



DRAFT

**TRANSFERABLE DEVELOPMENT RIGHTS
TECHNICAL REPORT
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**PREPARED BY
STATE OF NEW JERSEY
HIGHLANDS WATER PROTECTION
AND PLANNING COUNCIL
IN SUPPORT OF THE
HIGHLANDS DRAFT REGIONAL MASTER PLAN**



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EXECUTIVE SUMMARY

Transfer of development rights (TDR) is an important tool authorized by the Highlands Act to achieve the Regional Master Plan's overarching goal of protecting and enhancing the significant values of Highlands resources. This technical report details the legal requirements and information that has shaped development of the Highlands TDR Program Framework. Unlike other technical reports, which detail the outcomes of specific technical analyses, this report outlines alternatives for developing a TDR program framework and presents recommendations for that framework, including all program elements and procedures necessary to implement a regional TDR program. Specifically, this framework: (1) establishes a procedure that awards TDR credits called Highlands Development Credits or HDCs to designated sending zone property owners; (2) allows HDCs to be allocated to a lot based upon its lost development potential as of August 9, 2004, and adjusted for the real estate market variability across the Highlands Region; (3) allows HDCs to be sold on the private market to a developer who wants to construct within a designated TDR receiving zone at a higher density than that permitted by the underlying zoning; (4) establishes a Highlands TDR Bank that will serve as a buyer of last resort of HDCs, will serve as a seller of HDCs, will record and track all HDC activity, and will review annually the minimum HDC price established by the Highlands Council; (5) allows municipalities that have designated receiving zones to be eligible for an enhanced planning grant and a grant to offsets the costs of amending their municipal development regulations; and (6) authorizes municipalities to assess an impact fee of up to \$15,000 per unit for all new development within any designated receiving zone.

1.0 INTRODUCTION

Undeveloped lands are a finite resource, which serve a number of important uses. In the Highlands Region, these lands provide drinking water for Highlands residents and half the State's population. Protecting and enhancing these undeveloped lands and the resources on and within them, is the primary objective of the Highlands Water Protection and Planning Act (Highlands Act). As a means of achieving this objective, the Highlands Act empowers the Highlands Council to develop and implement a TDR program for the Highlands Region.

At its essence, TDR is a straightforward concept: protect certain lands with important ecological and agricultural resources by removing their development potential, and allow that development potential to be transferred to areas that are suitable for increased growth. In exchange for removing development potential on the land, a property owner receives compensation in the form of development rights.

Although the concept of TDR is relatively simple, development and implementation of a TDR program is difficult. Hard choices must be made regarding which lands are to be protected, which lands can accommodate more growth, what the value of a development right is, and what those rights can be used for. Once the program is designed, it must be constantly monitored to ensure that a balance is maintained between the severance of development rights and their use in appropriate areas.

This technical report explains the process and information the Highlands Council has examined in developing a framework for the Highlands TDR Program. The technical report begins with a discussion of the various elements that influence TDR program development. It then highlights the recommended program purposes and goals developed in light of this information and the program's overarching objective to further the goals of the Regional Master Plan. The report concludes with a detailed discussion regarding the proposed Highlands TDR Program Framework.

2.0 REQUIREMENTS OF THE HIGHLANDS ACT RELATING TO TDR

The Highlands Act contains a number of provisions relating to TDR. The following subsections set forth the relevant provisions and are preceded by the Section citation from the Act.

2.1 HIGHLANDS ACT TDR PROVISION

The Highlands Act in Section 13 includes specific requirements relating to the establishment of the Highlands TDR Program.

Section 13.a. The council shall use the regional master plan elements prepared pursuant to sections 11 and 12 of this act, [FN1] including the resource assessment and the smart growth component, to establish a transfer of development rights program for the Highlands Region that furthers the goals of the regional master plan. The transfer of development rights program shall be consistent with the "State Transfer of Development Rights Act," P.L.2004, c. 2 (C.40:55D-137 et seq.) or any applicable transfer of development rights program created otherwise by law, except as otherwise provided in this section.

Section 13.b. In consultation with municipal, county, and State entities, the council shall, within 18 months after the date of enactment of this act, and from time to time thereafter as may be appropriate, identify areas within the preservation area that are appropriate as sending zones pursuant to P.L.2004, c. 2 (C.40:55D-137 et seq.).

Section 13.c. In consultation with municipal, county, and State entities, the council shall, within 18 months after the date of enactment of this act, and from time to time thereafter as may be appropriate, identify areas within the planning area that are appropriate for development as voluntary receiving zones pursuant to P.L.2004, c. 2 (C.40:55D-137 et seq.) considering the information gathered pursuant to sections 11 and 12 of this act, including but not limited to the information gathered on the transfer of development rights pursuant to paragraph (6) of subsection a. of section 11 of this act. For the purposes of the council establishing a transfer of development rights program prior to the preparation of the initial regional master plan, the council in identifying areas appropriate for development as voluntary receiving zones shall consider such information as may be gathered pursuant to sections 11 and 12 of this act and as may be available at the time, but the council need not delay the creation of the transfer of development rights program until the initial regional master plan has been prepared. The council shall set a goal of identifying areas within the planning area that are appropriate for development as voluntary receiving zones that, combined together, constitute four percent of the land area of the planning area, to the extent that the goal is compatible with the amount and type of human development and activity that would not compromise the integrity of the ecosystem of the planning area.

Section 13.d. The council shall 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.

Section 13.e. In consultation with municipal, county, and State entities, the council shall assist municipalities or counties in analyzing voluntary receiving zone capacity.

Section 13.f. In consultation with municipal, county, and State entities, the council shall work with municipalities outside of the preservation area to assist these municipalities in developing ordinances necessary to implement the transfer of development rights. The council shall also establish advisory or model ordinances and other information for this purpose.

The council shall make assistance available to municipalities that desire to create additional sending zones on any lands within their boundaries which lie within the planning area and are designated for conservation in the regional master plan.

Section 13.g. Notwithstanding the provisions of P.L.2004, c. 2 (C.40:55D-137 et seq.) to the contrary, the council shall perform the real estate analysis for the Highlands Region that is required to be performed by a municipality prior to the adoption or amendment of any development transfer ordinance pursuant to P.L.2004, c. 2.

Section 13.h. (1) The council shall set the initial value of a development right. The Office of Green Acres in the Department of Environmental Protection and the State Agriculture Development Committee shall provide support and technical assistance to the council in the operation of the transfer of development rights program. The council shall establish the initial value of a development right considering the Department of Environmental Protection rules and regulations in effect the day before the date of enactment of this act.

(2) The council shall 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 this act but for the lack of a necessary State permit as specified in subparagraph (b) or (c), as appropriate, of paragraph (3) of subsection a. of section 30 of this act, [FN2] and for which an application for such a permit had been submitted to the Department of Environmental Protection and deemed by the department to be complete for review on or before March 29, 2004.

Section 13.i. (1) The council may use the State Transfer of Development Rights Bank established pursuant to section 3 of P.L.1993, c. 339 (C.4:1C-51) for the purposes of facilitating the transfer of development potential in accordance with this section and the regional master plan. The council may also establish a development transfer bank for such purposes.

(2) At the request of the council, the Department of Banking and Insurance, the State Transfer of Developments Right Bank, the State Agriculture Development Committee, and the Pinelands Development Credit Bank shall provide technical assistance to the council in establishing and operating a development transfer bank as authorized pursuant to paragraph (1) of this subsection.

(3) Any bank established by the council shall operate in accordance with provisions of general law authorizing the creation of development transfer banks by municipalities and counties.

Section 13.j. The Office of Smart Growth shall review and coordinate State infrastructure capital investment, community development and financial assistance in the planning area in furtherance of the regional master plan. Prior to the council establishing its transfer of development rights program, the Office of Smart Growth shall establish a transfer of development rights pilot program that includes Highlands Region municipalities.

Section 13.k. Any municipality in the planning area whose municipal master plan and development regulations have been approved by the council to be in conformance with the regional master plan in accordance with section 14 or 15 of this act, and that amends its development regulations to accommodate voluntary receiving zones within its boundaries which are identified pursuant to subsection c. of this section and which provide for a minimum residential density of five dwelling units per acre, shall, for those receiving zones, be: eligible for an enhanced planning grant from the council of up to \$250,000; eligible for a grant to reimburse the reasonable costs of amending the municipal development regulations; authorized to impose impact fees in accordance with subsection m. of this section; entitled to legal representation pursuant to section 22 of this act; [FN4] accorded priority status in the Highlands Region for any State capital or

infrastructure programs; and eligible for any other appropriate assistance, incentives, or benefits provided pursuant to section 18 of this act.

Section 13.l. Any municipality located outside of the Highlands Region in any county that has a municipality in the Highlands Region that has received plan endorsement by the State Planning Commission pursuant to the "State Planning Act," P.L.1985, c. 398 (C.52:18A-196 et al.), that establishes a receiving zone which provides for a minimum residential density of five dwelling units per acre for the transfer of development rights from a sending zone in the Highlands Region, and that accepts that transfer of development rights shall, for those receiving zones, be eligible for the same grants, authority, and other assistance, incentives, and benefits as provided to municipalities in the planning area pursuant to subsection k. of this section except for legal representation as provided pursuant to section 22 of this act and priority status in the Highlands Region for any State capital or infrastructure programs.

Section 13.m. (1) A municipality that is authorized to impose impact fees under subsection k. of this section shall exercise that authority by ordinance.

(2) Any impact fee ordinance adopted pursuant to this subsection shall include detailed standards and guidelines regarding: (a) the definition of a service unit, including specific measures of consumption, use, generation or discharge attributable to particular land uses, densities and characteristics of development; and (b) the specific purposes for which the impact fee revenues may be expended.

(3) An impact fee ordinance shall also include a delineation of service areas for each capital improvement whose upgrading or expansion is to be funded out of impact fee revenues, a fee schedule which clearly sets forth the amount of the fee to be charged for each service unit, and a payment schedule.

(4) An impact fee may be imposed by a municipality pursuant to this subsection in order to generate revenue for funding or recouping the costs of new capital improvements or facility expansions necessitated by new development, to be paid by the developer as defined pursuant to section 3.1 of P.L.1975, c. 291 (C.40:55D-4). Improvements and expansions for which an impact fee is to be imposed shall bear a reasonable relationship to needs created by the new development, but in no case shall an impact fee assessed pursuant to this subsection exceed \$15,000 per dwelling unit unless and until impact fees are otherwise established by law at which time the impact fee shall be 200% of the calculated impact fee.

(5) No impact fee shall be assessed pursuant to this subsection against any low or moderate income housing unit within an inclusionary development as defined under P.L.1985, c. 222 (C.52:27D-301 et al.). No impact fee authorized under this subsection shall include a contribution for any transportation improvement necessitated by a new development in a county which is covered by a transportation development district created pursuant to the "New Jersey Transportation Development District Act of 1989," P.L.1989, c. 100 (C.27:1C-1 et al.)

2.2 OTHER HIGHLANDS ACT PROVISIONS RELATED TO TDR

Section 6.n. To identify and designate in the regional master plan special areas in the preservation area within which development shall not occur in order to protect water resources and environmentally sensitive lands while recognizing the need to provide just compensation to the owners of those lands when appropriate, whether through acquisition, transfer of development rights programs, or other means or strategies.

Section 6.o. To identify any lands in which the public acquisition of a fee simple or lesser interest therein

is necessary or desirable in order to ensure the preservation thereof, or to provide sites for public recreation, as well as any lands the beneficial use of which are so adversely affected by the restrictions imposed pursuant to this act as to require a guarantee of just compensation therefor, and to transmit a list of those lands to the Commissioner of Environmental Protection, affected local government units, and appropriate federal agencies.

