Central Puget Sound Regional TDR Program
TDR Policy Advisory Committee
Possible Options for Legislative Recommendations

Background

At the July 17, 2008, Policy Advisory Committee meeting, the Committee began discussions of what a regional TDR marketplace might look like for central Puget Sound. The Committee also had a very preliminary discussion about funding for the program. There appeared to be areas of agreement around some of the elements of the marketplace, such as a bank and clearinghouse, but not who would administer them and how they would be funded.

This paper attempts to assist the Committee in moving forward with decisions by identifying areas of agreement (for confirmation by the Committee), identifying decisions still to be made, and providing some options for committee discussion where appropriate. Each option includes pros and cons for the Committee's consideration. This is not intended to be an exhaustive list of options or the pros and cons for options, but to provide a starting point for the discussion.

1. **What is the conservation goal of the program? For example, is it to conserve the highest priority lands or the maximum amount of acres?**
2. **Who should be designating sending areas?[1]**

Options:

(a): Conservation priorities for sending areas should be locally determined with guidance from the state similar to the goals of the GMA. Broad criteria for designation would be developed in statute. For example, criteria could include:

- Type of land - natural resource lands, including land designated rural that is being farmed or managed for forestry.
- Land with a high risk of conversion/amount of pressure to convert.
- Proximity to urban centers.
- Contribution to the community – access from urban areas to open space within a reasonable commute.
- Variegated landscape.
- Local consideration of opportunities to conserve contiguous tracts of land.

Pros: This approach with broad criteria/goals would be similar to how the GMA works now. The GMA provides broad goals and local governments have discretion as to how they meet those goals. There seemed to be a possibility of agreement around this issue.

[1] Questions #1 and #2 had significant overlaps, and so are treated together.

Cons:

- *The counties have already designated sending areas in their programs. This might require them to revisit those decisions instead of moving forward with implementation. It could be inconsistent with Working Principle #7 to build on and enhance existing TDR programs unless the priorities of the existing programs are taken into consideration.*
- *There could be policy implications for conservation of natural resource land if the criteria for conserving resources lands with TDRs is different than the criteria for designation of natural resource lands of long-term commercial significance.*

(b): Conservation priorities should be left up to local government.

Pros: This would recognize the programs that already exist in the counties consistent with the legislation, and would be consistent with Working Principle #7 to build on and enhance existing TDR programs.

Cons: If the state is going to provide funding, it should have some say in what lands are conserved.

(c): Conservation priorities should be determined by the state in statute.

Pros: If the state is investing funding in local TDR programs, it should have some say in what lands are conserved.

Cons:

- *The counties have already designated sending areas in their programs. This might require them to revisit those decisions instead of moving forward with implementation. It could be inconsistent with Working Principle #7 to build on and enhance existing TDR programs unless the priorities of the existing programs are taken into consideration.*
- *There could be policy implications for conservation of natural resource land if the criteria for conserving resources lands with TDRs is different than the criteria for designation of natural resource lands of long-term commercial significance.*

3. Given the market analysis for central Puget Sound, at what jurisdictional level is it appropriate to create a market for TDRs? I.e., what should be the focus of an effective program that meets the Working Principles?

Transfers should not be restricted to one county. Receiving area cities should be able to choose which sending areas they will receive TDRs from. This was recommended by the consultant and appears to have agreement by the Committee.

4. What are the key elements/functions needed to make a regional TDR program function? Which are needed to build upon existing programs?

a. Technical assistance with the development and implementation of TDR programs

Although not specifically discussed by the Committee, discussions have implied and Committee members appear to agree there needs to be a technical assistance component to the program.

Options:

(1) CTED would continue to develop a technical assistance program for local governments that would be provided statewide. Technical assistance would be provided through CTED's Growth Management Unit to enhance existing and develop new programs. Guidance materials for setting up a program, including consideration of both policy and technical aspects of a program, would be provided.

Pros: This is consistent with CTED's role under GMA. It would take advantage of the expertise that CTED has built in developing the regional TDR program.

