

**RMP Component:** Smart Growth Component  
**Technical Report:** Transfer of Development Rights  
**Memorandum Title:** TDR Background and Program Development  
**Status:** Preliminary Draft  
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## **I. EXECUTIVE SUMMARY**

This technical memorandum provides information on the concept, history and legality of Transfer of Development Rights (TDR) and the process for program development. The program development process has included meeting with stakeholder groups and the TDR Technical Advisory Committee as well as undertaking a critical examination of existing TDR programs. Utilizing this information, the technical memorandum sets forth the Highlands TDR program purposes and goals, which are to be achieved through the establishment and implementation of the program. Importantly, this technical memorandum provides background information and a series of case studies that are essential to understanding the Highlands TDR program framework. Subsequent TDR technical reports will continue to be developed in support of the Regional Master Plan, Smart Growth Component.

## **II. INTRODUCTION**

The Highlands Council is currently developing its Highlands TDR program to be implemented throughout the seven counties of the Highlands Region. This program will serve as one mechanism to provide compensation to property owners in the Preservation Area that have been affected by implementation of the Highlands Act through a TDR credit system. This system will allocate TDR credits to such property owners, which credits may be sold to developers for their use in appropriate voluntary receiving zones. Use of TDR credits by developers in the receiving zones that have been established by participating municipalities will allow developers to increase the density of proposed projects in those zones. Through the TDR program, development potential will be transferred from the most ecologically sensitive and agriculturally important lands in the Highlands to those lands within the seven Highlands counties that are best suited to accommodate development.

The purpose of this technical memorandum is to provide information on the history, statutory requirements, and public input that have each influenced development of the Highlands TDR program. The technical memorandum concludes with a brief discussion of the program purposes

and goals that inform development of the Highlands TDR program and will shape the structure and processes of the program.

### **III. TRANSFER OF DEVELOPMENT RIGHTS – WHAT IS IT?**

Transfer of development rights (TDR) is a land use tool that permits a community to utilize market forces to encourage the transfer of development potential from areas that the community wants to preserve, called sending zones, to areas that are more appropriate to accommodate increased growth, called receiving zones. (Pruetz, 2003) Landowners in the sending zones receive compensation for restricting development on their property. As a market-based system, payment for this lost development potential comes from purchasers who buy credits representing the lost development potential in the sending zones. The credits then entitle the purchaser to build in a receiving zone at a density greater than that permitted in the underlying zoning.

TDR has become an increasingly popular land use tool to preserve lands with sensitive resources, whether those resources are environmental, agricultural, or historical. In New Jersey, TDR programs have been established to preserve large contiguous parcels of farmland to maintain agricultural viability, such as the programs in Chesterfield and Lumberton Townships in Burlington County, while in the New Jersey Pinelands TDR is used to preserve tracts of ecologically important lands to maintain ecosystem health and high water quality. TDR is also utilized to preserve historic buildings such as those programs in New York City and San Francisco.

TDR was developed in response to two concerns. First, it serves to mitigate the “windfalls” and “wipeouts” that frequently accompany the regulation of land use. (Costonis, 1973) For example, where a municipality downzones, property within those down-zoned areas may experience a reduction in property value and hence suffer a “wipeout.” Where a municipality up-zones, permitting greater development density per acre, landowners often see an increase in property values and experience a “windfall.” TDR attempts to balance these situations by requiring receiving zone landowners to purchase development rights from sending zone landowners. The receiving zone landowners must pay for the ability to develop at a greater density or intensity in the receiving area. The sending zone landowner receives compensation in the form of payment from the receiving zone landowner.

Second, TDR seeks to use market forces to pay for the preservation of properties with unique resources where local governments may not have the financial wherewithal to acquire property outright. There is little doubt that municipalities have many competing demands for their limited financial resources. School construction or improvement, road and sewer extensions, police and fire services, and other municipal services all require significant municipal budget allocations. Preserving lands with specific ecological, agricultural or historical importance is just one of many costs that must be borne by municipalities. TDR aids municipalities in achieving the preservation of these important lands by compensating landowners for the development restrictions imposed on those properties through sale of development rights for use in designated receiving zones.

Importantly, TDR recognizes that the development potential of a parcel of land may be separated from the other rights of property ownership, such as the rights to possession and exclude others.<sup>1</sup> TDR also recognizes that this development potential is transferable from one specific parcel to another. (Schnidman, 1977) Once a parcel's development potential is severed, the parcel is encumbered with either a deed restriction or conservation easement generally limiting its future use to its current use. Underlying ownership of the encumbered parcel remains with the existing landowner until he or she decides to sell the parcel. As for the TDR credit, once it has been redeemed, i.e. it has been used to increase development density or intensity in a receiving zone, it can never be used again.

In addition to understanding what TDR is, it is equally important to understand what TDR is not. First and foremost, TDR is not the “cure-all to the inequities of contemporary land development regulations.” (Siemon, 1997) It simply represents another tool, in addition to current State preservation programs administered by the State Agriculture Development Committee (SADC) and the Green Acres Program at the Department of Environmental Protection (NJDEP), to provide landowners with a means to extract equity out of their property. “The reality was and is that no

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<sup>1</sup> Although property owners have a right to use their property, this right is not unrestricted. For example, the right to develop property is not absolute. In New Jersey, the law does entitle a landowner to reasonable use of his or her land, but it does not require that the land be put to the most profitable use. See Fischer v. Township of Bedminster, 11 N.J. 194, 206 (1952); see also Gardner v. New Jersey Pinelands Commission, 125 N.J. 193 (1991) (“For there exists no constitutional right to the most profitable use of property.”) The New Jersey courts have long recognized that municipalities have the power to control the use of property under the police power, but they possess that power only insofar as it is delegated to them by the Legislature. See Riggs v. Township of Long Branch, 109 N.J. 601, 610 (1988).

program is a panacea, and while TDR can be a viable and legal response to the harsh impacts of restrictive [land use] regulation, it is not, more than any other program, a perfect solution.” (Simon, 1977)

Second, TDR is not, nor is it ever meant to be “just compensation” as that term is understood in the context of the Fifth Amendment of the U.S. Constitution or Article I, paragraph 20 of the State constitution. Simply because a regulation, such as the Highlands Rules, has diminished the value of property, does not mean that a taking has occurred requiring compensation. “Mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.” (Lackland and Lackland v. Readington Township, 2005 WL 3074714 (Sup. Ct. L. Div)) To prevail on a takings claim, a landowner must show more than a substantial decrease in market value when the regulation is designed to achieve a legitimate government objective. For example, in Bernardsville Quarry v. Borough of Bernardsville, 129 N.J. 221 (1992), even a 90% reduction in value did not constitute a taking. The law does entitle a landowner to reasonable use of his or her land, but it does not require that the land be put to the most profitable use. (Fischer v. Township of Bedminster, 11 N.J. 194 (1952)) In the case of the restrictions imposed by the Highlands Act and the Highlands Rules, the Highlands TDR program is meant to provide additional economic benefit out of the ownership of Preservation Area property along with the remaining uses of the encumbered property.

#### **A. Basic Elements of a TDR Program**

There are a number of essential elements to any TDR program. The first is the identification of sending and receiving zones. Sending zones represent the areas which a municipality or regional entity desires to protect. They are the areas from which development potential is transferred or sent out. Receiving zones represent those areas which will accommodate the transferred development potential. These zones should have the infrastructure capacity, ecological integrity and real estate market to support increased development and its attenuating growth impacts. Generally, both sending zones and receiving zones are identified at the outset of a TDR program and are incorporated into the overall zoning scheme as either specific zoning districts or overlay zones. Sending zone identification tends to be the simplest step in establishing a TDR program because there is usually consensus regarding the need to protect specific resources. Identification of receiving zones tends to be more difficult. In addition to determining whether a potential receiving zone has the ecological integrity and infrastructure capacity to accept increased development, there

is often the political challenge of overcoming NIMBYISM (“not in my back yard”) and BANANAISM (“build absolutely nothing anywhere near anything”). Through careful planning and public input these political challenges can be regularly overcome.

Another basic component of any TDR program is a determination of what development rights are going to be severed from sending zone parcels and available for sale and use in receiving zones. The process of defining what these rights are and what they entitle a purchaser to do with them is known as allocation. The transferable development rights are often expressed in the form of credits which serve as a proxy for the development potential that is restricted on sending zones parcels. How TDR credits are allocated varies among TDR program. For the most part, however, there are three means of allocating credits: (1) based upon the number of lost units or square footage; (2) based upon the gross acreage of given land characteristics (e.g. wetlands or uplands); or (3) based upon the value of the lost development potential.

How TDR credits are valued is another important aspect of a TDR program. The cost of a TDR credit is inextricably linked to how TDR credits are allocated, what those credits allow a purchaser to do in a receiving zone, and the number of opportunities for use of the credits. For example, where credits are allocated on a unit basis (e.g. 1 single-family dwelling equals 1 TDR credit), the price of those credits will be tied to the value attributable to use of those credits in a receiving zone. In such a system, the market will determine what a credit purchaser is willing to pay for use of the credit to build one additional unit in a receiving zone. As noted by a number of commentators, without an active and vital market for use of TDR credits, there is likely to be little value to the credits. (Siemon, 1989)

A TDR program must also have a process for recording, transferring, and tracking credits from a parcel in a sending zone to their use in a receiving zone. This requires that an administrative and legal framework be established to carry out these activities. Generally, a TDR program will utilize a form of TDR certificate which indicates the number of credits allocated to a given parcel in a sending zone. This certificate is transferred to the purchaser of the credits and then retired when the credits are used in a receiving zone project.

Frequently, a TDR program will use a model conservation restriction or easement. This legal document sets forth the land uses that are prohibited after the development potential is severed

from a parcel, and will also state which uses remain. A sending zone landowner will tailor the model easement to the particulars of his or her property and then file the easement with the proper recording agency. Under many TDR programs, the filing and recording of the conservation restriction is required before TDR credits will be issued to a parcel.

Many TDR programs utilize a TDR credit bank to support program administration. This bank will serve as the clearinghouse for information regarding the program and will administer the recording, transferring and tracking of TDR credits. In addition to serving these administrative functions, a TDR credit bank may also assist sellers and purchasers of TDR credits by providing or serving as a buyer or seller of last resort of TDR credits, or guaranteeing loans utilizing the TDR credits as collateral. Commentators have suggested that the existence of a TDR credit bank establishes credibility for a TDR program particularly where the bank is able to purchase and sell credits. In such a case, landowners and developers see that there is a market for the credits, and that the credits have value. (Machemer, Kaplowitz, Edens, 1999) Where a bank does not actively buy and sell TDR credits, the bank often facilitate private transactions by bringing buyers and sellers together.

It is important to understand that TDR programs may either be voluntary or mandatory. Under voluntary programs, a community identifies sending zones by adopting overlay zones, but the underlying zoning remains in place. A landowner within the overlay sending zone may either build at the density proscribed in the underlying zoning or agree to voluntarily restrict his or her property upon the sale of the property's development rights for use in a receiving zone. In a mandatory TDR program, the zoning classification of the identified area to be protected is downzoned or otherwise designated in the zoning ordinance as property that can no longer be developed in a way that would destroy the resource to be preserved. (Machemer, Kaplowitz, Edens, 1999) The Highlands TDR Program is a mandatory program because the Highlands Act and Rules restrict the development potential of Preservation Area property. Preservation landowners do not have the option of opting-out of the restrictions to realize the development potential that existed prior to passage of the Highlands Act.

