities involved must grapple with the fiscal implications of these transfers and ensure that there are reasonable incentives for one community to receive development rights from another. In a local program, it is fairly easy to demonstrate the benefits of preserving open space while revitalizing another area of the community. Balancing growth at the local level in this manner provides clear fiscal, economic, and environmental benefits that are easily documented and communicated to officials, stakeholders, and the general public. With an interlocal program, as discussed above, the benefits of TDR need to be seen on a regional level and the significance of this approach may be hard to commu-

nicate to officials who must view every local regulatory change through the lens of balancing the local budget. For those with preservation interests in the receiving community, an interlocal approach will not target preservation of local lands and may raise objections regarding the benefits to local resources.

If a more regional mindset is successfully established, and interlocal TDR is viewed as a viable tool, communities will be required to go beyond basic regulatory changes and must craft legally binding interlocal agreements to ensure a successful transaction. While the local Comprehensive Plans and Zoning Ordinances will enable interlocal TDR and provide for some of the basic procedures, an interlocal agreement is needed to spell out the details of how many development rights will be transferred, what the TDR ratios will be, and any other specific terms. The following checklist for interlocal agreements is adapted directly from a document published by the Washington State Department of Commerce and the TDR Regional Alliance ("Sample TDR Interlocal Agreement Checklist"). Alterations to the checklist were made to create consistency with Rhode Island's governmental structure (i.e., no county government, removing reference to Washington statutes, etc.)

Recitals or Findings

1. TDR is a tool to encourage preservation of farm and forest land while promoting higher density development in cities consistent with Rhode Island General Laws (RIGL)
2. TDR is a land use and growth management tool that is consistent with the state's Land Use 2025 plan
3. TDR is a tool consistent with the [INSERT CITY/TOWN NAME] Comprehensive Plan and Zoning Ordinance [INSERT SECTION CITATIONS]
4. Communities are entitled to develop interlocal agreements pursuant to RIGL 45-40.1-4

Agreement Provisions

- City/Town Council supports TDR in accordance with [INSERT STATE AND LOCAL CITATIONS]
- Identify TDR sending site areas specific to the agreement
- Identify TDR transfer ratios in receiving areas that are specific to the agreement
- Notification process regarding the use of TDR credits

During a recent planning workshop, participants used stickers to map existing and potential downtowns, main streets and village centers that serve as the focus for economic activity across South County. TDR is one of the tools towns can use to save open space and implement an economic development strategy. Regional TDR agreements could help to revitalize regional centers while helping to preserve regional assets such as farmland and water supplies.



in permit applications for both municipalities

- Terms of conservation easements in TDR sending site areas
- Agreement for ongoing cooperative work between the municipalities to improve the program as appropriate
- Duration of the agreement
- Terms for termination of the agreement
- Terms for extension of the agreement
- Provisions to evaluate and monitor the TDR program
- Indemnification of the parties
- Administration of the agreement and the program
- Severability clause
- No waiver clause
- No third party beneficiary clause
- State Support for Receiving Areas

Perhaps the most common question asked by potential receiving area communities in interlocal programs is "If we're going to accept greater density, what else do we get

out of the deal?" While the economic benefits to increased density may be clear, receiving area communities are justifiably concerned about increased needs for public improvements and services associated with higher levels of density. Do the roadways in the receiving area require improvements to accommodate larger scales of development? Is the school system at capacity or can we absorb an increase in school aged children based on projections associated with the development? Is sewer and water service adequate? Do we have the technical expertise to draft and administer the TDR program?

All of these questions and many others are typical concerns of receiving area communities in interlocal programs and point to the fact that the community may require incentives or access to tools that will answer to these concerns. In other programs across the country, incentives may come in the form of giving receiving areas priority in existing programs like funding for public improvements. Other programs establish new funding or technical assistance mechanisms associated with the TDR program that may be used both to facilitate the transactions and provide monetary assistance for things like public improvements.

In Rhode Island, the most likely source of assistance for any receiving area community would be state-level programs. Within state-level policy, the most logical platform to think about increased incentives for receiving area communities would be the "growth centers" program. Growth centers are identified in the state guide plan *Land Use 2025* as a preferred approach to growth

control, concentrating growth in areas with increased levels of infrastructure, higher market opportunities, and in settings where residents would enjoy a high quality of life.

At the time this report was written, this program did not provide much detail regarding how growth centers would be identified, what they might look like, and whether they would receive any incentives with regard to state-level funding. Recently, however, there has been renewed interest in further developing the state's Growth Centers program. One of the key elements of the project is identifying incentives that can be attached to designated growth centers and, potentially, to those that specifically accept development rights on a regional scale.

In a previous TDR study performed by the Washington County Regional Planning Council (WCRPC), several municipal planners were interviewed from ten communities that could be candidates for receiving communities in an interlocal or statewide TDR program. As part of those interviews, attendees were asked what types of incentives from the state would help to create a successful growth centers program. The following answers are taken directly from that report:

- Monetary assistance or seed money to invest in revolving loan programs that can be put toward commercial building façade improvements or other building maintenance issues;
- Technical and monetary assistance to municipalities for infrastructure improvements, including upgrades and extensions of water, sewer, and fiber optic systems;
- Streamlined state-level permitting;
- The revitalization of programs like the Enterprise Zone, the Historic Tax Credit, and any other vehicles that allow for the award of tax credits;
- Design and construction assistance to municipalities for streetscape improvements;
- State-led promotion of growth centers as areas for economic development through effective "clearing-house" style information sharing and other marketing techniques;
- Strong regional transportation planning and implementation to link growth centers with ongoing efforts associated with the MBTA, T.F. Green Airport,

and Rhode Island Public Transit Authority (RIPTA);

- Technical assistance to municipalities for more complex redevelopment initiatives such as those associated with creating TIF Districts or coordinating and financing environmental clean-up (brownfields); and
- Overall technical assistance to municipalities on development/redevelopment projects in the anticipation that staffing will be cut due to local budget constraints.

NEXT STEPS FOR IMPLEMENTING INTERLOCAL TDR PROGRAMS IN RHODE ISLAND

Revise State Enabling Legislation: Similar to the discussion of local TDR programs, developing a viable framework for interlocal agreements would include revisions to state enabling legislation. It is important to note that, on a limited level, interlocal programs are legal in Rhode Island with Exeter and North Kingstown having already established such programs. However, similar to concerns related to local TDR programs, the legislation in effect at the time this report was written can be interpreted narrowly and should be revised to clarify that interlocal agreements are available to all communities.

If the state were to pursue a state-level TDR program, significant revision to the enabling statutes would be required. Revisions would include enabling the state to establish a TDR program and identifying a governing agency or group to administer the program.

Enhance Growth Center Focus in Land Use 2025

As discussed earlier in the report, the existing growth center policies with the state are not fully developed within the current guide plan *Land Use 2025*. A renewed *Growth Centers program* would address the following:

1. How to identify the potential location of future growth centers looking at environmental constraints, economic opportunity, and existing infrastructure;
2. How to achieve local and state-level designation as a growth center;
3. What the significance is of designating a growth center as related to state policy;
4. Different illustrated typologies for urban, suburban and rural growth centers with discussion of planning,

zoning and design techniques that are applicable to each; and

5. The way in which incentives could be applied at both the local and state level to encourage public and private investment in growth centers.

