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Technical Memorandum

To: Mac Hatcher, PM Collier County

From: Moris Cabezas, PBS&J
Robert Mulhere, Mulhere & Associates

Date: March 10, 2011

Re: Watershed Model Update and Plan Development
Contract 08-5122, PO 4500106318
Element 4, Task 3: Development & Analysis of Alternative Scenarios
Recommended Implementation of TDR Program

1.0 Objective

Certain portions of the North Golden Gate Estates basin, along with lands directly east of the Golden Gate Watershed, also within the Golden Gates Estates Subdivision (and falling within Faka Union Watershed) show high ecological restoration potential. Currently these areas have low population density, and land uses follow predominantly a single family low coverage semi-rural development pattern of one dwelling unit per 2.25 acres (or in the case of legal nonconforming lots, one dwelling unit per 1.2 acres). In fact, the North Golden Gate Estates Flowway Restoration Plan is currently under design. The purpose of that project is to restore “strategic areas of drained wetlands within Golden Gate Estates and north Belle Meade to allow storage and conveyance of stormwater runoff. The restoration of these wetlands will enhance flood management, water quality, wildlife habitat; add recreational area and green space; promote aquifer recharge; and provide opportunities as a potential mitigation area for wetland and stormwater impacts within the North Golden Gate Basin.”

The factors described above provide the opportunity to set aside or otherwise guide land development to protect environmentally valuable lands with a modification to the current Collier County Transfer of Development Rights (TDR) program.

The purpose of this technical memorandum is to describe the potential modification of the current TDR program in Collier County as part of the watershed management plan local regulatory recommendations. At the outset, it should be understood that the potential TDR program is intended to be largely incentive based. It is recognized that there are existing property rights and that any regulatory program designed to achieve or further the Watershed Management Plan Project objectives must be designed with full consideration of the impacts such regulations may have on those existing private property rights, including both federal (constitutional) rights, and the potential impacts of Florida’s “Bert J. Harris Private Property Rights Protection Act”.



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2.0 General Description of TDR Programs

Often there are valid public policy reasons for limiting property rights on certain land, where the preservation or substantial preservation of such land is deemed to have a valid public purpose. Generally, this is regulated through zoning, and derives from a local government's "police powers"¹. However, local governments must use caution when adopting new policy or zoning regulations that further limit or eliminate existing private property rights. If not, an unjust "Taking" can occur when the government acquires private property and fails to compensate an owner fairly. A taking can occur even without the actual taking of property title, such as when a government regulation substantially devalues a property. For many years TDR programs have been adopted throughout the Country (with varying degrees of success) as a means of compensating landowners who, for a valid public propose, have had their private property rights either fully or partially "taken" as a result of the local government action.

There are essentially two goals for TDR programs. The primary goal is to preserve some identified asset for public benefit. Examples include ecologically valuable land, open space, farmland, areas prone to flooding, areas necessary for groundwater recharge, waterfront areas, or historic structures. The areas that are the target of such preservation are generally called "Sending" lands. Lands to which such property rights may be transferred are generally referred to as "Receiving" lands.

The second goal of a TDR program is to compensate landowners in the Sending areas, for the loss of development rights on the Sending lands. This is accomplished through the ability to transfer these rights, or to sell these rights to another person or entity who can then use these rights within designated Receiving areas. The goal of compensating Sending land property owners is no less important than the first goal of preservation for primarily two reasons.

- If the program is purely voluntary, Sending land owners will not sell or transfer such rights unless the value they will receive for severing these rights provides sufficient incentive when compared to the rights they retain on the Sending lands and the goals of preserving the Sending lands and compensating the landowners will not be accomplished.
- If the TDR program includes a significant loss of the existing property rights on Sending lands, and such program is not viable and thus Sending land owners are not compensated for the loss of property rights, such landowners may then have a course of legal action for "Taking" claims against the agency, thereby jeopardizing the implementation of the entire program.

¹ The right of states to make laws governing public health, safety, welfare, and morals is granted by the Tenth Amendment to the US Constitution, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." State legislatures exercise their police power by enacting statutes to protect the public's health, safety, welfare, and they also delegate much of their police power to local governments.

