TO: CHAIRMAN WOLPERT AND MEMBERS OF THE HOUSE LOCAL AND MUNICIPAL GOVERNMENT AND URBAN REVITALIZATION COMMITTEE

FROM: LARRY LONG, EXECUTIVE DIRECTOR
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SUBJECT: SUPPORT FOR H.B 69—TRANSFER OF DEVELOPMENT RIGHTS (TDR)

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INTRODUCTION

The County Commissioners Association of Ohio (CCAO) supports H.B.69 as an additional land use tool for the preservation of open space and farmland. In recent years the General Assembly has recognized the needs of counties by granting a series of new land use related authorities and changes to existing laws including access management, storm water management, erosion and sediment control, surface and subsurface drainage authority, changes to Ohio’s subdivision enabling statutes allowing for the control of large lot developments, and others.

Today we are asking for an additional tool to help shape the form and intensity of development—Transfer of Development Rights enabling authority. But this new tool is substantially different from the previous grants of authority. This is because, in the case of TDR authority, counties, townships, and municipalities can establish programs that will primarily facilitate private property owners to purchase development rights in sending areas and transfer those rights to properties in receiving areas where increased density or other development incentives will encourage such private market based transactions.

Under H.B. 69 authority is granted to counties to develop TDR programs under the current county zoning law, while townships are granted the authority under the township zoning enabling law. In addition, specific authority is granted to develop joint TDR programs between counties, townships and municipalities. Finally, the bill grants authority for the establishment of a TDR bank by any of the jurisdictions individually or under a joint TDR program.

The TDR authority will allow counties another tool to manage, control and encourage growth. State government and local governments could potentially see an advantage in this program as farmland preservation monies are generated essentially through the free market by the purchase of development rights at the election of the land owner and a willing buyer, allowing the state and local governments with greater flexibility in other discretionary spending. This legislation, used correctly, creates the opportunity for the smart growth so greatly desired by local governments, utilizing a technique driven by a cooperative spirit between developers and land owners.
THE BASIC CONCEPT OF TRANSFER OF DEVELOPMENT RIGHTS

Transfer of Development Rights is a land use tool whose basic premise is that a landowner’s right to develop their land has value. TDR programs provide incentives to promote growth in designated areas while offering compensation to landowners who extinguish their right to develop in other areas. TDR programs are voluntary and incentive based. They respect private property rights and can create a “win-win” situation for developers, landowners and the community at large.

The transfer of development rights is not a new concept. TDR’s have been used in other areas of the country for the preservation or protection of open space, natural resources, farmland, and urban areas of historical significance. According to OSU Extension, more than 20 states have enacted or amended laws to accommodate the TDR concept. Currently seven states have TDR statutes specific to farmland protection.

According to the American Planning Association: “Transfer of development rights (TDR) is a market based technique that encourages the voluntary transfer of growth from places where a community would like to see less development (called sending areas) to places where a community would like to see more development (called receiving areas). The sending areas can be environmentally-sensitive properties, open space, agricultural land, wildlife habitat, historic landmarks or any other places that are important to a community. The receiving areas should be places that the general public has agreed are appropriate for extra development because they are close to jobs, shopping, schools, transportation and other urban services.”

“TDR is driven by the profit motive. Sending site owners permanently deed-restrict their properties because the TDR program makes it more profitable for them to sell their unused development rights than develop their land. Developers buy the development rights and use them to increase the density of receiving site projects; they do that because these larger projects are more profitable than the smaller projects allowed when development rights are not transferred. In addition to making property owners and developers happy, TDR solves a seemingly intractable dilemma for communities: it gives them a way to achieve critical land use goals using little or no public funding.”

Another summary of how a TDR Program works is found in a summary prepared by the Land Use Law Center of the Pace Law School in: “There are three basic elements to a TDR program: the sending district, the receiving district, and the TDR credits themselves. The sending district consists of the area or properties sought to be protected from development or redevelopment. The receiving district is located where additional density can be accommodated with a minimum of adverse consequences. The TDR credits are a legal representation of the abstract development rights which will be severed from property in the sending district and grafted onto property in the receiving district. The TDR credits are traded in a free market, although a TDR bank may be established to facilitate exchanges. When a TDR credit is purchased from a property owner in the sending district, that property owner records a deed restriction prohibiting development on his property. The TDR credit can then be applied to property in the receiving district as a density bonus or other zoning incentive.”

PURPOSES OF A TRANSFER OF DEVELOPMENT RIGHTS PROGRAM

Under the provisions of H.B. 69, a TDR Program must further one or more of the following purposes:
1. Protection of the natural, scenic, agricultural, or open space qualities of land, or the preservation of natural resources, through conservation or agricultural easements;

2. Enhancement of sites and areas of special character or historical, cultural, aesthetic, or economic interest or value;

3. Encouragement of development in enterprise zones, brownfield sites, or redevelopment areas;

4. Protection and management of land, water, and other natural resources.

**ESTABLISHMENT OF A TDR PROGRAM UNDER COUNTY ZONING**

Following is a summary of how a TDR program would be established and would operate:

- To establish a county TDR Program the county zoning resolution would have to be amended. The provisions in the zoning resolution would establish procedures for when and how the provisions of the program would be applied to specific parcels of property. In addition, the amendment to the zoning resolution must establish an administrative board to administer individual transfers. This board could be the board of county commissioners itself, the county zoning commission, the county board of zoning appeals, a county or regional planning commission, or a special new board.

