TRANSFER OF DEVELOPMENT RIGHTS IN NEW JERSEY
A BACKGROUND PAPER

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EXECUTIVE SUMMARY

New Jersey is at a crossroads. It is on track to be the first state to achieve full build-out within the next 50 years. Only those lands purposely preserved will still be undeveloped. The question now is not *whether* NJ will achieve full build-out, but *how.*

In most of the state, municipalities are responsible for answering this question. Many strive to preserve treasured community assets, such as farmland, sensitive environmental areas, historic neighborhoods and village and town centers. But high land costs and ongoing development pressure undermine progress, and municipalities have found that traditional tools, such as land purchase for preservation and master planning and zoning, are inadequate.

An Opportunity for New Jersey

Transfer of Developments Rights, or "TDR", is a land-use management tool that allows municipalities and regions to achieve both land conservation *and* economic growth through the transfer of development potential from one area ("preservation area") to another ("growth area"). TDR can help accomplish many of the state's overarching land-use goals *simultaneously,* including expanding economic growth, promoting compact development and redevelopment, conserving natural and historic resources, protecting farmland and open space, providing affordable housing, and implementing the state's energy conservation and climate change agenda. Further, TDR provides a way to permanently preserve land utilizing private, *not public,* funds, because of TDR's unique requirement that development potential be *transferred* from one area to another. Landowners in the preservation area sell their property's development potential, or "development rights," to builders wishing to use them in the growth area to develop at higher densities. As a result, preservation area landowners are compensated for the loss of their property's development potential with private funds.

To date, New Jersey has witnessed successful deployment of TDR on the municipal level in two Burlington County towns, and on the regional level in the NJ Pinelands Region. Under pilot legislation passed in 1989, both Lumberton and Chesterfield townships used TDR to manage growth in their communities, together resulting in the preservation of more than 3,000 acres of farm and forest lands, accompanied by the development of hundreds of new residential units. In the Pinelands, TDR has been used to preserve over 50,000 acres of environmentally sensitive land, while accommodating approximately 3,200 new housing units and some commercial growth. In both cases, property owners in the designated preservation areas voluntarily sold, and developers in the growth areas voluntarily purchased, development rights that resulted in the permanent preservation of land and increased economic development.

Success of the 1989 pilot TDR legislation paved the way for passage of legislation authorizing the use of TDR statewide in 2004 by single municipalities or groups of municipalities. Since then, despite widespread interest in the program, only one additional municipality, Woolwich Township in Gloucester County, has passed a TDR enabling ordinance. The 2004 legislation creating the Highlands regional planning council also called for creation of a regional TDR program. Implementation is proceeding slowly, due in part to municipal concerns about voluntarily designating regional growth areas.

The Obstacles

Why has such a promising tool been used in only a few places? The obstacles to implementation fall into three categories: 1) burdens of the TDR planning process; 2) difficulties preparing for accelerated growth in receiving districts; and 3) special complications of regional programs.

<u>Burdens of the TDR Planning Process</u>. Initially both landowners and the development community were skeptical of TDR's efficacy. As a result, the TDR enabling legislation is chock-full of new municipal planning requirements designed to prevent an impractical TDR plan from being adopted. They include conducting a full pre-TDR build-out analysis; performing a real estate market analysis to demonstrate the financial integrity of the proposed ordinances in the marketplace; and the need to secure "Plan Endorsement" from the NJ Office of Smart Growth. While all of these requirements address real issues, together, they greatly increase planning costs, which can often approach $500,000, and a very long time delay associated with securing state agency approvals. Meanwhile, state grants for planning are limited to $40,000.

<u>Difficulty Preparing for Accelerated Growth</u>. The greatest opportunity for TDR to have a dramatic effect on New Jersey's growth pattern is to implement TDR in the still rural and undeveloped parts of the state. In these regions, municipalities typically have very small populations, a limited ratable base, and a relative lack of available public infrastructure to support new growth. These rural municipalities have tended to change their zoning to require larger residential lots where the gradual "creep" of development allows for incremental decision-making and short-term infrastructure planning.

TDR, in contrast, requires comprehensive, up-front planning and decision-making on many levels. Unlike traditional large-lot zoning, TDR implementation requires the municipality to fully understand and plan for full build-out at the beginning, not the end, of the planning process. Therefore, these often very rural municipalities need to decide issues related to what public water supply source is most viable; where and how sewer service should be provided; how the transportation network in the municipality under full build-out will affect, and be affected by, the county and state road system; how storm water management will be accommodated; how the school systems will plan to absorb an influx of new students; how to meet Council On Affordable Housing requirements; and how and where a recreation plan can be implemented.