## **B. History of TDR**

The general concept of TDR was first introduced in 1961 in an article by Gerald Lloyd published by the Urban Land Institute. (Fulton, Mazurek, Pruetz, Williamson, 2004) Mr. Lloyd proposed extending the concept of clustering, which permits developers to concentrate development on one

portion of a single parcel to preserve unique features (i.e. transferring density around a single site), to allow developers to transfer development between parcels. This would permit the transfer of development to parcels that were better able to accommodate development. (Fulton, Mazurek, Pruetz, Williamson, 2004)

New York City developed the first TDR program in the country to permit the severance and sale of development rights from one parcel to another not under the same ownership for the purpose of preserving historic landmarks. (Stevenson, 1998) Instituted in 1968 through an amendment to the New York Zoning Resolution, owners of designated historic landmarks could transfer the development potential of those sites to lots across the street or intersection. (Giordano, 1998) (Previously, transfers of development potential could only be made to adjoining lots under the same ownership.) This amendment provided landmark owners with additional opportunities to sell their development potential, and benefited them by increasing opportunities for the realization of economic gain. Although this program was the subject of a U.S. Supreme Court decision in 1978, the Court never ruled on the validity of the transfer mechanism or TDR in general.

Subsequent to New York City's TDR program, TDR programs were established in Southampton Township, NY in 1972; Buckingham Township, PA in 1975; and Eden, NY also in 1975. Calvert County, MD developed one of the first TDR programs to specifically protect farmland in 1978. (Machemer, Kaplowitz, Edens, 1999)

In New Jersey, the first efforts at introducing state-wide TDR in the State Legislature occurred in the mid-1970s. (Beetle, 2003) At the municipal level, TDR programs were attempted in Hillsborough and Chesterfield Townships, in Burlington County in 1975. (Machemer, Kaplowitz, Edens, 1999) These initial efforts generally proved unsuccessful, but laid the foundation for adoption of the TDR program in the New Jersey Pinelands in 1981. Adoption of the Pinelands Development Credit program was followed by the establishment of the Burlington County TDR pilot project in 1989, and programs in Chesterfield and Lumberton Townships. Then in March 2004, the State Legislature enacted the State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 et seq. Each of these programs is discussed more fully below in Section IV.

### C. Legality of TDR

The U.S. Supreme Court first visited the use of TDR in 1978 in the case Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978). In that case, Penn Central Transportation Company owned the historic Grand Central Terminal and several surrounding properties in New York City. It sought to construct a 55-story office tower above Grand Central Terminal, but the company was prohibited from doing so under the City's Landmarks Preservation Law. (Miller 1999) However, Penn Central was entitled to TDRs as a proxy for the prohibited development, which it could utilize to develop the air space above adjacent properties Penn Central owned. Penn Central argued that the development restrictions imposed by the Landmarks Preservation Law amounted to an unconstitutional regulatory taking in violation of the Fifth Amendment. The Supreme Court found that the development restrictions imposed by the Landmarks Preservation Law did not result in a taking. Important in its decision was the fact that the air rights above the Terminal could be transferred to other parcels. Specifically the Court stated:

Although appellants and others have argued that New York City's transferable development-rights program is far from ideal, the New York Courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well have not constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation. (Penn Central Transportation Co. v. New York City, 438 U.S. 104, 137 (1978))

It must be noted that the Supreme Court did not specifically address the legality of TDR. It merely supported TDR implicitly by recognizing that the transferable development rights should be considered in determining the economic impact of the Landmarks Preservation Law.

The Supreme Court reexamined the use of TDR in Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997). Under the land use regulations promulgated by the Tahoe Regional Planning Agency, Bernadine Suitum was prohibited from developing her property because it lies within a "Stream Environment Zone." However, the property was given a transferable development right, which could be sold for use on other properties within the Tahoe region, to limit the economic impact imposed by the agency's regulations. Mrs. Suitum sued the agency arguing that the prohibition on development amounted to a regulatory taking. As in Penn Central, the Supreme

Court did not rule on the validity of TDR, but held that Mrs. Suitum did not have to attempt to sell her TDR for her to have her day in court.

Like the Supreme Court in Penn Central and Suitum, the New Jersey Supreme Court has not specifically ruled on the legality of TDR. However, the court has implicitly recognized TDR as a legitimate land use tool in the context of a comprehensive land use management system. In Gardner v. Pinelands Commission, 125 N.J. 193 (1991), Hobart Gardner, a farmer who owned 217 acres in the Pinelands, sought to overturn the Pinelands Comprehensive Management Plan (“CMP”) that had been adopted by the New Jersey Pinelands Commission (“Commission”). Gardner claimed that the land use restrictions imposed on his property, i.e. that his property should remain in agricultural production and limited his development options, resulted in an unlawful taking requiring compensation from the State. After the State refused payment, Gardner filed an action for inverse condemnation against the Commission. In determining that the CMP did not affect a taking of Mr. Gardner’s property, the New Jersey Supreme Court noted that he continued to have several viable, economically-beneficial uses of his land under the revised CMP, including continuing its use as farmland. Similar to the U.S. Supreme Court’s decision in Penn Central, the availability of TDR also served as an important factor in determining whether the economic impacts imposed by the CMP went too far and constituted a regulatory taking.<sup>2</sup>

Evident from the above discussion is the fact that neither the U.S. Supreme Court, nor the New Jersey Supreme Court have specifically ruled on the validity of TDR. That said, it is also apparent that the use of TDR has been recognized as a legitimate tool to offset the economic effects of development restrictions imposed to secure important public benefits, such as the preservation of sensitive resources.

#### **IV. TDR PROGRAM DEVELOPMENT**

Development of the Highlands Region TDR program is framed by the TDR provision of the Highlands Act, the applicable requirements of the State TDR Act, the history of TDR’s use in New Jersey, the legal precedents addressing relevant aspects of any potential TDR program, and, of

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<sup>2</sup> The court stated “Penn Central could offset its loss by transferring valuable property rights to other properties, even if such transfers did not fully compensate it. Plaintiff possesses the similar right to offsetting benefits; it may receive Pinelands Development Credits in return for recording the deed restrictions.”

course, public input. Within this frame of reference, the Highlands Council has undertaken a number of activities to gather and analyze information for development of the Highlands TDR Program. These activities include:

- Reviewing all relevant statutory provisions and outlining statutory requirements;
- Reviewing existing TDR programs both within and without New Jersey for identification of mechanisms to accomplish TDR program purposes and goals;
- Utilizing stakeholder groups and Technical Advisory Committee (“TAC”) meetings to explore TDR program alternatives and opportunities; and
- Identifying TDR program purposes and goals based upon statutory requirements, legal precedent, TDR experience in New Jersey, and public input.

The information derived from these activities is described below in detail.

#### **A. Highlands Act TDR Provision**

With the adoption of the Highlands Water Protection and Planning Act, P.L. 2004, c.120 (N.J.S.A. 13:20-1 et seq.) (Highlands Act), the State Legislature authorized the Highlands Council to establish a Highlands Region TDR program. This program is to be regional in scope and is to be premised on the resource assessment and smart growth component of the Regional Master Plan, which elements the Highlands Council is presently developing. (N.J.S.A. 13:20-13.a)

An initial requirement of the Highlands TDR Program is that it be consistent with the State TDR Act, except as provided for by the Highlands Act TDR provision. (N.J.S.A. 13:20-13.a) Although this mandate seems clear on its face, there are provisions of the State TDR Act that appear incompatible with creation of a regional TDR program. For example, the State TDR Act contemplates that a municipality must submit its development transfer ordinance to the county for approval. (N.J.S.A. 40:55D-149) The county is to review the development transfer ordinance with regard to a number of criteria, one of which is the “sufficiency of the receiving zone to accommodate the development potential that may be transferred from sending zones and a reasonable assurance or marketability of any instruments of transfer that may be created.” Given that not all municipalities in the Highlands Region may be appropriate to serve as a potential receiving zone, how would a municipality satisfy this particular criterion? Another example is the requirement under the State TDR Act that any receiving zone must be sufficient to accommodate all

of the development potential of a municipally designated receiving zone. (N.J.S.A. 40:55D-145) As with the county requirement, this criterion cannot be satisfied on a municipal basis where the Council is to establish a region-wide TDR program. Must a receiving zone within a Highlands municipality be able to accommodate all of the development potential from sending zones around the region? Surely, this is not what the Legislature intended. As the courts have noted, statutes are to be read sensibly rather than literally and the controlling legislative intent is to be presumed as consonant to reason and good discretion. (Roig v. Kelsey, 135 N.J. 500, 515 (1994))

To address these conflicts where they arise, the Highlands Council should be guided by the principle of *in pari materia* (“upon the same matter or subject”). Where two legislative enactments that deal with the same subject matter appear to conflict, courts are required to reconcile the conflicts and read the laws as consistent to give effect to both expressions of the Legislature’s purpose. (New Jersey State League of Municipalities v. Department of Community Affairs, 310 N.J.Super. 224, 234 (App. Div. 1998)). Consequently, where a provision of the State TDR Act conflicts with the development of a regional program, that provision should not be applicable. Where, however, there is no conflict, that provision of the State TDR Act should guide and apply to the Highlands TDR Program. This recommendation is supported by the Council’s TDR counsel Charles Siemon, Esq. Mr. Siemon notes that a determination of consistency with the State TDR Act should be determined on the basis of whether the elements of a Highlands TDR program conflict with an express requirement of the State TDR Act. If a provision, for example, makes no sense in the context of the Highlands program, then almost by definition, the Highlands program would be consistent because it is not in conflict; that is, the circumstances to which the State TDR Act applies does not exist under the Highlands program. Or, to state the proposition in the inverse, because circumstances established in the State TDR Act do not occur under the Highlands Act, the manner in which the Highlands program addresses the circumstances that do occur are consistent because there is no conflict.

In addition to developing the Highlands TDR Program consistent with the State TDR Act, there are a number other important provisions mandating Council action, including:

- Identify sending zones and voluntary receiving zones; (N.J.S.A. 13:20-13.b and c)
- Working with municipalities, identify centers, designated by State Planning Commission as voluntary receiving zones; (N.J.S.A. 13:20-13.d)

- Develop advisory or model TDR ordinances; (N.J.S.A. 13:20-13.f)
- Conduct a real estate analysis of the Highlands Region; (N.J.S.A. 13:20-13.g)
- Set the initial value of a development right (N.J.S.A. 13:20-13.h(1)); and
- Give priority consideration to any lands that comprise a major Highlands development that would have qualified for the third exemption under the Highlands Act but for the lack of a necessary State permit. (N.J.S.A. 13:20-13.h(2))

As noted above, the Highlands Act obliges the Highlands Council to identify sending zones and voluntary receiving zones. To meet this requirement, the Council adopted criteria for the identification of sending zones and voluntary receiving zones on February 23, 2006, based in part on the criteria for sending and receiving zones set forth in the State TDR Act. The identification of sending zones and voluntary receiving zones is criteria-based because the resource assessment and smart growth components of the Regional Master Plan have not yet been completed. Until those components are done, the Council will not have sufficient information to identify specific areas, particularly potential voluntary receiving zones.

The purpose of the sending zone criteria is to be as inclusive as possible to ensure that those properties impacted by the Highlands Act and the Highlands Rules may participate the Highlands TDR Program. The sending zone criteria adopted by the Council are as follows:

In consultation with municipal, county and State entities, the Highlands Council may identify any land in the Preservation Area as an area appropriate as a TDR sending zone provided that the land could have been developed as of August 9, 2004, based upon municipal zoning and land use regulations then in effect, and State and federal environmental laws and regulations then in effect, but which development is now precluded or severely constrained by the restrictions imposed pursuant to the Highlands Act. The Highlands Council may deem land within the Preservation Area inappropriate as a sending zone where that land is appropriate for redevelopment as either a brownfield site designated by the Department of Environmental Protection or a site at which at least 70% of the area thereof is covered with impervious surface, or such land otherwise qualifies for an exemption or waiver from strict compliance with the standards at N.J.A.C. 7:38. (Highlands Council Resolution 2006-09)

Utilizing the above criteria the Highlands Council envisions a process whereby Preservation Area landowners will apply to the Council for a determination as to how many development rights or credits their respective properties are entitled. Specifically, the Highlands Council may utilize an individual property review process to assign TDR credits on a lot-by-lot basis that will be developed by the Council as part of the Regional Master Plan. It is important to note that all lands in the Preservation Area are eligible to participate in the TDR program provided they satisfy the sending zone criteria. Thus, any land types are eligible, including but not limited to agricultural lands, woodlands, environmentally sensitive lands or lands zoned for residential, commercial or industrial development.