Section 8.a. . . . The council shall not adopt the regional master plan unless it recommends receiving zones in the planning area and capacity therefor for each receiving zone pursuant to the transfer of development rights program authorized in section 13 of this act.

Section 11.a.(2) charges the Council with developing “[a] financial component; together with a cash flow timetable which:

(a) details the cost of implementing the regional master plan, including, but not limited to, property tax stabilization measures, watershed moratorium offset aid, planning grants and other State aid for local government units, capital requirements for any development transfer bank, payments in lieu-of-taxes, acquisition, within five years and within 10 years after the date of enactment of this act, of fee simple or other interests in lands for preservation or recreation and conservation purposes, compensation guarantees, general administrative costs, and any anticipated extraordinary or continuing costs; and

(b) details the source of revenue for covering such costs, including, but not limited to, grants, donations, and loans from local, State, and federal departments, agencies, and other governmental entities, and from the private sector.

Section 11.a(6) A smart growth component that includes an assessment, based upon the resource assessment prepared pursuant to paragraph (1) of subsection a. of this section, of opportunities for appropriate development, redevelopment, and economic growth, and a transfer of development rights program which shall include consideration of public investment priorities, infrastructure investments, economic development, revitalization, housing, transportation, energy resources, waste management, recycling, brownfields, and design such as mixed-use, compact design, and transit villages. In preparing this component, the council shall:

(a) prepare a land use capability map;

(b) identify existing developed areas capable of sustaining redevelopment activities and investment;

(c) identify undeveloped areas in the planning area, which are not significantly constrained by environmental limitations such as steep slopes, wetlands, or dense forests, are not prime agricultural areas, and are located near or adjacent to existing development and infrastructure, that could be developed;

(d) identify transportation, water, wastewater, and power infrastructure that would support or limit development and redevelopment in the planning area. This analysis shall also provide proposed densities for development, redevelopment, or voluntary receiving zones for the transfer of development rights;

(e) identify potential voluntary receiving zones in the planning area for the transfer of development rights through the appropriate expansion of infrastructure or the modified uses of existing

infrastructure;

(f) issue model minimum standards for municipal and county master planning and development regulations outside of the preservation area, including density standards for center-based development to encourage, where appropriate, the adoption of such standards;

(g) identify special critical environmental areas and other critical natural resource lands where development should be limited; and

(h) identify areas appropriate for redevelopment and set appropriate density standards for redevelopment. Any area identified for possible redevelopment pursuant to this subparagraph shall be 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.

Section 12. In addition to the contents of the regional master plan described in section 11 of this act, the plan shall also include, with respect to the preservation area, a land use capability map and a comprehensive statement of policies for planning and managing the development and use of land in the preservation area, which shall be based upon, comply with, and implement the environmental standards adopted by the Department of Environmental Protection pursuant to sections 33 and 34 of this act, and the resource assessment prepared pursuant to paragraph (1) of subsection a. of section 11 of this act.

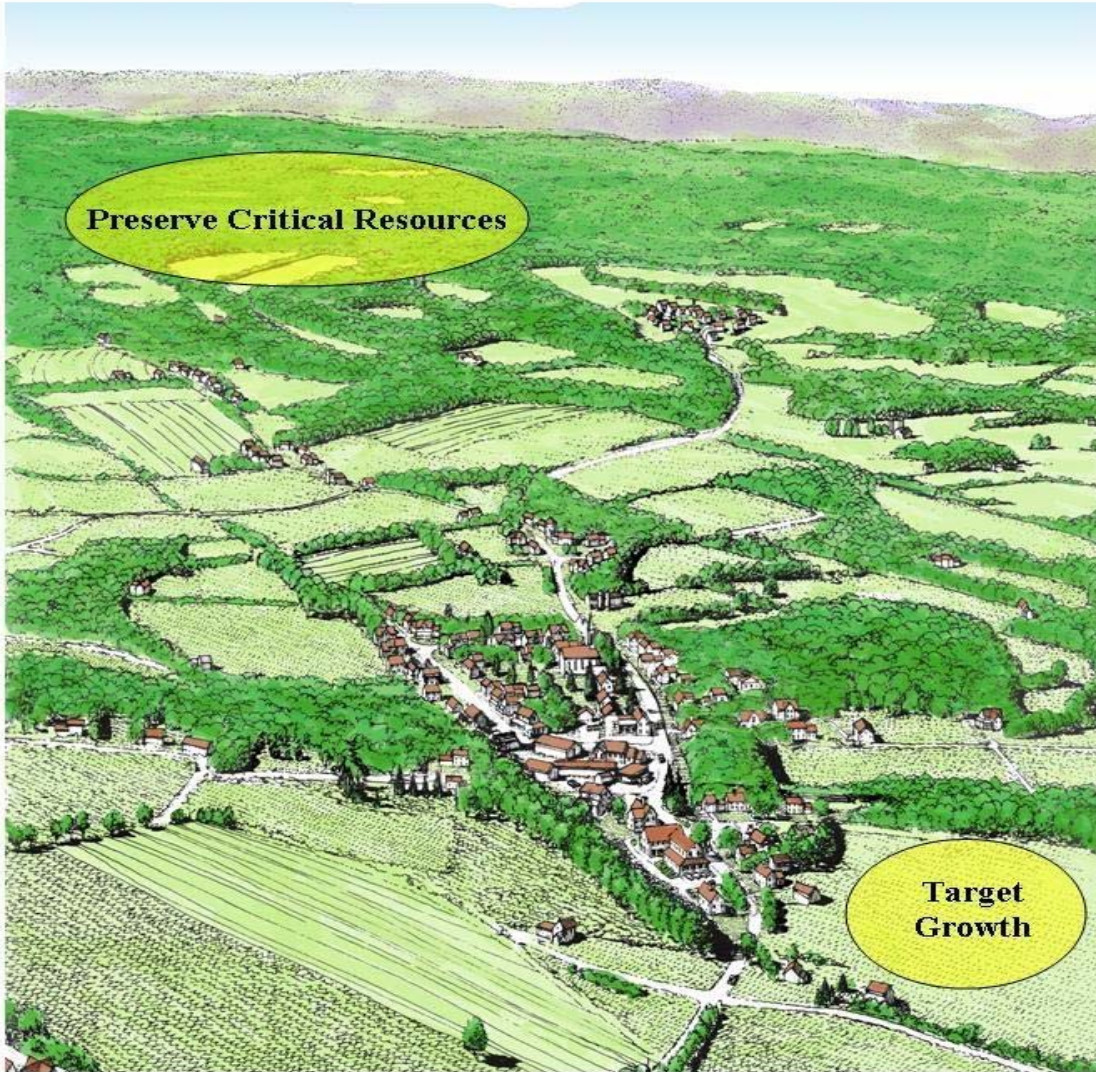
These policies shall include provision for implementing the regional master plan by the State and local government units in the preservation area in a manner that will ensure the continued, uniform, and consistent protection of the Highlands Region in accordance with the goals, purposes, policies, and provisions of this act, and shall include:

a. a preservation zone element that identifies zones within the preservation area where development shall not occur in order to protect water resources and environmentally sensitive lands and which shall be permanently preserved through use of a variety of tools, including but not limited to land acquisition and the transfer of development rights.

2.3 TRANSFER OF DEVELOPMENT RIGHTS – WHAT IS IT?

Transfer of development rights (“TDR”) has been described as 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 (see Figure 1 – Sending and Receiving Zones). (Pruetz, 2003)

Figure 1 - Sending and Receiving Zones

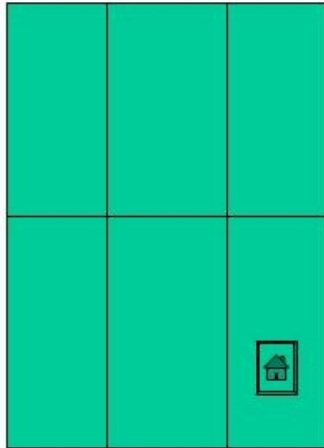


Landowners in the sending zones receive compensation for restricting development on their property. As a market-based system, payment for this lost development potential comes from purchasers who buy credits representing the lost development potential in the sending zones. The credits then entitle the purchaser to build in a receiving zone at a density greater than that permitted in the underlying zoning (see Figure 2 – Concept of TDR).

Transfer of Development Rights

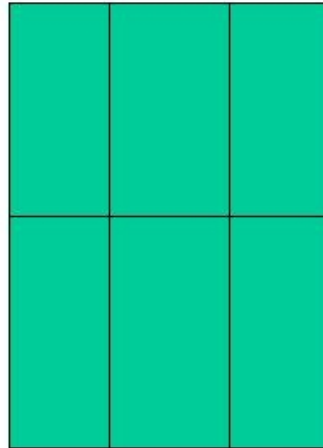
Sending Zone

Receiving Zone

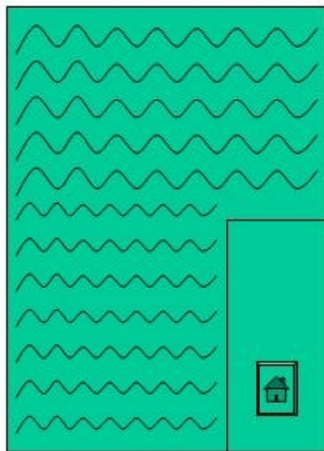


**Parcel A : 6
development rights
including existing house**

=



**Parcel B : 6 development
rights**

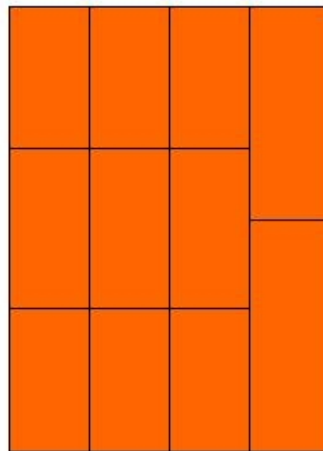


**Parcel A : Sells 5
development rights, retains
one for existing house**

Credits



\$\$\$



**Parcel B : 11 unit or
more development
potential**

Figure 2 – Concept of TDR

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

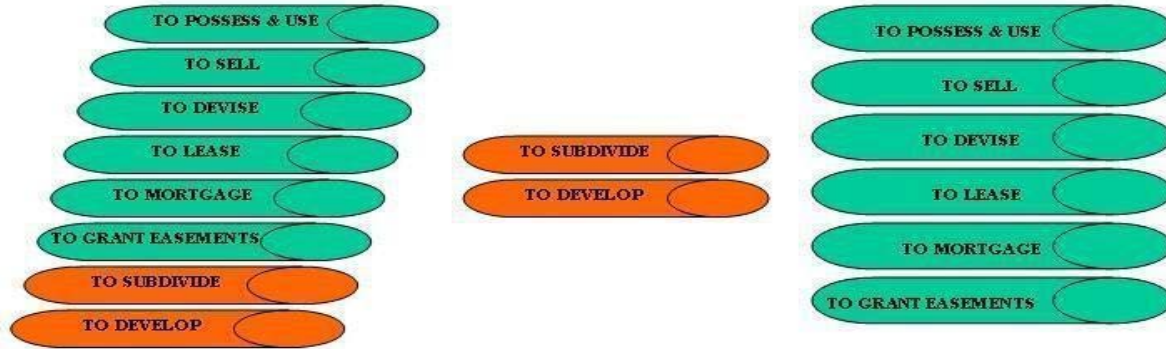
established to preserve large contiguous parcels of farmland to maintain agricultural viability, such as the programs in Chesterfield and Lumberton Townships in Burlington County, while in the New Jersey Pinelands TDR is used to preserve tracts of ecologically important lands to maintain ecosystem health and high water quality. TDR is also utilized to preserve historic buildings such as those programs in New York City and San Francisco.

TDR seeks to use market forces to pay for the preservation of properties with unique resources where government funding is limited to acquire the property outright. There is little doubt that governments have 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 government. TDR aids governments 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.

