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What the Highlands Can Learn From the Pinelands: An Assessment of Two Transfer of
Development Rights Programs in New Jersey
Michael C. Bachmann*

I. Introduction

New Jersey has long been on the receiving end of jokes about its quality of life. This tradition dates back to the 1640's when Swedish settlers commented on the state's large number of mosquitos.¹ That tradition has extended well into modern times with New Jersey frequently being the subject of jokes on popular shows such as Saturday Night Live.² Their most frequent target is the seemingly poor state of New Jersey's air, water, and natural resources.³ Northern New Jersey in particular has the most roads per square mile, its waters were some of the first to be declared impure, and air pollution has been an ever-present result of living in the shadow of New York City.⁴

This culture of insult is, however, not without response from the people of New Jersey. Residents of the state are extremely self-aware of their environmental issues, as voters have frequently identified environmental degradation as one of the state's most important issues.⁵ Similarly, the New Jersey legislature has been at the forefront of environmental legislation and regulation to assuage some of that concern.⁶

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¹ DAVID STEVEN COHEN, *THE FOLKLORE AND FOLKLIFE OF NEW JERSEY* 9 (1983).

² *Id.* at 10.

³ Michael Aaron Rockland, *What's So Funny About New Jersey?*, *NEW JERSEY MONTHLY*, April 1979, at 49.

⁴ BARBARA G. SALMORE & STEPHEN A. SALMORE, *NEW JERSEY POLITICS AND GOVERNMENT* 338 (3rd ed. 2010).

⁵ *Id.* at 338.

⁶ *See id.* at 338–45. For example, New Jersey's early environmental legislation closely followed or predated similar federal efforts including the establishment of the Department of Environmental Protection, the Air Pollution Control Act, and Clean Water Enforcement Act. *Id.* As well, New Jersey's Spill Compensation Control and Environmental Cleanup Responsibility Acts served as models for federal "Superfund" laws. *Id.*

One such innovative measure is a transfer of development right (TDR) program. Such a program has been part of two of New Jersey's most important pieces of environmental legislation. TDR programs are land use control measures that have existed for several decades.⁷ At their core, TDRs direct growth away from environmentally sensitive areas to areas better situated to accept new development. To achieve this end, TDRs will typically set up a marketplace between developers and individuals who own property in the area to be preserved. Those property owners are given "credits" typically based on the loss of development potential of their land. Through a variety of mechanisms, the developers are then encouraged to purchase these credits directly from property owners. These credits will usually allow developers to build at higher densities in other areas. As well, the property owner, who would otherwise be subject to a decline in property value, is now compensated for their loss.

New Jersey has a number of county-wide, regional, and even statewide TDR schemes. Most notable of these programs is the one administered in the New Jersey Pinelands, which has been hailed as one of the most successful nationwide.⁸ By contrast, New Jersey's newest TDR program in the Highlands is but a few years old but has not yet seen the same success.

This Comment examines the major difference between two of New Jersey's best known TDR programs—the historic Pinelands TDR and the nascent Highlands TDR. Part II of this Comment examines the standard TDR structure, defining characteristics, and a comparison to other land preservation tools. Part III then examines the history of the Pinelands TDR and evaluates its success and effect in practice. Part IV conducts a similar analysis of the Highlands

⁷ The concept of a TDR was first introduced by Gerald Lloyd in 1961. STATE OF N.J. HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL, TRANSFER OF DEVELOPMENT RIGHTS TECHNICAL REPORT 6 (2008) [hereinafter *2008 Technical Report*].

⁸ See Rick Pruetz & Noah Standridge, *What Makes Transfer of Development Rights Work?*, *Journal of the American Planning Association* Vol. 75, No. 1 (Winter 2009) (listing the New Jersey Pinelands as the second most successful TDR in terms of acres preserved as of 2008).

TDR. Next, Part V analyzes the major difference between those two programs and suggests how the enabling statute can be amended to incorporate these findings. Part VI addresses potential issues that would arise from an amended Highlands Act and Part VII concludes the Comment.

II. TDR Definition, History in New Jersey, and Constitutionality

A. Structure and Design

In a traditional land preservation program, a land owner is directly compensated by government funds to deed restrict their property from future development, thus preserving the environmental integrity and preventing future negative impacts.⁹ This classic method of land preservation typically is administered by the government, whether at the state or federal level.

Unlike the traditional preservation method of purchase and preservation, TDRs attempt to use economic forces to create a marketplace that directs growth and preservation to separate, distinct areas.¹⁰ Any land preservation scheme recognizes that a portion of a property's value is the ability to subdivide and further develop that property. TDRs, on the other hand, attempt to create a market between property owners and developers.¹¹

To accomplish this goal, TDRs distinguish between receiving zones and sending zones.¹² The sending zone is the area where land is to be preserved, whether for environmental, historic preservation, or other reasons.¹³ The goal is to prevent future large scale commercial development from occurring in that area.¹⁴ Generally, the sending zone designation is the simplest part of establishing a TDR as most parties will agree that a specific resource or area is in

⁹ *Id.*

¹⁰ See 2008 Technical Report, *supra* note 7, at 2.

¹¹ *Id.*

¹² *Id.* at 3.

¹³ *Id.* at 3.

¹⁴ *Id.*

need of protection.¹⁵ The receiving zone is any area outside of the sending zone that has been deemed better suited for growth. This determination may be made due to existing infrastructure, pre-existing development, or a strong real estate market.¹⁶ Typically, TDRs are designed with the sending zones as the main focus.¹⁷ Receiving zones, however, demand just as much attention, as there is a necessary, mutual relationship between the two.¹⁸ The entire TDR mechanism cannot function if the development credits have no value. Nor can it function if there is no place to accept the targeted growth.¹⁹

TDRs operate on the idea of being able to separate development rights from the other rights that accompany fee simple ownership in property.²⁰ In order to fairly compensate a land owner in a preserved area, the development rights are assigned a monetary value.²¹ The monetary value for a land owner comes in the form of credits.²² These credits are then purchased by a developer who uses them to develop in a receiving area.²³ If the process works as designed, a property owner is compensated for the loss of development potential.²⁴

A TDR program will also typically provide different types of financial incentives to purchasers of credits in order to facilitate and encourage transaction.²⁵ In most cases, the incentive is allowing a credit purchaser to build in a receiving area and subdivide units at a

¹⁵ *Id.* at 5.

¹⁶ See 2008 Technical Report, *supra* note 7, at 5.