Assess Existing Funding/Assistance Mechanisms: An important and technically challenging exercise required to assess the potential applicability of various incentives will include an inventory and audit of any state-level incentive that could be applied to growth centers. Tax credits for housing, transportation improvements, state revolving funds, historic tax credits (pending), and other programs that could be applied will need to be reviewed to answer the following questions:

■ **Does the granting agency have any discretion regarding where these funds can be applied or the order in which it can award project requests?**

For some projects, the answer to this question may be "no" based on selection criteria embedded in the program or other restrictions imposed by the federal government, etc. Where the answer is "yes" there may be opportunity to use the designation of "growth center" as part of the prioritization for funding.

■ **How difficult would it be from a political or administrative perspective to use growth centers as a prioritization factor?**

Funding mechanisms that have been in place for many years may have certain expectations regarding how the money is allocated. Introducing new preferences or selection criteria may receive political resistance. Assessing the political or administrative difficulties with introducing a growth center funding priority could be started through interviews with program administrators.

■ **How much strength would growth center designation have in the selection process?**

Careful consideration of a particular agency's goals will need to be examined to determine how much weight would be placed on growth center designation as a selection criterion. Some agencies may find that growth center designation is complementary to their goals, but less important than other factors. Other agencies may find that growth centers capture many of their goals and package them in a way that allows for considerable weight to be placed on this designation.

■ **How would TDR fit into the incentive scheme for existing programs?**

If an agency finds that prioritization of growth centers for its assistance programs is appropriate, the agency may also wish to consider

whether to prioritize those growth centers that are built through TDR. This adds another layer to this assessment of existing programs and would likely require considerable education of existing program administration to gauge how important the use of TDR is to them.

Assess the Potential for New Incentives and Finalize a State-Level Incentive Package:

With the audit of existing funding programs complete, it may be necessary to identify potential new funding/incentive mechanisms that could be applied to growth centers that participate in a state-level TDR program. For example, a new Growth Center tax credit program could be created or some similar mechanism that has yet to be considered. Once the final list of existing and new program incentives are in place, amendments to state legislation and program guidelines will need to be drafted, presented as a package, and adopted.

OTHER POTENTIAL APPROACHES TO TDR AT THE STATE LEVEL

As discussed earlier, a fully functioning state level TDR program in Rhode Island would look, in many ways, like the county level program now working in King County, WA. The program would be complex, with case-by-case interlocal agreements being facilitated through a state level TDR bank. While this model has been successful in King County, it is important to note that the program evolved over time and had more local TDR implementation in place before it moved to the interlocal and county level. When compared to the timeline of many long-standing programs across the country, Rhode Island is just beginning to step seriously into implementation. North Kingstown and Exeter represent the first Rhode Island communities to adopt TDR as part of a broader, community-wide growth control effort. As the national economy continues to emerge from recession, continued monitoring of development activity and discussions with developers will reveal whether these programs require adjustments in order to be successful in Rhode Island. Once these programs, or other local programs, demonstrate success, the state may be ready to tackle the challenge of establishing a statewide TDR program as described above.

As an interim step to a more fully developed state-level program, one approach to involving the state would be to enhance the existing state Purchase of Development Rights (PDR) programs and allow them to accept payments for density transfer credits in specific growth centers. These payments would be added to the existing

funds dedicated to open space and/or farmland preservation at the state level. The state could then use these funds under the same guidelines it has today. In order to have this state level mechanism work, two of the same basic technical questions that were examined earlier in the report would need to be answered:

1. How would preservation and growth areas qualify for the program?

With regard to identifying viable preservation areas, the advantage of using the established state level programs is that they already have criteria and procedures for selecting sites. The question of growth area selection would be potentially more challenging. One aspect of this selection process that is clear from the outset is that the growth area community would need to agree to allow for a portion of the payment from the developer to go into the state-level PDR fund. Inclusion of a growth center in the program would therefore be through an application by the host community to the state, and would require some additional analyses and planning beyond a typical growth center designation. As an example, the value of density bonuses would need to be calculated, which is discussed under the second question below.

In order for a local government to see the value in letting funds go to the state for preservation in another community, officials would have to understand this money as an investment that will yield greater returns than just keeping the funds in a local TDR model. This “return on investment” would likely come in the form of state-level incentives, which would be identified through the same state-level incentive assessment described earlier in the report. State agencies would need to agree to a specified level of investment over a pre-determined period of time to make this type of deal worthwhile to a community.

As a hypothetical example, a municipality allows for limited residential development in a downtown district today. As part of a growth center designation process, the community agrees to potentially increase development significantly as part of a voluntary, fee-based program. Under the terms of the program, a developer decides to pay \$200,000 for the ability to build 40 units of housing beyond what is already allowed. Of that density bonus fee, based on previous agreements with the state, \$100,000 goes into the state-level PDR fund and \$100,000 stays in local funds. This allocation of funds between state and local control can vary and would be determined through the program design process.

With regard to the funds that go to the state, a coordinated state agency effort would be required to ensure an attractive return on investment. For example, based on the terms of a formal agreement, the state might make provisions to invest \$300,000 into that growth center over a five-year period.¹ Of the \$100,000 that remains local, careful consideration when crafting the program would be needed to determine how this money might be spent. If the Density Transfer Credit model is followed, then it would be incumbent on the community to spend the money on open space preservation. However, if the opportunities could be expanded, following more of an “impact fee” model, this money could be used to re-invest in the growth center either in direct costs or as matching funds for larger infrastructure investment. The legal nuances of these options have yet to be explored in Rhode Island.

2. How would the value of density bonuses be determined?

In order to send money into a state-level PDR fund, the fair value of density bonuses needs to be determined. In the hypothetical example above, the developer paid \$5,000 for each additional unit of housing beyond the base zoning allowance. This number is usually determined through market/real estate analyses and, where TDR operates across large regions, these values are often set on a case-by-case basis. Ideally, for the purposes of this proposal, the State of Rhode Island would be able to set a single equitable price to create an easily administered and predictable program. Unfortunately, because receiving area economies will be different from one city to another, and because the purchase of development rights could include a wide array of land at different values—a standardized approach would be very challenging to develop.

One way to determine this value would be as part of the application process for growth center designation. During this process, the state would work with the proposed receiving area community to perform the residual land value analyses needed to set a fair price. On the receiving area side, the location of the growth center would be used to determine the appropriate market conditions, costs associated with construction, cost of land, and other factors that drive a developer’s pro forma. Once the initial fee value is established, it can be pegged to an annually reported value so that it automatically adjusts (perhaps once a year) to fluctuations in the local real estate market.

1 The monetary values and investment time horizon provided here are done purely for illustrative purposes.

II. Regulatory Guidance for Transfer of Development Rights

DRAFT ENABLING LEGISLATION FOR TRANSFER OF DEVELOPMENT RIGHTS (TDR).

The following text is provided as a working draft for new state enabling legislation in Rhode Island specifically for Transfer of Development Rights (TDR). In researching other state legislation, Horsley Witten Group (HW) found that most states applied a “minimalist” approach to their TDR legislation. State law routinely provided a *framework in which local governments could implement the tool, but left the details associated with different aspects of the program to the local governing bodies to craft. This approach is particularly important for TDR as the manner in which the program could be applied to Rhode Island communities is quite diverse. While some communities would choose to protect farms and open space, other communities may choose to trade individual building stories in an urban environment, and still others may choose to protect historic structures. In summary, it is not possible to anticipate all of the combinations of resource protection priorities and growth incentive bonuses that could be paired in local TDR program. State legislation that is more “enabling” than “prescriptive” is therefore the preferred approach.*

The language provided below would replace the existing §45-24-46.2 and §45-24-46.3 and includes provisions for:

- Basic TDR transactions;
- Definitions for important terms;
- Certifying development rights;
- The potential use of Density Transfer Credits; and
- The potential for inter-municipal TDR.