In addition to Preservation Area properties, the Highlands Council is also charged with providing assistance to municipalities that wish to create additional sending zones on any properties within the Planning Area portion of their boundaries and which are designated for conservation in the Regional Master Plan. (N.J.S.A. 13:20-13.f) Once these areas are designated by a municipality and certified by the Highlands Council, these properties will also be eligible to participate in the Highlands TDR program as sending zones.

As important as determining which properties in the Preservation Area may participate in the TDR program is determining when those sending zone properties are eligible to have their development potential purchased. To aid this determination, the Highlands Act mandates that the Highlands Council give priority consideration for inclusion in a transfer of development rights program any lands that comprise a major Highlands development that would have qualified for an exemption pursuant to paragraph (3) of subsection a. of section 30 of the Highlands Act but for the lack of a necessary State permit. (N.J.S.A. 13:20-13.h(2)) An application for such a State permit must have been submitted to NJDEP and deemed by NJDEP to be administratively complete on or before March 29, 2004.

With respect to voluntary receiving zones, specific identification of these zones will occur during the Regional Master Plan conformance process. Of course, a focus of that identification will be on existing and proposed centers under the State Development and Redevelopment Plan. That focus will be tempered, however, by resources constraints, infrastructure capacity and real estate market vitality. A similar process will be utilized to identify voluntary receiving areas outside of the

Highlands Region but within the seven Highlands counties. The voluntary receiving zone criteria are:

Any area in the Planning Area that is appropriate and suitable for development utilizing existing resource assessment information and exhibits one or more of the following characteristics may be appropriate as a voluntary TDR receiving zone provided that it has been approved by the Highlands Council in consultation with municipal, county and State entities:

- (1) Land with access to multi-modal transportation utilizing the existing transportation network;
- (2) Land that is proximate to existing areas of concentrated development patterns and existing population centers; or
- (3) Land that is underutilized or previously developed.

In addition, a voluntary TDR receiving zone must demonstrate access to available water supply and wastewater infrastructure with the capacity to support increased development, and the proposed zoning must be economically viable and be shown to be able to accommodate an increase in density above that allowed in municipal zoning in place at the time of adoption of a voluntary TDR ordinance. The Highlands Council will work with municipalities and the State Planning Commission to identify centers, designated by the State Planning Commission, as voluntary receiving zones for the transfer of development rights program. (Highlands Council Resolution 2006-09)

The above criteria with respect to both sending and voluntary receiving zones are preliminary and do not preclude the Highlands Council in the future from modifying the criteria or identifying other areas within the Highlands Region that may serve as sending zones, or within the seven Highlands counties as voluntary receiving zones.

In addition to identifying sending and receiving zones, the Highlands Act mandates that the Council conduct a real estate analysis of the Highlands Region. To this end, the Highlands Council has engaged the services of Integra Realty Resources to assist in assessing the real estate market conditions of the Highlands Region. As part of this work, Integra is also assisting Council staff with

development the initial method for allocating and valuing the development potential from the sending zones. This work will be discussed in depth in subsequent technical reports.

An essential aspect of the Highlands Act TDR provision is the incentives provided for municipalities that serve as voluntary receiving zones. The purpose of these incentives is to induce municipalities in the Planning Area, or municipalities outside the Highlands Region but within the seven Highlands counties, to voluntarily designate receiving zones in their communities. Municipalities become eligible for the incentives where they designate receiving zones which provide for a minimum residential density of five dwelling units per acre. The municipality must also be deemed in compliance with the Regional Master Plan if its lies within the Highlands Region, or have its petition for initial municipal master plan endorsement approved by the State Planning Commission. Where these requirements are met, municipalities are eligible to receive the following incentives:

- The ability to charge up to \$15,000 per unit impact fee for development projects within the voluntary receiving area;
- Up to \$250,000 in an enhanced planning grant to offset the planning and other related costs of designating and accommodating voluntary receiving zones;
- A grant to reimburse the reasonable costs of amending municipal development regulations to accommodate voluntary receiving zones; and
- The ability to control the design of voluntary receiving zones. (N.J.S.A. 13:20-13.k and l)

Municipalities in the Planning Area are eligible for two additional incentives. First, they are entitled to legal representation by the State in challenges to municipal decisions regarding the voluntary receiving area. It is important to note, however, that such representation may only be provided where the municipal decisions are consistent with the Regional Master Plan and involve a development application that provides for the disturbance of two acres or more of land or a cumulative increase in impervious surface by one acre or more. Second, they are to be accorded priority status for any State capital or infrastructure programs. Municipalities outside of the Highlands Region but within the seven Highlands counties are not eligible for these two incentives, but may be eligible for incentives available under the State Development and Redevelopment Plan endorsement process administered by the Office of Smart Growth.

## **B. State Transfer of Development Rights Act**

Enacted in March 2004, the State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 et seq. (State TDR Act) is the first state-wide comprehensive TDR enabling legislation.<sup>3</sup> It authorizes municipalities to establish intramunicipal TDR programs by ordinance as well as enter into inter-municipal agreements with other municipalities to establish a joint program. Municipalities establishing a joint TDR program need not be in the same county.

Prior to adopting a TDR ordinance, the State TDR Act mandates that a municipality must undertake a number of planning activities. First and foremost, the municipality must adopt a development transfer plan element of its municipal master plan. This master plan element must include:

- an estimate of the anticipated population and economic growth in the municipality for the succeeding 10 years;
- the identification and description of all prospective sending and receiving zones;
- an analysis of how the anticipated population growth is to be accommodated within the municipality in general, and the receiving zone or zones in particular;

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<sup>3</sup> In 1995, the State Legislature amended the Municipal Land Use Law to permit clustering and planned unit development to non-contiguous sites. By doing so, a municipality could transfer the development potential of non-contiguous parcels, which the municipality sought to preserve, to property that had the infrastructure to support more intense development. The transfer of the development potential to the appropriate site permits that site's owner to develop at a density greater than that permitted by the underlying zoning, provided the development ensures that some amount of the site is encumbered as open space.

Unlike traditional TDR, a municipality does not identify sending and receiving zones. Instead, the municipality and landowners are given the flexibility to determine how the transfer occurs and what the development value is of the non-contiguous parcels. For example, in Hainesport, the owner of a 131-acre farm transferred the density of his property, which was zoned for 65 homes, to a site zoned for 75 homes elsewhere in the municipality. The farmer placed a conservation restriction on his property preserving the property for agricultural use only. He then gave half of the deed-restricted farm to the developer. The developer of the second property was permitted to build the 140 homes and was also given a bonus of 26 additional homes for a total of 166 homes. The developer and the farmer agreed to share the proceeds from the sale of the home lots as payment for the development potential of the deed-restricted farm.

Often called "baby TDR," the use of clustering or planned unit development with non-contiguous parcels has been used throughout New Jersey, but legislators continued to push for the adoption of state-wide transfer of development rights enabling legislation.

- an estimate of existing and proposed infrastructure of the proposed receiving zone;
- a presentation of the procedure and method for issuing the instruments necessary to convey the development potential from the sending zone to the receiving zone; and
- explicit planning objectives and design standards to govern the review of applications for development in the receiving zone in order to facilitate their review by the approving authority. (N.J.S.A. 40:55D-141)

Along with the development transfer element, a municipality must also adopt a capital improvement program for any identified receiving areas as well as a utility service plan element of its master plan. These last two planning requirements are meant to ensure that a receiving zone has or will shortly have the infrastructure and utilities necessary to service the increased development to be located within the zone.

Integral to adopting the development transfer ordinance, a municipality must conduct a real estate market analysis. The purpose of this study is to examine the relationship between the development rights anticipated to be generated in the sending zones and the capacity of designated receiving zones to accommodate the necessary development. In essence, the Act seeks to ensure that there are sufficient opportunities in the receiving zones to absorb the number of development rights to be transferred from the sending zones. The Act delegates authority for adopting the rules governing a real estate market analysis to the Office of Smart Growth. OSG adopted these rules in December 2005, which set forth specific requirements for who may conduct the real estate market analysis, what that analysis entails, and what information must be incorporated into the real estate market analysis report. (N.J.A.C. 5:86-1.1 et seq.)

In addition to conducting the above planning activities, a municipality must also receive approval of its initial petition for endorsement of its master plan by the State Planning Commission. This approval must occur prior to the municipality adopting its development transfer ordinance, and must include the development transfer plan element. If a municipality has already received initial plan endorsement, then it must receive approval of the development transfer plan element as an amendment to its plan endorsement.

Another important requirement under the State TDR Act is the need to conduct periodic reviews of the municipal TDR program. The Act mandates that the local planning board review the municipal

TDR ordinance and real estate market analysis at the end of the 3 years after ordinance adoption. This review must include an analysis of development potential transactions in both private and public market, an update of current conditions in comparison to the development transfer plan element of the local master plan and capital improvement program, and an assessment of the performance goals of the development transfer program. At year 5, the planning board must undertake a similar review. If after the 5-year review period at least 25% of the development potential has not been transferred, the local TDR ordinance is presumed no longer reasonable as well as any zoning changes adopted as part of the development transfer program. This assumption may be overcome if, within 90 days after the end of the 5-year period one of the following is met: (i) municipality immediately takes action to acquire the difference between the development potential already transferred and the 25% of the development potential created in the sending zone; (ii) a majority of the property owners in the sending zone who own land from which the development potential has not yet been transferred agree that the local TDR ordinance should remain in effect; (iii) the municipality can demonstrate that low levels of development potential transfer activity are due to low levels of development demand in general; or (iv) the municipality can demonstrate that less than 25% of the remaining development potential in the sending zone has been available for sale at market value during the 5-year period.

The State TDR Act authorizes municipalities and counties to establish development transfer banks. (N.J.S.A. 40:55D-158.a) These banks may purchase, sell or exchange development potential, but may do so only in ways that do not substantially impair the private sale or transfer of development potential. To determine the value of development potential to be acquired or sold for its own development potential transactions, the bank may establish a municipal average of the value of the development potential of all property in a sending zone of a municipality within its jurisdiction, which value shall generally reflect market value prior to the effective date of the local TDR ordinance.

To assist municipalities in determining what areas of their communities may serve as sending or receiving zones, the Act specifies certain criteria or characteristics that must be satisfied. (N.J.S.A. 40:55D-144 and 145) Sending zones may be comprised of lands that are agricultural or ecological in nature such as woodlands or wetlands, lands that present unique and distinctive aesthetic, architectural, or historical points of interest in the municipality; or other improved or unimproved areas that should remain at low densities for reasons of inadequate transportation, sewerage or other

infrastructure. Potential receiving zones must be appropriate and suitable for development and are required to be sufficient to accommodate all of the development potential of the sending zone. The Act also maintains that a receiving zone have a reasonable likelihood that a balance is maintained between the sending zone land values and the value of the transferable development potential. In addition, in assessing the likelihood that a potential receiving zone is appropriate, a municipality must determine that development potential of receiving zone is realistically achievable considering: (i) availability of existing infrastructure; (ii) all provisions of the zoning ordinance; and (iii) local land market conditions as of the date of the adoption of the development transfer ordinance. Another important aspect of the receiving zone is that the infrastructure necessary to support the development of the receiving zone either exist or be scheduled to be provided so that no development requiring the purchase of transferable development potential shall be unreasonably delayed because the necessary infrastructure will not be available due to any action or inaction by the municipality.