¹⁷ PLANSMARTNJ, HOW MUCH GROWTH? WHERE? TO DO WHAT? FINDING AND PLANNING RECEIVING AREA FOR THE HIGHLANDS TRANSFER OF DEVELOPMENT RIGHTS PROGRAM 18 (2010) available at http://plansmartnj.dreamhosters.com/wp-content/uploads/2011/09/Finding_Receiving_Areas_Outside_Highlands.pdf.

¹⁸ *Id.*

¹⁹ *Id.* at 11.

²⁰ See 2008 Technical Report, *supra* note 7, at 4.

²¹ *Id.* at 3.

²² There are three common means of allocating credits: (1) based upon the number of lost units or square footage; (2) based upon the gross acreage of given land characteristics; or (3) based upon the value of the lost development potential. *Id.* at 5.

²³ See PLANSMARTNJ, *supra* note 17, at 5.

²⁴ *Id.*

greater density than local zoning law would allow.²⁶ All else being equal, the greater the number of subdivided lots, the greater profit to be had for the developer.

The enabling statute for the TDR program will typically also authorize a TDR bank to facilitate transfers of credits.²⁷ That way, if there are outside factors that interfere with the TDR transaction, the bank is in a position to ameliorate the issue.²⁸ In a depressed real estate market, for example, the TDR bank can preemptively purchase a willing landowner's rights, distribute the monetary compensation, and hold on to the credits until a willing buyer is found. The TDR bank is an important safeguard for land owner equity.²⁹

B. Comparison with Other Land Preservation Methods

New Jersey currently has a number of legal mechanisms that all share the ultimate goal of land preservation. It is important to note that any land conservation method is subject to criticism and that TDRs should not be considered a perfect solution for all situations.

New Jerseyans have historically been supportive of open space and land preservation programs administered by the state government.³⁰ This fact is even more surprising considering that New Jersey has one of the highest property tax burdens in the nation and most conservation programs are funded by state tax revenue.³¹

One of New Jersey's most successful land preservation tools is the Agriculture Retention and Development Act.³² The Act allows the state to purchase from farmers a deed restriction to

²⁶ See *2008 Technical Report*, *supra* note 7, at 5.

²⁷ *Id.* at 6.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See Salmore & Salmore, *supra* note 4, at 351.

³¹ Opinion, *Finding Balance on Highlands Land Issues*, HERALD NEWS (NJ), Feb. 26, 2013, at A08; Richard Borean, *State and Local Property Tax Collections Per Capita*, TAX FOUNDATION (June 10, 2013) (listing New Jersey as the state with the highest property tax burden).

³² N.J. STAT. ANN. § 4:1C (LEXIS 2013).

keep their property in continuous agricultural use.³³ The program has been such a success that New Jersey has protected 25 percent of all its farmland through this method.³⁴ New Jersey, despite being the fourth smallest state in area, now is the state with the second highest number of farms preserved and fourth in terms of actual acreage.³⁵ This success, however, has come at a price to taxpayers who have approved nearly \$1 billion in funding through voter referendums.³⁶

Another popular program is Green Acres, administered by the New Jersey Department of Environmental Protection.³⁷ Green Acres is targeted at land conservation to be used as parks or for other public purposes.³⁸ The Green Acres program has been approved by voters thirteen times since 1961 and funded by nearly \$3.32 billion.³⁹

The downside to these programs is their cost to New Jersey taxpayers. For example, since the Highlands Water Protection and Planning Act was passed in 2004, the Green Acres program alone has been funded by two rounds totaling \$327 million.⁴⁰ Comparatively, the Highlands TDR program was funded with an initial \$10 million to fund the Highlands Development Credit Bank.⁴¹

In 2013, an open-space amendment to the New Jersey Constitution was to be sent to the public for voter approval, but was narrowly defeated by the State Legislature before it could

³³ State of New Jersey Department of Agriculture, New Jersey Farmland Preservation Program Overview, <http://www.nj.gov/agriculture/sadc/farmpreserve/#2> (last visited Nov. 4, 2013).

³⁴ David O'Reilly, *N.J. Program has been preserving farmland for 30 years*, PHILLY.COM (Oct. 21, 2013), http://articles.philly.com/2013-10-20/news/43222446_1_farmland-development-rights-land-preservation

³⁵ *Id.*

³⁶ *Id.*

³⁷ State of New Jersey Department of Environmental Protection, Green Acres Program, <http://www.nj.gov/dep/greenacres/> (last visited Jan. 15, 2014).

³⁸ State of New Jersey Department of Environmental Protection, Green Acres Program FAQ, http://www.nj.gov/dep/greenacres/local_faq.html (last visited Nov. 4, 2013).

³⁹ State of New Jersey Department of Environmental Protection, Green Acres Funding Summary 1961-2009, <http://www.nj.gov/dep/greenacres/bondact.html> (last visited Nov. 4, 2013).

⁴⁰ *Id.* (Funding provided by \$109 million in 2007 and \$218 million in 2009).

⁴¹ HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL, LAND PRESERVATION IN THE HIGHLANDS REGION 3 (2010) [hereinafter *Land Preservation in the Highlands*].

reach the ballot.⁴² The proposed amendment would have asked voters to decide whether or not to amend the New Jersey Constitution to use \$200 million of tax revenue per year for land preservation, including the Green Acres program.⁴³ There is still another chance for the referendum to appear on the ballot in November of 2014.⁴⁴

In a world of increasingly constrained state budgets, these types of land preservation tools, although successful, risk being underfunded or repealed. Furthermore, TDRs generally cost less to the taxpayer because the private builder will eventually purchase those credits and in doing so preserve the land. Even if a TDR bank preemptively purchases credits from a property owner who is unable to find a willing buyer, it is assumed that market forces will eventually even out and a developer can then purchase from the TDR bank. For these reasons, an active TDR program offers a relief valve to property owners whose property does not qualify for those other programs or in the event that there is weakened demand for development.⁴⁵

C. History in New Jersey⁴⁶

The earliest TDR efforts to take place in New Jersey began in the mid-1970s.⁴⁷ Various, local TDR schemes were intermittently attempted by municipalities including Hillsborough and

⁴² Michael Linhorst, *Time runs out on same-sex, open-space ballot proposals*, NORTHJERSEY.COM (July 29, 2013), http://www.northjersey.com/news/Time_runs_out_on_same_sex_open_space_ballot_proposals.html?c=y&page=1

⁴³ *Id.*

⁴⁴ Such a result would be a long shot, however. Even the Sierra Club's New Jersey chapter head stated the amendment would "have been spending money we don't have, which is irresponsible." *Id.*

⁴⁵ This idea was typified in a rule proposal to the State Transfer of Development Rights Bank. N.J. STAT. ANN. § 4:1C-52f (proposed Jan. 18 2000), *available at* 2000 WL 8714617. The proposed rule stated that TDRs are "necessary because as traditional land conservation programs like land acquisition in fee simple title and the acquisition of development easements on land become more strained due to a lack of adequate funds, there will be an increased reliance on the transfer of development rights."