§ 45-24-46.2 Special provisions – Transfer of development rights (TDR)

- (a) *In addition to other powers granted to towns and cities by this chapter to establish and administer transfer of development rights programs, a town or city council may provide by ordinance for the TDR, as a program available to developers and property owners, in the manner set forth in this section.*

(By putting voluntary in the legislation it could be misinterpreted by the courts that TDR is not mandatory to gain density in a receiving area. I don't think it's needed.)

- (b) *Terms defined for this chapter.*

- (1) *“Certification of development rights” means the process by which the number of development rights associated with a particular tract of land is approved by a municipal government and thereby made available for transfer.*
- (2) *“Density Transfer Credit” means the payment of money to a dedicated land preservation account in exchange for the ability to develop more intensely in a receiving area pursuant to a transfer of development rights ordinance and any associated regulations.*

Commentary: *The framework for the Density Transfer Credit option is provided below in subsection e.*

- (3) *“Receiving area” means an area of a municipality that is established as part of a transfer of development rights ordinance for the purposes of increasing the density of development on the parcel(s) of land to specified levels that would otherwise not be allowed. A receiving area may be established as an added component to an existing district or as an overlay district that is superimposed upon one or more existing zoning districts.*

- (4) *“Sending area” means an area of a municipality that is established as part of a transfer of development rights ordinance for the purposes of preserving valued resources on a parcel(s) of land by transferring development rights associated with those resources to a receiving area. A sending area may be established as an added component to an existing district or as an overlay district that is superimposed upon one or more existing zoning districts.*
- (5) *“TDR resource” means any land or structure that is targeted for preservation in the Comprehensive Plan through inclusion in a sending area as part of a transfer of development rights ordinance. These resources may include, but shall not be limited to, scenic landscapes, open space, forest, wildlife habitat, farmland, drinking water protection areas, historic land or structures, or areas with lower levels of infrastructure.*

Commentary: This definition was provided as an important way to encapsulate the wide variety of landscapes, activities or structures that could be preserved through TDR into a single term that will make the legislation easier to read. In rural areas, valued resources might likely be open space and farmland. In urban areas, valued resources may be more focused on parks or historic building sites.

(c) *The establishment of a system for TDR within or between municipalities shall be for the purpose of:*

- (1) *Providing developers and property owners the ability to establish, certify, purchase, sell, convey, extinguish and/or hold land development rights;*
 - (2) *Limiting or extinguishing development rights on parcels where preservation of land or of existing activities are valued by the municipality as identified in the Comprehensive Plan;*
 - (3) *Directing development away from valued resources to places better suited to increased levels of development such as established or proposed mixed use, commercial, industrial, village, or residential centers;*
 - (4) *Directing development to areas served by existing infrastructure such as established roadways, public water supply systems, centralized sewer collection systems, public transit and other utilities; or*
 - (5) *Shaping and balancing urban and rural development.*
- (d) *As part of an ordinance for TDR, a city or town may allow property owners to have the number of development rights certified by the city or town prior to any TDR transaction. Said certification may occur through an application to the Administrative Officer or the Planning Board as deemed appropriate by the city or town and as identified in the Zoning Ordinance. Certification shall only provide a means to quantify transferable development rights and, unless specifically stated by the municipality, shall not be interpreted to be the actual amount of development that could be achieved in accordance with other permitting mechanisms.*
- (e) *As part of an ordinance for TDR, a city or town may allow for intensification of development in a receiving area to occur through the purchase of Density Transfer Credits. Any municipality that provides for a Density Transfer Credit option shall have identified the targeted TDR resource(s) within its Comprehensive Plan as eligible for a Density Transfer Credit transaction and shall provide:*

Commentary: The use of Density Transfer Credits (sometimes known as a fee-in-lieu approach is gaining interest across the country and has been implemented in Rhode Island by Exeter and North Kingstown. See Washington County Transfer of Development Rights Study: Final Report (October, 2012) for a discussion of this approach.

- (1) *A formula and/or procedure by which a credit amount for development rights is determined using acceptable real estate valuation processes and which demonstrates that the credit amount is reasonably related to the monetary value of the TDR resource;*
- (2) *A schedule by which the municipality shall revisit any data collection, analyses or other components of the formula and/or procedure used to determine the credit amount;*

- (3) *Identification of the approval mechanism required to use the Density Transfer Credit option;*
- (4) *Identification of an account that shall be used to hold the funds and the party that shall administer the account;*
- (5) *Requirements that the purpose of the funds in the account shall be for preserving or facilitating the preservation of TDR resources within in the sending area;*
- (6) *Identification of the authority that shall approve use of the funds for purchasing development rights and the process by which those approvals are made.*

Commentary: *The six elements above provide the framework within which a Density Transfer Credit program would operate. Importantly, the framework **DOES NOT** prescribe a specific approach to identifying the monetary value of valued resources. Because of the diverse types of landscapes or structures that could be identified, it is essential that state legislation allows calculations to be tailored to specific local programs.*

Also note that funds in the account may be used for “facilitating the preservation of TDR Resources within the sending area.” Research of best practices across the country show that these funds are sometimes used to pay for services associated with a lawyer, real estate professional or other professional that can help finalize a deal related to TDR.

- (f) *As part of an ordinance for TDR, a municipality may enter into an agreement with another municipality to transfer development rights from one municipality to another. Any transfer of development rights from one municipality to another shall require the following at a minimum:*
 - (1) *Approved language within each municipality’s Comprehensive Plan calling for the potential use of inter-municipal transfer of development rights;*
 - (2) *A zoning ordinance in each municipality allowing for said transfer;*
 - (3) *The establishment of sending areas and receiving areas in a zoning ordinance as applicable and reflected in the applicable municipal Comprehensive Plans;*
 - (4) *In the municipality that will receive development rights, a development review process that requires at least one public hearing in advance of final approval.*

Commentary: *Any community choosing to accept development rights from another community will clearly need an incentive to do so. However, this draft legislation does not presume to know what that incentive will be and how it may be calculated. The recommendation is to have local Planning Board and Council develop a process that meets their needs. This may include fiscal or other impact analyses that demonstrate a net benefit to the receiving community. But, again, this should be decided at the local level.*

The following guidance is not intended to provide legal advice and represents examples of how the research and discussion that occurred as part of this project could be organized into a community ordinance and associated regulations. As with any sample language provided for a project of this nature, this document cannot be simply copied into an existing Zoning Ordinance in its current form. Local officials will need to tailor the language to their own definitions and processes, and there are several “policy decisions” noted for consideration. Local officials are encouraged to review the language within this guidance, and any adjustments that may be developed locally, with their legal counsel.

Potential New Definitions

- **Agricultural Lands, TDR:** Those lands preserved for agricultural use as part of a TDR transaction. The development rights associated with those lands shall be recorded in TDR Certificates and are potentially transferable to Receiving Areas.
- **TDR Certificate:** Document issued and maintained by the [Administrative Officer] that serves as the official record for quantification, ownership, sale or extinguishing of transferable development rights associated with land in designated Sending Areas.
- **Conservation Lands, TDR:** Those lands preserved in a natural state and/or for those uses allowable by the Planning Board as part of a TDR transaction. The development rights associated with those lands shall be recorded in TDR Certificates and are potentially transferable to Receiving Areas.
- **Development Rights, TDR:** The number of detached single family dwelling units that can reasonably be permitted on a designated Sending Area parcel using the calculations specific to developing a TDR Certificate.
- **Receiving Area:** Any area identified by the [INSERT CITY/TOWN NAME] in the Zoning Ordinance as land eligible to receive development rights through a Major Land Development project review. These areas may also be identified on a Zoning Map on file with the Town Clerk.
- **Sending Area:** Any area identified by the [INSERT CITY/TOWN NAME] in the Zoning Ordinance as land eligible for establishing development rights that may eventually be transferred to a Receiving Area. These areas may also be identified on a Zoning Map on file with the Town Clerk.
- **Transfer of Development Rights:** The process by which a developer or property owner may apply development rights previously established in designated Sending Areas to parcel(s) in designated Receiving Areas for the purposes of increasing density as may be allowed in the Zoning Ordinance or Land Development and Subdivision Rules and Regulations. This process involves an application for a Major Subdivision or Land Development project as applicable to the Planning Board.
- **Transferable Development Rights:** Development rights for a parcel(s) of land in designated Sending Areas that have been recorded on a TDR Certificate and may only be developed, per Planning Board approval, once they are successfully landed in a Receiving Area.