Lastly, the State TDR Act requires that the municipality submit its proposed ordinance and relevant master plan elements to the county planning board and, if agricultural land is involved, county agriculture development board review the proposed development transfer ordinance. (N.J.S.A. 40:55D-149) The county planning board must make a determination within 60 days of receiving the ordinance either recommending or not recommending the ordinance. If the county planning board does not recommend enactment, it must set forth its reasons and work with the municipality to address them. If the municipality and the county cannot resolve the planning board's objections, the municipality must petition the Office of Smart Growth to render a final determination. The Office of Smart Growth may approve, approve with conditions, or disapprove the proposed development transfer ordinance. If approved with conditions, the municipality must incorporate those conditions into the final enacted ordinance. If disapproved, the municipality may not enact the proposed ordinance. It may appeal the Office of Smart Growth's decision, however, to the Appellate Division of Superior Court.

### **C. Past Experience with TDR in New Jersey**

Prior to adoption of the State TDR Act, and more recently, the TDR provision of the Highlands Act, a regional entity and several municipalities established TDR programs. Like the requirements of the Highlands Act TDR provision and the State TDR Act, the State's past experience with TDR

programs will also influence and shape the design of the Highlands TDR program. Summaries of each of the programs are provided below. A more detailed discussion of each program is included in Appendix A.

### ***Pinelands Development Credit Program***

The Pinelands Development Credit (“PDC”) Program was the first established TDR program in the State. Instituted in 1981, this program has preserved nearly 48,000 acres since its inception. (Pinelands Development Credit Bank, June 8, 2006) The PDC Program is a component of the Pinelands Comprehensive Management Plan (“CMP”) and is administered by the Pinelands Commission and the Pinelands Development Credit Bank. The CMP separates the Pinelands Region in southern New Jersey into eight separate districts and establishes environmental regulations and development standards governing those districts. The regulations and standards are then implemented by the region’s municipalities by amending their respective local master plans and land use regulations to conform to the requirements of the CMP.

The PDC program seeks to offset the severe development restrictions imposed within the Preservation Area District, Agricultural Production Areas and Special Agricultural Production Areas. These management areas serve as sending zones for the PDC Program. To determine the number of PDCs for a given property in one of the identified sending zones, a landowner requests a Letter of Interpretation (“LOI”) from the Pinelands Commission. Through the LOI process, the Pinelands Commission applies allocation formulas based upon a parcel’s location and its land characteristics.

Under the PDC Program, Regional Growth Areas established by the CMP serve as receiving zones. Within these areas, purchasers of PDCs may use the development rights to build at densities above the base density.

Before a property owner may sell his or her PDCs, the PDCs must be certified by the Pinelands Development Credit Bank. To obtain certification, the property owner submits an application, the deed, and several other documents, including a signed deed restriction appropriate for the location of the property. Once this information is submitted to the bank and there are no issues, the deed restriction is recorded with the county clerk and a Pinelands PDC Certificate is issued to the property owner.

The value of PDCs is established on the open market through the purchase and sale of PDCs between private parties. The most recent sales information indicates that the price of a PDC is currently ranging between \$60,000 and \$160,000 per PDC or \$15,000 to \$40,000 per development right. (Sales Activity through April 25, 2006, NJ Pinelands Development Credit Bank)

### ***Burlington County***

In 1989, the State Legislature adopted the Burlington County Transfer of Development Rights Demonstration Act, N.J.S.A. 40:55D-114 et seq. The purpose of the act was to permit Burlington County to serve as a pilot project for the State in the creation and implementation of TDR. The Legislature chose Burlington County because of its strong agricultural base. Under the Act, a municipality in Burlington County is authorized to establish a TDR program through the adoption of a local ordinance. To date, only two municipalities have established voluntary intra-municipal TDR programs under the Act: Chesterfield and Lumberton Townships.

### ***Chesterfield Township***

Chesterfield Township implemented its municipal TDR program in 1997 after nearly ten years of study and program development. Chesterfield's sending area is the roughly 10,000 rural and primarily agricultural acres that are located outside of the settled and developed areas of the Township. The receiving area within the Township, known as Old York Village, comprises 560 acres in the northwest corner of Chesterfield. The Township selected this receiving area because of its proximity to existing water treatment facilities in Bordentown and its location adjacent to several transportation corridors, including Interstate 295. The receiving area is planned to accommodate 1,200 residential housing units, and includes a variety of attached and detached single family housing types as well as a new elementary school, which is adjacent to centralized active recreation areas. The site plan for Old York Village also incorporates a network of neighborhood parks and a mixed-use village center hosting retail, office and convenience uses intended to serve local market needs.

The TDR credit allocation formula employed by Chesterfield is based upon a parcel's soil suitability to accommodate septic. The best soils, those with only "slight" limitations to accommodate septic, were awarded one credit for every 2 acres. Soils that were "moderate" in regard to septic suitability were awarded one credit for every 10 acres. Soils that were "severe" in regard to septic limitations were awarded one credit for every 50 acres. Chesterfield utilized this approach because it reflected

the number of units that could realistically be constructed on a sending area parcel under existing zoning. The TDR program also offers an appeal procedure to landowners who feel that they have been under-allocated credits due to inaccurate mapping or acreage determination.

Under the Chesterfield Master Plan, a single TDR credit can be used to construct one single family home and fractions of credits may be used to construct smaller units such as smaller homes, town houses and apartment units. Credits may also be used towards development of commercial and institutional uses; one credit entitles its holder to development of 2,000 square feet of commercial or retail space.

Following the allocation of credits to a parcel, there is a three step process toward “extinguishing” TDR credits. First, landowners apply to “enroll” their credits into the Chesterfield TDR program. At the time credits are enrolled, the land from which the credits originate is “deed restricted” against future development. While it is possible to enroll some but not all of a parcel’s credits, the entire parcel is deed restricted with the enrollment of the first credit. Second, once credits are enrolled in the TDR program they can be “assigned” to a developer who is then free to use the credits in the receiving area in accordance with the Municipal Master Plan. Third, Credits are “extinguished” when the credit is exercised in a developed project. The Chesterfield Township municipal clerk handles the recording of deed restrictions on parcels that enroll in the TDR program. The municipal clerk also records the retirement or extinction of credits when employed in a particular lot and block in the receiving area. The Burlington County TDR Bank works cooperatively with the Township to help track credit transactions and recordings.

TDR credit values are currently determined through an auction process. At the most recent auction held in July 2004, 50 credits sold at \$50,000 per credit.

#### *Lumberton Township*

Lumberton Township was the first municipality to utilize the authority of the Burlington County Transfer of Development Rights Demonstration Act to develop and implement a voluntary municipal TDR program. Adopted in 1995, the first Lumberton TDR program seeks to preserve farmland in the western portion of the Township. Based upon the success of this program, in 2000, the Township adopted a second TDR program to preserve farmland in the municipality’s eastern

portion. As of March 2006, TDR had permanently preserved over 850 acres of farmland within the Township.

The sending areas for the first TDR program in the western portion of the township were designated in the October 1994 municipal master plan and comprised 1,513 acres. With the adoption the second TDR program in 2000, an additional 1,355 acres in the eastern portion of the Township were designated as sending areas.

Like Chesterfield's program, TDR credits are allocated to a sending area parcel based the parcel's suitability for septic. Relying on soil septic suitability, the Township devised a formula which allocates development credits at a rate of 0.5 credits per acre with soils that have slight septic limitations down to one credit per 50 acres where soils have severe limitations on septic suitability. Lumberton Township's TDR ordinance provides a process for a landowner to appeal the credit allocation of a parcel where the landowner believes more credit should have been allocated.

For a sending area landowner to participate in the TDR program, the landowner must enroll his or her property. Enrollment requires the landowner to submit an application, proof of title, a TDR easement and the necessary review fees. After verification by the municipality, the owner records the TDR easement which establishes the TDR credits.

The process of selling TDR credits is termed "assignment" under Lumberton's TDR program. To assign credits to another, the owner submits an application for assignment to the Township, including information regarding the potential purchaser and information concerning the recorded TDR easement. Once approved by the municipality, the assignment must be recorded within 90 days or the assignment is deemed null and void.

Initial credit values were established by the Township at \$10,000 per credit. Credit values are now determined on the open market.

Receiving areas within Lumberton are identified in the municipal master plan. Under the TDR program adopted in 1995, receiving sites are located in the Township's five Rural Agricultural/TDR Receiving Area zones. Within these receiving areas the density of a receiving site can increase from a minimum of 0.7 units per acre to a maximum of 4 units per acre. Under the TDR provision adopted in 2000, the designated receiving area consists of 185 acres zoned for an age restricted

community with mixed uses, including residential, neighborhood retail, office space, public or quasi-public facilities and open space. Within this receiving area, each age-restricted unit requires 0.7 TDR credits, and to achieve the maximum residential density of three units per acre, the receiving site developer must acquire 287 credits from the sending area.

To utilize TDR credits within a receiving area, the developer of the receiving site must “extinguish” the TDR credits. The developer must first obtain final approval for the project, conditional on the use of credits. The developer must then submit a deed of credit transfer with the application for TDR credit use and demonstrate ownership of the credits. After verification of credit ownership, a deed of credit transfer is signed and must be recorded before a building permit is issued.

Lumberton also established its own municipal TDR credit bank as part of its TDR program. The bank’s purpose is to facilitate the marketing of development credits between landowners with credit allocations and landowners who can use the credits. The bank is also empowered to purchase and sell development credits, at a price initially established by the board of the bank, and subject to the fluctuations of the market.

### ***Other NJ Programs***

Prior to adoption of the Burlington County Transfer of Development Rights Demonstration Act in 1989, three communities in New Jersey experimented with the use of TDR. These municipalities are Bernards Township, Somerset County, Hillsborough Township, Somerset County, and West Windsor Township, Mercer County. Although these programs remain in place, they have not been used significantly throughout their existence. These programs are described in Appendix A.

### **D. TDR Programs Outside of NJ**

Another important source of information in developing the Highlands TDR program is garnered by reviewing and critically examining elements of successful TDR programs as well as those that are ineffective. The purpose of this review is to determine the success of these programs in both preserving important resource lands and ensuring adequate TDR credit values. This review is also important in that it may identify elements of these programs that could be incorporated into the Highlands TDR program to ensure its success. Highlands Council staff, with the support of its consultants, reviewed the following programs: Long Island Pine Barrens, Suffolk County, New

York; Tahoe Regional Planning Agency; Montgomery County, Maryland; Calvert County, Maryland; Charles County, Maryland; Collier County, Florida; and Boulder County, Colorado.

Having reviewed the above programs and others, as well as numerous commentaries regarding TDR programs, there are a number of factors that contribute to successful TDR programs like those in the New Jersey Pinelands and Montgomery County, Maryland. The factors may vary in significance due to facts surrounding a program's establishment and its underlying purpose and goals. However, each factor highlighted below is important to developing a viable and ultimately successful program.

- The TDR program should have clear objectives (Tripp, Dudek, 1989);
- The program should address problems of regional significance (Juergensmeyer, Nicholas, Leebrick, 1998);
- Sending areas should be clearly defined and designated, and relate to the objectives of the program;
- The original allocation of TDR credits to sending area properties should be simple and equitable;
- The program should clearly describe the permissible property uses remaining after development potential has been severed;
- The program should be the only means to exceed base density in designated receiving areas (Pruetz, 2003);
- The program should clearly articulate the development allowed in the receiving areas, both with and without TDRs;
- Receiving areas should be located where growth indicators are strong (Personal Communication with Larry Liggett);
- TDR credit values should be less than the marginal value of increased density in the receiving areas, otherwise no demand for credits will be generated;
- The agency administering the program should reduce the complexity, confusion and costs associated with the acquisition, transfer and use of TDRs (Juergensmeyer, Nicholas, Leebrick, 1998);
- The infrastructure needs to accommodate increased growth in designated receiving areas should be considered and prioritized;

- The administrating agency should market the program but not create unrealistic expectations (Personal Communication with Larry Liggett); and
- The administrating agency should monitor the program carefully and be willing to adjust program parameters to address changing market conditions.