⁴⁶ For a detailed and in-depth look at every New Jersey TDR program, including those addressed in this comment, see Lauren A. Beetle, Comment, *Are Transferable Development Rights a Viable Solution to New Jersey's Land Use Problems?: An Evaluation of TDR Programs within the Garden State*, 34 RUTGERS L.J. 513 (2003).

⁴⁷ *Id.* at 514.

Chesterfield Townships as well as Burlington County in 1975.⁴⁸ The Burlington County Transfer of Development Rights Demonstration Act was passed in 1989.⁴⁹ Under the Act, the Burlington County TDR was to serve as a pilot program for a potential statewide TDR.⁵⁰ Municipalities in Burlington County could voluntarily form TDR programs. So far only the towns of Chesterfield and Lumberton have done so.⁵¹

In 2004, the State Legislature passed the State Transfer of Development Rights Act.⁵² The Act created a statewide TDR bank that could facilitate inter-municipal and intra-municipal transfers. The 2004 Act declared that the Burlington County TDR, as a pilot program, was a success and that a statewide TDR program was now warranted.⁵³

D. Constitutionality of TDRs in New Jersey

TDR programs have been upheld by both state and federal courts. The Fifth Amendment of the United States Constitution contains the Takings Clause, stating no person “shall be deprived of life, liberty, or property, without the due process of law.”⁵⁴ Takings case law under the United States Constitution is vast and varied. The Court, however, has addressed TDR programs specifically on numerous occasions. In *Penn Central Transportation Co. v. New York City*,⁵⁵ the owner of the famous Grand Central Terminal challenged the City’s Landmark Preservation Law. The owner alleged an unconstitutional regulatory taking that ran afoul of

⁴⁸ See 2008 Technical Report, *supra* note 7, at 7.

⁴⁹ N.J. STAT. ANN. § 40:55D-114 (LEXIS 2013).

⁵⁰ *Id.*

⁵¹ These programs are intra-municipality TDR programs meaning they are wholly created and administered within a single municipality. Although, importantly, they do not face the same issues a larger, regional TDR program would. For more on these programs, see Beetle, *supra* note 46, at 539.

⁵² N.J. STAT. ANN. §40:55D-137 (LEXIS 2013).

⁵³ *Id.*

⁵⁴ U.S. CONST. amend. 5.

⁵⁵ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

Fifth Amendment requirements.⁵⁶ The Court found there to be no taking.⁵⁷ The Court also focused on the TDR credits granted to the owner under the scheme and noted that they were valuable and should be weighed against the financial burdens imposed by the TDR scheme.⁵⁸ The only other time the Court addressed TDRs was indirectly in *Suitum v. Tahoe Regional Planning Agency*.⁵⁹ There, a situation existed similar to the one at issue in *Penn Central*; a landowner claimed a development prohibition constituted a regulatory taking.⁶⁰ The Court did not rule on the substantive issue, however, as the case was decided on procedural grounds.⁶¹

The New Jersey Constitution contains its own Takings Clause.⁶² New Jersey's Takings Clause is considered to be more expansive than its federal counterpart.⁶³ Of course, however, just compensation is required as it is in the United States Constitution.⁶⁴

The New Jersey Supreme Court has directly addressed the constitutionality of TDRs specifically in the context of both the Pinelands and the Highlands. The guiding case is *Gardner v. Pinelands Commission*.⁶⁵ In *Gardner*, the plaintiff, a farmer whose land fell within the jurisdiction of the Pinelands Commission, claimed that the land use regulation promulgated by the Commission, which prevented him from subdividing his land, constituted a partial taking without compensation.⁶⁶ The court stated that a takings analysis requires a fact-sensitive examination of both the regulations and its impact on property rights.⁶⁷ The court gave great

⁵⁶ *Id.* at 122.

⁵⁷ *Id.* at 138.

⁵⁸ *Id.* at 137.

⁵⁹ *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997).

⁶⁰ *Id.* at 728.

⁶¹ *Id.* at 744.

⁶² N.J. Const. art. IV, § 6.

⁶³ See Cory Kestner, *SCOTUS SCONJ TDRS= New Jersey Highlands Act Litigation Outcomes: Will It All Add Up to a Fair Outcome for Property Owners?*, 18 FORDHAM ENVTL. L. REV. 399, n. 33 (2007).

⁶⁴ N.J. Const. art. IV, § 6. (When the state is "empowered to take or otherwise acquire private property . . . such taking shall be with just compensation.").

⁶⁵ *Gardner v. Pinelands Comm'n*, 125 N.J. 193 (1991).

⁶⁶ *Id.* at 197.

⁶⁷ *Id.* at 205.

weight to the State's interest in preserving the Pinelands resources. Ultimately, the court held that the Pinelands regulations did not deprive the plaintiff of economic or beneficial use of his property and thus did not constitute a taking.⁶⁸

A similar legal challenge was launched in *County of Warren v. State*.⁶⁹ The plaintiffs, the county of Warren and other farmers affected by the Highlands Act, challenged the Act on a number of grounds including due process and equal protection.⁷⁰ The farmers contended that the Act impeded their right and ability to farm.⁷¹ In rebutting this argument, the court noted that in fact certain provisions and requirements of the Act encouraged farming and protecting agricultural activities.⁷² The court specifically invoked the *Gardner* case stating how the plaintiff farmers here, like the plaintiff farmers in *Gardner*, were guaranteed TDR credits as a minimum guarantee that their property values were not diminished.

These two cases, *Gardner* and *County of Warren*, stand for the proposition that insofar as they have been implemented, the Pinelands and Highlands TDR programs are both constitutional and, in fact, are an important aspect in supporting the overall legislative protections.