3.0 The Collier County Existing TDR Programs

In Collier County there are already several types of TDR programs in effect. Most follow the format of the traditional TDR program, but one of them, the County's Rural Lands Stewardship (RLSA) program is significantly different and is specifically excluded from the County's general TDR provisions (Land Development Code (LDC) Section 2.03.07. D.4.a.iii.).

This analysis assumes that any TDR policies developed to advance the goals of the Watershed Management Plan will be in the form of a traditional TDR program. However, such policies would be distinct from policies that are presently applicable in various areas of Collier County. It should be noted that the LDC TDR provisions presently provide for transfers in three ways: a) from urban areas to urban areas; b) from Rural Fringe Mixed Use (RFMU) Sending lands to RFMU Receiving lands; and c) from Rural Fringe Mixed Use (RFMU) Sending lands to urban areas (limited to the Urban Residential Fringe (URF) subdistrict and to qualified urban infill areas. The applicable TDR provisions are as described below.

LDC Section 2.03.07. D.

4. Transfer of Development Rights (TDR).

a. Purpose, Intent and Applicability.

- i. **Purpose.** *The primary purpose of the TDR process is to establish an equitable method of protecting and conserving lands determined to have significant environmental value, including large connected wetland systems and significant areas of habitat for listed species; and to provide a viable mechanism for property owners of such environmentally valuable lands to recoup lost value and development potential which may be associated with the application of environmental preservation standards to such lands.*
- ii. **Intent.** *These TDR provisions are intended to accomplish the above stated purpose through an economically viable process of transferring development rights from less suitable non-RFMU sending areas and RFMU sending lands to more suitable non-RFMU receiving areas and RFMU receiving lands.*
- iii. **Applicability.** *These TDR provisions shall be applicable to those areas specifically identified in (b), (c) and (d) below. These TDR provisions shall not be applicable to the any transfer of development rights within the RLSA District.*

The existing Collier County TDR programs have not been utilized for a number of reasons. The urban to urban transfer has been rarely used as typically it is not necessary for a landowner to purchase a transferable urban TDR to accomplish the desired gross density on a project. In simple terms, there is no market for the urban to urban TDR program. As to the potential transfer from RFMU Sending to qualified urban infill areas, there has also been little use of this opportunity. The County's Future Land use Element (FLUE) provides the following conditions related to Residential Infill (and the ability to transfer a TDR from the RFMU Sending Lands into the Urban Area):

Density Bonuses

d. Residential In-fill

To encourage residential in-fill in urban areas of existing development outside of the Coastal High Hazard Area, a maximum of 3 residential dwelling units per gross acre may be added if the following criteria are met:

- (a) The project is 20 acres or less in size;*
- (b) At time of development, the project will be served by central public water and sewer;*
- (c) The project is compatible with surrounding land uses;*
- (d) The property in question has no common site development plan with adjacent property;*
- (e) There is no common ownership with any adjacent parcels;*
- (f) The parcel in question was not created to take advantage of the in-fill residential density bonus and was created prior to the adoption of this provision in the Growth Management Plan on January 10, 1989;*
- (g) Of the maximum 3 additional units, one (1) dwelling unit per acre shall be transferred from Sending Lands; and*
- (h) Projects qualifying under this provision may increase the density administratively by a maximum of one dwelling unit per acre by transferring that additional density from Sending Lands.*

Again, based upon the fact that the Residential Infill provision has been rarely used, the additional requirement that at least one of the three additional bonus units must come from RFMU Sending lands (added in 2002), even though a project could realize an increased density of up to one dwelling unit per gross acre administratively (without being required to rezone the property), creates a condition for which there is insufficient market demand for the urban infill provisions.

Collier County also provides for TDR to be transferred from RFMU Sending lands to RFMU Receiving lands. That program provides for a base TDR at a ratio of one TDR per 5 acres of Sending land, and also provides that for each base TDR a property owner also has the ability to secure an early entry TDR Bonus (still in effect) and a bonus for environmental restoration for the Sending lands and a bonus for deeding the Sending lands to a public land management/conservation agency. Although there have been several properties which have secured the base and early entry TDR bonuses, to date there has been no actual utilization of these TDRs in Receiving lands.