Preparing for well-planned and relatively rapid growth is too complex and interdependent for the municipality to manage alone without major coordination and assistance from state agencies. To date, however, the lack of commitment to ensuring successful TDR implementation from all affected state agencies has impeded this degree of proactive planning and decision-making.

In addition, successful TDR programs depend on developers to build in the receiving district and purchase the credits needed for preservation. To the extent that developers face extra costs – not only for credit purchase, but also for providing infrastructure—they may need financial incentives to participate, depending on the strength of the demand for development in the receiving district.

Special issues for regional TDR programs. As demonstrated in the Pinelands, TDR can be used to help direct growth to the best locations in a region, by transferring growth from one municipality to another. When development is transferred across municipal boundaries, however, special complications arise; development brings obligations to the host municipality, e.g., to educate schoolchildren and to provide affordable housing. The result is unwillingness on the part of many municipalities to receive development. Mechanisms are needed, either to make growth more revenue neutral from the municipal perspective, or to allow for cost sharing between or among municipalities.

A Path Forward

So where do we go from here?

TDR offers an opportunity to comprehensively manage much of New Jersey's future growth and development, particularly in areas that are today still rural and underdeveloped. It offers a method of preserving land using private funds, instead of continued reliance on 100% public financing. In a time when New Jersey is struggling to afford a permanent commitment to continued public financing of land preservation, it can't afford not to maximize TDR implementation to help achieve conservation goals.

What is needed to achieve widespread TDR implementation is a better set of tools, and an unwavering commitment on the part of state government to be a full partner in achieving TDR implementation. To that end, a package of statutory, regulatory, policy and programmatic changes are needed to facilitate the use of Transfer of Development Rights to achieve the following three goals.

- Ease the TDR planning process. The planning process municipalities undertake to implement TDR must be simplified and made more affordable, while still ensuring effective TDR programs.

- Make TDR the better choice for municipalities. Most municipalities that explore TDR implementation recognize its strengths: permanent land protection, increased economic development, comprehensive planning for build-out, construction of needed housing, etc. But they balk, understandably, at the substantial costs of preparing the receiving district for relative rapid development and associated regulatory complications. As such, we must find a way to allow New Jersey municipalities to "do well by doing good" – meaning that choosing TDR implementation makes sense from an administrative and fiscal standpoint, when compared to traditional sprawl zoning. This can be accomplished through technical and financial assistance with planning, access to infrastructure funds, development incentives where appropriate and close coordination and support by state agencies that act as a full partner with local and regional agencies in ensuring successful, large-scale TDR implementation.

- Identify and address obstacles to regional TDR programs. Municipalities and counties that wish to protect regional landscapes using TDR can form voluntary regional partnerships—but will do so only if there are mechanisms in place that make the process fair for both sending and receiving municipalities. These mechanisms will likely involve sharing the costs associated with growth.

The remainder of this background paper is dedicated to providing a comprehensive academic and legal background on TDR as a planning tool, chronicling its history in New Jersey, and commencing a conversation about how to improve TDR implementation moving forward.

INTRODUCTION TO 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 – *Example Sending Zone & Receiving Zone*). (Pruetz, 2003)