TDR recognizes – as a legal matter – 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 (see Figure 3 – Property Rights).¹ 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.

¹ 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).

Figure 3 - Property Rights



$$\text{Fee Simple} = \text{Development Rights} + \text{Remaining Rights}$$

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 affected landowners with compensation in return for the transfer of their development rights. “The reality was and is that no 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.” (Siemon, 1977)

Second, TDR is not, nor is it ever meant to be synonymous with “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 an effect on the value of property, does not mean that a taking has occurred. “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)).

2.4 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 that 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 the issue of whether a potential receiving zone has the ecological integrity and infrastructure capacity to accept increased development, there is often the issue of the receiving municipality's interest in accepting that density.

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. 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, an active and vital market for use of TDR credits, is necessary to ensure adequate value for such 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 development potential is severed from a sending zone 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.

A number of TDR programs also 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 facilitates private transactions by bringing buyers and sellers together.

Lastly, 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 landowner has no discretion as to whether or not to abide by the development regulations that have been enacted. (Machemer, Kaplowitz, Edens, 1999)

2.5 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, New York in 1972; Buckingham Township, Pennsylvania in 1975; and Eden, New York also in 1975. Calvert County, Maryland 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 3.3.

2.6 LEGALITY OF TDR

The U.S. Supreme Court first examined the use of TDR in 1978, in 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 taking 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, including the requirement that his property remain in agricultural production with limited 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. The New Jersey Supreme Court found that the CMP did not constitute a taking of Mr. Gardner's property. It 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.²

² 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

From the above cited case law, it is clear 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.

offsetting benefits; it may receive Pinelands Development Credits in return for recording the deed restrictions.”

3.0 TDR PROGRAM DEVELOPMENT

Development of the Highlands Region TDR program has been 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 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.

3.1 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. (N.J.S.A. 13:20-13.a)

In addition to developing the Highlands TDR Program consistent with the State TDR Act, the Highlands Act also requires the Highlands Council to:

- 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))

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 that choose to conform to the Regional Master Plan 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.

3.2 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.³ 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:

³ In 1995, the State Legislature amended the Municipal Land Use Law to permit clustering and planned unit development to non-contiguous parcels. By doing so, a municipality could transfer the development potential of a non-contiguous parcel, 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 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;
- 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.

3.3 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.

3.3.1 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 jointly 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 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)

3.3.2 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.

3.3.2.1 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.

3.3.2.2 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.

3.3.3 OTHER NEW JERSEY 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.

3.4 TDR PROGRAMS OUTSIDE OF NEW JERSEY

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.

3.5 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
- Town of Newton
- Borough of Somerville
- 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 issues related to establishing and implementing a TDR program. 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.

3.6 CONSIDERATIONS FOR AN EFFECTIVE HIGHLANDS TDR PROGRAM

In addition to legal requirements and public input, development of the Highlands TDR Program Framework has also been shaped by circumstances unique to the Highlands Region. One of the first considerations is the scale of the program. Although not the largest TDR program in terms of number of acres in which development potential can be transferred, the Highlands TDR Program will certainly involve the most number of municipalities. Within the region itself, there are 88 municipalities, but an additional 130 municipalities outside of the region may also serve as voluntary receiving zones. Consequently, a total of 218

municipalities may be involved in the program. By contrast, the New Jersey Pinelands Commission Pinelands Development Credit Program has 53 participating municipalities.

Given the geographic scope of the Highlands Region, another significant consideration is the widely varying real estate market values that exist across the seven counties. For example, vacant property in Warren County as of 2004 had an average equalized value of \$15,452 per acre. In Bergen County, the comparable value was more than five times greater, averaging \$84,964 per acre. Significant real estate market variability also exists among municipalities within a given county.

It is important to consider these varied real estate values in developing the TDR program. One reason for doing so may be to prevent sending zone property with the lowest development potential value from being the first property that has its development potential acquired. This situation may occur because a developer constructing a project would seek to acquire TDR credits with the least value for use in municipalities with the highest land costs. In such a circumstance, a developer may be more willing to build with TDR credits in Bergen County because the developer can purchase credits from a Warren County property in the Preservation Area. Having the ability to reflect differences in real estate market values based upon the area where credits originate from will be important to establish an equitable market-based system that provides all sending zone property owners with equal opportunity to participate in a TDR program. If credit values are adjusted to reflect differences in market value across the seven counties, then the incentive for a developer to build at a TDR density lies solely in the economics of a given project within a receiving zone. In addition, over time, if credits values are not adjusted for differences in real estate market value, unequalized credits values may slow down demand for credits as only the most expensive credits remain available for purchase.

Another significant consideration is the fact that any receiving zones in the Highlands TDR Program are strictly voluntary. The ability to develop with TDR credits in receiving zones establishes the demand for those credits. Consequently, it is necessary to establish adequate receiving zones.

The Highlands Council does not have the authority to mandate specific receiving zones which municipalities must accommodate. This lack of authority differs greatly from that granted to the New Jersey Pinelands Commission. In the Pinelands Region, the Pinelands Commission has the authority to specifically designate where growth is to occur. These regional growth areas are coterminous with where Pinelands Development Credits may be used to secure increased density. Once designated, municipalities in which the regional growth areas are situated must amend their local master plans and development regulations to accommodate the use of Pinelands Development Credits in these areas. For the Highlands Region, however, the strategy must be to work with municipalities to locate and designate suitable receiving zones.

4.0 PROPOSED HIGHLANDS TDR PROGRAM FRAMEWORK

Each of the considerations described above influence development of the Highlands TDR Program and its structure. With them in mind, the following discussion highlights the program elements comprising the proposed framework for the Highlands TDR Program.

4.1 PROGRAM PURPOSES AND GOALS

Section 13.a of the Highlands Act establishes that the objective of the TDR program to be developed and implemented by the Highlands Council is to further the goals of the Regional Master Plan. To achieve this essential objective, the Highlands Council believes it is necessary to establish purposes and goals that will serve as guiding principles for the formation and implementation of the Highlands TDR Program.

These purposes and goals are shaped by the legal requirements of the Highlands Act and State TDR Act, as well as the history of TDR and of course, the input received from stakeholders. Based upon this information, the Highlands Council proposes the that the Highlands TDR Program:

- Serve as a land use tool to aid Highlands Region municipalities in the protection of the Region's unique resources, including its water resources, ecological resources, and agricultural resources;
- Provide a mechanism for property owners to sell the development potential of their lands where the Highlands Act has impacted development potential; and
- Serve as a catalyst to ensure proper planning for efficient development within designated receiving zones.

Along with these program purposes, the Highlands Council proposes the following program goals:

- Use TDR as a mechanism to protect and enhance the significant values of Highlands Region resources;
- Provide a predictable process that recognizes a fair return on the use and utility of land in the sending zones;
- Develop a process for prioritizing sending zone lots for inclusion in the TDR program that recognizes the regional resource value of sending zone lots and their likelihood of development;
- Ensure that the program clearly describes, memorializes, and tracks the remaining uses of land permitted after TDR credits are severed from sending zone lots;
- 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;
- Provide mechanisms for those developing with TDR credits in voluntary receiving zones to

- achieve prompt development approvals; and
- Establish a Highlands TDR Bank that will foster implementation of the Highlands TDR Program.

4.2 IDENTIFICATION OF SENDING AND RECEIVING ZONES

The Highlands Council is charged with identifying appropriate areas in the Preservation Area as sending zones (N.J.S.A. 13:20-13.b) and appropriate areas in the Planning Area as voluntary receiving zones. (N.J.S.A. 13:20-13.c) To satisfy this mandate, the Highlands Council previously approved narrative criteria to determine which areas of the Preservation Area may be appropriate as sending zones, and which lands in the Planning Area and the seven Highlands counties may be appropriate as voluntary receiving zones. The narrative criteria are based in part upon those established in the State TDR Act. (N.J.S.A. 40:55D-144 and 145).

For the Preservation Area, any property may serve as a sending zone provided that (1) it 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, and (2) development is now precluded or severely constrained by the restrictions imposed pursuant to the Highlands Act. The use of the above criteria ensures that those properties in the Preservation Area (and subsequently, Planning Area municipalities that voluntarily conform to the standards of the Regional Master Plan) that have been affected by the Highlands Act and its implementing regulations will be able to participate in the TDR program. Only where property could not have previously been developed because of legal or environmental constraints, will that property not likely be able to serve as a sending zone.⁴

In the Planning Area, and areas outside of the Highlands Region but within the seven Highlands counties, an area may serve as a voluntary receiving zone provided that it is appropriate and suitable for development based upon the Resource Assessment and exhibits one or more of the following characteristics:

- (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 has used the above narrative criteria in formulating the Land Use Capability Map to identify the Planned

⁴ It is important to note that the Highlands Council has also stated that certain property in the Preservation Area may be deemed inappropriate as a sending zone where that property 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. It is possible that, in certain instances, these properties may actually be appropriate as voluntary receiving zones provided that (1) they satisfy the receiving zone criteria, and (2) they receive approval by the Highlands Council as a designated receiving zone (discussed in detail below).

Community Zone and Specially Planned Areas⁵ that may be appropriate as voluntary receiving zones.

4.3 HIGHLANDS DEVELOPMENT CREDITS ALLOCATION METHOD

A key component of any TDR program is the allocation of transferable development rights to properties in the designated sending zones. Allocation consists of defining what these rights are and how many rights should be given to a particular lot. As noted in the *TDR Background and Program Development* technical memorandum, 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 lots. For purposes of the Highlands TDR Program, TDR credits to be allocated are called Highlands Development Credits (“HDCs”).

How TDR credits are allocated varies among TDR programs. For the most part, however, there are three means of allocating credits: (1) based upon the gross acreage of given land characteristics (e.g. wetlands or uplands); (2) based upon the value of the lost development potential; or (3) based upon the number of lost units or square footage. The Highlands Council staff critically examined each of the methods utilized by other TDR programs to allocate credits in the context of the legal requirements mandated by the TDR provision of the Highlands Act and the State Transfer of Development Rights Act.

The Highlands Council staff first explored the allocation of HDCs on the basis of the gross acreage of a given land characteristic. This allocation method is generally employed in the Pinelands Commission’s Pinelands Development Credits (“PDCs”) Program and in the intramunicipal programs in Chesterfield and Lumberton Townships. PDCs are allocated to property owners based upon the land type and number of acres of a given lot. For example, within the Preservation Area District established by the Pinelands Comprehensive Management Plan, PDCs are allocated at one PDC per 39 acres of upland and two-tenths of a PDC for 39 acres of wetlands. (N.J.A.C. 7:50-5.43(b)1.iii and iv) In the Chesterfield TDR program, using existing Soil Conservation Service soil maps, credits are awarded based upon a sending zone lot’s soil limitations for accommodating septic disposal. The best soils, those with only “slight” limitations, are awarded one credit for every 2 acres. Soils that are “moderate” in regard to septic suitability are awarded one credit for every 10 acres. Soils that are “severe” in regard to septic limitations are awarded one credit for every 50 acres. This approach was viewed as reflecting the number of units that could realistically be constructed on a lot in Chesterfield under existing zoning. Lumberton applies a similar allocation approach. 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.

