



To: Board of Skagit County Commissioners

From: Allison Aurand  
Former Director, Skagit Farmland Legacy Program

5 August 2014

RE: Transfer of Development Rights Report to County Commissioners

I am writing with concern regarding the Transfer of Development Rights (TDR) Program being proposed and developed by the Skagit County Planning Department with assistance from Forterra, Inc, and Heartland, LLC. It is clear from the report and some of the comment letters by committee members that some fundamentals of TDRs have either not been presented or are not understood by the proponents.

***TDR is, at its core, a single-jurisdiction, urban tool, and was never intended to cross jurisdictional boundaries or work in rural areas.*** The first TDR program was developed for New York City early in the last century as a way to compensate developers for the protection of historic buildings and skyline views as the city went through a boom in growth. Like rights were transferred to like buildings within the city, without bonuses or changing the type of right (residential stayed residential, for example, and did not become commercial or industrial upon transfer). While the concept of transferring rights in order to protect a valued community asset with minimal impact on those property owners expected to protect said asset has continued in modern TDR programs, the basic understanding of where and how a TDR program works has been lost along the way. Over the decades, we have merely attempted to hammer a square peg into a round hole without consideration that it may not fit, and without understanding or accepting that this peg is not designed to work in rural areas or across jurisdictional boundaries.

The TDR report shares a list of localities and states that ostensibly have active and successful TDR programs, based on the purported acreage protected, but it is unclear whether the information about those programs is comprehensive enough to give the committee a clear view of their efficacy. For example, Montgomery County, MD, has an active TDR program. However, the County has served as the bank for the program, and many development rights have not been transferred – so it frequently acts in fact, if not in name, as a Purchase of Development Rights (PDR) program. Additionally, when developing that TDR program, the County elected to require that one “residual” right be left on every 25 acres. Sending sites have an allowed residential density of 1 dwelling per 25 acres while transferred units are sold at a density bonus of 1 unit per 5 acres. Receiving areas have 2 densities identified in the zoning plan, one without transferred units and the higher density with transferred units. The resulting fragmentation of the agricultural zone and the requirement that agricultural landowners retain a residential right (upon which they must pay residential property tax rates) has helped along a type of suburbanization that is expensive to taxpayers, who pay to provide roads and services, and that has served, over time, to undermine much of the County’s agricultural industry. Since 2006, Montgomery County has been purchasing

residual rights, and retiring rather than attempting to transfer them (Farmland Preservation Report, March 2006). However, the damage is already done, and Montgomery County's TDR program has helped create rural sprawl, contributing to pushing the population of a formerly rural/suburban county to over 1,000,000 residents.

Indeed, Maryland and its various local TDR programs are the "headliners" we all use to mark success. However, the success of Maryland programs may need to be more carefully scrutinized. From a 2009 final report of a statewide work group tasked with examining TDR programs in Maryland: *"This report examines interjurisdictional TDRs—i.e., programs that transfer rights from one jurisdiction into another. Such cooperation between jurisdictions can make TDR programs more effective. However, few such programs exist, and none in Maryland."* (Final Report of the TDR/Land Preservation Work Group of the Task Force On the Future for Growth and Development in Maryland: Part I)

New Jersey has also worked toward building TDR programs. In the Pinelands Program, we do not see merely a TDR program, but a combined effort in PDR, TDR, and stringent land use regulation. Although the program boasts on impressive record of protection, the designated receiving areas for increased density had significant environmental constraints (lack of public sewers), which has inhibited successful execution of the second part of the TDR transactions, and unintended outcome that was not anticipated by proponents. In 2004, New Jersey passed a statewide TDR bill. One advocate for passage of the bill stated that "despite technical difficulties with creating TDR programs, the support for the legislation by both farmers and developers [would] assure its use by local developers." She went on to state, "We think there are many municipalities that will be ready to use TDR. We're surrounded [in the mid-Atlantic] by places that are using it despite its complications. We see in its use that it works very well." This misconception is perpetuated regularly when TDR programs are proposed. In fact, the 2004 article from which that quote is drawn goes on to note: "A spot survey by Farmland Preservation Report found that at least six of the [Pennsylvania] localities had no activity recorded, and none had a person responsible for implementation." (Farmland Preservation Report, March 2004)

Today, the majority of programs across the country require that one jurisdiction have the sending areas, and another have receiving areas, which necessitates an interlocal agreement, a stumbling block to a successful TDR program. Reconciling the new costs taken on by the jurisdiction receiving the development rights – which will ultimately fall on the taxpayers – and resolving how a rural residential development right mutates when it crosses a jurisdictional boundary are two significant issues within the interlocal. Additionally, it appears from the Skagit TDR report that the prevailing belief is that these transactions to transfer rights will be private transactions, with no cost to or involvement by the government. Government creates zoning, establishes density, issues permits, and presides over land use decision making. How can a transaction that fundamentally changes the underlying value and use of property not include significant government involvement or oversight? Realistically, the process envisioned here (wherein the government takes an exceedingly small role) is not workable. How will Skagit County, which one presumes must certify all transfers, determine what constitutes an acceptable conservation easement in exchange for the transfer? Given the fluid nature of land use planning and zoning, a strong and detailed contract spelling out the nature of the easement and the transaction will be essential. Skagit County has invested considerable time and effort in developing

one of the strongest conservation easement documents in Washington State for its Farmland Legacy Program; to rely on TDR-related easements that may or may not be as rigorously vetted weakens the County's position as the land use authority, as well as the participants' position, in this transactional program. The County must take an active role in ensuring that the public's interests are met through standardized contracts before a non-County easement is accepted under a County program.