Each of the factors listed above should be considered as the Highlands TDR program is developed in support of the Regional Master Plan.

## **E. Public Input**

In addition to examining the statutory requirements of the Highlands Act and the State TDR Act, as well as reviewing TDR program both within and without New Jersey, it is essential that the Highlands Council receive public input on the development of the TDR program. To this end, the Highlands Council staff has held numerous meetings and conducted six initial stakeholder group meetings to identify the TDR program’s purposes and goals. To date, the Highlands Council or its staff has met with the following agencies, organizations, municipalities and individuals:

- State TDR Bank
- State Agriculture Development Committee
- Office of Smart Growth
- NJ Meadowlands Commission
- NJ Pinelands Commission
- Pinelands Development Credit Bank
- Green Acres Program of NJDEP
- NJ Farm Bureau
- NJ Builders Association
- Community Builders Association
- Environmental Defense
- Regional Plan Association
- Morris County Park Commission
- Morris County Planning Board
- Morris County Preservation Trust
- Sussex County Office of Farmland Preservation
- Association of NJ Environmental Commissions
- Upper Raritan Watershed Association
- Conservation Resources, Inc.
- Land Use Law Center, Pace University School of Law
- Clarke Caton Hintz
- City of Clifton
- Town of Morristown
- Borough of North Haledon
- Individual Property Owners

From January through mid-April 2006, Council staff conducted six stakeholder meetings with the development community, environmental community, agricultural community, relevant State agencies and individual property owners. During these meetings, Council staff provided an overview of the TDR provision of the Highlands Act and the issues related to TDR program development which with the Council is wrestling. In addition, during each meeting, Anthony M. Graziano of Integra Realty Resources gave a presentation on issues that affect market value of property. Based upon these meetings, the following recommendations were highlighted by a number of the stakeholder groups:

- The Highlands TDR Program must be simple and understandable to encourage participation of buyers and sellers;
- The market for sale of TDR credits must be transparent and efficient;
- Property owners in the sending zones must know what rights are being severed from their property and what limitations will be placed on their property;
- The process of certifying and transferring TDR credits must be simple and not cost prohibitive;
- Purchasers of TDR credits in the voluntary receiving zones must understand what the TDR credits entitle them to do;
- The Highlands TDR Program should consider awarding bonus TDR credits to properties with unique ecological or agricultural characteristics to achieve the preservation goals of the Highlands Act; and
- No matter what TDR credit valuation methodology is employed, property owners should have some method to dispute and resolve differences of opinion and seek clarification on assessment of TDR credit values.

Highlands Council staff also sought input on program purposes, goals and mechanisms from the TDR Technical Advisory Committee (“TAC”). The TDR TAC is comprised of professionals and others with expertise in land use, property valuation, acquisition strategies, finance, and real estate markets. The purpose of the TDR TAC is to advise the Highlands Council on development of the TDR program keeping in mind that any recommendations by the TAC are advisory only. Highlands Council staff held meetings with the TAC on July 20, 2005, and again on March 27 and 28, 2006.

Based upon these meetings, the TDR TAC has made the following recommendations to the Council:

- Keep allocation of TDR credits simple, regional and uniform;
- Use an active Highlands TDR credit bank to serve as an “exchange” to account for regional valuation differences in both sending and receiving zones;
- The TDR program should also allocate TDR credits to undevelopable resource lands because these lands have a unique value not reflected in traditional valuations of development rights;
- The Highlands Council needs to establish other means for credit demand, including:
  - Settlement of natural resource damages (NRD) claims;
  - Variances; and
  - Allow private land trusts to buy TDR credits for retirement;
- The Highlands Council needs to make a long-term commitment to balance supply and demand of TDR credits to maintain their value over time; and
- The Highlands Council must ensure appropriately designated and designed voluntary TDR receiving zones that do not exceed the carrying capacity (both ecological and infrastructure-related) of the land.

## **V. HIGHLANDS TDR PROGRAM PURPOSES & GOALS**

### **A. Program Purposes**

Based upon the requirements of the Highlands Act, the State TDR Act, and the discussions held with the above entities, three essential and equally important purposes must be achieved through the Highlands TDR Program. First, the program must serve as another land use tool to aid the Highlands Region and its municipalities to protect those resources that make this region so unique: its water, its forests and its farmland. Second, the program must provide an additional means for landowners to receive equity out of their lands, even though those lands may have been affected by the Highlands Act and Rules. Third, the program must serve as a catalyst to ensure proper planning for smart development within designated receiving zones.

## **B. Program Goals**

Through the input of the stakeholder groups and the TDR TAC, as well as the review of the State TDR Act, the TDR provision of the Highlands Act, and other TDR programs, a set of goals has been developed for the Highlands TDR program to achieve the three primary program purposes described above. The goals are:

- Develop an understandable program that addresses the concerns of affected land owners and the development market;
- Identify sending and receiving zones consistent with the Highlands Regional Master Plan;
- Provide a predictable process that recognizes a fair return on the use and utility of land in the sending zones;
- Ensure that program clearly describes the remaining uses of land permitted after TDR credits are severed from sending zone parcels;
- Establish mechanisms that allow sending zone landowners to borrow against the value of certified TDR credits;
- Develop sufficient incentive mechanisms and broad-based stakeholder support to create the highest possible demand for credits, which in turn will maximize the value of credits from the sending zones;
- Provide sending zone landowners with an appeal mechanism to dispute and resolve differences of opinion regarding the assessment of TDR credit allocations;
- Ensure appropriately designated and designed voluntary receiving zones that do not exceed the carrying capacity, both ecological and infrastructure-related, of the land;
- Establish a process for voluntary receiving zones that will result in clearly articulated permitted development both with and without the use of TDR credits; and
- Provide mechanisms for those developing with TDR credits in voluntary receiving zones to achieve prompt development approvals.

With the above purposes and goals in mind, the Highlands Council staff is currently developing the framework for the Highlands TDR program. It is anticipated that this framework will be completed by early August, with the Highlands Council reviewing and approving the program elements throughout the months of August and September. Once the Highlands Council has approved the

Highlands TDR program framework, all details of the program will be established for inclusion in the draft Regional Master Plan due in October.

## **VI. NEXT STEPS**

As noted in the Executive Summary, this technical memorandum provides a background on the concept, history and legality of TDR and explains the various resources that the Highlands Council staff has examined as it develops the Highlands TDR program. From this information, the staff has developed the TDR program's purposes and goals, which will influence program structure and procedures. Subsequent TDR technical reports will examine alternatives for major program elements, ultimately explaining staff's recommendations for program structure, which staff believes will achieve the program's purposes and goals in support of the Regional Master Plan, Smart Growth Component. Ongoing coordination will continue with Regional Master Plan elements including Utilities, Transportation, Land Preservation, Agricultural and Forested Lands Sustainability as well as the Regional Master Plan Implementation Framework.

## **APPENDIX A**

### **Past Experience with TDR in New Jersey**

Prior to adoption of the State TDR Act, and more recently, the TDR provision of the Highlands Act, a regional entity and several municipalities had established TDR programs. Like the requirements of the Highlands Act TDR provision and the State TDR Act, the State's past experience with TDR programs will also influence and shape the design of the Highlands TDR program. Each of these programs is explored below.

#### ***New Jersey Pinelands Development Credit Program***

The Pinelands Development Credit ("PDC") Program has been described as the "most ambitious, innovative and geographically extensive TDR program in the country." (Tripp, Dudek, 1989) Since its inception in 1981, the PDC Program has preserved 47,979.32 acres of the Pinelands region through the transfer of development rights. (Pinelands Development Credit Bank, June 8, 2006)

The PDC Program is a component of the Pinelands Comprehensive Management Plan ("CMP"). The CMP, adopted by the New Jersey Pinelands Commission in 1981, controls land use throughout the Pinelands to preserve the region's unique ecological and agricultural resources. (N.J.A.C. 7:50-1.1 et seq.) The Pinelands region itself is comprised of fifty-three municipalities in four counties and has a total land area of over 1 million acres. The CMP divides this region into eight separate districts and establishes environmental regulations and development standards governing those districts. The regulations and standards are then implemented by the region's municipalities by amending their respective local master plans and land use regulations to conform to the requirements of the CMP.

The Pinelands Commission established the PDC Program to offset the severe development restrictions imposed within the Preservation Area District, Agricultural Production Areas and Special Agricultural Production Areas. These management areas serve as sending zones for the PDC Program. PDCs are allocated to landowners in these districts based upon the land type and number of acres of a given parcel. For example, within the Preservation Area District, PDCs are allocated at one PDC per 39 acres of upland and two-tenths a PDC for 39 acres of wetlands. (N.J.A.C. 7:50-5.43(b)1.iii and iv) No PDCs are allocated to a parcel if it is 10 acres or less and is

already developed for a commercial, industrial or other such use. For parcels less than 39 acres, the property owner receives fractional PDCs at the same ratio established for the management area in which the parcel is located. The number of PDCs is also reduced by one quarter PDC for each single family dwelling existing on a parcel. Each PDC allocated to a parcel equals four transferable development rights.

Under the PDC Program, Regional Growth Areas established by the CMP serve as receiving zones. Within these areas, purchasers of PDCs may use the development rights to build at densities above the base density. It is important to recognize that the State Legislature authorized the Pinelands Commission to designate specific Regional Growth Areas in the CMP. Once the Pinelands Commission identified and designated the Regional Growth Areas, municipalities where these areas are located had to amend their municipal master plans and local development regulations to accommodate them.

To determine the number of PDCs for a given property in one of the identified sending zones, a landowner requests a Letter of Interpretation (“LOI”) from the Pinelands Commission. Through the LOI process, the Pinelands Commission applies the allocation formulas mentioned above based upon a parcel’s location and its land characteristics. The Commission then subtracts or adds credits depending upon other circumstances such as the existence of a home. There is no charge for the LOI application. PDCs are issued in denominations of 0.25 credits (quarter credits). Once an LOI is obtained from the Pinelands Commission, it is valid for two years. If the LOI is two years old or older, the property owner must obtain an “Update” from the Pinelands Commission by making a written request.

Before a property owner may sell his or her PDCs, the PDCs must be certified by the Pinelands Development Credit Bank. The Legislature established the bank in 1985 to promote the marketability of PDCs as well as record and track all PDC activity. As part of these activities, the bank certifies the number of PDCs allocated to a property through the LOI process. This is done to ensure that the property owner owns the property free of encumbrances. To obtain certification, the property owner submits an application, the deed, a 60-year title search, a 20-year upper and lower court search of liens and judgments, a copy of the tax map showing the property in question, a letter from any mortgage holder indicating that they understand the land will be encumbered with a deed restriction, and a signed deed restriction appropriate for the location of the property. Once

this information is submitted to the bank and there are no issues, the deed restriction is recorded with the county clerk and a Pinelands PDC Certificate is issued to the property owner. No PDCs may be sold without the deed restriction being recorded. A landowner selling PDCs retains title to the land and is allowed to continue using it for any non-residential use authorized by the CMP. Any future purchaser of that property is bound by the terms of the deed restriction.

The value of PDCs is now established on the open market through the purchase and sale of PDCs between private parties. It should be noted that Pinelands Protection Act, which established the Pinelands Commission, originally set the value of a PDC at \$10,000. The most recent sales information indicates that the price of a PDC is currently ranging between \$60,000 and \$160,000 per PDC or \$15,000 to \$40,000 per development right. (Sales Activity through April 25, 2006, NJ Pinelands Development Credit Bank)

Although the Pinelands Development Credit Bank primarily serves to administer the PDC program, it may also buy and sell PDCs, although there are limitations on these actions. When PDCs are purchased by the Bank, they are purchased at 80% of market value so that the Bank does not affect the open market. The Bank may also sell PDCs held by it, but only does so through an auction. To date only two auctions have been held, the most recent occurring approximately ten years ago. (Personal communication with Larry Liggett, Pinelands Commission, December 7, 2005) Importantly, the Bank may guarantee loans using PDCs for collateral.