III. The Pinelands

The Pinelands of New Jersey, also known as “The Pines” or “The Pine Barrens,”⁷³ make up a large portion of the southern inland part of the state. Commonly considered one of the most environmentally pristine preserves of land in the state, the Pinelands have a rich history. What is

⁶⁸ *Id.* at 215–16. (“We conclude that the restriction on lands to farmland and related uses, given the distinctive and special characteristics of the Pinelands, does not deprive plaintiff of the economic or beneficial use of all or most of his property, sufficiently diminish the value or profitability of his land, or otherwise interfere with his ownership interest to constitute a taking of property without just compensation.”).

⁶⁹ *County of Warren v. State*, 409 N.J. Super. 495 (N.J. Super. Ct. App. Div. 2009), *cert. denied*, 201 N.J. 153 (2010), 130 S. Ct. 3508 (2010).

⁷⁰ *Id.* at 501.

⁷¹ *Id.* at 508.

⁷² *Id.* at 19.

⁷³ JOHN MCPHEE, *THE PINE BARRENS* 6 (1967).

now the Pinelands National Reserve spans fifty-six municipalities over seven counties.⁷⁴ In total, the Reserve is 1.1 million acres.⁷⁵

The Pinelands sit on the Atlantic Outer Coastal Plain which is a geological formation made up of sandy soils.⁷⁶ The forests of the Pinelands, from which the name is derived, consist of pine, oak, cedar and hardwood. Bogs and marshes round out the landscape. The area is also home to many species of fish, birds, reptiles, amphibians, and mammals, including forty-three threatened or endangered species.⁷⁷

Early settlers in the area found the sandy soils unsuitable for agriculture and, thus, left large tracts of the native forests untouched.⁷⁸ In addition to being recognized for its natural beauty, the Pinelands also serve as a crucial source of drinking water. Below the region sits the Kirkwood-Cohansey aquifer which contains 17.7 trillion gallons of water or nearly half the water consumed each year nationwide.⁷⁹ That same reserve is equal to almost thirty times the entire drinking water reserve of New York City.⁸⁰ Such an enormous reserve of drinking water also contains an enormous economic potential. According to some estimates, the state of New Jersey could sell only the discharged portion of groundwater for two-hundred million dollars a year but does not do so because of concerns for its own future.⁸¹

⁷⁴ New Jersey Pinelands Commission, The Pinelands National Reserve, <http://www.state.nj.us/pinelands/reserve/size/> (last visited Oct. 16, 2013) (stating that Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, and Ocean are included in the Reserve).

⁷⁵ *Id.*

⁷⁶ New Jersey Pinelands Commission, The Pinelands National Reserve, <http://www.state.nj.us/pinelands/reserve/loca/> (last visited Oct. 16, 2013).

⁷⁷ New Jersey Pinelands Commission, The Pinelands National Reserve, <http://www.state.nj.us/pinelands/reserve/anim/> (last visited Oct. 16, 2013).

⁷⁸ McPhee, *supra* note 73, at 5.

⁷⁹ National Park Service- New Jersey Pineland's National Reserve F.A.Q., <http://www.nps.gov/pine/faqs.htm> (last visited Oct. 1, 2013).

⁸⁰ MCPHEE, *supra* note 73, at 14.

⁸¹ *Id.* at 14–15 (The \$200 million estimate was made in 1967 and is likely even larger today due to inflation and other economic factors).

Formal legal protections for the Pinelands began in the late 1970s as the result of both state and federal action. In 1979, the New Jersey legislature created the Pinelands Protection Act.⁸² During the preceding decade, there was a renewed interest in Pinelands development. Then-recently legalized casino gambling provided a new industry in Atlantic City which developers saw as a lucrative opportunity for new housing and other commerce.⁸³ These development efforts were promptly countered by environmentalists' calls for protection and preservation. Then-Governor Brendan Byrne, urged by those calls as well as by local politicians, sought permanent protections and issued a construction moratorium on several hundred acres.⁸⁴ In 1979 when the Pinelands Protection Act was passed, formal and lasting protections were finally given to nearly a quarter of the state's total land. The Act's legislative findings stated "that the continued viability of such area and resources is threatened by pressures for residential, commercial and industrial development; that the protection of such area and resources is in the interests of the people of this State and of the Nation"⁸⁵

Federal legislation soon followed. The Pinelands Reserve was the first of its kind created under the authority of the new National Parks and Recreation Act of 1978.⁸⁶ The federal legislation's findings echoed those of the New Jersey legislature, stating "the Pinelands area in New Jersey, containing approximately 1,000,000 acres of pine-oak forest, extensive surface and ground water resources of high quality, and a wide diversity of rare plant and animal species, provides significant ecological, natural, cultural, recreational, educational, agricultural, and public health benefits"⁸⁷

⁸² N.J. STAT. ANN. § 13:18A-1 (LEXIS 2013).

⁸³ THOMAS BELTON, PROTECTING NEW JERSEY'S ENVIRONMENT 154-55 (2011).

⁸⁴ *Id.*

⁸⁵ N.J. STAT. ANN. § 13:18A-2 (LEXIS 2013).

⁸⁶ 16 U.S.C. §471(i) (LEXIS 2013)

⁸⁷ *Id.* § 471(i)(c)

The Pinelands Protection Act vested authority in the Pinelands Commission which is made up of fifteen members—seven appointed by the governor of New Jersey and one from each of the seven counties in the Pinelands.⁸⁸ The Commission is tasked with overseeing all growth and development in the region.⁸⁹

To this end, the Commission created the Comprehensive Management Plan (“CMP”).⁹⁰ The CMP, according to the Pinelands Protection Act, sets forth the absolute minimum guarantees of land preservation in the region. All municipalities with borders inside the Act’s jurisdiction are required to conform to the CMP’s regulations and adapt their own zoning and land use ordinances to that end. Municipalities are free to adopt more stringent development regulations.⁹¹ Covered municipalities, however, were required to import the CMP regulations into their own ordinances including the provisions relating to Pinelands Development Credits (PDCs).⁹² This mandatory requirement is further defined by the Act, providing:

[i]n the event that any county or municipality fails to adopt or enforce an approved revised master plan or implementing land use ordinances, as the case may be, including any condition thereto imposed by the commission, the commission shall adopt and enforce such rules and regulations as may be necessary to implement the minimum standards contained in the comprehensive management plan as applicable to any such county or municipality.⁹³

⁸⁸ New Jersey Pinelands Commission, About the Commission, <http://www.state.nj.us/pinelands/about/memb/> (last visited Nov. 4, 2013).