Within the RFMU Subdistrict there are four distinct Receiving areas. The RFMU Receiving areas were chosen because they contained lower ecological value than other lands within the RFMU subdistrict and are situated such that they had or could relatively easily develop adequate access to the arterial transportation network and to other necessary public services such as public utilities. The Receiving area can be developed in two ways, either as a Rural Village, or as Receiving lands located outside of a Rural Village. The maximum allowable density within a Rural Village is 3.0 units per gross acre and for Receiving lands located outside of a Rural

Village the maximum density is 1.0 unit per gross acre. For a number of reasons, all generally related to the economic viability (that is potential return when compared to cost and potential risk), development of RFMU Receiving lands has not happened since the inception of the RFMU TDR program.

Since there has been no utilization of the TDR in designated RFMU Receiving areas, either in a Village or outside of a Village, again one must look to the market viability of the program.

Clearly any new or expanded TDR program must be designed so as to have a tangible market value, both to the Sending landowners, and to the owners or potential owners of Receiving lands.

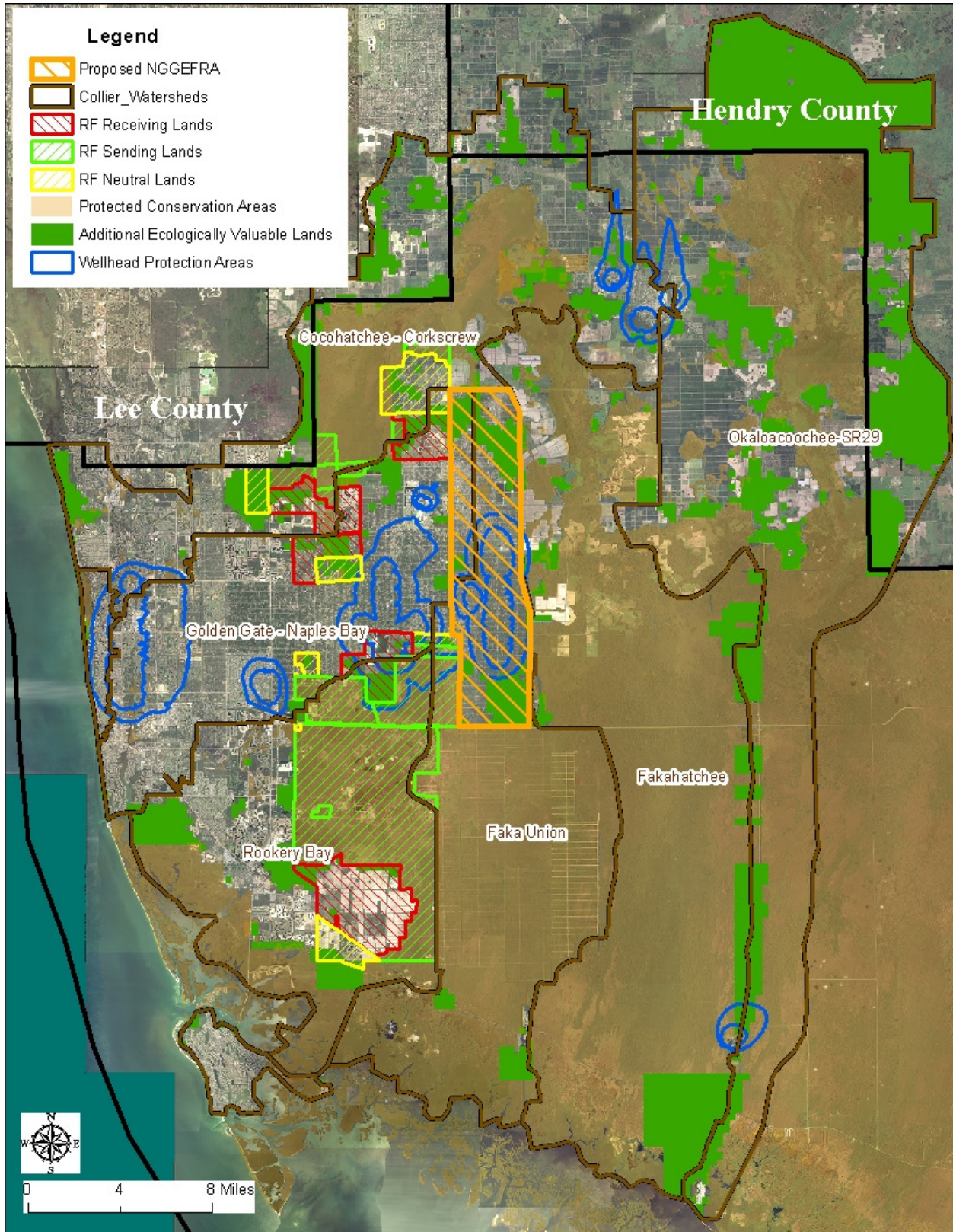
4.0 Recommendation to Develop a TDR Program for the Northern Golden Gate Estates