Allocation of TDR credits based on gross acreage of a given land type (e.g. upland, wetland, soil type) works fairly well where there is a consistency in land characteristics throughout the sending zone. It also makes sense in a program that is voluntary in nature where addressing landowner fairness and equity are not primary concerns. For the Highlands, however, allocation of HDCs on this basis would be complicated. Due to the significant variability of land types or characteristics found throughout the seven Highlands counties, it would be difficult to devise an allocation method that is seen as fair, particularly where property values differ so greatly across the Region. Similarly, allocating HDCs in this manner would not likely result in property

⁵ Specially Planned Areas function as a subset of the Planned Community Zone and have similar characteristics. They include lands within the Preservation Area which are characterized by previous development and are less constrained by environmental resources, therefore, representing opportunities for redevelopment, infill, and adaptive reuse. They also include those lands within the Planning Area which exhibit the characteristics of the Planned Community Zone, but do not meet the minimum size requirements of that zone.

owners receiving a sufficient credit allocation that provides a fair return in the face of lost development potential. For these reasons, HDC allocation based on gross acreage of a given land type is not recommended.

The second allocation method examined is one that awards HDCs based upon the value of development potential lost as a result of the Highlands Act and the Department of Environmental Protection's Highlands rules being applied to a given property. In this allocation method, a determination must first be made as to how much development potential is lost. For example, assume prior to passage of the Highlands Act, an undeveloped five-acre lot is residentially zoned at one single family house per acre. Assume further that there are no wetlands or other regulatory environmental constraints imposed on the lot. After passage of the Highlands Act, this lot, which is located in the Preservation Area, may only construct one single family house based upon the exemption for construction of a single family house on a lawfully existing lot that was in existence on August 10, 2004. In this example, the lot would have lost 4 single family housing opportunities as a result of the Act (5 acres at 1 unit/acre minus 1 unit under exemption = 4 lost units).

The next step is to determine the value of these lost housing opportunities. This likely requires an appraisal of the lot comparing its value with 5 single family houses (unrestricted value) versus 1 single family house (restricted value). Once the value is determined based upon the appraisal, HDCs would be allocated to the lot in a certain dollar increment, for example, one HDC per \$5,000 of lost development potential.

At first blush, establishing a TDR program that awards HDCs based on the value of lost development potential makes sense. Because the credits under this allocation method are denominated in dollars, there is no need to account for the real estate market variability around the Highlands Region (e.g. Bergen County versus Warren County). This variability is accounted for in the appraisal conducted on a sending zone lot. Similarly, there is no need to distinguish between lost residential development potential and lost commercial development potential in how credits are awarded. HDCs are allocated based upon the lost value expressed in dollars regardless of the land use.⁶ A value-based allocation method certainly meets the Highlands Council's stated goal of providing an allocation process that recognizes a fair and equitable return of land value based on the use and utility of land in the sending zones prior to adoption of the Highlands Act.

There are two difficulties posed by this allocation method, however. First, it is administratively burdensome. Requiring an appraisal of every lot to participate in the program is time consuming. An appraiser must be retained, the appropriate information provided and the appraisal must be conducted. In addition, the cost of such an appraisal, which may range between \$350 and \$500 per residential lot,⁷ would have to be borne by a sending zone property owner in support of an application for credit determination.

Second, this allocation method requires a similar value assessment on the receiving side of the TDR equation to make the transfer of development value work. Since what is being transferred from sending zones to receiving zones is the value of development potential, not some specific number of residential or commercial units, it is necessary to determine how much value a proposed development project gains by being constructed at a TDR density (i.e. the density greater than that permitted by the base density in the receiving zone). Once the enhanced value of the proposed project is known, a developer would be required to

⁶ It is recognized, however, that the value of lost development potential is heavily influenced by the underlying zoning of the sending zone lot.

⁷ The cost of appraisals for commercially zoned lots is likely to be greater.

purchase a certain number of HDCs reflecting some percentage of this increased project value.⁸ For example, if a proposed project value is increased by \$1 million dollars because of the increased density permitted in the receiving zone, and a developer must purchase credits equivalent to 30% of this increased value (i.e. \$300,000), the developer would have to purchase 60 credits where each credit is worth \$5,000.

Although determining project value seems rather straightforward, it presents a number of obstacles. First, the overall increase in value of a receiving zone project is different depending upon the type of units being constructed. For example, the increased value of a project is different between single-family detached houses and apartments. Because of these differences, it is difficult for someone, other than the developer, to know where the breakeven point for a given project is, particularly where the proposed project consists of mixed uses. In such a case, how is the percentage of increased value fixed? Second, who determines the increase in project value and how is that done? Does it require an appraisal of every proposed project to be built with TDR credits in a receiving zone?

As is evident from this discussion, transferring the value of lost development potential is neither simple nor easily understood. It requires significant, in-depth knowledge of real estate development, real estate financing and appraisal. Consequently, establishing an allocation method based on the value of lost development potential and then the conveyance of that value to a receiving zone does not satisfy the Highlands Council's goal of developing an easily understood program. Similarly, it would not likely meet the goal of establishing a process for voluntary receiving zones that results in a clearly articulated permitted development with the use of TDR credits. In turn, this reduces the predictability that developers have suggested must be present in the Highlands TDR program necessary to generate market demand for TDR credits. Additionally, there are a limited number of programs that allocate TDR credits on this basis, and those programs are all intramunicipal – credits are only transferred within the municipality's borders. Finally, as noted previously, attempting to establish a TDR program that is value-based for such a large region would be administratively cumbersome, particularly where appraisals must be conducted on both sending zone lots and receiving zone projects. Given these issues, allocating HDCs based upon the value of lost development potential is not advised.

The third and most common method of allocating TDR credits is based upon the number of lost residential units or lost commercial square footage occurring as a result of restrictions on sending zone property. Under this method, the number of HDCs allocated to a sending zone lot would be based upon the zoning in place as of August 9, 2004, as well as any environmental laws and regulations applicable to the lot at that time minus any units that remain developable after applying the requirements of the Highlands Act and any restrictions resulting from implementation of the Highlands Act. For example, assume prior to passage of the Highlands Act, an undeveloped five-acre lot in the Preservation Area is residentially zoned at one single family house per acre. Assume further that, due to wetlands present on the lot, one acre cannot be developed. This results in four acres being available for development prior to enactment of the Highlands Act. After passage of the Highlands Act, only one single family house may be built on the lot under the exemption for construction of a single family house on a lawfully existing lot that was in existence on August 10, 2004. In this example, the lot would have lost 3 single family housing opportunities as a result of the Highlands Act (4 acres at 1 unit/acre minus 1 unit under exemption = 3 lost units). In turn, these lost housing opportunities can be transformed to HDCs that can then be sold to a developer who will utilize those credits to construct additional units in a voluntary receiving zone.

⁸ A developer would not be required to purchase HDCs in an amount equal to the increased project value because this would not allow the developer to realize any profit on the project being constructed at the TDR density. Keep in mind that a project will only be built at a TDR density if the developer is still able to realize a profit in the face of paying for HDCs and any impact fees that the municipality may charge to develop in the TDR receiving zone.

Although this allocation method is fairly simple to understand, it does not account for two important variables. First, it does not account for great differences in real estate market values that exist across the Highlands Region. For example, two 10-acre lots, similarly zoned at one single family house per acre, do not have the same value where one lot is located in Warren County and the other is situated in Bergen County. Generally, the lot in Bergen County, with the same amount of development potential, will be worth more on a per acre basis. Second, the type of use of property in sending zones also influences the value of the lost development potential. Residential development has value different from commercial development. And even with development that is residential, development of a lot based on detached single family homes has a different value than if that same lot could be developed with attached townhouse units. Consequently, for this allocation method to be fair to sending zone property owners and attractive to receiving zone developers, it must incorporate some measures to account for these variables.

Allocating HDCs based on lost development potential, expressed in the number of lost residential units or lost commercial square footage, and adjusted for the variables discussed above, is the most appropriate allocation method for use in the Highlands Region. It is relatively simple to understand, and is a generally accepted credit allocation method. It is a fair allocation method provided that the above variables are accounted for. It makes the transfer of credits to receiving zones much easier because municipalities understand what number and type of units they are willing to accept and developers know what number of units they will be able to build. It is also important to note that transferring development potential expressed as a number of units or commercial square footage is generally consistent with other TDR programs in the State, including the Pinelands, Chesterfield and Lumberton.

To account for the Highlands Region's real estate market variability and differences in value of unit types, the Highlands Council will need to develop two factors: a real estate Market Factor and an End-Use Factor. With respect to the market factor, the Highlands Council will need to devise a municipally-based factor to be applied to the sending zone HDC allocation process. This approach would, in part, help to address the concern that high-value projects would only pursue credits in lower-value sending markets because use of a market based factor has the potential to balance credit allocations.

It is envisioned that the Market Factor will be developed by examining real estate market values for each municipality in the seven Highlands counties based upon the fourteen composite zones developed by the Highlands Council.⁹ By analyzing MOD-IV and SR1A data, appropriate per acre values will be established for each municipality for each composite zone. In turn, these values will be compared against each other to determine the median value per composite zone for the seven counties. Derivations from this median value will then be developed for each municipality resulting in the Market Factor to be applied in the HDC allocation process.

Similarly, an End-Use Factor will need to be developed for the following land use types at a minimum: large, single-family detached home (> 3,500 sq. ft.); medium, single-family detached home (between 3,500 sq. ft. and 2,000 sq. ft.); small, single-family detached home (< 2,000 sq. ft.); attached town home; apartment/condo; commercial-office; commercial-retail; and industrial. Like the real estate Market Factor, the End-Use Factor will be derived from examining existing real estate data.

A third factor may also be included in the allocation process that awards a bonus for important resource

⁹ The 14 composite zones developed by the Highlands Council represent an aggregation of the nearly 1,500 different zoning districts prevalent in the Highlands Region.

lands. This Resource Value Factor was suggested by many of our stakeholder groups, and is specifically authorized under Section 144.c of the State TDR Act. In essence, the Resource Value Factor awards a bonus to lots to be identified by the Highlands Council in the Regional Master Plan as lands of exceptional resource value. This bonus would be applicable to lots that have either exceptional ecological value or exceptional agricultural value. In either case, the application of a bonus factor is meant to entice property owners to enroll their property in the Highlands TDR Program. Like the Market Factor and End-Use Factor, the Resource Value Factor is being developed by Council staff and will be based in part on the outcomes of the Land Use Capability Map.

To better explain how the Highlands Council staff envisions allocating HDCs to sending zone lots, below are several examples to illustrate the process. The factors are illustrative only and do not represent any actual factors currently under consideration.

Determination of the number of HDCs allocated to a sending zone lot is based upon the following criteria:

- (a) zoning as of August 9, 2004, assuming highest and best use;
- (b) environmental laws and regulations in place as of August 9, 2004;
- (c) real estate market factor (“MF”) based upon municipality;
- (d) end-use factor (“EUF”); and
- (e) resource value factor (“RVF”).

Example A:

- 15-acre undeveloped lot in Y Township zoned 1 single family home per three acres
- 5 buildable lots because of there are no environmental constraints
- Lot located in Y Municipality which has an MF of 1.25 (i.e. 25% higher than the Regional median per acre value)
- End-use permitted is large single family home (> 3,500 sf), which has an EUF of 1.5
- Property has no exceptional resource value and is therefore not entitled to an RVF bonus
- Property owner may reserve one HDC to develop a future home (based upon single family exemption), which this property owner does reserve and requires 1.5 credits (equivalent to one large single family home)
- Total HDCs = 7.9 (5 lots x 1.25 x 1.5 – 1.5 reserved = 7.875)

Example B:

- 15-acre undeveloped lot in Y Township zoned 1 single family home per three acres
- Property has 5 acres of wetlands habitat, and as such has 5 acres of designated Highlands open waters
- 3 buildable lots because of wetlands constraint
- Lot located in Y Municipality which has an MF of 1.25
- End-use permitted is large single family home (> 3,500 sf), which has an EUF of 1.5
- Property owner may reserve one HDC to develop a future home, which this property owner does not reserve
- Because of high value wetlands and the severe conservation restriction placed on the property, property has an RVF bonus of 1.25 based on 0.25 credit bonus for each acre of Highlands open water protection area
- Total HDCs = 6.9 (3 lots x 1.25 x 1.5) + 1.25 = 6.875

Example C:

- 15-acre lot developed with one existing single family home in Y Township zoned 1 single family dwelling per three acres
- 3 acres of floodplain resulting in 3 acres of Highlands Riparian Area
- 3 buildable lots in addition to existing home and accounting for 3 acres of floodplain
- Lot located in Y Municipality which has an MF of 1.25
- End-use permitted is large single family home (> 3,500 sf), which has an EUF of 1.5
- Because there is an existing home, property owner cannot reserve an additional HDC
- Because of riparian area, an RVF bonus of 0.75 applies (0.25/acre x 3 acres)
- Total HDCs = 6.4 (3 lots x 1.25 x 1.5) + 0.75 = 6.375

4.4 HDC CERTIFICATION PROCESS

The Highlands TDR Program will include a process that sending zone property owners will follow to have an HDC determination made for their property. This process certifies the number of credits that a property is entitled to without requiring the sale of those credits. It is similar to the process followed by the New Jersey Pinelands Commission in its PDC program and other programs around the country. This process is outlined below.