As noted above, to conform to the CMP, municipalities are required to allow for the use of PDCs in their land use regulations. To distribute the bonus housing units evenly and maintain consistent housing types in various neighborhoods, municipalities designate zoning districts in which residential development will be permitted at densities ranging from less than 0.5 dwelling units per acre to 12 or more dwelling units per acre with PDCs. Using PDCs, development can take place at the high end of the density ranges.

An important aspect of the conformance requirement for the PDC Program is that municipalities may not “give away” density through variances. Where a proposed development requires a variance from bulk or area standards, the developer must secure a certain number of PDCs before approval for that variance will be granted. Because of this mechanism, demand for PDCs is not undermined by municipalities allowing density to be exceeded without securing PDCs.

## *Burlington County*

In 1989, the State Legislature adopted the Burlington County Transfer of Development Rights Demonstration Act, N.J.S.A. 40:55D-114 et seq. The purpose of the act was to permit Burlington County to serve as a pilot project for the State in the creation and implementation of TDR. The Legislature chose Burlington County because of its strong agricultural base.

Under the Act, a municipality in Burlington County is authorized to establish a TDR program through the adoption of a local ordinance. Before establishing the program, however, a number of requirements must be satisfied including preparation of detailed population, zoning, land use, and real estate market studies; development of an infrastructure plan for any receiving zones; and amendment of the municipal master plan and development regulations to accommodate growth in any identified receiving zones. There must also be an established TDR credit allocation process. The Act also permits a municipality to establish a TDR bank to aid in the marketability of TDR credits.

Once the TDR program is established, the Act requires that the municipality evaluate its effectiveness after three years. If after six years specific transfer of development potential targets are not achieved, the ordinance establishing the program is to be repealed.

To date, only two municipalities have established voluntary intra-municipal TDR programs under the Act: Chesterfield and Lumberton Townships. Both of these programs are examined in detail below.

### *Chesterfield Township*

Chesterfield Township has designed and is implementing a comprehensive municipal TDR program. Today, Chesterfield is overseeing the transfer of development rights from areas of the township planned for agriculture and open space, to a new, planned, traditional-neighborhood community called Old York Village. The goal of Chesterfield's municipal master plan is to cluster new development into a well designed and sewered community center, allowing surrounding lands to remain in agriculture and natural open space. By allowing landowners in planned preservation areas

to sell their development rights to developers who can use them in the village center, new growth pays for the protection of farmland and open space.

Chesterfield's TDR program was the result of long-term planning, consensus building, community education, work with county and state officials and civic minded compromise. Most would say that the program did not come easy and that Chesterfield is extraordinary in that it sustained the will to find creative solutions over a decade or more of effort.

While Chesterfield looked at TDR as early as the mid-1970's, the vision for its current program evolved in the late 1980's. Beginning in June of 1989, Chesterfield began collaborating with Burlington County and State officials on a number of issues, including computerized mapping, on a method for the allocation and transfer of TDR credits, on the development of a suitable receiving area based upon existing traditional village models and "visual preference surveys" conducted with community members, on the development of a sewer service area and provision of services essential to development of a growth center, and on the design of an ordinance to orchestrate and direct the process. After sustained effort, collaboration, planning and public process, Chesterfield Township adopted its present TDR ordinance in 1997, almost ten years after TDR was proposed as an alternative approach to municipal acquisition of farmland easements.

Chesterfield, though only 10 miles from Trenton and the crossroads of I-295, Route 130 and the New Jersey Turnpike remains relatively sparsely settled: approximately 920 residential dwelling units in a 21 square mile area. The Township has preserved 4,575 acres through combined efforts of farmland easement purchase and assignment of credits under the TDR program. This represents a third of the Township's total land area. The Township's traditional development pattern consists of farms surrounding the historic village of Crosswicks and hamlets of Chesterfield and Sykesville. The TDR receiving area, Old York Village, is designed, in part, based on the historic village of Crosswicks.

Chesterfield's receiving area comprises 560 acres in the northwest corner of the township. This area is most adjacent to the employment center of Trenton and the major transportation corridors, I-295 and route 130. The receiving area was also selected because of its proximity to existing water treatment facilities in Bordentown. In an effort to implement the TDR plan and support the viability of the receiving area, Chesterfield provided sewer and water services to the receiving area

tract. The receiving area is planned to accommodate 1,200 residential housing units. The Old York Village Plan includes a variety of attached and detached single family housing types as well as a new elementary school, which is adjacent to centralized active recreation areas. The site plan for the village incorporates a network of neighborhood parks and a mixed-use village center hosting retail, office and convenience uses intended to serve local market needs. The site plan also seeks to promote non-motorized transportation within the village. Preserved stream corridors and walking paths connect the respective neighborhoods and extend north to the existing neighborhood of Crosswicks Village.

All development within the new village will be in accordance with site planning and architectural design standards which have been incorporated within the Township's implementing zoning ordinances. "The site planning standards address the spatial relationships between buildings and the roadways, streetscape elements and open spaces which form their context. The architectural design standards will ensure that the residential and commercial buildings echo the architectural styles and details, building materials and colors which are characteristic of buildings within Chesterfield's historic villages." (Clarke Caton and Hintz, 2004)

Chesterfield's sending area is the roughly 10,000 rural and primarily agricultural acres that exist outside of the receiving area and existing settled and developed areas of Chesterfield. A total of 4,575 acres of the sending area have already been preserved, primarily through the purchase of farmland preservation easements since 1987 and more recently through the assignment or transfer of TDR's under the Chesterfield Township TDR ordinance. Through the purchase of farmland preservation easements (since the enactment of Chesterfield's TDR ordinance) Burlington County holds approximately 300 of Chesterfield's TDR credits. The policy of the county has been to bank credits indefinitely allowing the private market for credits to sustain developers demand for credits.

Over the years that Chesterfield explored TDR as a planning technique, there were density studies conducted, zoning changes enacted, development proposals reviewed, and large scale farmland preservation easements appraised and purchased, all of which activity had some level of influence on the method of credit allocation finally adopted in 1997. During much of the discussion, Chesterfield's zoning plan allowed for the development of one house on 3.3 acres of land. To some extent, the 3.3-acre zoning was based upon the suitability of local soils to treat residential effluent via traditional septic system designs.

A number of more complex credit allocation approaches were considered, but, the final approach taken was fairly simple. Using existing Soil Conservation Service soil maps, credits were awarded based upon the parcels' soil limitations for accommodating septic disposal. The best soils, those with only "slight" limitations were awarded one credit for every 2 acres. Soils that were "moderate" in regard to septic suitability were awarded one credit for every 10 acres. Soils that were "severe" in regard to septic limitations were awarded one credit for every 50 acres. This approach was viewed as reflecting the number of units that could realistically be constructed on a parcel in Chesterfield under existing zoning.

The transfer of credits under the TDR ordinance is voluntary. In order to encourage TDR transfers, the Township offers a 10% bonus in the number of credits awarded when transferred. The TDR program also offers an appeal procedure to landowners who feel that they have been under-allocated credits due to inaccurate mapping or acreage determination.

Prior to enactment of Chesterfield's TDR ordinance, the Township and Burlington County conducted and commissioned a number of studies and considered both simple and creative approaches toward estimating the value of a Chesterfield TDR credit. There was considerable pressure to render TDR credit values somehow comparable to the values achieved through the State's Farmland Preservation Program. The results of a study conducted by Dr. Jim Nicholas revealed a TDR credit value of \$26,000. Dr. Nicholas' study estimated TDR credit values over a range of densities using a multiple linear regression model that utilized data on building and land costs and recent residential sales in and around Chesterfield. The analysis found that the value of a TDR credit changed as density changed, increasing at first to reflect high construction savings, but then decreasing once reduced home values offset any gains in construction economies of scale.

Early credit transactions tended to support the results of Dr. Nicholas' estimate. However, the last auction of credits, held in July of 2004, found credits selling for \$50,000 each. At the 2004 auction, 50 credits were sold at that price.

Under the Chesterfield Master Plan, a single TDR credit can be used to construct one single family home and fractions of credits may be used to construct smaller units such as smaller homes, town houses and apartment units. Credits may also be used towards development of commercial and

institutional uses; one credit entitles its holder to development of 2,000 square feet of commercial or retail space.

Following the allocation of credits to a parcel, there is a three step process toward “extinguishing” TDR credits. First, landowners apply to “enroll” their credits into the Chesterfield TDR program. At the time credits are enrolled, the land from which the credits originate is “deed restricted” against future development. While it is possible to enroll some but not all of a parcel’s credits, the entire parcel is deed restricted with the enrollment of the first credit. Second, once credits are enrolled in the TDR program they can be “assigned” to a developer who is then free to use the credits in the receiving area in accordance with the Municipal Master Plan. Third, Credits are “extinguished” when the credit is exercised in a developed project. The Chesterfield Township municipal clerk handles the recording of deed restrictions on parcels that enroll in the TDR program. The municipal clerk also records the retirement or extinction of credits when employed in a particular lot and block in the receiving area. The Burlington County TDR Bank works cooperatively with the Township to help track credit transactions and recordings.

At this time there are no formal arrangements for monitoring of deed restrictions.

The County and Township report that credit transactions continue to occur on the private market. The last public auction of credits was in 2004 yielding a credit value of \$50,000 per credit. Fifty credits were sold. The County continues to bank roughly 300 Chesterfield TDR credits. More than 90 percent of the receiving area has been sold or is under contract to developers.

#### *Lumberton Township*

Lumberton Township was the first municipality to utilize the authority of the Burlington County Transfer of Development Rights Demonstration Act to develop and implement a voluntary municipal TDR program. Adopted in 1995, the first Lumberton TDR program seeks to preserve farmland in the western portion of the Township. Based upon the success of this program, in 2000, the Township adopted a second TDR program to preserve farmland in the municipality’s eastern portion. As of March 2006, TDR had permanently preserved over 850 acres of farmland within the Township.

The sending areas for the first TDR program in the western portion of the township were designated in the October 1994 municipal master plan and comprised 1,513 acres. The parcels must be at least 6 acres in size, they must have been assessed as farmland in 1994, and they must not be deed restricted from further subdivision or further development. With the adoption the second TDR program in 2000, an additional 1,355 acres in the eastern portion of the Township were designated as sending areas.

Like Chesterfield's program, TDR credits are allocated to a sending area parcel based the parcel's suitability for septic. This basis is used because it is seen as the most reliable measure of a parcel's actual development potential. Relying on soil septic suitability, the Township devised a formula which allocates development credits at a rate of 0.5 credits per acre with soils that have slight septic limitations down to one credit per 50 acres where soils have severe limitations on septic suitability. The allocation plan relies on soils maps for Burlington County prepared by the USDA Soil Conservation Service (now known as the Natural Resources Conservation Service of NRCS). After applying the formula to a sending area parcel one credit is subtracted from the total allocation for each single family unit existing on the parcel at the time of ordinance adoption.

Lumberton Township's TDR ordinance provides a process for a landowner to appeal the credit allocation of a parcel where the landowner believes more credit should have been allocated. Two methods are available to appeal the allocation decision. The landowner may either submit a soil survey prepared by a licensed soil scientist or submit a conceptual plan of development accompanied with representative soil borings. In either case, the parcel owner submits a notice of appeal, the required application and review fees to the Township's planning board secretary. The planning board engineer then reviews the submission and advises the board of the findings. If the information submitted by the parcel's owner demonstrates that the parcel has greater development potential than initially allocated, the planning board will grant the appeal and award the appropriate additional credits. Any appeal must occur prior to the recording of a TDR easement. Once an easement is recorded the opportunity for an allocation appeal is lost.

For a sending area landowner to participate in the TDR program, the landowner must enroll his or her property. Enrollment requires the landowner to submit an application, proof of title, a TDR easement and the necessary review fees. After verification by the municipality, the owner records the TDR easement which establishes the TDR credits.