Potential Zoning Ordinance Language to Implement TDR

ARTICLE 8 – TRANSFER OF DEVELOPMENT RIGHTS (TDR)

Commentary: “Article 8” is used simply to help organize the document below and represents an arbitrary number. Local communities will need to identify the best location(s) in their ordinance to implement TDR.

Sec. 8.1. Purposes

The purposes of this Article are as follows:

- A. To provide TDR as an optional incentive for more sustainable land development practices in the [Town/City] of [INSERT NAME];
- B. To preserve and protect agricultural lands and open space;
- C. To direct development away from sensitive resource areas to places better suited to higher densities of development;
- D. To preserve sensitive resource areas in the community such as groundwater reserves, wildlife habitat, and public access to surface waters;
- E. To provide developers and property owners the ability to establish, certify, purchase, sell and land development rights;
- F. To help implement the Future Land Use Map and Land Use Element of the Comprehensive Plan

Commentary: A well-crafted “Purposes” section will be necessary if a local community chooses to approach this as a stand-alone section of the Zoning Ordinance. These purposes establish that TDR is optional and that it is used both for intensifying development and protecting open space. It also establishes a direct tie to the Comprehensive Plan. The language above cites the Future Land Use Map and the Land Use Element of the Comprehensive Plan. TDR may be included in other areas of the Comprehensive Plan as well.

Sec. 8.2. Applicability

- A. Areas of [INSERT NAME OF CITY/TOWN] that qualify as potential Sending Areas include developable areas within the Sending Area Overlay District as depicted on the Town’s official Zoning Map on file with the [Office of the Clerk].

Commentary: Sending areas can be identified in a variety of ways. The approach provided above uses an overlay district approach, which may be more fitting for municipalities that want to target specific parcels or tracts of land. Other municipalities may wish to identify entire districts as receiving areas such as a “rural residential” district. In this case, an overlay would not be necessary and the ordinance would simply identify the entire district as a sending area.

- B. Areas of [INSERT NAME OF CITY/TOWN] that qualify as potential Receiving Areas include those depicted on the Town’s official Zoning Map on file with the [Office of the Clerk].

Commentary: Similar to the sending areas, receiving areas can be identified in a variety of ways. The approach provided above uses an overlay district approach, which may be more fitting for municipalities that may have multiple receiving areas. Other municipalities may wish to identify entire districts as receiving areas such as a “Village Mixed Use” or “Transit Oriented Development” district. In this case, an overlay would not be necessary and the ordinance would simply identify the entire district as a receiving area.

- C. Where a lot is partially contained within either a Sending Area or a Receiving Area, only the portion of the lot contained in such area may be used for the purposes of establishing or landing development rights respectively.

Sec. 8.3. Authority

The certification of development rights may only be approved through application to the [Administrative Officer] according to the procedures and standards provided in this Article. The actual transfer and landing of development rights may only occur through application to the Planning Board for a Major Land Development Project in accordance with the provisions in the Zoning Ordinance and the Land Development and Subdivision Regulations.

Sec. 8.4. Determining and Certifying Development Rights

- A. Property owners seeking to certify development rights for the purposes of TDR shall apply to the [Administrative Officer] for a TDR Certificate in accordance with the procedures and plan requirements listed in the Land Development and Subdivision Regulations.
- B. The number of development rights that may be certified for a particular piece of land within the Sending Area shall be determined using the following formula:

$$DR = (A - C) \div L$$

Where

"DR" is Development Rights

"A" is the total area of the parcel(s)

"C" is constraints to development which include wetlands and areas reserved for infrastructure such as roadways. For the purposes of this calculation, the amount of land reserved for infrastructure shall be 10% of the upland area.

"L" is the minimum lot size allowed in the base zoning district.

- C. As part of an application for a TDR Certificate, the submission shall establish whether property would be preserved as conservation land or as agricultural land within the terms of any future easement.
- D. Applicants for a TDR Certificate shall perform the required calculation for the entirety of all parcels associated with the application. Determining development rights for a portion of any associated parcel is not allowed.
- E. Upon the approval of the TDR Certificate Application, the [Administrative Officer] shall authorize the issuance of a TDR Certificate unless the application is challenged and placed before the Planning Board.
- F. Any party that has received Master, Preliminary or Final Plan approval for a parcel in a designated Sending Area and has not commenced construction may still apply to the Planning Board for a TDR Certificate provided the property is eligible as a Sending Area in accordance with Sec. 8.2 of the Zoning Ordinance.

Sec. 8.5. Partial Transfer of Development Rights

- A. Establishment. Property owners with a TDR Certificate may choose to transfer all or a portion of their development rights as part of any TDR transaction. Where only a portion of the rights are transferred, these rights shall be extinguished as part of a deed restriction and the transaction shall be recorded in accordance with the procedures in the Land Development and Subdivision Regulations.
- B. Partial Property Development. Where a property owner has transferred/extinguished a portion of the certi-

fied development rights, said property owner may apply to develop the remaining rights on the sending area parcel(s). To do so, the property must set aside a portion of the property for agriculture or open space in accordance with the following provisions:

1. The minimum percentage of restricted conservation land or agricultural land required for the developed area shall be equal to the percentage of development rights that are extinguished. For example, if 25% of the development rights have been extinguished, 25% of the land area must be preserved as part of any development proposal.
2. Where the preserved area will be held under an agricultural easement, the preserved area may only contain wetlands if all of the land designated for agricultural activity is preserved.
3. Where the preserved area will be held as conservation land, the preserved area may contain the same percentage of wetland as the entire parcel area. For example, if 30% of the entire parcel(s) is covered by wetlands, up to 30% of the conservation land may be covered by wetlands.
4. Subdivision applications for the remaining development rights shall follow the Conservation Subdivision design process described in [INSERT SECTION] of the Zoning Ordinance.

Commentary: Provisions 1-3 above provide one way to answer the policy question “Should wetlands be allowed in preserved areas and, if so, how much?” Communities have typically grappled with this question when adopting Conservation Subdivision Design or a similar tool that integrates the protection of open space with the design/development process. One of the objectives is to gain as much open space as possible that can actually add value to the residents living in close proximity. If the open space was all wetland, this defeats the purpose. On the other hand, requiring all of the open space to be upland area can make it mathematically impossible for a developer to use these tools on sites with a significant portion of wetlands to begin with.

In the above approach, agricultural easements assume that the priority is preserving land that can be placed in active agricultural use. Therefore, no wetlands are allowed in the preserved area. For conservation areas—areas in a natural state—a more flexible approach is provided that allows the property owner to realize the full potential of the developable land, while providing some valuable upland open space.