1. Property owner submits an HDC Determination Application.
 - In the application, property owner specifies the following information:
 - Property owner’s contact information;
 - Property location by address and block & lot;
 - Number of acres;
 - State whether there are any existing structures on the property;
 - If property undeveloped, state whether property owner wishes to reserve the right to construct one home or maintain other uses of property (e.g. agriculture);
 - State whether any commercial activities take place on the property;
 - State whether there are any easements or deed restrictions applicable to the property; and
 - State whether property owner was in process of securing development approval at the time Highlands Act passed, and what State and municipal approvals were secured as of March 29, 2004, and what approvals were pending as of that date.
 - Property owner provides copies of the following documents:
 - Deed to property;
 - Tax map depicting property location; and
 - Sixty year title search.
2. Highlands Council Staff determines number of HDCs allocated to property based upon the following formula:
$$\text{Number of Buildable Lots} - \text{Reserved Lot (if any)} \times \text{Real Estate Market Factor} \times \text{End-Use Factor} + \text{Resource Value Factor} = \text{number of HDCs}$$

3. Property owner receives an HDC Determination Letter from the Highlands Council indicating the number of HDCs allocated to the property.
4. If property owner disputes the number of HDCs allocated, the owner must submit a “Notice of HDC Appeal” in writing to the Highlands Council. Along with the notice of appeal, the property owner should submit a proposed subdivision plat, prepared by a professional engineer, demonstrating that the property’s lot yield is greater than that calculated by the Highlands Council. The Highlands Council will review the submitted information and make a determination within a reasonable time. If the property owner continues to dispute the number of HDCs allocated to the property, the property owner may appeal the decision of the Highlands Council.
5. Once the number of HDCs becomes final, the credits may not be made available for sale until the requisite conservation restriction is recorded with the County deed office and a copy of the recorded conservation restriction is filed with the Highlands Council and the Highlands TDR Bank. At that time, HDC Certificates (discussed below) will be provided to the property owner for each HDC allocated listing the owner of record, the Block and Lot of the lot, the HDC Certificate serial number, and the date of issuance.

4.5 RECEIVING ZONE DESIGNATION

The Highlands Council is charged with identifying areas within the Highlands Region that are appropriate to serve as TDR receiving zones and establish an appropriate density for those identified areas. (N.J.S.A. 13:20-8 and 13:20-13.c) Based upon the Resource Assessment and Smart Growth components of the Regional Master Plan, the Highlands Council should identify potential TDR receiving zones which are coterminous with the identified Planned Community Zone or Specially Planned Areas established in the Land Use Capability Map. It is in these areas that the Highlands Council should focus its efforts on establishing voluntary TDR receiving zones within the Region.¹⁰

As elucidated above, the Highlands Council is not authorized to require conforming municipalities to accept its recommendations concerning the location of voluntary receiving zones. Whether these identified areas, and others outside of the Highlands Region but within the seven counties, serve as TDR receiving zones is left to the determination of the municipalities themselves. As such, once the Highlands Council has identified areas that may be appropriate for TDR receiving zones in the Regional Master Plan, it will then need to work with municipalities during the conformance process to have them become designated TDR receiving zones. This is not the ideal situation for establishing a regional TDR program, but it recognizes the importance of home rule and that growth receiving aspects of the Regional Master Plan are voluntary. The process being proposed seeks a significant level of commitment and cooperation by municipalities, which are important to the success of this program.

The Highlands Council should approach those municipalities within the Planned Community Zone and Specially Planned Areas identified in Land Use Capability Map to examine whether they may serve as voluntary receiving zones. As part of Plan Conformance, the Highlands Council will work with interested municipalities to articulate the “vision” the municipality has for its proposed receiving zone or zones. The municipality will explore the proposed receiving zone’s existing density and look at ways it can promote more compact development that supports a mix of uses in light of the local real estate market recognizing development limitations based on ecological and infrastructure capacity.

¹⁰ Additionally, the Highlands Council should seek to meet the four percent goal specified in N.J.S.A. 13:20-13.c regarding receiving zones in the Planning Area through this identification.

Additionally, the Council should discuss establishing receiving zones with those communities recognized as PA1, PA2 or designated centers in the State Development and Redevelopment Plan within the seven counties but outside of the Highlands Region. For these municipalities, the Highlands Act requires that they receive State Plan Endorsement from the State Planning Commission before they may participate in the Highlands TDR Program.

Before a municipality may designate a TDR receiving zone, it will have to assess the capacity of the proposed area to accommodate the attendant growth impacts occasioned by increasing density. These impacts may include increases in water supply needs, wastewater generation, number of school children, affordable housing obligations, and traffic generation, as well as fiscal consequences. This assessment will also require an examination of natural resource constraints within the proposed receiving zone, the local and regional real estate markets' ability to bear the level of development proposed for the receiving zone, and other issues of particular interest to the municipality.

To assist municipalities with these assessments activities, the Highlands Council may use the authority granted to it under Section 13.e of the Highlands Act to establish a Voluntary TDR Receiving Zone Feasibility Grant Program. This provision directs the Highlands Council to assist municipalities in analyzing the capacity of voluntary receiving zones. In addition, sections 13.k and l, and 18.b authorize the Highlands Council to provide grants to municipalities to assist them in the implementation of the TDR program. The purposes of this program would be to provide monetary and technical assistance to communities as they assess the feasibility of establishing a receiving zone or zones in their municipality.

A municipality receiving a grant from the Council would be required to assess the infrastructure and ecological capacity of a proposed receiving zone. Required elements of the feasibility assessment will include: (1) a preliminary identification of potential receiving zones; (2) an inventory of important natural resources; (3) an analysis of sewer and water supply capacity; (4) a build-out analysis of the proposed receiving zone; (5) a simple fiscal impact analysis; and (6) an analysis of the local real estate market. For communities outside of the Highlands Region but within the seven counties, a municipality must conduct a real estate market analysis pursuant to the rules promulgated by the Office of Smart Growth. In addition, the municipality must examine its current planning documents, and zoning and development regulations given the requirement that it receive initial plan endorsement from the State Planning Commission before it is eligible to serve as a voluntary TDR receiving zone under the Highlands TDR Program.

For communities within the Highlands Region, much of the baseline data and information sought above will have already been examined by the Highlands Council through development of the RMP. This information will be shared and discussed with the municipality. For those municipalities outside the Highlands Region but within the seven counties, much of this information may be gathered from existing sources, including municipal and county planning departments.

If the results of the feasibility assessment demonstrate that the proposed voluntary receiving zone is able to accommodate additional density, then the municipality may move forward with seeking designation of that receiving zone. This designation process will require the Highlands Council to review the results of the assessment and verify the determination reached by the municipality. Assuming there is no omission of essential information, the Highlands Council will designate the proposed receiving zone and approve its use in the Highlands TDR Program. This process will ensure that designated receiving zones are within the carrying capacity of the area, that the TDR density within the zone is economically feasible, and that the vision of the municipality for development within the receiving zone is clearly articulated.

The designation process should also permit a municipality to petition to include a property not otherwise

identified in the Regional Master Plan as a proposed receiving zone. In this situation, a municipality may identify a property and seek receiving zone designation provided that (1) the municipality can demonstrate that the property can accommodate additional density, and (2) allowing additional density on that property conforms to the goals of the Regional Master Plan. If these two criteria are met, the municipality could seek a Voluntary TDR Receiving Zone Feasibility grant from the Council to assess the likelihood of establishing a receiving zone on the

Upon approval by the Highlands Council of a designated voluntary receiving zone, the municipality will need to adopt a TDR ordinance, which will serve as an overlay atop the area's existing zoning. This TDR overlay ordinance will identify the boundaries of the receiving zone, specify the bonus density permitted within the receiving zone, establish any site and architectural design criteria required by the RMP, and set forth the number of HDCs required to develop at the bonus density (i.e. TDR density). The TDR ordinance will also explain the process for recording the use of HDCs and ensuring that those HDCs are retired and ineligible for future use.

Determining the number of HDCs required to build at TDR density will be calculated by taking the number of additional units and/or commercial square feet to be permitted in the receiving zone and then multiplying that number(s) by the relevant real estate market factor and end-use factor. The result will dictate how many HDCs must be purchased to build in the receiving zone at the TDR density. By looking at the then going rate for credits, a developer will be able to build in the cost of the credits and any per unit impact fee into its pro forma. Additionally, by specifying the type of development the community is looking to encourage, the development is less likely to face opposition and municipal approval is likely to occur more expeditiously.

Additionally, conformance with the RMP and the requirements established for a TDR overlay ordinance will specify that any growth-inducing variance granted by the zoning board of adjustment for development within the receiving zone will require the use of HDCs.¹¹ A schedule will be established specifying the number of HDCs required per type of variance and the extent of the variance. This recommendation is important to ensure that any new development above base density in a voluntary receiving zone secure HDCs to build. By requiring HDCs for any variance to develop in the receiving zone, a zoning board of adjustment is prevented from granting variances that would allow development to exceed base density and thereby thwart demand for HDCs.

Section 13.f of the Highlands Act directs the Highlands Council to assist municipalities in developing ordinances to implement the TDR program, including developing advisory or model ordinances. During Pre-Conformance, a model TDR overlay ordinance should be developed that will serve as a template for municipalities that designate a voluntary receiving zone.

Another important component of the receiving zone designation process should be permitting a Planning Area municipality to participate in the Highlands TDR Program without conforming to the Regional Master Plan. This process recognizes the true voluntary nature of receiving zones, and supports the Highlands Council's position that municipalities have the option of accepting aspects of the Regional Master Plan that foster growth.

A Planning Area municipality that agrees to participate in the program without conforming, however, is ineligible for the benefits and incentives provided to voluntary receiving zones under the Highlands Act TDR

¹¹ By requiring HDCs for any variance to develop in the receiving zone, a zoning board of adjustment is prevented from granting variances that would allow development to exceed base density and thereby thwart demand for HDCs.

provision. Section 13.l of the Highlands Act states that, to be eligible for voluntary receiving zone benefits, the Planning Area municipality’s “master plan and local development regulations [must] have been approved by the council to be in conformance with the regional master plan” In this situation, a Planning Area municipality would not be authorized to assess an impact fee or be eligible to receive an enhanced TDR planning grant of up to \$250,000, for example.

Despite the eligibility requirement imposed by the Highlands Act, the Highlands Council should provide grants and other technical assistance to Planning Area municipalities that want to designate voluntary receiving zones but not conform to the Regional Master Plan. Section 18.b of the Highlands Act authorizes the Highlands Council to “make available grants and other financial and technical assistance to municipalities . . . for implementation of a transfer of development rights program pursuant to this act.” Given this authority, the Highlands Council should allow Planning Area municipalities to be eligible for participation in the Voluntary TDR Receiving Zone Feasibility Program and technical assistance with preparation and adoption of a TDR overlay ordinance. Additionally, the Highlands Council may use this authority to provide any other benefits it deems appropriate in the future.