(2) Technical assistance would be provided by the clearinghouse.

Pros: This was recommended by the consultant. See clearinghouse discussion below.

Cons: CTED has developed expertise and knowledge of existing local programs that would have to be replicated by staff for the clearinghouse. Technical assistance from the clearinghouse would not be available statewide for other jurisdictions outside central Puget Sound, as it would if CTED were providing the technical assistance..

b. A clearinghouse that would issue and track TDR certificates, provide outreach, and bring together buyers and sellers of TDRs.

The Committee appears to have agreed that a clearinghouse should be an element of the program.

Consultant's recommendation for a clearinghouse:

A regional information clearinghouse should be created to track the issuance of TDR certificates; track transactions; provide information on how both regional and local TDR programs work; and conduct outreach to landowners, developers, land speculators and real estate brokers with the goal of stimulating transactional activity on the part of private market players. The regional clearinghouse could also provide technical assistance to sending- and receiving-area local governments. The regional clearinghouse can play the same role on behalf of local TDR programs, as it would be in the state's interest to encourage an active TDR market in all circumstances.

Because the clearinghouse would plan an important role in tracking and documenting market activity, it is important to separate the clearinghouse role from any transactional role played by a nonprofit or private market player. Therefore, the clearinghouse should be operated by a government agency, possible Puget Sound Regional Council. Cost would be small and could be funded on an ongoing basis through a small portion of the real estate excise tax or by a new tax or fee on TDR transactions.

Options for a clearinghouse:

(1) Consistent with the recommendation from the consultant, CTED would contract out to a private entity to issue and track TDR certificates much as a title company would do. The contractor could collect fees for issuing and redeeming TDR certificates to cover its administrative costs and earn some profit. The contractor would be responsible for outreach to inform landowners and developers of the program, and to ensure that sellers and buyers of TDRs can find each other in the marketplace.

Pros: A private entity such as a title company with expertise in tracking real property could provide this service with administrative fees to cover costs and generate a profit.

Cons: A private entity would also have to be willing and able to do the outreach to bring buyers and sellers into the program. They would have to have some marketing expertise. For a title company to make a profit, it would have to have approval from the Office of the Insurance Commissioner.

(2) The Puget Sound Regional Council (PSRC) would be tasked with the duties of the clearinghouse as described above and could recover administrative costs through fees, but not profits.

Pros: PSRC already has a relationship with the counties and cities in the region. They have public outreach capabilities. The consultant recommended that the clearinghouse be operated by a government agency, possibly the PSRC.

Cons: PSRC may not have the financial and legal expertise to issue and track certificates. Additional staff with this specific expertise would have to be hired.

(3) The responsibility for issuance and tracking of TDRs could be separated from public outreach. The separate responsibility could be contracted out to the private sector. Public outreach could be assigned to PSRC, counties, cities, or the Office of Farmland Preservation.

Pros:

- *A private entity such as a title company might be more interested in issuing and tracking certificates than in public outreach.*
- *Regional and local governments are used to promoting their programs to citizens.*
- *The Office of Farmland Preservation, housed in the State Conservation Commission, is tasked with serving as a clearinghouse for incentive programs that would consolidate and disseminate information relating to conservation programs that are accessible to landowners and assist owners of agricultural lands to secure financial assistance to implement conservation easements and other projects. The OFP clearinghouse could include outreach on local and regional TDR programs.*

Cons: More separate entities in the program would require more coordination to make the program work.

c. A bank to purchase and sell TDRs.

The Committee has appeared to agree that a bank should be created. However, per below, private transactions would also be allowed and encouraged. Note: This is one aspect of the program that could require significant funding. How it would be funded will be discussed per the funding discussion and the paper on *TDR Funding Opportunities.*

<u>Consultant's recommendation for a TDR bank</u>:

A regional bank should be created and capitalized. The role of the bank would be to stimulate market activity when the bank is first set up and then use its future activity to smooth out ups and downs in the market. Major capitalization would be required. The bank could be capitalized by the state with the understanding that the capitalization would be used as a revolving fund. The bank might also be capitalized with a revenue stream from the real estate excise tax.