Provision 4 above provides a process by which any retained development rights can be developed. Using the Conservation Design approach, communities have a strong “fall back” to ensure that the development respects the resource opportunities that have not been preserved as part of TDR. Where communities do not have this design tool available, a more prescriptive process will be required. North Kingstown’s TDR ordinance contains a process that can be considered.

-
- C. **Deed Restrictions.** Certification of any development rights shall be conditioned on the placements of a deed restriction on the associated parcels. The failure of an applicant to record this deed restriction shall render the certificate null and void if any transfer of development rights is subsequently attempted. This restriction shall include the following provisions at a minimum:
 1. The number of transferable development rights associated with the parcel shall be clearly stated.
 2. As development rights may be purchased and subsequently extinguished, this reduction in the number of development rights shall be amended on the deed.
 - D. **Conservation Easements.** Conservation easements shall be applied to the sending area parcels in accordance with Section 8.6 once all development rights have been extinguished or once some development rights have been purchased and the remaining land area is approved for development.

Sec. 8.6. Conservation Easements on Sending Area Lands.

- A. **Existing Agricultural Lands.** Lands identified for preservation in the Sending Area that are in agricultural production or are otherwise identified for agricultural activities by the applicant when development

rights are purchased should be preserved for agricultural activities.

- B. Existing Natural Lands. Lands identified for preservation in the Sending Area that are not in agricultural production or otherwise identified for agricultural activities by the applicant when development rights are purchased shall be preserved as conservation areas.
- C. Restrictions on Sending Area Parcels. Restrictions on Sending Area parcels shall be recorded as conservation easement restrictions on the title of the parcel to be preserved upon approval of a TDR Sending Area Land Development application. These restrictions shall include a management plan, to be approved by the Planning Board, which will specify how the open space will be used in the future. The guidance provided in the Rhode Island Conservation Easement Guidance Manual (RIDEM 2009, or as amended) shall be used to prepare a conservation easement and management plan. Conservation or agricultural lands preserved through TDR shall either:
 - 1. Be conveyed to and accepted by the Town for park, open space, agricultural or other permitted use or uses;
 - 2. Be conveyed to a nonprofit organization, the principal purpose of which is the conservation of open space or resource protection; or
 - 3. Be conveyed to a corporation or trust whose principal purpose is the stewardship of said land for uses approved by the Planning Board.
 - 4. Remain in private (non-common) ownership if the use is limited to those approved by the Planning Board through a binding conservation easement restriction that runs with the land. With agreement of the property owner through the land development or subdivision process, the Planning Board may limit the amount of space that remains in private ownership to ensure the protection of natural resources or the maintenance of an established greenway.
- D. Easements for Conservation Lands. All non-agricultural land preserved through the TDR permit process shall be protected in perpetuity against further development and unauthorized alteration by appropriate conservation easement restrictions, and by the grant of a conservation or preservation restriction to the Town, pursuant to R.I.G.L. 34-39, as amended. In addition, the perpetual maintenance of open space and any authorized uses shall be guaranteed by appropriate conservation easement restrictions and by grant of a conservation or preservation restriction to the Town, pursuant to R.I.G.L. 34-39, as amended. Every conservation easement restriction shall require approval by the Planning Board before any development rights are sold, landed or otherwise extinguished. Every conservation easement restriction shall contain the following provision:

"If the owners, or their successors or assigns fail to maintain conservation lands in accordance with those restrictions placed upon the property, the Town may perform any necessary maintenance and enforce the payment for such costs, including reasonable attorneys' fees, by an action at law or in equity against the owners or their successors or assigns."

- E. Easements for Agricultural Lands. All land designated for conservation as agricultural land shall be protected in perpetuity against non-agricultural development and shall allow agricultural use in accordance with this ordinance by appropriate conservation easements and management plans. Said restrictions shall be imposed via restrictions for farming and agricultural uses (pursuant to Title 34, Chapter 39 of the Rhode Island General Laws as amended). The [CITY/TOWN] shall serve as the principal steward and enforcer of these restrictions for any period of time. The Rhode Island Agricultural Land Preservation Commission with the Division of Agriculture Chief acting as advisor (pursuant to the Farmland Preservation Act, Title 42, chapter 82 of the Rhode Island General Laws as amended) shall serve as the secondary steward and enforcer. Notwithstanding the foregoing, if the [CITY/TOWN] and/or the Agricultural Land Preservation Commission do not agree or fail to serve as steward and enforcer, the Planning Board may allow, for such period of time, other non-profit entities to hold various stewardship and enforcement rights to supplement those rights held by the those parties. These non-profit entities shall have missions dedicated to agricultural preservation and a commitment to continuing allowable agriculture use. Any rules or enforcement enacted by said entity shall be consistent

with any applicable rules of the Department of Environmental Management, Division of Agriculture. No restrictions shall be placed upon the property that would preclude agricultural lands that have been left fallow to be cleared, re-cultivated and returned to an active agricultural operation subject to applicable state laws.

- F. Allowable Uses on Conservation Lands. Uses allowable in conservation lands shall be devoted to conservation purposes or for park, recreation, or forest management purposes. Vegetated stormwater drainage areas may also be allowed if permitted by the Planning Board in accordance with [REFERENCE STORMWATER SECTION OF REGULATIONS].
- G. Allowable Uses on Agricultural Lands. Consistent with any applicable local, state or federal regulations, the Planning Board shall allow agricultural lands preserved through TDR to be used as prescribed during the development right certification process and as recorded by the Administrative Officer.

Sec 8.7. TDR Density Bonuses and Transfer Ratios

- A. Description of Bonuses. The transfer of development rights into the Receiving Area Overlay District will be used to create multi-family housing or town-house style development, and will allow developers to increase residential density beyond what is allowed in the base zoning. In the [General Commercial District], allowable residential density may increase to a maximum of [20 units per buildable acre]. In the [Neighborhood Commercial District], allowable residential density may increase to [10 units per buildable acre].

Commentary: This section presents a very simple way of presenting what can quickly become a complicated discussion at the local level: the discussion of density limits. Assuming the use of an overlay district, this language demonstrates how the underlying zoning can be used to tailor density allowances.

The language here limits the TDR transactions as “residential to residential.” In other words, development rights from residential areas are not being transformed into commercial space or some other use. While those more complicated transfers do occur elsewhere in the country and are certainly feasible, the types of real estate analyses required to make them work are more challenging. When rolling out a TDR program for the first time, communities will want to keep the program as simple as possible while still meeting their goals for growth.

Another important point is that the language above stipulates that the product of the transfer is limited to two types of housing. Communities will want to decide which types of housing represent a desirable outcome as part of density increases.

- B. TDR Transfer Ratio. For every development right certified in a Sending Area, the Planning Board may allow housing units to be developed in the Receiving Area at the following ratios. Fractions of units shall be rounded down to the nearest whole number when calculating potential density bonuses.

Town-house	Multi-Family
[2.5 units] for every development right	[4.0 units] for every development right

Commentary: This section assumes, again, that development rights will be used solely to produce either town-house and/or multi-family units. The numbers within the table are known as the “TDR Transfer Ratio” and demonstrate that multiple units of housing will likely be required for each preserved development right in order for the venture to make financial sense to a developer. The numbers provided in the table are somewhat arbitrary and are meant to illustrate the scale of bonuses that may be required for a TDR program to work depending on local real estate conditions.

It is recommended that a local community solicit the services of a real estate professional who can de-

termine the TDR transfer ratio required to entice this level of investment. An analysis known as a “residual land value” calculation is recognized as one of the more effective tools to determine this ratio. This analysis can also be used to identify a reasonable fee-in-lieu value (see section 8.XX).