The process of selling TDR credits is termed “assignment” under Lumberton’s TDR program. To assign credits to another, the owner submits an application for assignment to the Township, including information regarding the potential purchaser and information concerning the recorded TDR easement. Once approved by the municipality, the assignment must be recorded within 90 days or the assignment is deemed null and void. Like enrollment, the process of assigning credits is done administratively. No public hearing is required. Initial credit values were established by the Township at \$10,000 per credit. Credit values are now determined on the open market.

Receiving areas within Lumberton are identified in the municipal master plan. Under the TDR program adopted in 1995, receiving sites are located in the Township’s five Rural Agricultural/TDR Receiving Area zones. Within these receiving areas the density of a receiving site can increase from a minimum of 0.7 units per acre to a maximum of 4 units per acre. Under the TDR provision adopted in 2000, the designated receiving area consists of 185 acres zoned for an age restricted community with mixed uses, including residential, neighborhood retail, office space, public or quasi-public facilities and open space. Within this receiving area, each age-restricted unit requires 0.7 TDR credits, and to achieve the maximum residential density of three units per acre, the receiving site developer must acquire 287 credits from the sending area.

To utilize TDR credits within a receiving area, the developer of the receiving site must “extinguish” the TDR credits. The developer must first obtain final approval for the project, conditional on the use of credits. The developer must then submit a deed of credit transfer with the application for TDR credit use and demonstrate ownership of the credits. After verification of credit ownership, a deed of credit transfer is signed and must be recorded before a building permit is issued.

An interesting provision of Lumberton’s TDR program is the ability to reassign credits or even dis-enroll them from the program. This provision is designed to provide relief from those situations of inherent unfairness, such as where a property owner in a sending zone who enrolls in the program is unable to sell credits because there of inadequate demand in the receiving zones. Landowners who have determined that they have an inability to utilize credits within the receiving zone may apply to the planning board for reassignment of the credits to the parcel from which they originated. The landowners may also dis-enroll the parcel from the program upon a showing of good cause. Where either reassignment or dis-enrollment is sought, a public hearing must be held.

Lumberton also established its own municipal TDR credit bank as part of its TDR program. The bank's purpose is to facilitate the marketing of development credits between landowners with credit allocations and landowners who can use the credits. The bank is also empowered to purchase and sell development credits, at a price initially established by the Board of the bank, and subject to the fluctuations of the market. The Bank may only sell credits after a demand for credits has been demonstrated. This requirement is designed to eliminate the bank as a competitor of landowners in the bidding process and sale of credits. Lastly, the bank may provide guarantees on loans utilizing the TDR credits as collateral.

Another important provision of the TDR program is the comprehensive design guidelines that pertain to development constructed with TDR credits. These guidelines govern site standards, architectural aspects and open space requirements. The purpose of these guidelines is to ensure that receiving area development is compatible with the environment and architecture of the traditional communities in the Township.

### ***Other NJ Programs***

Prior to adoption of the Burlington County Transfer of Development Rights Demonstration Act in 1989, several communities in New Jersey experimented with the use of TDR. Although these programs remain in place, they have not been used significantly throughout their existence. Each program is described briefly below.

#### *Bernards Township, Somerset County*

Bernards Township adopted its transferable density provision in 1984 to encourage the provision of affordable housing and preservation of natural areas. In response to the State's Fair Housing Act regulations, the Township permitted Planned Residential Neighborhoods in its R-5 zone that provide a realistic opportunity to construct affordable housing. Within the R-5 zone there are both lowlands and uplands. In lowland areas, density is one unit per acre because of the need to preserve important natural resources. In the uplands sections, density is set at 5.5 units per acre. The ordinance allows the transfer of units from the lowlands areas to the upland areas. Transferable development credits are awarded at 1 credit per acre of lowland. Use of these credits allows density in the upland areas to be increased to 6.5 units per acre from 5.5 units per acre.

According to Pruetz, as of February 2001, there had been no use of the TDR provision. Additionally, all upland portions of the R-5 zone had been developed, thus eliminating any future use of the provision.

*Hillsborough Township, Somerset County*

In 1975, Hillsborough Township downzoned areas at the periphery of the municipality for purposes of preserving environmentally sensitive land and farmland. A property owner within one of these downzoned districts sued the township for approval of a plan to transfer development rights from the constrained parcel to another parcel in town owned by the same person. In response to this lawsuit, Hillsborough adopted a municipal TDR ordinance. Due to legal concerns the ordinance was amended in 1976 and again in 1981.

The TDR ordinance permits the transfer of dwelling unit credits from sensitive parcels to parcels in certain districts provided that the sending parcel is deeded to the township. The sending parcel must be at least 25 acres or larger, unless the parcel for which credit is sought is adjacent to an already dedicated 25 acres or more. In such case, the sending parcel may be as small as five acres. Sending parcels may be located in the township's residentially zoned districts. Receiving sites may be any parcel in the township's residentially zoned districts. As noted above, these same districts may also serve as sending sites. Density bonuses in the various receiving districts range from increases of 25% to 50%.

The determination of how many dwelling credits a sending parcel is entitled to is based upon the applicable baseline zoning. For every dwelling unit permitted in the district in which the sending parcel is located, the property owner receives one credit. The property owner is also awarded a ½ credit for those portions of a parcel that are identified as critical areas under the township's natural resource inventory. In no case, however, shall the number of credits awarded exceed the maximum density otherwise permitted in the district in which the sending parcel is located. The planning board determines the number of dwelling credits generated by a sending parcel.

Unlike most TDR programs where the sending parcel is deed restricted and the property owner retains ownership of the underlying fee, the Hillsborough TDR ordinance requires the dedication of the sending parcel to the township. The dedication occurs when the receiving site development is approved.

An applicant who wishes to develop utilizing transferable dwelling credits must apply to the planning board. As part of the application for development of the receiving tract, the applicant submits information on all parcels for which credit is being sought. The applicant submits a plat showing the lands proposed to be dedicated to the township (sending parcel) and a plat showing the area to which the dwelling credits are to be transferred (receiving tract) and the manner in which those credits will be used. Once this information is submitted to the planning board, the application is referred to the Township Committee for a finding that the lands to be dedicated are or are not acceptable to the township. If a favorable finding is made, the development application then follows the normal land development approval process in the township.

There is no banking of dwelling credits permitted by the township. If dwelling credits generated by the sending parcel or parcels are not all used for the proposed project on the receiving tract, an extra dwelling credits are forfeited.

The TDR ordinance has been used periodically since its adoption in 1975. It was first used in 1978, when a developer with land in one of the residential districts purchased a 70-acre farm in one of the preservation districts. Through purchase of the farm, the developer received 30 dwelling unit credits which were then applied to the developer's project. The township approved the development on the receiving tract with 30 more dwelling units above base density.

*West Windsor Township, Mercer County*

West Windsor adopted its TDR ordinance in 1991 to specifically preserve a private golf course that the owner wanted to convert into a 100-unit residential subdivision. The TDR ordinance allowed the golf course owner to sever the development potential from the parcel in exchange for deed restricting the parcel to recreational or open space uses in perpetuity. However, the Township did not have a receiving site sufficient to accommodate the 100 units. To address this issue, the Township ordinance allows residential units to be converted into an equivalent amount of office floor area for use within designated commercial zones. The TDR ordinance has only been used for this specific project and has not otherwise been utilized.

## **APPENDIX B**

### **TDR Programs Outside of NJ**

Another important source of information in developing the Highlands TDR program is garnered by reviewing and critically examining elements of successful TDR programs as well as those that are ineffective. The purpose of this review is to determine the success of these programs in both preserving important resource lands and ensuring adequate TDR credit values. This review is also important in that it may identify elements of these programs that could be incorporated into the Highlands TDR program to ensure its success. Provided below are summaries of a number of the programs that have been reviewed as part of this analysis.

#### ***Long Island Pine Barrens***

##### Overview

- The Long Island Pine Barrens is located in Suffolk County and is the largest undeveloped area on Long Island.
- The region contains an aquifer which provides drinking water for the majority of Long Island residents.
- This is a regional TDR program encompassing 102,500 acres in three municipalities: Southampton, Brookhaven, and Riverhead.
- Credit values are established on the open market with the developer and land owner negotiating as a function of supply and demand.
- Credits started at \$7,500 per credit in 1996 and are now selling for \$70,000 per credit in Brookhaven. Riverhead started at \$10,000 per credit and are now selling for over \$65,000 per credit. Finally, Southampton began in 1997 with credits selling in the \$9,250 to \$12,000 per credit range and are now selling in the \$70,000 to \$80,000 per credit range.
- In 1995, the Central Pine Barrens Comprehensive Land Use Plan was adopted, dividing the region into a Core Preservation Area (55,000 acres) and Compatible Growth Area (47,500 acres). The Core Area is designated for preservation and the Compatible Growth Area is designated for controlled growth.
- The goal of the program is to preserve 75% of the privately owned land in the Core Area.
- TDR credits are termed Pine Barren Credits or PBCs.

## Sending Areas

- New development is mostly prohibited in the sending areas; however, expansion of existing dwellings and lots approved before July 1993 may be permitted.
- Lots of ten acres or more may be developed if located on existing roadways.
- PBCs are allocated to property owners in the Core Area based on parcel size, the underlying zoning of the parcel, and any prior parcel development. No deductions are taken for wetlands, steep slopes or other development constraints.
- PBCs can be sold to potential purchasers by reviewing a list of buyers. Additionally, these credits can be listed with a real estate broker or sold to the Clearinghouse, the Pine Barrens TDR credit bank.
- PBCs cannot be transferred outside of the town in which they are generated. For example, PBCs generated by a parcel in Southampton cannot be transferred to a receiving area parcel in Riverhead.

## Receiving Areas

- The three municipalities contain varying densities depending on the amount of PBCs purchased.
- In Riverhead receiving areas, a single PBC permits an increase in intensity of development equal to three hundred (300) gallons per day per acre or the equivalent rated sewage flow as described in the Suffolk County Health Department Standards.
- Southampton permits receiving areas, which are located in residential overlay zones, to increase density from one unit per five acres to one unit per one acre with the purchase of PBCs. For areas already zoned for one dwelling unit per acre, bonus density can be increased to one unit per half acre.
- Through the purchase of PBCs, Brookhaven allows increases of density in commercial and industrial properties, as well as Planned Retirement Communities.

## Strengths and Weakness

- Developers can increase baseline density by as much as ten times.
- PBCs must be permitted “as of right” in receiving areas.

- A weakness is that there is little development potential on the sending sites.
- From a regional perspective, another weakness is that PBCs may not be transferred between municipalities within the region.

#### Conclusions

- To date, approximately 1,300 acres have been preserved through TDR.
- As of April 1, 2006, a total of 601 parcels have been preserved, with an average parcel size of 2.24 acres. There were 759 credits generated, 259 credits redeemed and approximately 500 credits not redeemed.

### ***Tahoe Regional Planning Agency***

#### Overview

- The Tahoe Regional Planning Agency was established in 1969. In 1987, the current master plan was created, which includes six counties in California and Nevada.
- The new master plan seeks to implement controlled growth and to promote residential subdivision development in designated areas with proper infrastructure, away from environmentally sensitive land.
- This program is a regional with voluntary receiving zones for TDR.
- Credit values are established on the open market with the developer and landowner negotiating as a function of supply and demand.
- Credits in the late 1990's were approximately \$30,000 per credit, with credits now selling between \$90,000 and \$100,000 per credit. However, there are signs of the market softening, which could have an affect on future credit prices.

#### Sending/Receiving Areas

- Sending areas allow transfer of rights under four scenarios. Two of the scenarios include the transfer of development rights from vacant land and from already improved land. The other two scenarios include the transfer of "land coverage" and "building allocations."