- The proposed bill provides that a TDR program can only apply to property as an additional option for property owners and can only be applied at the election of the property owner.

- The zoning map must be amended to include sending and receiving areas. This can be done in two ways. First, the county could include specific areas as sending and receiving areas as an overlay to the base zoning district on the zoning map. If the county mapped sending or receiving areas, however, the application of TDR’s is still only an option and can only be used at the election of the property owner. It is an option for the property owner, and the property owner retains all rights, privileges, and obligations that currently exist under the base zoning district.

  Second, the county would not have to map any sending or receiving areas as an overlay to the zoning map. In this case, any property owner may apply to have his or her property mapped as a sending or receiving area as an amendment to the overlay of the zoning map.

- If development rights were purchased in a sending area for transfer to a receiving area either an agricultural easement or a conservation easement would be placed on the parcels in the sending area that would restrict subsequent development in the sending area.

- If a county TDR Program includes land in a township that is subject to neither county or township zoning the board of county commissioners must notify the township trustees of the establishment of the program. In the case where township land is included in a county TDR Program and the land is under township zoning, then the program must first
be approved by the township trustees before it can affect any land in the township zoned under township zoning.

**REQUIREMENT FOR THE DEVELOPMENT OF A PLAN IN CONJUNCTION WITH A TDR PROGRAM**

Unlike the bill introduced last session, H. B. 69 includes specific requirements that require the county to conduct a study and a plan based on the results of the study. The study and plan must include:

- A determination of the purpose for which the program should be created
- A determination of the best locations for sending and receiving areas
- A resource assessment to help determine which areas should be preserved or developed under the program.
- A determination of the development incentives that should be used to make the program feasible
- A determination of the nature and quantity of development rights that may be severed from each sending area and then attached to parcels of property in receiving areas.
- An estimate of population and economic growth during the next decade and a projection of development potential.
- An estimate of the existing and needed infrastructure capacity in receiving areas and needs to accommodate development at higher densities.
- Give consideration to the density and intensity of development allowed under current zoning and other regulatory tools.
- Assurance that the TDR program is consistent with the comprehensive plan that is the basis of the county zoning.

**ESTABLISHMENT OF JOINT TDR PROGRAMS BETWEEN COUNTIES, TOWNSHIPS, AND MUNICIPALITIES**

H.B. 69 authorizes counties, townships, and municipalities to enter into a joint agreement to create a joint TDR Program. The joint agreement shall establish the parameters of the program and the responsibilities of each of the parties to the agreement.

In the case of a joint program involving only counties and municipal corporations, but where land in any township not covered by either county or township zoning is affected, before this township territory may be included in the program, the township trustees must approve the program. Again, this is only if the township is not a party to the joint agreement.

If the joint program is approved by the various legislative authorities and if necessary changes to any local laws must be made, such changes must follow procedures specified by statute or by local law or municipal charter.
INCENTIVES TO DEVELOPERS TO PARTICIPATE IN TDR PROGRAMS

For such programs to work and for those that wish to develop in receiving areas to purchase development rights in sending areas, there must be economic incentives for the developer to make such expenditures. Under the bill, the following incentives are specifically authorized:

- A variation in density, or the number of dwelling units allowed or the square footage of buildings.
- A variation in the height, bulk, number of stories, and size of buildings.
- A variation in the number of parking spaces normally required.
- A variation in the size of lots, set-back lines, size of yards, percentage of lot coverage and other open space requirements.
- A variation in utility service tap in fees or utility user fees charged.
- Any other requirement that varies the density or intensity of development or that makes development more economically beneficial.

ESTABLISHMENT OF COUNTY TDR BANK AND JOINT TDR BANKS

The legislation also provides for the establishment of TDR Banks along with separate funds in public treasuries to handle any monies associated with an individual or joint TDR Program. In the case of an individual program the TDR Bank is permissive. In the case of a joint program, the TDR Bank is required. A TDR bank is managed by an advisory board that is largely advisory to local elected officials. Duties of the TDR advisory board include:

- To oversee the development and implementation of the TDR Program.
- To purchase development rights and sell development rights held by in the TDR bank, but only as directed by elected officials.
- Facilitate transactions between property owners in sending and receiving areas through technical assistance and education.
- Monitor conservation or agricultural easements in sending areas.
- Receive funding from political subdivisions, proceeds from the sale of development rights, and donations.

There is one issue that we feel needs to be modified in the bill. We believe that the bill needs to distinguish a development right from a development incentive. The definition of a development right as now contained in the bill appears to really be a definition of a development incentive, and thus we look forward to working with the sponsor to craft a clear definition of a development right in addition to a definition of development incentives.

It should be stressed that to implement effective TDR Programs it is vital to have effective community planning and strategies to channel growth in areas where it can be more effectively
accommodated. While we do not feel this new land use tool will have broad initial use in the state, we do feel that over time and with local cooperation between local governments and development interests that it can become an effective option to promote good development in Ohio.