⁸⁹ N.J. STAT. ANN. § 13:18A-9 (LEXIS 2013) (“The goal of the comprehensive management plan with respect to the entire pinelands area shall be to protect, preserve and enhance the significant values of the resources thereof in a manner which is consistent with the purposes and provisions of this act and the Federal Act.”).

⁹⁰ N.J. ADMIN. CODE tit. 7, § 50

⁹¹ *Fine v. Galloway Twp.*, 463 A.2d 990 (N.J. Super Ct. Law Div. 1983) (upholding the ability of a municipality to have more stringent ordinances than provided by the CMP).

⁹² N.J. STAT. ANN. § 13:18A-12(b) (“Within one year of the date of the adoption of the comprehensive management plan, or any revision thereof, each municipality located in whole or in part in the pinelands area shall submit to the commission such revisions of the municipal master plan and local land use ordinances as may be necessary in order to implement the objectives of the comprehensive management plan and conform with the minimum standards contained therein.”).

⁹³ N.J. STAT. ANN. § 13:18A-12(c).

The TDR aspect of the CMP comes in the form of the Pinelands Development Credit (PDC) program, administered through the Pinelands Development Credit Bank.⁹⁴ The PDC, as part of the CMP, must be integrated into Pinelands municipalities' zoning and land use ordinances. The Pinelands TDR program is not as simple as a traditional TDR because it contains more than two distinct zones. Rather, there are, among others, agricultural, preservation, regional growth, and forest zones.⁹⁵ Municipalities that are part of the agricultural, preservation, or regional growth zones must fully implement the PDC.⁹⁶

It is important to note that the Pinelands Protection Act was not universally lauded. Namely, opponents claimed that it threatened local land use control.⁹⁷ Others predicted that the loss of development would make the area seem hostile to further business investment.⁹⁸

Despite these objections, the Pinelands Protection Act in practice has been a major success. Its TDR program has even been recognized on a national level.⁹⁹ As of 2008, the Pinelands TDR program has preserved 55,905 acres, with an average of 2,071 acres a year.¹⁰⁰ Of the ten most important success factors for TDRs, the Pinelands program, according to one analysis, possesses nine of them.¹⁰¹ Of these success factors, it is important that few or no alternatives to TDR exist for achieving additional development which is achieved by mandating PDC implementation.¹⁰²

⁹⁴ § 13:18A-33.

⁹⁵ See N.J. ADMIN. CODE tit. 7, § 50-5.22-29.

⁹⁶ *Id.*

⁹⁷ See Anne F. Morris, *Pineland Plan Facing A Test*, N.Y. TIMES (June 30, 1981), <http://www.nytimes.com/1981/06/30/nyregion/pineland-plan-facing-a-test.html>

⁹⁸ *Id.*

⁹⁹ See PLANSMARTNJ, *supra* note 17, at 13.

¹⁰⁰ See Pruetz & Standridge, *supra* note 8. (listing the New Jersey Pinelands as the second most successful TDR in terms of acres preserved as of 2008).

¹⁰¹ *Id.* (see Table 2-3). The one factor missing from the Pinelands program, simplicity, is "not essential." *Id.* at 85.

¹⁰² *Id.* at 83 ("Most successful programs rarely allow developments to circumvent TDR requirements. In the New Jersey Pinelands program, the State of New Jersey not only required the 60 jurisdictions to conform their codes to implement the regional TDR program, but the Pinelands commission reviews and certifies all municipal zoning and

IV. The Highlands

As are the Pinelands, the Highlands Region has long been recognized as an important source of drinking water within the state. A 1907 report by the Potable Water Commission stated:

The Highlands watersheds are the best in the State in respect to ease of collection, in scantiness of population, with consequent absence of contamination These watersheds should be preserved from pollution at all hazards, for upon them the most populous portions of the State must depend for water supplies.¹⁰³

Geographically, the Highlands region has various definitions depending on the governing body. At the federal level, the Highlands Region consists of lands in Pennsylvania, New Jersey, New York and Connecticut.¹⁰⁴ The Highlands, as defined by the state of New Jersey, is made up of 859,358 acres.¹⁰⁵ The region provides drinking water for over five million residents,¹⁰⁶ more than half of the state's entire population.¹⁰⁷ The Highlands Region has eighty-eight municipalities within its borders as well as seven counties including Bergen, Hunterdon, Morris, Passaic, Somerset, Sussex, and Warren.¹⁰⁸ The region is defined by its mountainous terrain. It has some of the highest elevation points in the state and encompasses the Ramapo Mountains

land use ordinances and master plans for consistency with the Comprehensive Management Plan.”) (citation omitted).

¹⁰³ STATE OF NEW JERSEY RIPARIAN COMMISSION, REPORT OF THE COMMISSIONERS TO INVESTIGATE THE PRACTICABILITY AND PROBABLY COST OF THE ACQUISITION BY THE STATE OF THE TITLE TO THE POTABLE WATERS OF THE STATE (1907).

¹⁰⁴ United States Forest Service, About the Highlands, <http://na.fs.fed.us/highlands/about/index.shtm> (last visited Nov. 4, 2013).

¹⁰⁵ HIGHLAND WATER PROTECTION AND PLANNING COUNCIL, FACT SHEET (2013), available at http://www.state.nj.us/njhighlands/news/Highlands_FactSheet.pdf [hereinafter *Highlands Council Fact Sheet*].

¹⁰⁶ *Id.*

¹⁰⁷ UNITED STATES CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2012, available at <http://www.census.gov/popest/data/state/totals/2012/index.html>.

¹⁰⁸ See *Highlands Council Fact Sheet*, *supra* note 105.

and local portions of the Appalachians.¹⁰⁹ It is also the convergence point of the four major freshwater basins in Northern New Jersey—the Raritan, Passaic, Wallkill, and Delaware.¹¹⁰

In 1992, the U.S. Forest Service issued a report urging that natural resources in the greater New York/New Jersey Highlands area should be protected. In 2002, that same study was updated with a finding that, over a ten year period, population in the region had increased by eleven percent, further increasing calls for preservation.¹¹¹ Of note is the fact that transfer of development rights has been linked to a Highlands preservation program since the initial calls for preservation.¹¹² Before the New Jersey legislature took formal action, there were scattered efforts by both state and federal bodies to purchase and preserve parcels in the area.¹¹³

Action in the Highlands by the legislature was not without its own set of political battles. Then-Governor McGreevey was a strong advocate of legislation despite advocates of “home rule” and politicians with ties to developers.¹¹⁴ What would eventually become the Highlands Water Protection and Planning Act (“Highlands Act”) was narrowly passed by the State Assembly.¹¹⁵ After a number of missteps and political fighting¹¹⁶, the Highlands Act was finally

¹⁰⁹ For a detailed description of the geology of the Highlands and surrounding regions, *see* United States Geological Survey, Highlands Sites in New Jersey, <http://3dparks.wr.usgs.gov/nyc/highlands/ramapo.htm>.