It should also be noted that the language provided here assumes that all development rights are valued equally within the community. So the ratios shown above will be the same for land on a farm that may be small, with limited production as compared with a large farm that has high production level and more perceived value to a community. Local TDR programs can set up a ranking system that provides a higher ratio when more valuable lands are targeted. North Kingstown and Exeter both employ this approach and readers are encouraged to review those ordinances to learn more about how this is implemented. Using a ranking system will require more analyses and permitting during the development right certification process and can serve as a disincentive for land owners to go through the process. Communities will need to weigh the importance of ranking different sending area lands against the added complexity of using this approach.

Sec 8.8 Procedures for Transferring Development Rights to the Receiving Area Overlay District.

- A. General. All applications for transferring development rights to a Receiving Area shall come before the Planning Board as a Major Land Development or Major Subdivision as applicable. At the outset of the permit review process, applicants must demonstrate to the Planning Board that the bearer of the TDR Certificate is in agreement with the terms of the proposed application and understands the number of development rights that will be extinguished after the landing process is complete. Documentation of this assurance shall be provided in a letter signed by the bearer of the TDR Certificate or his/her representative at the time of the application to land the development rights.
- B. Calculating the Number of Required Development Rights. Calculating the number of development rights required for increases in allowable density involves a three-step process:
 1. The applicant shall first determine how many residential units would be allowed as of right in the underlying districts.
 2. The applicant shall then determine the number of proposed residential units.
 3. The difference between the two numbers shall then be divided by the transfer ratio listed in Section 8.7.B.

Hypothetical calculation:

Step 1. Number of units allowed in underlying district: 14

Step 2. Number of proposed units: 30 town-house; 30 multi-family
Number of units requiring TDR: $60 - 14 = 46$ (half for town-house; half for multi-family)

Step 3. Town-house requirement: $23 \div 2.5 = 9.2$ development rights
Multi-family requirement: $23 \div 4 = 5.75$ development rights

Total requirement: $9 + 6 = 15$ development rights

- C. Materials. In addition to the materials customarily required as part of an application for a Major Land Development or Major Subdivision, an applicant proposing to land development rights shall submit the appropriate number of copies of his/her TDR Certificate to the Planning Board. The validity of these development rights shall be verified by the [Administrative Officer] or his/her designee during the Pre-Application Review.
- D. Transferral. A person or party purchasing certified development rights without landing said rights in the Receiving Area shall record the purchase with the [Administrative Officer] and receive an updated TDR Certificate reflecting the change in ownership. Parties may purchase all or a portion of the development rights vested in a TDR Certificate.

- E. Final Approval. The Planning Board shall not issue final approval of any transfer of development rights until all necessary conservation easement restrictions are recorded in the Land Evidence Records and said development rights are formally extinguished by the Town Planner through the issuance of a revised TDR Certificate.

Sec 8.9. Density Transfer Credit Option for Density Transfer.

- A. Establishment. As an alternative to transferring development rights in order to achieve higher densities than what would be allowed by the underlying zoning within the Receiving Area Overlay District, applicants for eligible development proposals may petition the Planning Board for a Density Transfer Credit option.
- B. Density Transfer Credit Program Requirements. The [INSERT CITY/TOWN NAME] Density Transfer Credit TDR option is allowed in accordance with the following provisions:
 - 1. Any funds collected as part of this transaction shall be deposited into an account dedicated to the preservation of open space.
 - 2. The account for these funds shall be administered by an entity designated by Town Council, identified as part of a public hearing, and approved through a majority vote.
 - 3. Funds within the account shall be used to facilitate the preservation of lands in the Sending Area Overlay District.
 - 4. Funds may be used to:
 - a. Purchase land as a fee simple acquisition. The fund may be used in a transaction where the Town is the sole purchaser, is in a partnership, or has a contributing interest.
 - b. Purchase development rights or apply easements. The fund may be used in a transaction where the Town is the sole purchaser, is in a partnership, or has a contributing interest.
 - c. Provide legal or other technical assistance for the development of site plans, the performance of field investigations, the recording of deeds, or other tasks required as part of the TDR Certificate process. Such assistance shall only be provided where the [City or Town] finds that preservation would not likely occur without said assistance.
 - d. Solicit the services of a qualified real estate professional to revisit the value associated with a fee-in-lieu transaction.

Commentary: Note that TDR funds provided through purchase of Density Transfer Credits can be used not only to purchase land, but also to facilitate the purchase of land by providing supportive services. These supportive services are not necessary, but are considered best practices based on research into TDR banks across the country. Expanding the capacity of the Town to pay for these services gives the Town more of a partnership role.

- 5. The value for a single development right shall be determined, at a minimum, on an annual basis by a qualified real estate professional using acceptable industry practice.

Potential Regulations Language to Implement TDR

SECTION 12 – APPLICATION FOR TDR CERTIFICATE

Commentary: “Section 12” is used simply to help organize the document below and represents an arbitrary number. Local communities will need to identify the best location(s) in their regulations to implement TDR.

- A. Property owners seeking to certify development rights for the purposes of TDR shall apply to the [Administra-

tive Officer] for a TDR Certificate as enabled by the Zoning Ordinance and in accordance with the procedures and plan requirements listed herein.

B. Submittal Requirements.

An applicant for approval of a TDR Certificate shall submit a plan labeled "TDR Certificate Application", drawn to a scale of not less than 1 inch to 100 feet showing all of the items listed in the TDR Certificate Application Checklist.

C. Review Procedure.

Commentary: The application procedure provided below is modeled after the process for an administrative subdivision. Because of the simplicity of the TDR Certificate plan materials, it is appropriate to keep the review process at an administrative level. Communities may impose a more rigorous review procedure with the Planning Board if that is deemed appropriate.

1. Certificate of Completeness.

Within fifteen (15) days of receipt of an application for a TDR Certificate, the [Administrative Officer] shall either issue or deny a certificate of completeness for the application materials submitted. Such certificate shall only be issued if all requirements of the administrative checklist are complete and submitted with the application. The [Administrative Officer] shall notify the applicant of the issuance or denial of the certificate in writing by regular mail.

2. Decision Required.

Within fifteen (15) days after the issuance of a certificate of completeness, the [Administrative Officer] shall review the application and approve, approve with conditions, deny or refer it to the Planning Board with recommendations. The [Administrative Officer] shall report all actions on administrative subdivisions to the Planning Board at its regularly scheduled monthly meetings. If the Administrative Officer fails to take any action after the fifteen days following the issuance of a certificate of completeness, the application shall be placed on the next available agenda of a regularly scheduled meeting of the Planning Board.

3. Approval and Recording.

If the [Administrative Officer] approves the application, the TDR Certificate shall be issued within ten (10) days of approval. The certificate shall be signed by the owner of the development rights and the [Administrative Officer] and stamped by the [Town/City] Clerk. Copies of the original certificate shall be kept on file with the [Administrative Officer] and the [Town/City] Clerk.

4. Denial.

Denial of the application by the [Administrative Officer] shall require the application to be referred to the Planning Commission for further review.

5. Planning Board Referral.

When a TDR Certificate application is referred to the Planning Board, the Planning Board shall consider the application and the recommendations of the Administrative Officer. The Planning Board shall approve, approve with conditions, or deny the application within sixty-five (65) days of the issuance of the Certificate of Completeness. Failure of the Commission to act within the required time shall constitute approval of the TDR Certificate. The Administrative Officer shall verify as to the failure of the Planning

Board to act within the required time and the resulting approval upon written request from the applicant.