It is recommended that Collier County establish the North Golden Gate Estates Flowway Restoration Program (NGGEFRP) and the corresponding North Golden Gate Estates Flowway Restoration Area (NGGEFRA) to preserve and thus protect from further degradation the ecological value and recharge function in the identified areas primarily within the north eastern portion of the Golden Gate Estates Subdivision.

The location of the NGGEFRA is shown in Figure 1. In addition to this area being used for the Floodway Restoration Plan, it includes significant portions of non-agricultural areas that have been identified in this study as “ecologically valuable lands”, as well as areas identified by the County for wellhead protection.

A major component of the NGGEFRP would be a TDR program designed to provide sufficient market attraction to not only accomplish the protection goals of the NGGEFRP (stated below), but also to provide enhanced incentives to promote development of the Rural Villages in all or some of the established RFMU Receiving lands. The TDR program would provide for the voluntary severing of residential development rights from the identified Sending lands in the NGGEFRA and allow the transfer of such rights to targeted Receiving lands.

Figure 1. Location of the North Golden Gate Flowway Protection Area (NGGFPA)



5.0 Program Description and Recommended Elements

It is further recommended that the following elements be considered for inclusion in the program:

- *Design the TDR program to be completely voluntary (with appropriate incentives).*
- *Use the TDR program to incentivize aggregation of smaller parcels into a larger development tract.* If smaller parcels are aggregated and then clustered development is employed, the remaining undisturbed portions can then be protected while still allowing common passive recreation uses. In such cases, an incentive of some amount of increased density, for example 10 or 20 percent, could be considered. In effect, the “clustered development area” becomes a Receiving area, and is granted a density bonus for protecting the remaining undisturbed land. As an example, if several smaller parcels containing the rights for 10 single family units are combined to create a large 20 acre development tract, and the single-family development is designed to be clustered such that the impact area is limited to a maximum of 10,000 square feet per unit, and a 20 percent bonus is granted bringing the density up to 12 units, then the overall impact area would not exceed 120,000 square feet or 2.75 acres. This would leave 17.25 acres of open space which could be used for passive recreation and at the same time for recharge and storm water management. Ideally the majority of this remainder area would be cleared of exotic vegetation and remain in its natural state with limited clearing permitted.
- *Incentivize TDR transfers from the NGGEFRA to RFMU Receiving lands and further incentivize Rural Village development in all or some of the RFMU Receiving Areas.* The TDRs generated from the NGGEFRA have the potential to provide additional market attraction for the RFMU Receiving lands. If designed properly, with sufficient bonus and/or multipliers, the TDR program can become more equitable for both owners of NGGEFRA Sending lands and owners or potential owners of RFMU Receiving lands. As stated by Dennis E. Gilkey, an individual with vast experience in Southwest Florida developing high quality large mixed-use master planned communities, “For a TDR program to work, it must first be market driven.”² Thus the program must achieve a marketable balance in terms of the cost to acquire necessary TDRs for use in Receiving areas and the compensation to Sending land owners for those TDRs.
- As previously stated, the maximum allowable density within a Rural Village is 3.0 units per gross acre and for Receiving lands located outside of a Rural Village the maximum