¹¹⁰ NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, POTABLE WATER SUPPLIED IN 1999 BY NEW JERSEY’S HIGHLANDS 4 (2004), *available at* <http://www.state.nj.us/dep/njgs/enviroed/freedwn/highpotwater.pdf>.

¹¹¹ *See Highlands Council Fact Sheet*, *supra* note 105.

¹¹² *See* Jay Romano, *Pristine Open Space: A Clash of Interests*, N.Y. TIMES (Feb. 9, 1992), <http://www.nytimes.com/1992/02/09/nyregion/pristine-open-space-a-clash-of-interests.html?pagewanted=all&src=pm> (“The report also recommends the creation of a New York-New Jersey regional planning authority to monitor future development in the area. In addition, it urges the examination of a planning concept known as “transfer of development rights” to protect landowners whose property value would otherwise be lowered by restrictions on development.”).

¹¹³ *See Land Preservation in the Highlands*, *supra* note 41, at 2.

¹¹⁴ *See* SALMORE & SALMORE, *supra* note 4, at 357.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 357–60. According to Salmore, after the Highlands Act narrowly passed in the assembly, South Jersey state senators and developers, “threatened to derail senate approval”. *Id.* To ameliorate this opposition, then Governor McGreevey offered a provision to “fast track” approval for certain projects. If the state did not rule within forty-five days on an approval decision, an approval became automatic. *Id.* These compromises helped pass the Highlands bill in its current form.

passed by the New Jersey State Senate and became law on August 10, 2004.¹¹⁷ The Act's findings provide:

The Legislature further finds and declares that the New Jersey Highlands is an essential source of drinking water, providing clean and plentiful drinking water for one-half of the State's population, including communities beyond the New Jersey Highlands, from only 13 percent of the State's land area; that the New Jersey Highlands contains other exceptional natural resources such as clean air, contiguous forest lands, wetlands, pristine watersheds, and habitat for fauna and flora, includes many sites of historic significance, and provides abundant recreational opportunities for the citizens of the State.¹¹⁸

It is also important to note that land in the Highlands is protected by the piecemeal efforts of two other major programs—the Green Acres Program administered by the Department of Environmental Protection and the State Farmland Preservation Program under authority of the State Agriculture Development Committee.¹¹⁹ The TDR program, however, serves as a third program for landowners whose property does not qualify for the other programs.¹²⁰ Thus, the TDR is an important safety valve which, although underutilized, is crucially important to the overall success of the Highlands Act.

The Highlands Act vested power in the Highlands Council, tasked with establishing, in its entirety, the Highlands TDR program. The creation process mirrored many of the same responsibilities of the Pinelands Commission, namely creation and implementation of a Regional Master Plan (RMP). When the RMP was adopted in its final form in July 2008, there had already been 273,457 acres preserved by other means in the region.¹²¹

Pursuant to the CMP, the Highlands Region was divided into two zones: the preservation zone and the planning zone. For municipalities in the preservation zone, conformance with all

¹¹⁷ N.J. STAT. ANN. § 13:20-1 (LEXIS 2013).

¹¹⁸ § 13:20-2.

¹¹⁹ See *Land Preservation in the Highlands*, *supra* note 41, at 4.

¹²⁰ *Id.* at 3.

¹²¹ *Id.* at 2.

aspects of the RMP is mandatory.¹²² The preservation zone is generally the area that the Highlands Act was intended to permanently preserve—large swaths of forests, important drinking water sources, and ecologically sensitive areas. The planning area and all municipalities therein, on the other hand, maintain voluntary compliance with the RMP.¹²³

In order for the TDR program to be effective, the Council has been given a number of financial incentives intended to entice municipalities into designating receiving zones for TDR credits.¹²⁴ If a municipality is deemed to be in compliance with the RMP and voluntarily designates Receiving Zones in its borders, the Council can provide up to \$15,000 per unit impact fee for projects, up to \$250,000 in the form of a planning grant to help offset costs, and a grant to reimburse the cost of amending municipal development regulations.¹²⁵ For municipalities in the planning area, extra incentives are provided to gain their voluntary cooperation. Legal representation is provided by the State to defend against challenges to any receiving zone-related decisions and participating municipalities are given priority status for certain infrastructure programs administered by the State.¹²⁶ Fifteen municipalities have been awarded feasibility grants but not one has agreed to be a receiving zone. As of 2010, the Council has allocated

¹²² N.J. STAT. ANN. § 13:20-14 (LEXIS 2014) (“Within nine to 15 months after the date of adoption of the regional master plan or any revision thereof, according to a schedule to be established by the council, each municipality located wholly or partially in the preservation area *shall* submit to the council such revisions of the municipal master plan and development regulations, as applicable to the development and use of land in the preservation area, as may be necessary in order to conform them with the goals, requirements, and provisions of the regional master plan.”) (emphasis added).

¹²³ N.J. STAT. ANN. § 13:20-15 (LEXIS 2014), “(1) For any municipality located wholly in the planning area or for any portion of a municipality lying within the planning area, the municipality *may*, by ordinance, petition the council of its intention to revise its master plan and development regulations, as applicable to the development and use of land in the planning area, to conform with the goals, requirements, and provisions of the regional master plan.” (emphasis added).

¹²⁴ See, e.g., N.J. STAT. ANN. § 13:20-18 (LEXIS 2014)

¹²⁵ See 2008 *Technical Report*, *supra* note 7, at 9.

¹²⁶ *Id.*

446.25 credits to twelve applicants at a cost of \$12,281 per acre.¹²⁷ Thus, the market for receiving zones has been lackluster at best.

The Council's most recent efforts on this front have been to more aggressively "sell" municipalities on the idea of accepting growth in the form of TDR credits.¹²⁸ In 2013, the city of Clifton was awarded a \$40,000 feasibility grant to study which areas of the city should be targeted for growth.¹²⁹ The development would potentially include housing, offices, and grocery stores.¹³⁰ Municipalities like Clifton are exactly the areas that the TDR program should be targeting as receiving zones—former industrial cities in the Planning Area that are in need of revitalization and development.