6. Changes to the TDR Certificate.

The sale, transfer, conveyance or extinguishing of development rights shall be recorded with the [Administrative Officer]. Revised certificates shall be issued upon change of ownership or upon the reduction of development rights vested in a certificate.

Potential Checklist for TDR Certificate

Administrative Subdivision Checklist

A. Required Information. The following information, where applicable, shall be submitted as part of an application for a TDR Certificate.

- ____ 1. Property owner name and address.
- ____ 2. Date of plan/materials preparation and any revision dates.
- ____ 3. Assessor's Plat and Lot Number(s).
- ____ 4. Graphic scale.
- ____ 5. True north arrow.
- ____ 6. Zoning Districts and/or overlay designation(s). (e.g. Official Zoning Map).
- ____ 7. Names, addresses, and telephone numbers of the person or firm preparing application materials.
- ____ 8. Professional stamps, with signatures, for surveyors, or other design professionals that prepared the plan.
- ____ 9. Class IV survey of property boundary.
- ____ 10. Approximate location, description and dimensions of existing structures and uses on the property.
- ____ 11. Approximate location of any gravesites, cemeteries, or stone walls.
- ____ 12. Floodways, V and A zones from current FEMA maps.
- ____ 13. Location of wetlands, calculation of wetland area and percentage of site covered with wetlands.
- ____ 14. Calculations for proposed number of development rights.

Commentary: Locating wetlands is an integral part of the TDR Certificate process. However, communities will want to carefully consider the information required to develop these plans. Survey of wetland boundaries can be costly and might serve as a disincentive for property owners to certify rights. On the other hand, using a readily available source of information like GIS data layers may not provide the level of detail local governments need to be comfortable with the submission.

It should be noted that a TDR Certificate DOES NOT vest rights as developable units of housing or commercial space. Therefore, issuing a certificate that may have slightly higher levels of development than what could really be achieved through a development application does not represent a risk to the community.

REGULATORY GUIDANCE FOR TDR IN A CONSERVATION DEVELOPMENT ORDINANCE

The following is provided for communities that may wish to add language to an existing Conservation Development Ordinance that allows for the use of TDR. This guidance assumes that a municipality already has a Conservation Development ordinance in the Zoning Ordinance and that supplemental language could be added to further increase both density and the overall open space preserved as part of a new subdivision.

The following guidance represents examples of how the research and discussion that occurred as part of this project could be organized into a community ordinance and associated regulations. As with any sample language provided for a project of this nature, this document cannot be simply copied into an existing Zoning Ordinance in its current form. Local officials will need to tailor the language to their own definitions and processes, and there are several "policy decisions" noted for consideration. Local officials are encouraged to review the language within this guidance, and any adjustments that may be developed locally, with their legal counsel.

Potential Zoning Ordinance Language to Implement TDR in a Conservation Development Ordinance

- A. The Planning Board may allow an increase to the number of dwelling units in a conservation development beyond the basic maximum number through the use of transfer of development rights in accordance with the following conditions and requirements.
 1. The preservation of land in the sending parcel is consistent with the purposes of this ordinance.
 2. The increase in development shall not go beyond double the basic yield as approved by the Planning Board.
 3. Where transfer of development rights is used to increase the basic yield beyond 25%, there shall be no minimum lot size. All front yard, side yard and rear yard setback requirements shall be maintained.

Commentary: Communities must carefully consider how dimensional requirements will be addressed when an applicant might double the density of residential development through the use of TDR. For example, if the existing ordinance has very little "wiggle room" to increase density, then the use of TDR may not work. If a community allows for a minimum lot size of 5,000 square feet and requires 75% open space, it may be very challenging to increase the development density.

The language provided above might work for a community where the minimum lot size in a Conservation Development is 12,000 square feet and the minimum open space requirement is 50%. In this example, there is the possibility of reducing lot sizes and increasing density.

4. The development rights used to increase density shall be transferred from a residential district with the same or a larger minimum lot size.
5. The number of development rights on the sending parcel shall be approved by the Planning Board.
6. The development rights being transferred are extinguished prior to final approval of the conservation development through an easement as described in [CITE SECTION FOR CONSERVATION EASEMENTS];
7. Where only a portion of the development rights are extinguished from the sending parcel, the owner of said parcel agrees that any future development of retained development rights will use the conservation development process as applicable in that zoning district. This condition shall be recorded as a deed restriction on the sending parcel.

Commentary: Densities that would result from this type of development would likely require either centralized water supply or wastewater disposal. Municipalities that want to pursue this land use tool will need to remove any barriers to developing this infrastructure. For example, when considering allowable uses of open space, including the possibility of establishing drinking water wells and/or wastewater disposal fields would be important.

REGULATORY GUIDANCE FOR INTER-MUNICIPAL TDR PROGRAM AGREEMENT

The following text is provided for communities that may wish to enter into an inter-municipal TDR program. Where possible, this language is adapted from the existing agreement developed by the Towns of Exeter (the “sending town”) and North Kingstown (the “receiving town”) because that language was reviewed by Rhode Island municipal solicitors prior to adoption. Other primary sources include interlocal agreements from King County, WA.

It is essential that any communities considering such an agreement will vet this sample regulatory language with a qualified attorney.

MEMORANDUM OF AGREEMENT

THIS AGREEMENT is between [INSERT SENDING CITY/TOWN] a municipal corporation of the State of Rhode Island, and [INSERT RECEIVING CITY/TOWN], also a municipal corporation of the State of Rhode Island (together to be referred to as “the Towns”). The agreement is made by and through the “Towns” respective Town Councils.

RESOLUTION

WHEREAS the State of Rhode Island, through State Guide Plan Element 121 *Land Use 2025*, encourages the use of innovative land use tools for the purposes directing growth toward areas where infrastructure can support such growth; and

WHEREAS the two participating Towns have adopted language within their Comprehensive Plans that call for the use of inter-municipal TDR; and

WHEREAS it is the goal of [SENDING TOWN] to preserve its rural character and preserve much of its developable agricultural and forest land; and

WHEREAS [SENDING TOWN] has identified lands eligible for participation in a TDR program through its Comprehensive Plan; and

WHEREAS it is the goal of [RECEIVING TOWN] to allow for increases in development density in designated Receiving Areas as identified in its Comprehensive Plan; and

WHEREAS the Towns recognize the economic, social and environmental benefits that will result from this agreement on a regional scale.

Commentary: Note that the language above assumes that some revision to the Comprehensive Plans has occurred prior to crafting this agreement.

AGREEMENTS

NOW THEREFORE be it resolved that the Towns will work together in accordance with the following:

A. Purpose

The two Towns agree to implement a program (hereafter the “Program”) to allow development rights to be transferred from [SENDING TOWN] to [RECEIVING TOWN] in accordance with this agreement and applicable standards and procedures in local laws and regulations.

B. Responsibilities of the Towns

1. The [SENDING TOWN] shall adopt an overlay to the zoning map that shows the land available a sending area for TDR through an overlay district.
2. The [SENDING TOWN] shall adopt an ordinance that will enable and facilitate the transfer of development rights of the sending area parcels.

3. The [RECEIVING TOWN] shall identify areas on its zoning map that may serve as receiving areas for the sending area lands identified by [SENDING TOWN].
4. The [RECEIVING TOWN] shall adopt an ordinance will enable and facilitate the transfer of development rights to the receiving area parcels.
5. The ordinances developed by these Towns shall be developed in a manner that allows for each party to have access to draft materials and provide comment. At a minimum, said ordinances shall address the following and shall be addressed separately or by each town as appropriate:
 - a. Calculating the number of development rights associated with land in the sending area.
 - b. Certifying or approving the number development rights.
 - c. Calculation of transfer ratios.
 - d. Permit application procedures.
 - e. Terms for conservation restrictions.
 - f. Allowable development levels in the receiving area.
 - g. Development standards associated with the receiving area.
6. The Towns shall establish a process for reviewing the effectiveness of the program and reporting any findings to each other on an annual basis.