4.6 HIGHLANDS TDR PROGRAM IMPACT FEES

Assuming that a municipally-designated receiving zone satisfies the minimum residential density threshold, the Highlands Act authorizes a municipality to impose up to a \$15,000 per unit impact fee on new development within a receiving zone to offset the costs of capital improvements or facility expansions necessitated by the new development. (N.J.S.A. 13:20-13.m)¹² These fees may be charged against all new development within the receiving zone. The impact fees are paid by the developer constructing within the receiving zone and are paid directly to the municipality. The impact fee may not be assessed against any low or moderate income housing unit within an inclusionary development.

To impose the impacts fees, a municipality must adopt an impact fee ordinance. The ordinance must define the service unit and set forth the specific purposes for which the impact fee revenues may be expended. The ordinance must also delineate the service area for each capital improvement or facility expansion to be funded out of the impact fee; establish a fee schedule setting forth the amount of the fee charged for each service unit; and lay out a payment schedule. Importantly, the improvements and expansions for which an impact fee is to be imposed must bear a reasonable relationship to the needs created by the new development in the receiving zone. (N.J.S.A. 13:20-13.m(4))

4.7 HIGHLANDS TDR BANK

The Highlands Act empowers the Highlands Council to use the State TDR Bank or to establish a Highlands TDR bank to facilitate the transfer of development potential in accordance with the Regional Master Plan. (N.J.S.A. 13:20-13.i) Both choices are optional; neither is legally mandated. In light of this authority, the questions to be answered are what purposes does a TDR bank serve; should a TDR bank be used to effectuate the Highlands TDR Program; and if so, should the Highlands Council utilize the State TDR Bank or establish a separate Highlands TDR Bank?

TDR banks serve a number of important functions. These include purchasing TDR credits from sending zone property owners, recording and tracking credit sales and credit retirements, establishing and reevaluating

¹² Under Section 13.m(4), if impact fees for TDR receiving zones are authorized Statewide, then the impact to be assessed by municipalities participating in the Highlands TDR Program is 200% of the statewide impact fee.

minimum credit values, and marketing the TDR program. The functions a TDR bank performs are often dictated by the needs of the specific TDR program and its structure.

The purchase of TDR credits by a TDR bank is critical to establishing a credible and functional program. This is particularly true in those programs where establishment of receiving zones is voluntary. A TDR bank's ability to purchase credits at the outset of the program creates a stable program because it establishes a ready purchaser and ensures sending zone property owners that their TDR credits have value despite the fact that private market demand might not yet exist. In this way, the TDR bank "fills any timing gap that might result from the lack of an immediate buyer." (Stevenson, 1998) The ability of a bank to purchase credits also provides assurance to developers that there will be credits available for purchase to be used in the receiving zones.

A TDR bank also aids in establishing and stabilizing TDR credit prices. (Pruetz, 2003) During the initial phase of a TDR program, there may be a reluctance to participate in the program because few, if any credit transactions have occurred. By establishing a minimum credit price, a credit benchmark will be established from which private parties can negotiate. (Id.) Additionally, by purchasing TDR credits, a TDR bank has the ability to stabilize the credit market. When credits are scarce, the bank may sell some of its credits to ensure an adequate supply. Where there are too many credits available for purchase, the bank may step in and purchase credits to reduce supply. (Id.)

A TDR bank may also help facilitate development of a private market. By serving as an information clearinghouse, the TDR bank can bring together sellers and purchasers of credits. The PDC Bank in the Pinelands serves this role. It maintains a registry of credits available for sale, which a potential purchaser of PDCs may access.

Finally, a TDR bank often administers the TDR program so that these activities do not have to be undertaken by municipal officials. As noted above, an important function of a TDR bank is recording and tracking all credit transactions. These activities require significant time and administrative cost. With the bank serving in this role, the administrative burden is not borne by the individual municipality. Similarly, a TDR bank can prepare marketing materials and conduct information sessions to promote the TDR program and gain greater community support. As with credit recording and tracking, where these functions are performed by a TDR bank, they are not an administrative and financial burden on a municipality.

As is evident from the discussion above, a TDR bank serves many critical functions in the implementation and administration of a TDR program. Given these important roles, the use of a TDR bank in the Highlands TDR Program is crucial. The remaining determination is whether the Highlands Council should utilize the State TDR Bank or establish a separate Highlands TDR Bank. In consideration of the requirements of the State TDR Bank Act and the State TDR Banks regulations, establishment of a separate Highlands TDR Bank is more likely to achieve the goals of the Highlands TDR Program.

The State Legislature established the State TDR Bank in 1993. (N.J.S.A. 4:1C-49 *et seq.*) With the adoption of the State TDR Act in 2004, the State TDR Bank took on an expanded role of seeking to facilitate municipal TDR programs throughout the State. The State TDR Bank's primary functions are to issue planning assistance grants, purchase and sell development rights, provide loan guarantees secured with development potential as collateral, and maintain a registry of development credits and transfers. (38 N.J.R. 363(a)) The State TDR Bank's procedures are governed by the State TDR Bank Act, and more specifically by its recently adopted amended regulations at N.J.A.C. 2:77-1 *et seq.*

The Bank's regulations establish the standards and procedures for all its functions. Although these

regulations are crucial to the State TDR Bank's operations, they may impose requirements that would hinder implementation of a regional TDR program.¹³ For example, before the State TDR Bank may undertake any of its functions in relation to a municipal TDR program, the Bank must determine that the municipal TDR ordinance is "viable." One requirement of viability is that the municipality has complied with all requirements of the State TDR Act, including conducting a real estate market analysis pursuant to OSG's rules. (N.J.A.C. 2:77-3.1(b)1) Another requirement is that the municipality has its municipal master plan endorsed by the State Planning Commission. (N.J.A.C. 2:77-3.1(b)1.i) The difficulty of complying with these and other aspects of the State TDR Act were discussed in the TDR Background & Program Development technical memorandum. Consequently, the State TDR Bank's viability requirement as currently written could prevent the Bank from undertaking certain functions where it was serving as the TDR bank to the Highlands TDR Program.

Given the potential limitations of utilizing the State TDR Bank, establishing a separate Highlands TDR Bank is preferred. As noted above, the Highlands Council is authorized establish a Highlands TDR Bank. (N.J.S.A. 13:20-13.i(1)) This bank is required to "operate in accordance with provisions of general law authorizing the creation of development transfer banks by municipalities and counties." (N.J.S.A. 13:20-13.i(3)) The general law is the State TDR Act, sections 158 and 159.

Section 158 of the State TDR Act authorizes municipalities and counties to establish a TDR bank for the purchase, sale, or exchange of development transfer. (N.J.S.A. 40:55D-158) Where such a bank is established, it must be governed by a board of directors comprising five members who have expertise in banking, law, land use planning, natural resource protection, historic site preservation or agriculture. In the case of a Highlands TDR Bank, the Highlands Council would establish the bank by resolution, and appoint a five member board of directors. In turn, the board of directors will adopt bylaws governing its activities.

Where the Highlands TDR Bank purchases, sells or otherwise conveys development potential, its activities are governed by section 159 of the State TDR Act. Section 159 allows a TDR bank to purchase development potential provided (1) it has adequate funds for this purpose, and (2) the sending zone property owner demonstrates marketable title to the property and is empowered to restrict that property. (N.J.S.A. 40:55D-159.a) The TDR bank may also sell any development potential that it has purchased, provided that the sale "does not substantially impair the private sale or transfer of development potential." (N.J.S.A. 40:55D-159.b)

Other than the requirements outlined above, the provisions of the State TDR Act governing a TDR bank are fairly fluid and provide flexibility for the Highlands TDR Bank to adopt methods and procedures to achieve the goals of the Highlands TDR Program. Being mindful of these requirements, the Highlands TDR Bank should serve four essential functions: as an information clearinghouse; as an HDC buyer of last resort, and seller of HDCs; as the agency charged with recording and tracking all HDC transactions; and as the agency empowered to reevaluate the minimum HDC price on an annual basis and make recommendations to the Highlands Council for its adjustment.

The Highlands TDR Bank's first function is to act as an information clearinghouse, particularly bringing buyers and sellers together to engage in HDC transactions. In this role, the bank would maintain an online registry of HDCs available for purchase (discussed below), which registry would list the HDC certificate number and its price. Potential purchasers would review the HDC registry and contact the bank for the seller's contact information to begin negotiations. This is similar to the role currently assumed by the

¹³ Keep in mind that the State TDR Bank's chief focus is on facilitating municipal TDR programs where TDR credits are not transferred outside of municipal boundaries. The State TDR Bank's regulations are drafted from this perspective.

Pinelands Development Credit Bank. Additionally, along with the Highlands Council, the Highlands TDR Bank would provide information to the public about the Highlands TDR Program, and the bank's role in the program.

At the outset of the Highlands TDR Program, the Highlands TDR Bank would purchase HDCs from sending zone property owners while receiving zones are being established. The bank would make HDC acquisitions in light of: (1) the importance of Highlands resources; (2) whether the lands had just missed being grandfathered under the Act; and (3) whether the landowner was in a hardship situation.¹⁴

With regard to Highlands resources, those lands that are important for conservation or preservation but not viewed as critical would not be acquired in fee simple but would be identified as sending zones to be conserved through TDR. The lands would be ranked based upon the presence of Highlands resources, which includes both ecological and agricultural resources.

In addition to ranking of properties according to their resource value, ranking of sending zones would also give priority to "almost grandfathered properties" pursuant to section 13.h(2) of the Highlands Act. The properties referenced in this section of the Act are those that just missed being grandfathered under the Act under Exemption No. 3. These are properties that had all local development approvals as of March 29, 2004, but were awaiting State permits. A lot that falls within this category would be given priority over another lot with a similar Highlands resource value.

A final consideration for prioritization would be hardship. There will be extreme, sudden, and/or extraordinary circumstances that will cause a landowner to seek to sell their Highlands Development Credits to generate funds to address these circumstances. The Highlands Council TDR bank, when buying TDR credits, should have the flexibility to purchase credits in such situations. After examining the tests for hardship used by the Pinelands Development Credit Bank, it is recommended that the following hardship test be used when rules for the Highlands Council TDR Bank are adopted:

The owner is experiencing a unique and extraordinary financial hardship which may only be ameliorated through an expedient sale of Highlands Development Credits. Unique and extraordinary financial hardship includes: imminent bankruptcy; death in a household; lengthy illness or serious injury in a household; exhaustion of unemployment benefits and still unemployed; unusually high medical expenses; or other extreme, sudden, and/or extraordinary circumstances.

Because of the lack of receiving zones at the outset of the program, the Highlands TDR Bank would purchase HDCs from sending zone property owners at 100% of the minimum HDC price for the first two years of the program's implementation or until a designated receiving zone is established, which ever comes later. After this initial period, the Highlands TDR Bank would purchase HDCs solely as a buyer of last resort, and at a reduced HDC price so that the bank does not operate at a deficit. The price would decrease by 5% per year over the following three years until the bank purchases HDCs at 85% of the then established minimum HDC price.

The Highlands TDR Bank would also sell HDCs it acquires to anyone who wishes to utilize credits for future development or to retire HDCs. As noted above, a requirement of any sale or conveyance of development potential by the Highlands TDR Bank is that its actions do not "substantially impair the private sale or transfer of development potential." This provision suggests that where the bank is selling HDCs, it sell them at a premium of the then going rate (e.g. 120% of going rate). In the case of a developer, he or she would

¹⁴ Note that the priority system would only apply to purchases by the Highlands TDR bank. There would be no restriction on the ability to transact credits between private parties.

have the options of negotiating directly with property owners to acquire their HDCs, purchasing HDCs from the Highlands TDR Bank but at a premium, or purchasing HDCs from both sources to satisfy the developer's credit requirement.