In its current form, the Highlands Act and accompanying TDR program have been considered by many to be a failure and a divisive issue. Highlands Council meetings are frequently crowded with opponents.¹³¹ The TDR program has upset farmers in the region and has been called "the biggest land grab ever."¹³² One environmental group has suggested that the Council do away with the required feasibility studies in order to streamline the process and encourage municipalities to accept growth.¹³³

Governor Chris Christie's recent appointment of new chief counsel to the Council has outraged environmentalists.¹³⁴ The appointment was criticized by environmentalists who

¹²⁷ See *Land Preservation in the Highlands*, *supra* note 41.

¹²⁸ See Highlands Water Protection and Planning Council, Annual Report page (2012) [*hereinafter* 2012 Annual Report].

¹²⁹ Jeff Green, *Clifton, aiming to modernize, studying state 'transfer' program*, THE RECORD (NJ), Apr. 2, 2013.

¹³⁰ *Id.*

¹³¹ See Elliott Ruga, Opinion, *New Jersey's Highlands Act: legal and constitutional*, NORTHJERSEY.COM, Apr. 15, 2013, http://www.northjersey.com/news/opinions/highlands_041613.html.

¹³² See Ben Horowitz, *N.J. Highlands Act has saved thousands of acres from development, but continues to cause friction*, NJ.COM, Oct. 26, 2011, http://www.nj.com/news/index.ssf/2011/10/nj_highlands_act_has_saved_tho.html.

¹³³ Jeff Green, *Highlands Program Awaits Rescue*, THE RECORD (NJ), Feb. 25, 2013, at L01.

¹³⁴ See Ben Horowitz, *Environmentalists blast Highlands Council's new attorney for calling for repeal of Highlands Act*, NJ.COM, Mar. 24, 2013, http://www.nj.com/morris/index.ssf/2013/03/environmentalists_blast_highla.html.

pointed to a 2011 article in which the chief counsel called for a repeal of the Highlands Act.¹³⁵ He specifically referred to other successful land use programs in New Jersey including the Meadowlands Commission and the “viable” TDR program in place in the Pinelands.¹³⁶ He called the Highlands TDR “toothless”.¹³⁷ This illustrates the inherently political nature of New Jersey land use issues as well as how muddled the implementation of the Highlands Act has been.

V. Major Differences and Amendment Suggestions

The success of the Pinelands TDR is without question. It has endured over the past several decades and has had success that the Highlands TDR has come nowhere near. On the other hand, a lack of receiving zones has been identified as the largest hurdle to a successful Highlands TDR.¹³⁸ One report on the success of the Highlands TDR states:

Demonstrated in the Pinelands, TDR can be used to direct growth to the best locations in a region, by transferring growth from one municipality to another. The Pinelands Commission has the authority to require municipalities to create regional receiving districts. Where they have a choice, though, such as in the Highlands TDR program, or smaller inter-municipal efforts, municipalities so far have been unwilling to create regional receiving districts to accept extra growth from outside their boundaries.¹³⁹

Another group’s report, focused on finding suitable receiving zones in the Highlands region, found:

The designation of receiving areas to match a preservation district as large as the Highlands is a difficult and complicated endeavor with potentially huge consequences that in the case of the Highlands, has largely been relegated to chance and local politics. Unlike other TDR programs that have been established in New Jersey and the region, the governing agency, the New Jersey Highlands Council, does not have the authority to designate mandatory receiving areas.¹⁴⁰

¹³⁵ Andrew R. Davis, *A Fix for the Highlands Problem*, NEW JERSEY LAW JOURNAL, Nov. 2, 2011.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ NEW JERSEY FUTURE, *REALIZING THE PROMISE: TRANSFER OF DEVELOPMENT RIGHTS IN NEW JERSEY* (2010).

¹³⁹ *Id.*

¹⁴⁰ See PLANSMARTNJ, *supra* note **Error! Bookmark not defined.**, at 12.

This shared concern is no coincidence. The Highlands Water Protection and Planning Act should be amended with regard to its TDR program. The Highlands Council, like the Pinelands Commission, should be granted the authority to amend the CMP to require municipalities in both the Planning and Preservation zones to accept HDC credits. This amendment would ensure TDR success, as can be seen in the Pinelands.

As previously stated, the Pinelands Protection Act, largely, does not differentiate between the different types of zones within its jurisdiction for compliance purposes. Rather, any municipality, wholly or partially located in the area must conform to all aspects of the RMP.¹⁴¹ On the other hand, the Highlands Act differs in requirements depending on the type of zone. Preservation zone municipalities must comply.¹⁴² Planning area municipalities, however, may choose to comply or not.¹⁴³ This simple difference in language (“shall” *versus* “may”) makes all the difference when it comes to enforcement and planning in each region. As we have seen, the Highlands Council, as a result of this language, lacks the ability to direct TDR credits beyond the preservation zone and has resorted to financial incentives only.

The failure of the Highlands TDR contrasted by the success of the Pinelands TDR makes it clear that the former should be amended. The Highlands Act should be amended to read:

Within one year of the date of the adoption of the comprehensive management plan, or any revision thereof, each municipality located in whole or in part in the highlands area shall submit to the commission such revisions of the municipal master plan and local land use ordinances as may be necessary in order to implement the objectives of the comprehensive management plan and conform with the minimum standards contained therein.

¹⁴¹ See N.J. STAT. ANN. § 13:18A-12(b), *supra* note 92.

¹⁴² See N.J. STAT. ANN. § 13:20-14, *supra* note 122.

¹⁴³ See N.J. STAT. ANN. § 13:20-15, *supra* note 123.

This language mirrors exactly the language of the Pinelands Protection Act.¹⁴⁴ New Jersey already has a recipe for a successful TDR. That recipe should be replicated in the Highlands. While there are substantial differences between the northern and southern halves of the state in both topography and culture, New Jersey is a small state. The Pinelands Protection Act TDR exists as a nationwide model for success. Thus, it follows that the Highlands Act should contain similar language and statutory authority.

In addition to the Pinelands TDR, the same common thread of mandatory receiving zones runs throughout several successful TDRs on the East Coast. On New York state's Long Island, a TDR program has preserved over 1,000 acres of wetlands.¹⁴⁵ While that program is much smaller than a Highlands or Pinelands regional effort, the Long Island program contains a feature to require mandatory receiving zones.¹⁴⁶ Each town in the affected area is required to delineate receiving zones capable of accepting all possible or current development credits for that town.¹⁴⁷

Similarly, Montgomery County, Maryland has a countywide TDR effort. That program, as does the Pinelands' program, ranks nationally as one of the most successful.¹⁴⁸ There, the county identified fifteen mandatory receiving zones through a county-wide ordinance.¹⁴⁹ These efforts have yielded an impressive total preservation of 45,000 acres in a single county.