Because the bank must operate as a nimble market player, it should not be housed within a government agency. The bank should be chartered by the state but operated as an independent nonprofit organization. The state could contract with a land conservation nonprofit to operate the bank.

However, the bank must play an exclusively transactional role, and the bank needs to be completely separated from other functions, including the creation, revision, and implementation of the TDR programs and policies themselves. The state legislation establishing the bank should also specify the members of the bank's board, which should include representatives both of the state and of the local government agencies that sponsor and regulate TDR programs.

Options for a TDR bank:

(1) Per the consultant's recommendation, CTED should contract with a private nonprofit to operate the bank. The bank should be governed by a board consisting of representatives from CTED and local governments in central Puget Sound.

Pros: Most successful TDR programs have established a bank operated by either a government agency or a nonprofit entity. A private nonprofit could charge a fee for transfers to cover its administrative costs. A private nonprofit would operate separately from the land use regulatory authority of local government to deny or approve projects. This would allow it to be more nimble in the market and allow local governments to maintain objectivity in land use decisions[2]*. See consultant recommendation above.*

Cons: If an existing nonprofit is not available to take on the bank, the state may have to create a new nonprofit entity.

(2) The state should operate the bank. Consistent with the New Jersey Pinelands TDR program, a program should be created in a state agency with financial expertise separate from CTED. The bank would be governed by a board consisting of representatives from state agencies and local governments in central Puget Sound.

Pros: If the state is capitalizing the bank, it could have more control over how the bank is operated. The availability of bank funds might be more easily be made available statewide if the TDR program is later expanded.

Cons: State agencies do not have land use authority, but they have other regulatory authority that affects land use. Agencies such as the Department of Ecology and Department of Fish and Wildlife issue permits that affect land use. The state also has the authority to appeal the adoption of local plans and regulations under the GMA. A separate program in a non-regulatory agency would have to be created to ensure the bank operates separately from state regulatory programs.

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[2] Rick Pruetz notes that when a jurisdiction becomes a player in the TDR market, it also can become the target of accusations regarding objectivity in making land use decisions. For example, if a governing body denies a project on a sending site, it could be accused by the property owner of trying to force a TDR sale, perhaps at a bargain price. *Beyond Takings and Givings*, Rick Pruetz, 2003, page 159.

(3) CTED should contract with a private, for profit, entity.

Pros: A private, for profit, entity might be able to be more nimble in the marketplace.

Cons: There are no examples in the country of a TDR bank being operated by a for profit entity. A for profit entity would have to charge more for transactions than a non profit to cover administrative costs and make a profit.

d. **Private transactions.** Private transactions should be allowed. There appears to be consensus of the Committee to allow and encourage private transactions.

e. **A fee in lieu of purchase of TDRs.** There appears to be consensus that a fee in lieu of purchase of TDRs be allowed as an option for developers. Payments in lieu would be made to the bank. The consultant recommended that the regional program not use a fee in lie because it could delay conservation of land and increase the cost. However, the consultant did not address whether it would be appropriate to include a fee in lieu as an option in addition to purchasing TDRs.

f. **A framework for establishing an allocation ratio(s).**

There seemed to be consensus around the following:

- An allocation ratio should not be included in legislation. It would be too difficult to come up with a single ratio and could not be easily changed to respond to the market.
- The TDR bank should establish allocation ratios. An allocation ratio framework could be developed that would apply to small projects. However, larger projects should be able to negotiate an allocation ratio. The framework should be kept flexible to allow values to be defined locally, depending on sellers' asking price and developers' willingness to pay.
- Don't limit the allocation ratio to residential density. Allow translation to floor area ratio, parking, carbon offsets, etc.

g. **Other legislation needed to facilitate the program for local governments?**

<u>Options</u>:

a. **Statutory authority for local governments to transfer TDRs without an interlocal agreement.**

Pros: Eliminating the need for interlocal agreements would facilitate transfers between counties and cities. Elected officials could delegate authority to staff to negotiate allocation ratios and other aspects of the program.