Another essential function of the Highlands TDR Bank will be to record and track all HDC transactions. This will require working cooperatively with the Highlands Council during the HDC allocation process to ensure that all credit determinations are recorded in an HDC registry. Each individual HDC will be assigned a serial number and those credits will be logged with the registry. As an HDC is sold, transferred and utilized in a receiving zone, the Highlands TDR Bank will record the activities of the credit.

The Highlands TDR Bank should also reevaluate the established minimum HDC price on a yearly basis to ensure that the value established by the Highlands Council does not negatively affect either the private TDR market or the Highlands TDR program generally. Where the Highlands TDR Bank believes the minimum HDC price should be adjusted, it will make its recommendation to the Highlands Council for consideration.

Finally, an important goal of the Highlands TDR Program is that HDCs have the ability to serve as collateral for securing loans from private lending institutions. A TDR bank established by the Highlands Council does not have the authority to specifically guarantee loans, however. The only TDR banks with this authority are the State TDR Bank and the Pinelands Development Credit ("PDC") Bank, and to date, neither entity has exercised this authority. The PDC Bank does allow PDCs to be encumbered by their owner by pledging PDCs as collateral for financing. In this situation, the PDC Bank simply places a notation on a PDC certificate stating that the certificate has been pledged as collateral to secure financing, and that the certificate is encumbered. The notation further states that the certificate cannot be transferred until a release is given by the requisite lending institution. In the event of a default, the PDC Bank lists the lending institution as the holder of the PDC certificate in its registry of available PDC certificates for purchase. It does nothing more than this administrative function with respect to loans. (personal communication, Guillermo Vivas, Executive Director, Pineland Development Credit Bank, August 16, 2006)

While the Highlands Council continues exploring ways of meeting the goal of HDC collateralization, the Highlands TDR Bank should be authorized to encumber HDCs in the same manner that the PDC Bank encumbers PDC certificates. Should a holder of an HDC certificate default on any mortgage obligation, the Highlands TDR Bank will place the mortgage holder on the list of owners that have HDCs available for sale.

4.8 RECORDING AND TRACKING HDC TRANSFERS

As noted above an essential function of the Highlands TDR Bank will be to record and track all HDC activity. These activities are governed by the requirements of the State TDR Act, which mandates that restrictions on the sending zone lot be noted and recorded, and that a record of the development potential severance and its transfer be provided to the State TDR Bank. (N.J.S.A 40:55D-147) To effectuate these requirements, the Highlands Council should prepare two documents, a model conservation restriction and model HDC certificate, which will be used as the templates for all HDC activities.

The State TDR Act requires that when development potential is being separated from a given sending zone lot, the encumbrance on the lot and the remaining uses that are permitted must be attached to and recorded with the lot's deed. (N.J.S.A. 40:55D-147) This instrument must also state that any development inconsistent with its conditions and restrictions is expressly prohibited and that all conditions and restrictions run with the land and are binding upon the property owner and any successor in interest. Furthermore, the instrument's restrictions are enforceable by the municipality and county in which the lot is located, as well as the State of New Jersey.

The conservation restriction will be signed and recorded at the time a sending zone property owner wishes to have the ability to sell or convey his or her development potential. After receiving a final HDC determination letter from the Highlands Council, a property owner may elect to record the requisite conservation restriction or simply hold onto the HDC determination letter. Where the property owner chooses not to record the requisite conservation restriction, the HDC determination letter will remain valid for two years. If no conservation restriction is recorded prior to the expiration of the HDC determination letter, the property owner must re-apply to the Highlands Council for an HDC determination. Once the necessary conservation restriction is properly recorded and filed with the Highlands Council and the Highlands TDR Bank, the Bank will issue the appropriate HDC certificates to the property owner, and the development potential represented by the HDCs is fully transferable.

It is important to note that only one conservation restriction will be recorded per lot. Consequently, even if a property owner wishes to sell or convey only one HDC of several that he or she owns, a conservation restriction must be recorded at that time for the entire lot before that first HDC may be sold.

In addition to providing all requisite development transfer information to the State TDR Bank, the Highlands TDR Bank be tasked with maintaining an HDC registry and tracking all HDC transfers. The registry and tracking system will be similar to that utilized by the Pinelands Development Credit Bank that was developed by Applied GIS, Inc. This tracking module is compatible with the Highlands Council Information System that Applied GIS has developed for the Highlands Council. HDC information maintained by the bank through its tracking module will be placed online so that potential purchasers can review the HDCs available and their minimum price. To maintain the privacy of sellers, however, HDCs would be listed online by their certificate number only. A potential purchaser would have to contact the Highlands TDR Bank directly to receive the potential seller's information.

4.9 MINIMUM HDC PRICE

The Highlands Act TDR provision charges the Highlands Council with establishing the initial value of a development right. (N.J.S.A. 13:20-13.h) Establishing this price requires balancing two critical interests. First, the minimum HDC price must be sufficient so that a sending zone property owner realizes a true economic return from the sale of credit. Second, the minimum HDC price cannot be so great that it reduces a developer's profit to such an extent that a proposed project is rendered uneconomical. Only by finding a balance between these two competing interests will an appropriate initial HDC price be established.

The dollar value of an HDC will depend on the profitability of the bonus density provisions for developers who construct in the voluntary receiving zones. (Nicholas 1982) A fundamental principle of the Highlands TDR Program is that, for each additional unit on a given lot, the increase in revenues will be greater than the increase in costs. While costs savings are attributable to lower per unit infrastructure costs (streets, sidewalks, sewers, utilities, etc.) and other economies of scale, the principal source of savings is reduced land costs. (Id.) Consequently, residential and commercial land values per unit are a significant factor that will influence the value of HDCs.

Also important to the value of HDCs is the recognition that there is great variability in per unit land costs depending upon the particular end use of a lot. (Nicholas 1995) Residential land costs per unit differ greatly when comparing single family home development with that for townhouses or apartments. Similarly, commercial land costs per unit differ significantly between office, retail and other commercial uses. All things being equal, the higher the permitted density (in the case of residential housing) or intensity (in the case of commercial use) of a given lot, the lower the per unit land costs. (Id.)

Understanding these concepts, the minimum HDC price will be established by estimating the land value increments associated with higher density/intensity development per end-use and then comparing these figures. A value will then be chosen that satisfies the balancing of the two critical interest discussed above.

4.10 REVIEW AND ASSESSMENT OF THE HIGHLANDS TDR PROGRAM

The State TDR Act requires that any adopted municipal TDR program be reviewed and assessed to determine whether it is meeting the goals of the program.¹⁵ These reviews occur at the third and fifth anniversaries of the program's adoption.

Although not specified by the TDR provision of the Highlands Act, Highlands Council believes that a similar review of the Highlands TDR Program be conducted. Unlike the reviews required by the State TDR Act, however, these reviews would occur at the fifth and seventh anniversaries of the program's adoption because of the program's scope and voluntary nature of the receiving zones.

At the fifth anniversary of the program's adoption, the Highlands Council would examine the development potential transactions in both the private and public market, compare current conditions with those at the outset of the program, and examine the units constructed with and without utilization of the Highlands TDR Program in the seven Highlands counties. This assessment would also examine the effectiveness of the HDC allocation process and the procedures for designating voluntary receiving zones. With this review, the Council would prepare a report examining the efficacy of the program to date and make recommendations for program changes if warranted.

At the seventh anniversary of the program's adoption, the Highlands Council would conduct another assessment. If an insufficient number of development potential transactions have occurred, the Highlands Council would presume the program is no longer reasonable and requires significant amendment. This presumption may be overcome by the Highlands Council by either:

1. immediately requiring the Highlands TDR Bank to acquire or provide for the private purchase of the difference between the HDCs already transferred and 15% of the total HDCs created in the Highlands Region sending zones; or
2. demonstrating that low levels of HDC transfer activity is due, not to the program's failure, but to low levels of development demand in general throughout the seven Highlands counties.

¹⁵ Section 155 of the State TDR Act requires that the development transfer ordinance and the real estate market analysis be reviewed by the planning board and municipal governing body three years after adoption. These bodies are to analyze the development potential transactions in both the private and public market, compare current conditions with those set forth in the development transfer plan element and capital improvement program, and examine the units constructed with and without utilization of the development transfer ordinance. (N.J.S.A. 40:55D-155) Section 156 of the State TDR Act requires a similar review five years after program adoption. If at least 25% of the development potential has not been transferred at the end of the five-year period the development transfer ordinance is presumed to no longer be reasonable, unless certain conditions are met. (N.J.S.A. 40:55D-156)

5.0 OTHER IMPORTANT ISSUES CONSIDERED IN FRAMING HIGHLANDS TDR PROGRAM

In addition to the essential program elements outlined above, there are several other important considerations that the Highlands Council examined. Each of these issues is discussed below.

5.1 INITIAL HDC ACQUISITION

As discussed above, the designation of receiving zones is strictly voluntary under the requirements of the Highlands Act TDR provision. Due to this situation, the designation of specific receiving zones will continue to evolve over time with demand for HDCs increasing as more receiving zones become available.

Recognizing this situation, the Highlands TDR Program will need to be developed in phases. The first phase of the program will permit the Highlands TDR Bank and others to purchase TDR credits from sending zone property owners despite the fact that there may not be designated voluntary receiving zones in which those credits may be utilized. With respect to the Highlands TDR Bank, it will purchase HDCs of those properties that satisfy the requirements for prioritization discussed above. After an initial period, the Highlands TDR Bank would transition to serve only as a buyer of last resort where, due to hardship circumstances faced by sending zone property owners, those property owners need to sell their TDR credits but no willing purchasers are available. In the second phase of the TDR program, TDR credits will be sold on the private market for use within the designated voluntary receiving zones. The transition between phases will be gradual, but the program mechanisms and processes established at the program's onset will be utilized in both phases.

There are a number of benefits to phasing in the TDR program. First, by permitting the Highlands TDR Bank to acquire credits at the outset before there are designated receiving zones, property owners who wish to sell their credits will have a mechanism for doing so. Second, by phasing the program, it will allow the Highlands Council and Highlands TDR Bank to develop a regionally accurate, land and real estate data during initial operations. This real estate market data, in turn, will aid the Highlands Council and Highlands TDR Bank in evaluating and adjusting the basis for TDR credit values (either regionally or sub-regionally). Third, it provides an appropriate timeframe to establish receiving zone uses in accordance with real market transactions, assisting in the transition to a more open, market-based TDR program.

Given the need for the Highlands TDR Bank to make HDC purchases during the first phase of the program, an adequate amount of initial acquisition capital for the Highlands TDR Bank is essential to its ability to instill confidence in the Highlands TDR Program. Based on initial projections, in light of data from the State Agriculture Development Committee, the Green Acres Program, and the current real estate market, it is estimated that the Highlands TDR Bank requires an initial capitalization of \$50 to \$70 million. This will provide sufficient funds at the outset of the program to ensure that sending zone property owners will be able to participate in the TDR program even as receiving zone demand is being established.

5.2 BALANCING SENDING ZONE HDCS AND RECEIVING ZONE OPPORTUNITIES

The number of TDR credits created in a sending zone versus the number of opportunities to use those credits in receiving zones is known as the "transfer ratio." Transfer ratios vary among TDR programs. In many programs, the transfer ration is set at 1 to 1, i.e. one opportunity is established for each TDR credit generated. Under these programs, a balance is sought to be achieved between the supply of sending zone credits and the demand generated for those credits within receiving zones. Other TDR programs have established transfer ratios as high as 40 to 1, where there are 40 opportunities for every credit created.

