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Courts Fluster Non-Contiguous Cluster

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Before the State TDR Act, the Ogden Amendment (L. 1995, c. 364, § 2) to the Municipal Land Use Law (MLUL) provided for cluster development between noncontiguous parcels. From 1995 to 2004, non-contiguous planned unit development (PUD) was the only game in town for municipalities outside Burlington County or the Pinelands. Often thought of as TDR-"lite", non-contiguous cluster is less complicated to implement and still results in land preserved through private investment.

The non-contiguous cluster provision of the MLUL, however, is rather ambiguous and vague. Municipalities have interpreted it in myriad ways to satisfy their growth management needs. It was commonly thought that a few municipalities over-stretched their authority under the non-contiguous cluster provision, but were able to rebuke challenge in the absence of TDR. Upon the passage of the State TDR Act, planners and land-use attorneys theorized that the courts would be less flexible in their interpretation of the non-contiguous PUD now that TDR was permissible throughout the state. Two municipalities recently proved this conjecture accurate when the courts invalidated their "non-contiguous cluster" ordinances because they too closely resembled TDR.

Builders League of South Jersey, Inc. vs. Township of Franklin et als
Docket No. A-1247-05T5

The 2004 Franklin Township (Gloucester) Master Plan called for the conservation of land and channeling of growth through the use of non-contiguous planned residential development that would allow "[d]evelopment rights within the sending area…be transferred into the Receiving Area" (2004 Master Plan, Franklin Township, Gloucester County). Not so cleverly as it turns out, the Master Plan went on to say, "that this use of non-contiguous planned residential clusters is not intended to be interpreted under the recently enacted legislation that permits the statewide Transfer of Development Rights."

In September 2004, the Township amended its zoning code and map to put all land in the R-A Residential District into either a Sending Area or a Receiving Area (Ordinance No. 4004-13). The ordinance did allow for conventional subdivisions and contiguous clusters in both the sending and receiving areas; however, allowed for non-contiguous planned residential development to occur only in the receiving area. In addition, it allowed non-contiguous lands to be combined to create a conforming lot.

In October 2004, the Builders League of South Jersey filed suit with the Superior Court of New Jersey, Gloucester County Law Division, claiming among other things, that Franklin's ordinance "established a TDR program in a manner not authorized by the MLUL" (Docket No. GLO L-1753-04-PW). The Township contended that the ordinance was not TDR because it was voluntary to transfer rights to the receiving area. Judge Bowen found for the Plaintiff in September 2005, and invalidated the ordinance "insofar as it is non-compliant with N.J.S.A. 40:55D-137 et seq". The Township appealed the decision to the Superior Court of New Jersey Appellate Division (Docket No. A-1247-05T5). In July 2007, the Appellate Division affirmed the lower court decision and provided detailed reasoning for the same.

The Court determined that the Township's ordinance exceeded the authority granted by the MLUL for non-contiguous PUD, because it was not limited to planned developments and that it did not require that the properties be developed as a "single entity" or be in "common ownership"—the hallmarks of a PUD. Moreover, the Court determined that several aspects of the ordinance made it reminiscent of TDR; including, "the establishment of sending and receiving areas…preliminary studies of topography and critical habitat, restrictions on future development, density bonuses and municipal authority to enforce the development restrictions". Thus, the court determined that the Township was seeking to implement a transfer of development rights program. As such, the ordinance was invalid because it did not meet the requirements of the State TDR Act.

Flynn Tucker, L.L.C., et al vs. Township of Springfield et al
Docket No. L-108-06 (Consolidated)
The background of the adoption of the three Springfield Ordinances in question is rather convoluted, and accordingly, the Court invalidated them on the basis of procedure. Despite Judge Sweeney's ability to end his decision with the procedural invalidation, he opted to "rule upon the procedural challenges…lest the defendants assume that the ordinances are substantially valid and can be readopted in their same form". For the purposes of this article, the procedural issues are not relevant, and only Judge Sweeney's opinion as it relates to TDR will be discussed.

In March 2006, Springfield Township (Burlington) adopted three ordinances that allowed for a transfer of density from sending zones to receiving zones at three-acre zoning. If property-owners opted not to participate in the density transfer, they were subject to ten-acre zoning.

(Ordinances 2006-5, 2006-6 and 2006-7) The Township contended that they adopted these ordinances under the "non-contiguous density transfer" provisions of the MLUL (N.J.S.A. 40-55D-65(c)). Judge Sweeney, however, emphasized that the MLUL does not contain such a term, and that the only allowance for "clustering between noncontiguous parcels" was through planned unit development.

Judge Sweeney ultimately concluded that the Township had created a "hybrid form" of TDR. First, the ordinance established districts where development rights could be transferred to and from, effectively creating TDR sending and receiving zones. Moreover, the ordinance included terms such as "development potential", "development transfer" and "development potential transfer", which by definition, are all associated with the TDR provisions of the MLUL. The ordinance also provided for a preservation mechanism, another concept associated with TDR.

Judge Sweeney also took issue with the fact that the Township ordinance openly admitted that the bonus densities might not be attainable if some parties in the sending or receiving zone opted not to participate. He said that this was evidence of "a TDR plan without the assurances necessary to render it a TDR plan in compliance with the MLUL", indirectly referring to the provisions for a market analysis in both the Burlington and State TDR enabling legislation. Due to the over-reaching yet unsupported nature of the Springfield ordinances, Judge Sweeney deemed them invalid insofar as they did not meet the statutory requirements of the TDR provisions of the MLUL.

Conclusion
In both cases, the Courts determined that the municipalities exceeded the authority of the non-contiguous cluster provisions of the MLUL. The Courts were vehement about the need for any non-contiguous clustering to occur pursuant to PUD. Any deviation from this provision would render the scheme a TDR. In the Franklin case, the Court was also keen to point out that the development was to be treated as a "single entity" or be in "common ownership". In both cases, the municipalities admitted that they had passed their non-contiguous ordinances because they did not have the resources or political will to pursue TDR. The Courts took exception to this, and pointed out the legislature's desire to provide safeguards and assurances for all parties through the TDR provisions of the MLUL. The Appellate Division put it best in the Franklin decision, "[s]imply stated, municipalities are not free to pick and choose the elements of the TDR program that it likes and disregard the provisions that it finds burdensome."

These Court decisions do not disqualify one's ability to pursue non-contiguous cluster via the planned development provisions of the MLUL. Instead, they put municipalities, planners and land use attorneys on notice that the courts are using a strict interpretation of those provisions. Non-contiguous cluster, when implemented appropriately, is a good first step toward balanced

growth. If your non-contiguous cluster ordinance walks, talks *or* quacks like TDR, however, it will be interpreted as TDR.

Please note that this unsolicited advice is coming from a professional planner—a land use attorney should be consulted when pursuing either non-contiguous cluster.