² *Transfer of Development Rights (TRD's) in Florida's Rural Lands (and why they haven't worked).* Report prepared by Dennis E. Gilkey, Gilkey Organization, 2010)

density is 1.0 unit per gross acre. To achieve these densities, one must purchase TDRs and TDR bonuses. Certainly it would be reasonable to allow additional density in these areas (for example an additional 1.0 units per in Receiving lands located outside of a Rural Village (for a total of 2.0 gross units per acre) and up to 5 units per acre in a Rural Village (for up to 5 units per gross acre)) if such increases were tied to TDRs and TDR bonus units derived from the High Recharge Sending lands. At least two of the identified RFMU Receiving lands areas are well suited in terms of existing access to the arterial network and extension of utility lines and service from existing County facilities. It is not enough just to allow additional density, but to ensure a viable market attraction and provide a balance in terms cost. This will require appropriate incentives to direct development to the Receiving areas.

- *Allow the transfer of TDRs and/or TDR bonus units from the NGGEFRA into the urban area under limited or general conditions.* For example, any project in the Urban Area qualifying as Urban Infill might then be able to increase its density by 1 or 2 units per gross acre by right (under certain identified conditions) through the acquisition and use of TDRs from the NGGEFRA Sending areas. Other opportunities for transfer to the urban area may also exist.
- *Consider whether or not to expand the NGGEFRA to also include other lands in the general vicinity that also contain high ecologic and/or high recharge value.* Of particular note is the fact that the data indicate high ecological value on the various “Neutral Lands” within the RFMU subdistrict. Figure 1 also shows the location of adjacent Neutral Lands.

6.0 Next Steps

- 1) *Establish an Oversight Committee of 9 members to work with staff to develop the specifics of the TDR program.* It is recommended that the committee have representation from the following stakeholder groups:
 - a. Landowners within the affected area (2 or 3 members)
 - b. Nongovernmental environmental organizations (2 members)
 - c. Golden Gate Estates Civic groups/organizations (2 members)
 - d. Land owners within the RFMU Subdistrict (2 members)
 - e. At least one a representative from the development industry.
- 2) Prepare a map or series of maps depicting the individual parcel boundaries within the targeted high recharge areas, primarily located in the North Golden Gate Estates Subdivision, to quantify the number of legal nonconforming and conforming parcels. Overlaying these maps on an aerial will allow quantification of the number of developed parcels as well as identification of the Sending lands boundaries.
- 3) Determine if there is support to move forward with developing a TDR program for this area by bringing the concept of a TDR program to the Environmental Advisory Council

(EAC) and Planning Commission (CCPC) for policy recommendation and then to the Board of County Commissioners (BCC) for policy direction.

7.0 Additional Considerations

It should be noted that the creation of a TDR program in the NGGEFRA and the attendant identification of Sending and Receiving areas and potential TDR bonuses, as well as potential changes to the RFMU subdistrict will require amendments to the County’s Comprehensive Growth Management Plan (GMP), including amendments to the Golden Gate Area Master Plan (GGAMP), the Future Land Use Element (FLUE), Future Land Use Map (FLUM), and the Conservation and Coastal Management Element (CCME), at a minimum. These Plan amendments would then be followed by implementing LDC amendments. A very conceptual timeline for completion is provided below.

Table 1. Conceptual Timeline for Implementation of the TDR Program

Task	Day to Complete
Policy Discussion Regarding NGGEFRA before EAC, CCPC, and BCC	90
Creation of Oversight Committee and Committee Work Period	250
Preparation of final draft GMP amendments for public hearings before EAC, CCPC, BCC (Transmittal Hearings) and Transmittal Hearings	150
DCA Review and issuance of Objection Recommendation and Comment (ORC) Report (issued 60 days after completion determination)	70
County review of ORC and Adjustments to address Objections (and Recommendations and Comments) (Note: Rule requires the adoption to occur within 60 days after receipt of ORC, but typically this is not accomplished within 60 days (given process requiring hearings before the EAC, CCPC and BCC) and DCA has been tolerant providing the County is working to address issues. Assuming Objections are not substantial, the County will simultaneously begin preparing LDC amendments.	120
DCA issues Notice of Intent (NOI) to find Plan Amendments in Compliance (or not) - within 45 days of receipt of a complete adopted plan amendment	50
LDC Amendment Final Preparation and hearings (again, EAC, CCPC,BCC)	100
Total Estimated Time for Completion	830