Certainly the more numerous the opportunities to use TDR credits, the greater the demand for those credits, assuming the price per credit enables development in receiving zones to be economically viable.

The TDR provision of the Highlands Act is silent regarding the transfer ratio that should be utilized in the Highlands TDR Program. The State TDR Act, however, specifically requires that a balance be achieved between credits generated and opportunities available for their use. (N.J.S.A. 40:55D-145) The Highlands Council recognizes the need, at the very least, to create a balance between sending zone HDCs and receiving zone opportunities to ensure adequate demand for use of HDCs. However, due to the voluntary nature of the receiving zones, it is not possible to predict the number of opportunities that can be created.

In an attempt to address this transfer ratio uncertainty, the Highlands TDR Program includes provisions to establish demand for all of the HDCs to be generated in sending zones. First, any individual or entity (in addition to the owners of lots within a designated receiving zone) will be permitted to purchase HDCs. This policy would likely encourage land trusts, property owners who want to protect themselves from adjacent development, and even investors to purchase HDCs. By enlarging the number of potential purchasers, demand for HDCs should be theoretically greater. In doing so, the Highlands Council recognizes HDCs as a commodity to be sold or transferred to anyone so long as the property owner of the sending zone lot from which the HDCs are generated has recorded the appropriate conservation restriction prohibiting future development of that lot.

Second, as discussed above, with Plan Conformance or the adoption of a municipal TDR ordinance, municipalities will be required to establish that a certain number of HDCs be purchased and retired as a condition to granting any growth-inducing variance. The number of HDCs required will vary based upon the variance sought and the scope of that variance to be granted, and will be established by a schedule to be developed and approved by the Highlands Council.

Another potential use of HDCs is to offset damages to natural resources occasioned by releases of hazardous or toxic material. The Department of Environmental Protection established an Office of Natural Resource Restoration which administers the State's Natural Resource Restoration program. The program was created in the early 1990s to restore natural resources damaged by multiple oil spills and discharges. (<http://www.nj.gov/dep/nrr> visited on July 14, 2006) Where the Natural Resource Restoration Program requires natural resource mitigation, the program could call for the responsible party to purchase HDCs as part of its restoration efforts. The purchase of HDCs would have to be tied specifically to natural resource damages occurring in the Highlands Resources.

Finally, the Highlands Council may seek legislative approval for the authority to require the purchase of HDCs by development beyond the Highlands counties. This would expand the demand for HDCs by creating a larger market for accepting density from the Highlands Region.

6.0 NEXT STEPS

Over the coming months, a variety of activities will be undertaken, including but not limited to, establishing the Highlands TDR Bank and HDC Registry tracking process; establishing the Market, End-Use, and Resource Value Factors; establishing the minimum HDC price; finalizing the language of the conservation restrictions; and, most importantly, working with municipalities interested in serving as voluntary receiving zones under the TDR Receiving Zone Feasibility Grant Program.

7.0 SUPPORTING INFORMATION

ACKNOWLEDGEMENTS

GLOSSARY

REFERENCES

APPENDICES

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GLOSSARY

Conservation Restriction – An interest in land less than fee simple, stated in the form of a right, restriction, easement, covenant, or condition, in any deed, will, or other instrument, other than a lease, executed by or on behalf of the owner of the land, appropriate to retaining land or water areas predominantly in their natural, scenic, open, or wooded condition; appropriate for conservation of soil or wildlife; appropriate for outdoor recreation or park use; or appropriate as suitable habitat for flora or fauna. Under the Highlands TDR Program, a sending zone lot owner must record a conservation restriction for his or her property before the HDCs allocated to that property may be sold.

End-Use Factor – A factor to be applied in the HDC allocation process that accounts for the relative value of the type of residential or commercial unit that could have been constructed on the property prior to enactment of the Highlands Act.

HDC Certificate – A document representing one HDC. Each HDC Certificate will list the lot by block and lot from which the HDC was separated, the lot owner's name, the date of award, and a specific identification number for that particular HDC.

Highlands Development Credit (HDC) – An interest in land, designated as a credit, which is awarded to a sending zone lot owner representing the lost development potential of the lot. One credit is awarded for each lost unit to be expressed as a certain size detached single family home (or some percentage thereof for an apartment, condo or townhouse) or a certain amount of commercial square footage.

Planned Community Zone – Those areas identified on the Land Use Capability Map with concentrated development signifying existing communities. These areas have less constraining environmental resources, and have existing infrastructure that may support development provided that it is compatible with the protection and character of the Highlands environment.

Real Estate Market Factor – A factor to be applied in the HDC allocation process that accounts for the relative value of the local real estate market in which a sending zone lot is located.

Receiving Zone – An area or areas designated in a master plan and zoning ordinance, for purposes of participating in the Highlands Transfer of Development Rights Program, within which development may be increased in light of the area's ecological and infrastructure capacity, and the local real estate market.

Resource Value Factor – A factor to be applied in the HDC allocation process that awards a bonus to a given lot where exceptional Highlands ecological or agricultural resources exists as identified by the Land Use Capability Map.

Sending Zone - An area or areas designated in a master plan and zoning ordinance, for purposes of participating in the Highlands Transfer of Development Rights Program, within which development is restricted in light of the requirements of the Highlands Act.

Specially Planned Area – The Specially Planned Areas function as a subset of the Planned Community Zone and have similar characteristics. They include lands within the Preservation Area which are characterized by previous development and are less constrained by environmental resources, therefore, representing opportunities for redevelopment, infill, and adaptive reuse. They also include those lands within the Planning Area which exhibit the characteristics of the Planned Community Zone, but do not meet the minimum size requirements of that zone.

TDR Density (bonus density) – In a Receiving Zone, either the amount by which development can exceed base zoning or the right to develop a use not permitted under the base zoning with the use of HDCs.

REFERENCES

- Beetle, L. (2003). Are Transferable Development Rights a Viable Solution to New Jersey's Land Use Problems?: An Evaluation of TDR Programs within the Garden State, *Rutgers Law Journal*, 34, 513-563.
- Central Pine Barrens Joint Planning and Policy Commission (1995). *Pine Barrens Credit Program Handbook: A User's Guide to the Central Pine Barrens Transferable Development Rights Program.*
- Central Pine Barrens Joint Planning and Policy Commission (2006). *The Pine Barrens Program: Transferable Development Rights in Central Suffolk County, NY.*
- Clarke, Caton and Hintz (2004). *Old York Village: Implementing Smart Growth.*
- Collier County, FL. Program Overview: Collier County's Rural Fringe Mixed Use District (RFMU) - Transfer of Development Rights (TDR) Program. Available at www.colliergov.net/compplanning/tdr/index.htm.
- Costonis, J. (1973). Development Rights Transfer: an Exploratory Essay. *Yale Law Journal*, 83, 75-128.
- Fulton, W., J. Mazurek, R. Pruetz, C. Williamson (June 2004). *TDRs and Other Market-Based Land Mechanisms: How They Work and Their Role in Shaping Metropolitan Growth*, Brookings Institution Center on Urban and Metropolitan Policy.
- Giordano, M. (1997/1998). Over-Staffing the Envelope: The Problems with Creative Transfer of Development Rights. *Fordham Urban Law Journal*, 16, 43-67.
- In the Region/New Jersey: New Law Addresses Both Conservation and Growth. (1996, February 18). *New York Times*.
- Jurgensmeyer, J., J. Nicholas, B. Leebrick (1998). Transferable Development Rights and Alternatives After Suitum. *Urban Lawyer*, 30, 441-475.
- Machemer, P., M. Kaplowitz, T. Edens (August 1999). *Managing Growth and Addressing Urban Sprawl: The Transfer of Development Rights*, Michigan Agricultural Experiment Station, Michigan State University.
- Miller, A. (1999). Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?, *Natural Resources Journal*, 39, 459-511.
- Montgomery County, Maryland (2001). *Plowing New Ground*. Department of Planning. Available at www.mc-mncppc.org/community/plan_areas/rural_area/related_reports/plowing_newground.
- New Jersey Highlands Water Protection and Planning Council, Resolution 2006-09, February 23, 2006.
- New Jersey Pinelands Development Credit Bank (2006, June 8). *Municipal Acres Permanently Preserved*. Available at www.state.nj.us/dobi/pinelandsbank.htm.
- New Jersey Pinelands Development Credit Bank (2006, April 25). *Sales Activity*. Available at www.state.nj.us/dobi/pinelandsbank.htm.
- Personal Communication with Deborah Lawlor (2005, October 14). *New Jersey Meadowlands Commission*.

- Personal Communication with Larry Liggett (2005, December 7). New Jersey Pinelands Commission.
- Pruetz, R. (2003). Beyond Takings and Givings. Arje Press (i).
- Schnidman, F. (1977). Transfer of Development Rights. In *The Severe Restriction of Development: Conference Proceedings and Selected Articles*, Syracuse University, 57.
- Simon, C. (1997). Successful Growth Management Techniques: Observations from the Monkey Cage, *Urban Lawyer*, 29, 233-249.
- Simon, C. (1989). TDRs: a Concept Whose Time Has Come. ANJEC Report, 12.
- Stevenson, S. (1998). Banking on TDRs: The Government's Role as Banker of Transferable Development Rights. *New York University Law Review*, 73, 1329-1376.
- Tripp, J., D. Dudek (1989). Institutional Guidelines for Designing Successful Transferable Rights Programs, *Yale Journal on Regulations*, 6, 369-390.

New Jersey Statutes

- Burlington County Transfer of Development Rights Demonstration Act, N.J.S.A. 40:55D-114
et seq.
- Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq.
- State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 et seq.

New Jersey Regulations

- Transfer of Development Rights Real Estate Market Analysis Report, N.J.A.C. 5:86-1.1 et seq.
- Pinelands Comprehensive Management Plan, N.J.A.C. 7:50-1.1 et seq.

New Jersey Municipal Ordinances

- Bernards Township, Somerset County, NJ, Township Code Section 21-14.10.3.
- Chesterfield Township, Burlington County, NJ, Township Code Section 130-128 et seq.
- Hillsborough Township, Somerset County, NJ, Township Code Section 188-93.
- Lumberton Township, Burlington County, NJ, Township Code Section 130-62.1 et seq.
- West Windsor Township, Mercer County, NJ, Township Code Section 200-239.

Other Statutes, Rules and Regulations

Boulder County, CO (2000). Successor Intergovernmental Agreement to Boulder Valley TDR Comprehensive Development Plan Intergovernmental Agreement.

Boulder County, CO (1995). Intergovernmental Agreement for City of Lafayette, Boulder County TDR Comprehensive Development Plan.

Boulder County, CO (1996). Intergovernmental Agreement between the City of Longmont and County of Boulder Concerning Transferred Development Rights.

Tahoe Regional Planning Agency. TRPA Code of Ordinances Chapter 34: Transfer of Development Rights. Available at www.trpa.org.

Cases

Bernardsville Quarry, Inc. v. Borough of Bernardsville, 129 N.J. 221, 238 (1992).

Fischer v. Township of Bedminster, 11 N.J. 194, 206 (1952)

Gardner v. New Jersey Pinelands Commission, 125 N.J. 193 (1991)

Kirby v. Township of Bedminster, 341 N.J.Super. 276 (App. Div. 2000).

Lackland and Lackland v. Readington Township, 2005 WL 3074714 (Sup. Ct. L. Div.)

New Jersey State League of Municipalities v. Department of Community Affairs, 310 N.J.Super. 224, 234 (App. Div. 1998).

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 137 (1978).

Riggs v. Township of Long Branch, 109 N.J. 601, 610 (1988).

Roig v. Kelsey, 135 N.J. 500, 515 (1994).

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997)

APPENDICES

- A Past Experience with TDR in New Jersey
- B TDR Programs Outside of New Jersey

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 New Jersey

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.