- The transfer of development rights from vacant land can be achieved by allocating rights to a receiving area in order to achieve development, regardless of the designated zoning. All rules and regulations of the existing zoning apply.
- The transfer of development rights from already developed land can also have rights transferred by the demolition of existing structures adjacent to environmentally sensitive land.
- The transfer of “land coverage” (i.e. impervious surface) can be obtained at a one to one transfer ratio or greater in certain regions. Once land coverage has been transferred to a receiving site, the sending site is deed restricted since the land coverage rights have been retired.
- Building allocation rights can be transferred from environmentally sensitive vacant land, which can not be developed due to various regulations. The receiving area must be less environmentally sensitive and planned for residential development. The land in the sending area must be permanently preserved either by deed restriction or transfer of title.

#### Strengths and Weakness

- The success of the program has been the strong demand for development throughout the region.
- The main weakness of the program is the confusion associated with TDR and the process of credit allocation.

#### Conclusions

- A significant amount of transfers within the region occur each year.
- The program’s combination of strong demand and strict building restrictions in sending areas provide for a good combination to lead to the purchase of TDR.

### ***Montgomery County, Maryland***

#### Overview

- The TDR program in Montgomery County is considered one of the most successful TDR programs in the country in terms of the amount of land preserved.

- The program was implemented in 1980 in order to preserve agricultural land and raw open space.
- This program is a county-wide program and is a voluntary program for TDR.
- Credit values are established on the open market with the developers and land owners negotiating as a function of supply and demand.
- Credits started at \$3,000 per credit in 1980 to 1982, and are now selling between \$42,000 and \$45,000 per credit.
- At the inception of the program, credits sold at a discount due to skepticism in the market. This permitted regional and local developers to purchase the credits inexpensively.

#### Sending Areas

- Zoning within the sending sites, known as the Rural Density Transfer Zone, can be developed with one dwelling per 25 acres; however, through TDR, dwellings can be developed in the receiving areas at one dwelling per 5 acres. If there are any permanent dwellings on the sending site, one development right must be preserved.
- Once a TDR has been transferred from a sending area, that TDR is retired from the sending area and recorded as preserved with the County Attorney's office so that the TDR can not be used again.

#### Receiving Areas

- All of the receiving areas within the County have the ability to receive TDRs.
- Two zoning designations are defined for the receiving areas, with one being for non-TDR uses and a second for developers using TDRs.
- With the use of TDRs in the receiving area, developers can achieve bonus densities; however, the Planning Board has complete control over development in order to maintain the vision of the program.
- If a developer incorporates moderately priced dwelling units (MPDUs) of at least 12.5% of the total project, a bonus density of up to an additional 20% is permitted beyond the density as allowed through TDR.

- The purchase of TDRs is typically sold as a purchase option until a final plat approval is granted by the County.

#### Strengths and Weakness

- The success of the program has been the ability for a landowner to sell a portion of their rights but maintain a fee interest in the property in order to obtain working capital for farming.
- The strength of the real estate market over the past few years has increased demand for bonus densities allowed through the use of TDR.
- Additional incentives that have led to the program's success include an expedited approval process for developers using TDR.
- One weakness of the program has been the time it took to establish the receiving areas. There were 23 master plans developed before the receiving areas were created.

#### Conclusions

- Of the 317,000 acres of total land in the county, 93,000 acres have been designated as the Rural Density Transfer Zone, which is land to potentially be preserved.
- To date, approximately 49,000 acres have been preserved through TDR.

### ***Calvert County, Maryland***

#### Overview

- The TDR program in Calvert County is considered to be one the most successful TDR programs in the country, similar to Montgomery County.
- The program was implemented in 1978 in order to preserve agricultural land and for implementing smart growth in the region.
- This program is a county-wide program and is a voluntary TDR program.
- Credit values are established on the open market with the developer and landowner negotiating as a function of supply and demand.
- The TDR program does not require easements to encumber a site with transferred rights, but rather a recording of covenants prior to sale.

- Credits started under at \$1,000 per credit in 1978 and are now selling between \$6,750 and \$9,000 per credit. In 2004, the average credit value was \$5,200 per credit.
- The original goal of the program was to preserve 20,000 acres; however, due to the success of the program, the goal of the program has increased to 40,000 acres.

#### Sending Areas

- Owners who have land that is considered by the Agricultural Preservation Advisory Board to be suitable for forestry or agricultural purposes, may have their land designated as an Agricultural Preservation District (overlay zone).
- The land must be designated as an Agricultural Preservation District or contain a minimum of 50 contiguous acres.
- Landowners in the Agricultural Preservation District are allocated TDRs based upon one dwelling unit per five acres. Special areas allocate credits based upon greater density.
- Once a TDR has been transferred from a sending area, the land must remain in the Agricultural Preservation District and density is limited to one dwelling unit per 25 acres or a maximum of 4 dwellings unit, regardless of the parcel size.

#### Receiving Areas

- Land in the receiving areas is known as a Transfer Zone District (TDZ).
- The TDZ includes designated Town Centers and Rural Communities.
- A TDZ must be approved by the County Commissioners and must be located within a major subdivision with 50% of the site remaining as open space.
- Density within a TDZ can increase to one dwelling unit per two acres or greater near Town Centers.
- The purchase of TDRs for use in receiving areas is typically sold as a purchase option until a final plat approval is granted by the County.

#### Strengths and Weakness

- The success of the program has been the ability for developers to obtain increased average density from one unit per ten acres to one unit per two acres.

- Many of the sending area landowners desire to continue farming, and utilize the funds obtained from the sale of TDRs as capital for existing farm operations or as extra income.

#### Conclusions

- Of the 140,000 acres of total land in the county, 60% of the County includes farmland, forested land, and vacant land, which has the potential to be preserved.
- To date, approximately 11,901 acres have been preserved through TDR. Other land preservation programs have helped preserve more than 20,000 acres throughout the entire county.

### ***Charles County, Maryland***

#### Overview

- The TDR program in Charles County was established in 1992 for the preservation of agricultural land.
- The county has established a goal to preserve 64,000 acres.
- Although the program started almost fifteen years ago, it is only within the past two or three years that TDR has become an acceptable practice.
- This program is a county-wide program and voluntary.
- The Current amount of potential TDRs is more than 4,600, with only 978 being certified and 298 being extinguished.
- Credit values are established on the open market with the developer and landowner negotiating as a function of supply and demand.
- Credit values began at \$3,000 per credit in 1992 and are now selling at \$20,000 per credit; only one year ago, developers were paying \$8,600 per credit.

#### Sending Areas

- Sending areas must be farms that are enrolled in the Maryland Agricultural Land Preservation Foundation (MALPF) District and must be in the program for a period of five years before becoming eligible to participate in the TDR program.

- Once a parcel is enrolled in the program, the landowner is issued Development Credits. The number of credits is predicated on the existing Rural Conservation and Agricultural Conservation zones which allow for one dwelling unit per three acres.
- Three Development Credits equals one Development Right.
- Once a property owner is issued TDRs, they can be transferred and owned with the same rights as real property. Additionally, once transferred, the land is encumbered with a deed restriction which only permits agricultural uses.

#### Receiving Areas

- TDRs can be utilized to increase density in the receiving areas.
- With the use of TDRs, owners/developers of designated receiving sites can obtain bonus density as of right.
- Density in receiving zones is one to one, with the ability to develop an additional two units by purchasing TDRs.
- Owners in a receiving site area who wish to use TDR must include a subdivision plan and other documentation in order to apply for TDRs.

#### Strengths and Weakness

- TDRs are the only mechanism for increasing density within the receiving areas.
- Many sending area sites contain environmentally sensitive land, making development cumbersome. As a result, transferring credits is a good alternative to create value.
- A weakness reported by a representative of the County is the lack of consistent regional planning/zoning for both the sending and receiving areas.

#### Conclusions

- Charles County's TDR program has gained momentum over the past few years.
- Of the 64,000 acres of total land to be preserved, 2,250 acres has been preserved through TDR.
- As successful as the TDR program has been, other preservation resources will be necessary to preserve the 64,000 acres.

## *Collier County, Florida*

### Overview

- The program was originally implemented in 1974 in order to preserve environmentally sensitive land and for controlling urban sprawl. Changes to the program occurred in December 1999 and most recently in July 2003.
- This program is a county-wide program and is an involuntary TDR program.
- Credit values are established on the open market with the developer and land owner negotiating as a function of supply and demand.
- Minimum credit values are set at \$25,000 per credit.
- Owners within the sending areas receive one credit per five acres.
- The TDR program is relatively small program with the majority of TDR transfers occurring in one transaction.

### Sending/Receiving Areas

- In 1974, more than 80% of the County was placed in a Special Treatment overlay to control growth and limit development in environmentally sensitive land.
- Currently, both sending and receiving areas must be located in urban areas designated as “urban” in the County’s Future Land Use Map.
- The number of dwelling units that can be transferred from a sending site is based upon the density permitted by the sending site’s underlying zoning.
- Base density under current zoning ranges from 1 unit per 2 acres to 1 unit per 10 acres. Bonus densities of five to ten percent are permitted on receiving sites.
- Unlike other TDR programs which require preservation/deed restriction of a sending area, land within a sending area can be utilized for certain uses as designated by the Collier County Board of Commissioners.

### Strengths and Weakness

- The success of the program has been guided by the simple process of selling development rights, and the administrative approval of development on receiving sites that are less than 20 acres in size.

- Extreme environmental restrictions in the Special Treatment Zone motivate developers to find alternative sites to develop.
- Because landowners of potential receiving sites do not often build at the densities permitted by the underlying zoning, they are not interested in utilizing development rights to increase the density of development on their property.

## Conclusions

- Although a small TDR program, it has been able to preserve 325 acres of environmentally sensitive land.
- A recent change to the zoning code, which permits greater bonus densities on potential receiving sites, has added to the demand for TDR.

## ***Boulder County, Colorado***

### Overview

- The TDR program was implemented in 1995 in order to preserve rural land. It is an outgrowth of two previous programs established by the county. Originally, the county adopted a technique known as Non-Urban Planned Unit Development (NUPUD), which allowed for bonus density for land which is preserved with a conservation easement on 75% of the site. NUPUD was later permitted to allow for a transfer of rights to Non-Contiguous Non-Urban Planned Unit Development (NCNUPUD). This includes the ability to transfer development rights to unincorporated section of cities where development is more prevalent.
- The Boulder County TDR program is actually several TDR programs. The county has entered into intergovernmental agreements (IGAs) with a number of cities within the county including Boulder, Longmont, Lafayette, Niwot and Broomfield, to permit the transfer of development rights from vacant and agricultural lands in unincorporated portions of the county to the various cities.
- Credit values are established on the open market with the developer and land owner negotiating as a function of supply and demand.
- Credit values under the various IGA TDR programs have averaged \$50,000 per credit.

## Sending Areas

- Pursuant to the various IGAs, sending site owners are awarded development rights at two units per 35 acres. With an addition of water rights granted to the county by a sending site, the landowner receives an additional development right for a total of 3 units per 35 acres.
- The extent of the TDR sending areas varies from program to program. For example, under the IGA with the City of Lafayette, the sending area is a 27-square mile region that extends from one to four miles in each direction from the city limits.
- A Development Rights Certificate is obtained by a property owner in the sending area when he or she applies for a conservation easement.

## Receiving Areas

- Receiving areas are established by each of the cities under their separate IGAs with the county.
- Each individual city also establishes the maximum amount of additional density that will be permitted with the receiving areas when TDR is utilized.

## Strengths and Weakness

- Rules associated with the receiving areas create a predictable development process for developers but also provide site development flexibility.
- Use of IGAs has helped bolster the overall program because each TDR program is tailored to the needs of a particular city.
- As more land is preserved, there are fewer 35-acre parcels which can be preserved in the sending areas.

## Conclusions

- The program is not a thriving TDR program, mainly due to the limitations on potential receiving areas.
- To date, approximately 6,000 acres have been preserved by the use of TDR.

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