Cons: None identified.

b. Other ideas for legislation to facilitate the program?

5. What incentives should be provided to cities and counties to encourage them to designate receiving areas and accept TDRs?

This is another part of the program that could require significant funding. Please see the *TDR Funding Opportunities, State Capital and Transportation Funding Programs and Local Options for Funding.*

Consultant recommendation

The state should use either new or existing revenue, or provide additional local authority to raise revenues, to provide receiving areas with infrastructure and/or amenity funds. If amenity or infrastructure funds are not available, it is unlikely that many jurisdictions will be interested in participating in a regional program. The "carrot" of additional funding, however, may stimulate considerable interest.

Options:

For more detailed information on state and local funding sources, please see the paper on *TDR Funding Opportunities.*

(1) Provide cities with the ability to designate from which sending areas they will receive TDRs.

Pros: If cities have a say in the sending area from which they receive TDRs, they can identify areas where conservation of the land benefits the city. Clear conservation benefits to the city will make it easier for the city to convince neighborhoods that they should receive increased development.

Cons: Allowing each city to choose a receiving area could complicate the process and put some limitations on the market. Not every city will be able to identify sending areas whose conservation will provide a benefit to residents. For these cities, other benefits/incentives will be needed.

(2) Provide state funding through allocation criteria for existing state infrastructure funds to counties and cities with receiving areas.

Pros:

- *State funding would provide encouragement to counties and cities that are already behind in being able to address infrastructure needs.*
- *State funding would encourage more compact development in urban growth areas. Encouraging more compact development in urban growth*

areas is consistent with the GMA and with discussions occurring in other forums such as the Climate Action Team, the Land Use and Climate Change Committee, and the Puget Sound Partnership.

Cons:

- *The State Office of Financial Management is engaging in an effort to more efficiently and effectively allocate state infrastructure funding. The Committee recommendations would need to consider and respect those allocation recommendations.*
- *Existing state funds are suffering from "criteria fatigue." Adding more allocation criteria dilutes the effectiveness of oversubscribed funding sources in meeting their program missions/goals.*

(3) Provide new state funding for infrastructure and amenities

Pros:

- *Creating a new funding source for cities and counties would ensure that existing funding programs and priorities are not diluted. New funding could help cities and counties accommodate projected growth through TDRs.*
- *State funding would provide encouragement to counties and cities that are already behind in being able to address infrastructure needs.*
- *State funding would encourage more compact development in urban growth areas. Encouraging more compact development in urban growth areas is consistent with the GMA and with discussions occurring in other forums such as the Climate Action Team, the Land Use and Climate Change Committee, and the Puget Sound Partnership.*

Cons: New funding requests will have to compete with other requests for funding from a variety of committees and interest groups.

(4) Provide new authority for raising local revenue or encourage the use of existing revenue authority.

Pros: New revenue authority provides counties and cities with more choices for funding infrastructure.

Cons: New taxes may be difficult to sell to citizens who do not see direct benefits to their neighborhood as a result accepting TDRs.

6. What incentives should be provided to developers to participate in a TDR program (that would require state legislation)?

Options:

a. Create a SEPA categorical exemption for receiving areas that have undergone a programmatic EIS that includes analysis of TDRs.
b. Fund and prioritize access to the Planning and Environmental Review Fund (PERF) for SEPA environmental analysis in TDR receiving areas.
c. Provide funding to jurisdictions for SEPA environmental analyses in TDR receiving areas.

7. Should the state consider facilitating and funding a series of pilot projects?

8. Should the state be supporting private initiatives that foster TDRs?

9. How do we define success? What are the performance measures we would be using to determine whether the program is effective?

10. What additional information do we need to support our recommendations?