Another challenge to the success of a TDR program is the multiplier factor. In our own state, King County's TDR program allows a multiplier effect when the rights are transferred to an urban area. This is a curious alteration of the original intent of TDRs and certainly is another instance of an attempt to tinker with a square peg to make it fit in the round hole we think we want. King County is not alone in attempting this. In all cases, it leads to the question: why is government actively attempting to drive the marketplace? By applying a multiplier to the development potential, on a case by case basis (that is, the case of TDR versus the case of any other builder attempting to develop an urban parcel without TDRs), government is changing the market and creating an unequal playing field for those participating in the market. ***If land use regulations apply in some instances or locations, but not others, both property values and the success of actors in the market are directly impacted.***

Regarding Skagit County's own Farmland Legacy Program and the impact of a parallel TDR program (or a program that is integrated with the existing PDR program) on farmland protection in the Valley, it is fairly safe to say that, given the examples of other TDR-type programs across the country, ***a TDR will not help the Farmland Legacy Program and will in all likelihood hinder its functionality.*** Should the County decide to become the "bank" for the TDR, it instantly eliminates itself from consideration for any funding from the US Department of Agriculture (USDA) for TDR "conservation" projects. USDA has matched local monies, nearly dollar for dollar, to protect farmland in Skagit County. However, USDA does not consider a transferred right to be consistent with its regulations: rights purchased with USDA funds must be retired. They may not be transferred. The argument has been made in the past that the TDR bank could be, in essence, a rotating fund and that as rights are sold out of the bank, the money could be used to fund farmland protection. However, given the sluggishness of TDR programs generally, it is unlikely much money would find its way to conservation. Additionally, the Farmland Legacy Program could be further damaged if Skagit County becomes the TDR bank and elects to appropriate Conservation Futures funds to advance TDR, as King County has. In a discussion where TDR and PDR are being spoken about as equivalent in intent, protection, and functionality, one of the most interesting and striking differences between TDR and PDR is that ***PDR follows the market, making purchases within the marketplace based on fair value appraisals, while TDR attempts to create markets, depressing values of rights in some instances while manufacturing increased values in others.***

***If Skagit County is intent on pressing forward with a TDR program, it should be honest: such a program is not for conservation, for rural land owners, for farmland protection, for the taxpayers, or for developers*** (except in limited instances when the market and population growth is exceedingly high). It is a program that attempts to be all things to all people, but being all things to all people never works, without some significant manipulation. I read a comment recently regarding TDR programs creating winners and losers. I would argue, however, that there really are

no winners: rural landowners are not adequately compensated for their rights, but if they are, those rights must be multiplied to make it economically feasible for a developer to purchase them. In that event, why does the farmer not get more? He sold more rights, apparently. By the same token, it is unfair to ask a developer to pay the full market value of a rural residential right. The taxpayers are losers as well, in this scenario: the receiving area gets additional density, but also additional road, water, sewer, school, and emergency costs. Who in Skagit County actually benefits from a TDR program? And why establish another program, especially one that requires additional regulation and monitoring of landowners? Were TDR a viable, successful tool for farmland protection, I would happily support it; I have spent most of my professional life advocating for farmland protection and its multiple community benefits, including economic. But my years of experience working in the Mid-Atlantic Region, where most of the modern TDR programs were conceived and implemented, tell me otherwise, as do my years-long conversations with colleagues around the nation regarding farmland use and protection. PDR and strong agricultural planning and zoning are the only *proven* methods for protecting farmland in the long term. Skagit County has done an admirable job protecting its natural resource lands while encouraging strong, healthy urban core areas. Given this, I especially appreciate the positions of Mr. Boon (RE/MAX Territory NW) and Mr. Crider (Skagit/Island Counties Builders Association), who so rightly ask the questions, "why this?" and "why now?" I strongly urge the Skagit County Commissioners to review their comments (contained in Appendix C of the report), and ask the same questions these gentlemen are asking.

As always, I am available to provide more information, answer any questions, or connect you with other experts in rural land use policy and programs, particularly conservation and farmland protection programs.

Thank you for your consideration of my comments and concerns.

Best Regards,

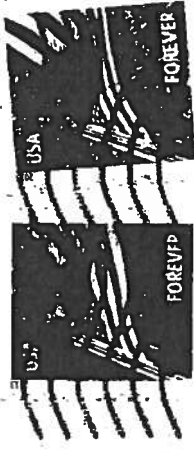
A handwritten signature in black ink, appearing to read 'Allison Aurand', written in a cursive style.

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