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

Figure 1 – Example Sending Zone & Receiving Zone

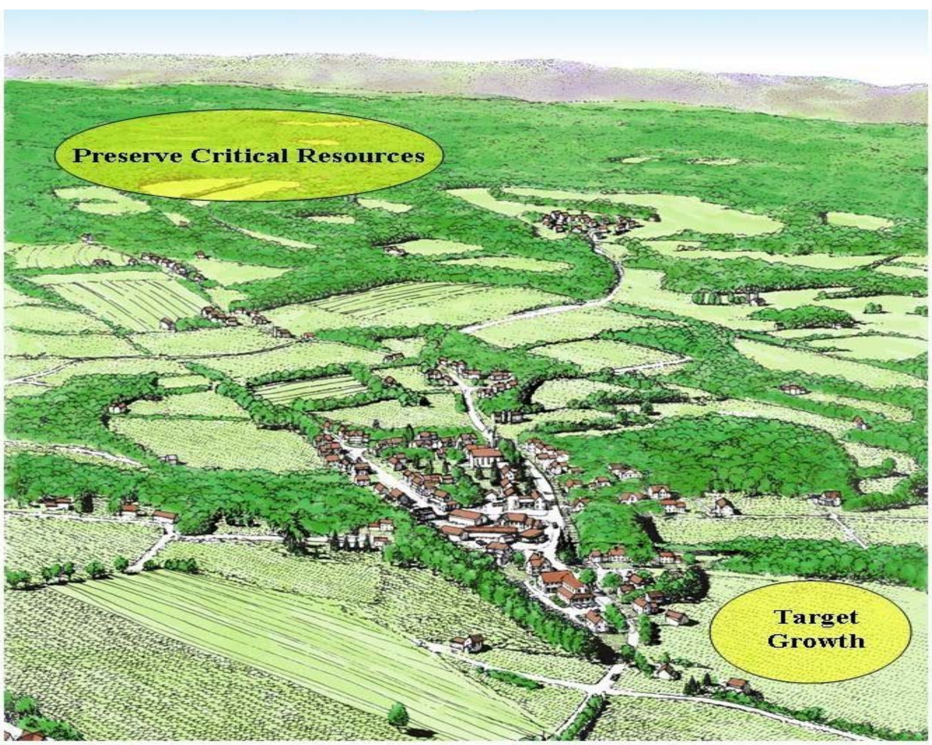
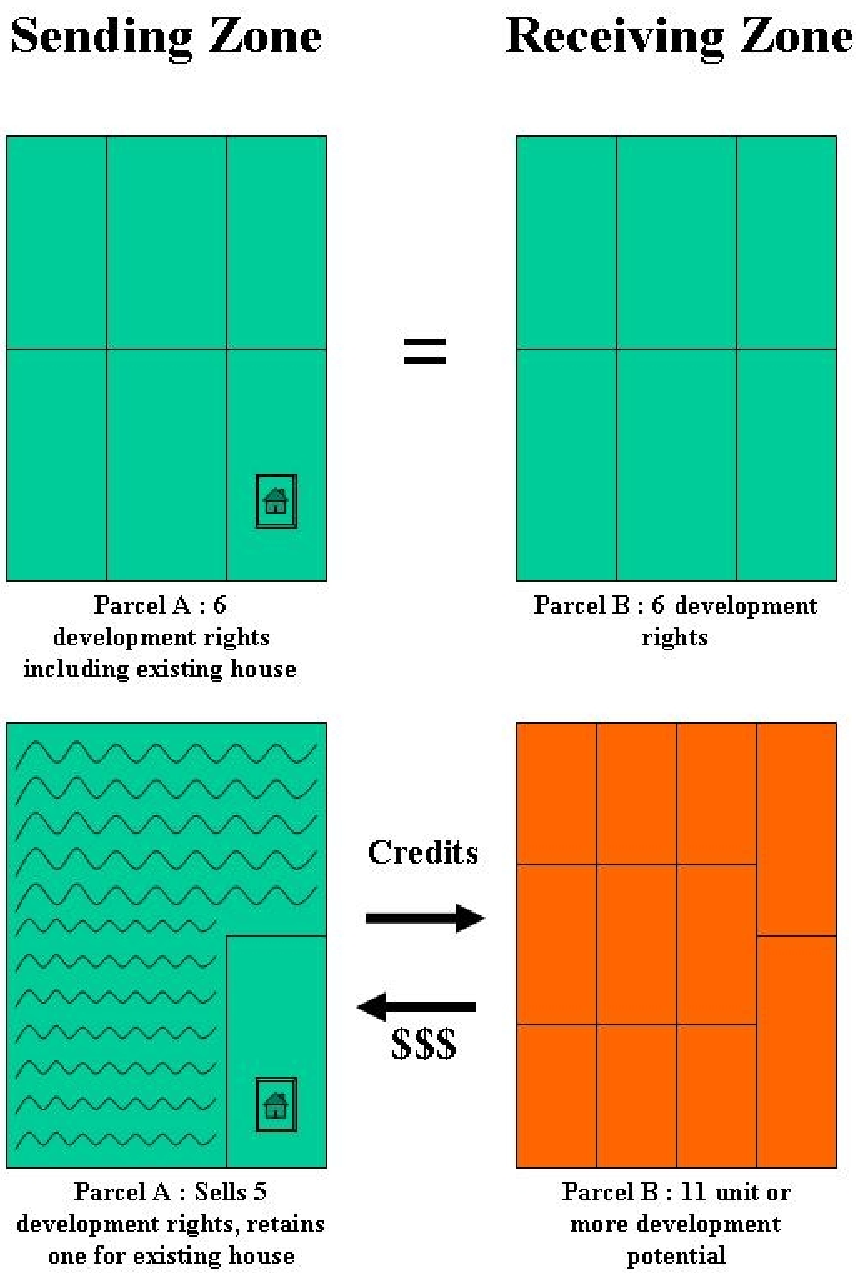


Figure 2 – Concept of TDR



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.