C. Duration

This Agreement shall become effective on the date it has been approved by the legislative authorities of both Towns and shall continue until terminated as provided in Section D.

Commentary: This language very simply states that both Towns shall continue as long as the Program is working and each Town is satisfied. Other ways to set a duration period can include setting a cap on the number of development rights transferred, the number of bonus units developed, etc.

D. Termination

The Town's may terminate the agreement through mutual consent as documented in a hearing with both Town Councils. Either party may individually terminate this Agreement upon 180 days' written notice to the other if:

1. Either Town's zoning ordinance or land development regulations pertaining to the Program are held invalid by any court of competent jurisdiction in a final judgment that is no longer subject to appeal; or
2. One of the Town's materially defaults in performing of its obligations under this Agreement and does not commence to cure the default within thirty (30) days after receiving written notice of the default and does not proceed to fully cure the default.

E. Indemnification

Each Town shall indemnify and hold harmless the other Town and its officers, agents and employees or any of them from any and all claims, actions, suits, liability, loss, costs, expenses, and damages of any nature whatsoever, by reason or arising out of any negligent action or omission of either Town, its officers, agents, and employees, or any of them, in performing obligations pursuant to this Agreement.

F. Concurrent Negligence

Each Town acknowledges and agrees that if any claims, actions, suits, liability, loss, costs, expenses and damages are caused by or result from the concurrent negligence of their agents, employees, and/or officers, this section shall be valid and enforceable only to the extent of the negligence of each party, its

agents, employees and/or officers.

G. General Terms

1. *Administration.* This Agreement shall be administered jointly by the [Planning Directors] for each Town.

Commentary: Each community will need to decide on the appropriate administrative staff for these programs.

2. *Severability.* If any provision of this Agreement shall be held invalid, the remainder of the Agreement shall not be affected.
3. *No Waiver.* Waiver of any breach of any provision of this Agreement shall not be deemed to be a waiver of any prior or subsequent breach, and shall not be construed to be a modification of this Agreement.
4. *No Third Party Beneficiary.* This Agreement is made and entered into for the sole protection and benefit of the parties hereto. No other person or entity shall have any right of action or interest in this Agreement based upon any provision set forth herein.

IN WITNESS WHEREOF, the towns have caused this Agreement to be executed on the ____ day of

In the Presence of:

[RECEIVING TOWN]

Authorized Signature

[SENDING TOWN]

Authorized Signature

III. Appendix: Notes from RI TDR Conference

Discussion Notes: RI Transfer of Development Rights Conference, March, 27-28, 2013

The following are key questions from the conference participants with answers from Bill Fulton and Rick Pruetz, national TDR experts who spoke at this conference.

1. Has TDR worked for small rural towns? If yes, were there any modifications needed to encourage TDRs? (Examples of towns like those in Rhode Island -- where each town is independent and there is no county government or regional taxation other than state sales taxes -- would be particularly helpful.)

Rick: Yes. 31 TDR programs at the township level in PA alone. There are pros and cons of working at this scale; you can get more buy-in from the community when they're familiar with the sending area; some are slow-growing- helps to have strong zoning to protect assets while TDR programs grow; need to find the demand

Bill: Yes. People often buy into high density in villages when: 1) they believe there's good design and 2) they're preserving something that's important to them (they have an attachment to the sending area); need to build support at the state level to protect areas in the western part of RI while increasing density in the eastern part

2. Is there a rule of thumb for the size of the area (land or population) that is needed to encourage TDR?

Bill: It's not so much about the number of people or acres but about the sending and receiving areas and people agreeing to participate (which will depend on the market); fewer restrictions on moving things back and forth results in more market activity; receiving area has to be big enough to generate market activity

3. What are the key elements or common attributes of communities/areas where TDR has been effective?

Rick: Absolutely critical to success are 1) demand for bonus development and 2) customized receiving areas (from "Top 10 Success Factors"; factors 3-5 are important, 5-10 helpful); the fewer the alternatives the better it's going to work; some towns with TDR continue to grant up-zoning on request (if they give bonus development for free, no one is going to end up using TDR.

4. Has inter-municipal TDR worked in towns without a county government? If yes what were the incentives that encouraged towns to receive TDRs?

Bill: yes

Rick: yes; e.g., TDR in Warwick, NY occurs without county government

5. Should RI consider a statewide TDR program? If yes what would be the key issues to consider?

Bill: Yes. Because it's small and there's no county government; the state can set up the basic rules (enabling legislation; fund the TDR bank if possible and turn it into a revolving fund; align other state incentives to back it up; think about how aggressively the state can do this)

Rick: if there's time and money, treat it like you would treat any TDR program- look at the supply/demand of various sending and receiving areas; concerns from local governments will arise; think about how well the sending and receiving areas line up (state market vs. sub-state market)

Bill: good TDR programs have good markets; the state could probably do some prototypical market analysis to collect baseline info to help in generating options for a state framework

6. How have transfer ratios been determined to go from residential in a sending area to commercial in a receiving area? How have they been determined from low density housing to multi-family housing? Do you have documentation of the real estate/market analyses that have been performed to determine these ratios?

Bill: Yes- moving development value around; some questions/concerns: are you shrinking the statewide housing supply?; residential to commercial is very common (good exs: Chesterfield, NJ and King County, WA towns)

Rick: economic analysis can point you toward the correct ratio (or if you want to amend a current ratio)

7. Following on #6 above, are there real estate/market analyses that have addressed how a “fee-in-lieu” (density transfer credit) value for TDR would be calculated?

Bill: Yes. Not useful to pull a fee out of thin air; analogy: affordable housing vs. fee, parking vs. fee; can make the fee the same or less

Rick: some communities don't want to get in the way of the private market; some set the fee low because they would rather have the cash (could be the match dollars for grants, etc)

8. Are there examples of a PDR and TDR combination that might be appropriate for RI?

Bill: conceptually there's no reason you can't combine them; it doesn't matter where the money comes from; in a practical sense, TDR programs are approached differently by different players (e.g., state government vs. land trust)- may have more flexibility in their easements (and vice versa); public money and TDRs work together to protect land

Rick: ex: King County, WA has dedicated taxes to create a revolving fund (vs. a single expenditure); Palm County, FL- open space bonds resulted in voter fatigue- they severed TDR from properties and bought and resold them (recoups the cost and puts it back into the reserve system); NJ Pinelands- not looking to sell; not involved with the private market

Bill: TDR banks can often 1) provide comps and 2) sell or hold rights to manage the market

9. What are some incentives that could make TDR work in RI? Does TDR often require tax incentives or other layers of incentives to be successful?

Bill: There are a variety of players and they all have to have motivation to be active in the market; if ratios are set up correctly a market should be able to be created (might take a while to get going, but TDR banks will speed it up); something to consider—the increased infrastructure burden in receiving area vs. the loss of value in the sending area (King County ex.); less significant if they occur in the same jurisdiction

10. Are there different ways to set up TDR banks? Where has this been successful and what are the best mechanisms for replenishing the funds?

Bill: Not a good idea for a regulatory agency to be the TDR bank; if a municipality is approving projects, they're manipulating the currency (e.g., a bank run out of a Natural Resources Department); however the state is likely to run a bank in RI b/c it's such a small state