New Jersey has always been at the forefront of progressive environmental protection. TDRs offer a similar innovative approach to deal with the competing forces of conservation and growth. TDRs, while not perfect, offer many extra benefits not afforded by traditional land preservation programs. As a state, New Jersey has one of the most successful TDRs right in its

¹⁴⁴ § 13:18A-12(b).

¹⁴⁵ *Id.* at 14.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Pruetz & Standridge, *supra* note 8.

¹⁴⁹ See PLANSMARTNJ, *supra* note 17, at 15.

backyard. This success, combined with the concurrent failure of the Highlands TDR, illustrates the need for legislation that more closely mirrors that of the Pinelands Protection Act. As increasing budget concerns turn voters away from traditional preservation methods, a strong and vibrant TDR is crucial to protecting our state's drinking water sources in the Highlands Region as well as protecting the monetary investments that property owners have made. The Highlands Council should be equipped with the proper legal authority to ensure that both of these goals are achieved.

VI. Potential Issues

If the above suggestions were adopted, a number of issues immediately present themselves. Three potential issues are discussed in this section: the need to balance the "carrot" and the "stick;" affordable housing; and infrastructure.

A. Balancing the "Carrot" and the "Stick"

An overarching theme for any land use control program is finding the correct balance between the incentives and the requirements.¹⁵⁰ As discussed, the Highlands Council has already been equipped with a number of tools to incentivize towns to accept TDR credits. If the recommendations made in this comment were to be adopted, it would be important to maintain the current financial incentives to encourage and advertise development in newly minted receiving areas. As well, the Highlands Act was passed in its current form, due in part, to political pressure. A mandatory requirement for municipalities could have potential political backlash and create distrust of the Highlands Council. Thus, while the "stick" would be mandatory compliance, there should be remain the possibility for "carrots" to ensure a mutually beneficial relationship between the Highlands Council and affected municipalities.

¹⁵⁰ Brady Dale, *The Various Sticks and Carrots for Putting Unused Land to Use*, NEXT CITY, (Aug. 23, 2013, 7:00 AM), <http://nextcity.org/politics-policy/entry/the-various-sticks-and-carrots-for-putting-unused-land-to-use> (recognizing the need for a combination of both "carrots" and "sticks" in the context of urban land use).

B. Affordable Housing and *Mt. Laurel*

New Jersey is unique in its scheme to provide affordable housing to its residents. In a landmark decision, the New Jersey State Supreme Court ruled in favor of the plaintiffs in a case that accused the South Jersey township of Mount Laurel of the practice of exclusionary zoning.¹⁵¹ The court mandated that Mount Laurel, as well as all other municipalities, had to provide a “fair share” of affordable housing.¹⁵² After lackluster enforcement of this mandate, a second Mount Laurel case was decided eight years later.¹⁵³ Since those decisions, a Fair Housing Act was created as well as the Council on Affordable Housing (COAH).¹⁵⁴ COAH was tasked with determining the number of units of affordable housing municipalities had to provide. Critics on both sides of the Mount Laurel issue are vocal, including current Governor Chris Christie whose attempt at dismantling COAH was recently overturned by the New Jersey State Supreme Court.¹⁵⁵

For purposes of this comment, the *Mount Laurel* mandate and subsequent COAH regulations add another factor into the mix of deciding where and what to develop. COAH and the Highlands Council recently entered into a joint memorandum of understanding that withstood judicial scrutiny.¹⁵⁶ According to the memorandum, the Highlands Council would prepare growth projections through “built out” analysis for conforming municipalities.¹⁵⁷ In turn, COAH would ensure that any of the municipalities in the Highlands Region that are under COAH’s jurisdiction that conform to the RMP utilize those projections to calculate their fair share of

¹⁵¹ See SALMORE & SALMORE, *supra* note 4, at 360; South Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (1975) [*Mount Laurel I*].

¹⁵² *Mount Laurel*, 336 A.2d at 713.

¹⁵³ See SALMORE & SALMORE, *supra* note 4, at 361; South Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (1983) [*Mount Laurel II*].

¹⁵⁴ See SALMORE & SALMORE, *supra* note 4, at 362.

¹⁵⁵ *In re Plan for the Abolition of the Council on Affordable Hous.*, 214 N.J. 444 (2013).

¹⁵⁶ *In re Highlands Master Plan*, 25 A.3d 1172 (N.J. Super. Ct. App. Div. 2011).

¹⁵⁷ *Id.*

affordable housing.¹⁵⁸ The court accepted this agreement and rejected claims by the appellant fair-housing non-profit organization that these procedures were not properly done.¹⁵⁹ This case illustrates that municipalities within the Highlands Region have the backing of two bodies—COAH and the Highlands Council—working together to accommodate the goals of affordable housing and preservation. Although there are likely other legal issues implicated by the RMP with regard to affordable housing, for now this does not present an issue for municipalities.

C. Infrastructure

For practical purposes, a municipality might be reluctant to accept unexpected development. More development and population influx lead to an inevitable strain on local resources including physical infrastructure (roads, bridges, sewer systems) as well as local schools.¹⁶⁰ This is especially true in New Jersey’s urban centers where these resources are already strained. As well, lack of infrastructure could also make potential developers weary of investing if the target area for development is not well-suited. All of these issues are valid but cannot be addressed by a short comment. They are, however, important to keep in mind. In areas where the growth would likely be targeted, new development may also mean new investment both at the private and state level.

VII. Conclusion

In a world of increasingly strained government budgets and clashes between development and conservation, transfer of development rights programs offer a viable legal mechanism for maximizing both of those goals in a mutual beneficial manner. In New Jersey, the past three

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See NEW JERSEY FUTURE, *supra* note 139 (“Special complications arise. Development brings obligations to the host municipality, such as to educate schoolchildren and to provide affordable housing, which impedes affluent communities from participating. Less affluent cities and towns may welcome new growth, but their real estate markets are typically too weak for developers to afford the purchase of TDR credits.”).

decades in the Pinelands have shown what a successful TDR program can look like. The same should be, and can be true of the Highlands TDR. The Highlands Act should be amended so as to more closely mirror the authority granted by the Pinelands Protection Act.