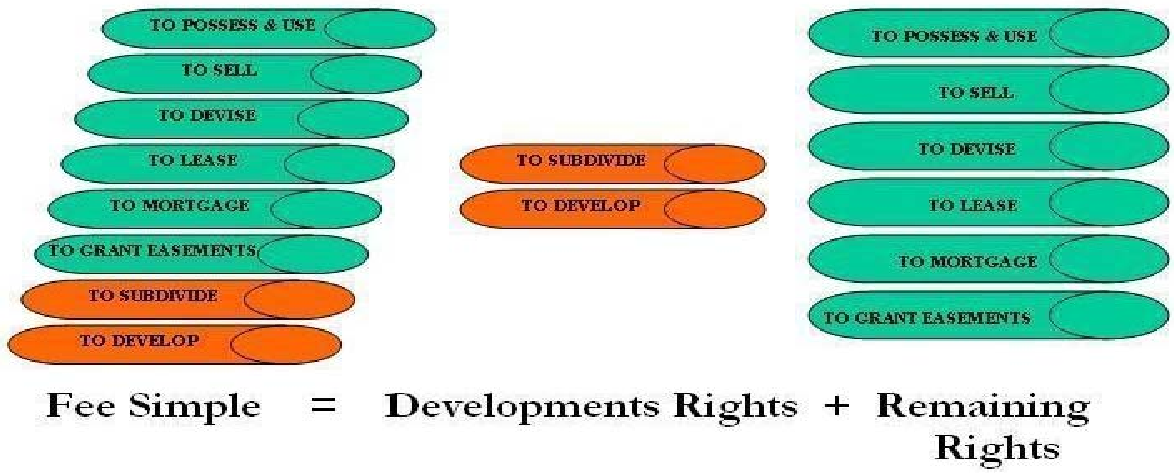
TDR seeks to use market forces to pay for the preservation of properties with unique resources instead of using public financing to purchase or preserve the property. There is little doubt that governments have competing demands for their limited financial resources. School construction or improvement, 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 areas.

TDR also enables local government agencies to provide for essential economic development opportunities, create a diversified housing stock, and accommodate its affordable housing obligations.

TDR recognizes – as a legal matter – that the development potential of a parcel of land may be separated from the other rights of landownership, 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 landowners 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



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, 1997)

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)). Rather, by distributing the value of increased development opportunity in the designated growth areas among both sending and receiving area landowners, TDR provides a level of fairness to all property owners affected by the changes in zoning and development regulations. In doing so, TDR can be more politically sustainable than traditional large-lot zoning scenarios.

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 need to have existing or potential infrastructure capacity, ecological integrity and real estate market to support increased development and its attendant 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 infrastructure capacity and ecological integrity to accept increased development, there is often the issue of proposed additional development density being acceptable within the delineated receiving zone.

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 zone 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. The deed for the sending zone parcel is tailored from the model easement to the particulars of a given property and then filed with the proper recording agency. Under most 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. The bank can serve as the clearinghouse for information regarding the program and can 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 prescribed 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 sending zone landowner has no ability to develop his/her property based on the pre-TDR zoning and must sell TDR credits to recover any portion of the lost development potential of the property. Here he landowner has no discretion as to whether or not to abide by the new development restrictions that have been enacted. (Machemer, Kaplowitz, Edens, 1999)

LEGAL VALIDITY 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 TDR credits as a proxy for the prohibited development, which it could utilize to develop the air space above adjacent properties Penn Central owned. Penn Central argued that the development restrictions imposed by the Landmarks Preservation Law amounted to an unconstitutional regulatory taking in violation of the Fifth Amendment. The Supreme Court found that the development restrictions imposed by the Landmarks Preservation Law did not result in a taking. Important in its decision was the fact that the air rights above the Terminal could be transferred to other parcels. Specifically the Court stated:

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

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

The Supreme Court reexamined the use of TDR in Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997). Under the land use regulations promulgated by the Tahoe Regional Planning Agency, Bernadine Suitum was prohibited from developing her property because it lies within a "Stream Environment Zone." However, the property was given a transferable development right, which could be sold for use on other properties within the Tahoe region, to limit the economic impact imposed by the agency's regulations. Mrs. Suitum sued the agency arguing that the prohibition on development amounted to a regulatory taking. As in Penn Central, the Supreme Court did not rule on the validity of TDR, but held that Mrs. Suitum did not have to attempt to sell her TDR for her to have her day in court.

Like the Supreme Court in Penn Central and Suitum, the New Jersey Supreme Court has not specifically ruled on the legality of TDR. However, the court has implicitly recognized TDR as a legitimate land use tool in the context of a comprehensive land use management system. In Gardner v. Pinelands Commission, 125 N.J. 193 (1991), Hobart Gardner, a farmer who owned 217 acres in the Pinelands, sought to overturn the Pinelands Comprehensive Management Plan ("CMP") that had been adopted by the New Jersey Pinelands Commission ("Commission"). Gardner claimed that the land use restrictions imposed on his property, 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]

More recently in OFP, L.L.C. v. State, 395 N.J.Super. 571 (1997), aff'd 97 N.J. 418, 963 A.2d 810 (2008), the Appellate Division of Superior Court of New Jersey again acknowledged TDR as an important planning tool. In discussing the TDR provision of the Highlands Act, the Appellate Division explained the mechanism of TDR and implied that it may be a remedy to offset a claim of regulatory taking.

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.

HISTORY OF TDR IN THE UNITED STATES

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 several municipalities and counties including Southampton Township, New York in

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

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)

PAST EXPERIENCE WITH TDR IN NEW JERSEY

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 Township, Somerset County and Chesterfield Township, 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 two successful programs in Chesterfield and Lumberton Townships. Success of the Burlington County pilot projects led to the March 2004 passage of 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. These programs shaped development of the State TDR Act and the TDR provision of the Highlands Water Protection and Planning Act. Summaries of each program are provided below.

Pinelands Development Credit Program

The Pinelands Development Credit (PDC) Program was the first established TDR program in New Jersey. Instituted in 1981, this program has preserved over 50,000 acres since its inception. (Pinelands Development Credit Bank, 2009) 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. Municipalities in these areas must allow for the use of PDCs.

Before a landowner may sell his or her PDCs, the PDCs must be certified by the Pinelands Development Credit Bank. To obtain certification, the landowner 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 landowner.

The value of PDCs is established on the open market through the purchase and sale of PDCs between private parties. One PDC is equal to four development rights, The most recent sales information indicates that the price of a PDC is currently ranging between $72,000 and $130,000 per PDC or $18,000 to $32,500 per residential development right. (Sales Activity through May 21, 2008, NJ Pinelands Development Credit Bank)

Burlington County

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

Chesterfield Township

Chesterfield Township implemented its municipal TDR program in 1997 after nearly ten years of study and program development. Chesterfield's sending area is the roughly 10,000 rural and primarily agricultural acres that are located outside of the settled and developed areas of the Township. The receiving area within the Township, known as Old York Village, comprises 560 acres in the northwest corner of Chesterfield. The Township selected this receiving area because of its proximity to existing water treatment facilities 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 village design is patterned on historic villages in Chesterfield.

The TDR credit allocation formula employed by Chesterfield is based upon a parcel's pre-TDR zoning and the soil suitability to accommodate septic systems as determined by the township's septic ordinance. The best soils, those with only "slight" limitations to accommodate septic systems, were awarded one credit for every 2 acres. Soils that were "moderate" in regard to septic system suitability were awarded one credit for every 10 acres. Soils that were "severe" in regard to septic system 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 pre-existing zoning and development regulations. 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. The township TDR zoning ordinances includes a list that identifies how many TDR credits were assigned to each eligible property.

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.

Once a landowner decides to participate in the program, there is a three step process toward "extinguishing" TDR credits. First, 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 and permanently preserves the land.

The second step is selling, or "assigning" credits to a buyer. To assign credits to another (usually the developer who is going to use them in the receiving area), 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.

Finally, credits are "extinguished" when the credit is used in a development project to construct additional dwelling units or non-residential development in the receiving area. Credits must be extinguished before building permits are issued by the township. The developer must first obtain final approval for the project, conditioned 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.

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 have been determined both in the private market and then through auctions sponsored by the Burlington County TDR Bank Board. Credit values started at $23,000 each in 1998; at an auction in 2007 they sold for $65,000 each.

Currently, Chesterfield Township's TDR program is reaching build-out. Not one application for conventional subdivision in the sending area has been processed through the Planning Board since the adoption of voluntary TDR in 1998. By contrast, five applications for development in the receiving area consisting of over 800 housing units have been approved by the Planning Board. To date, the development status of Old York Village includes 555 Certificates of Occupancy (CO's) with 60 additional building permits issued. As a result 460.9 TDR credits have been retired and their corresponding sending area lands preserved.

The effects of the national economic downturn have been evident throughout the Township as applications for residential building permits have dwindled, particularly in the sending area where only 2 certificates of occupancy were issued in 2008 and none in 2009 (through September). By contrast, the receiving area had 120 CO's issued in 2008 and 52 CO's issued in 2009.

On August 21, 2003 the Chesterfield Township School Board voted to locate the new elementary school on a site designated specifically for that purpose in the May 28, 2002 Master Plan amendment. A referendum on the funding of the school construction was twice defeated by the electorate but was finally approved in November 2008. The school is under construction with the anticipated opening for the 2010-2011 school year.

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, in two phases. 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 preexisting zoning and its suitability for septic systems. Relying on soil septic system 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 system limitations down to one credit per 50 acres where soils have severe limitations on septic system suitability. Lumberton Township's TDR ordinance also provides a process for a landowner to appeal the credit allocation of a parcel where the landowner believes more credit should have been allocated.

The credit transfer mechanism is essentially the same as that described for the Chesterfield TDR program above.

Credit values are now determined on the open market. At the height of implementation of the first Lumberton TDR program, credits sold for in excess of $30,000 each.

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.

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

Other 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.

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 for New Jersey municipalities.[3] It authorizes municipalities to establish intra-

[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

municipal TDR programs by ordinance as well as enter into inter-municipal agreements with other municipalities to establish a joint program. Municipalities establishing a joint TDR program need not be in the same county.

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

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

Prior to ordinance adoption the township must also accomplish the following:

- Adopt a capital improvement program for any identified receiving areas;

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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.

- Adopt 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.

In addition, the township must accomplish the following:

- Conduct a real estate market analysis. The purpose of this study is to examine the financial relationship between the value of the development rights anticipated to be generated in the sending zones and the market capacity of designated receiving zones to absorb the necessary development. In essence, the Act seeks to ensure that there is a sufficient fiscal balance between landowners' willingness to sell development rights in the sending area with developers' willingness to pay for TDR credits to achieve higher development densities in the receiving 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.)

- 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 three 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 landowners 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 requires 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 necessary 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.

Woolwich Township

Most recently, Woolwich Township in Gloucester County became the first municipality to adopt a TDR ordinance under the authority of the State TDR Act. Woolwich Township is located between Route 295 and the New Jersey Turnpike and is bisected by Route 322. The Township has been a predominantly agricultural community, but that character was likely to change significantly with the approvals for Weatherby, a 4500-unit residential development in the western portion of the community. By the early 2000's, Woolwich Township became the fastest growing community in New Jersey and the second fastest in the entire northeastern United States.

Facing a future of rising taxes, mounting traffic, and loss of open space and rural character, the Township set out to change its course. Woolwich Township agreed to be one of six communities to serve as a TDR pilot project under the State TDR Act. The community then began a three year public planning process to achieve its vision of preserving its agricultural and open space lands while focusing new development within two mixed-use, walkable town centers. The Township approved its TDR Plan in 2007 along with the necessary changes to its municipal master plan and the adoption of other master plan elements mandated by the State TDR Act.

Consistent with its TDR Plan, Woolwich Township adopted its TDR ordinance in October 2008 after review and approval of the Gloucester County Planning Board and the Office of Smart Growth within the Department of Community Affairs. The ordinance creates a voluntary TDR program that specifies sending and receiving zones along with the method for allocating TDR credits and the processes for enrolling them in the program and redeeming them for use in the receiving zones.

The sending zone is comprised of over 4,000 acres of farmland and open space situated on 115 tax parcels. These parcels, which are minimally 10 acres in size, are located within the Township's residential zoning districts outside of the existing sewer service area.

Under the TDR ordinance, there are two receiving zones: the US 322 Corridor Receiving Zone and the Auburn Road Receiving Zone. The US 322 Corridor Receiving Zone is the larger of the two and encompasses 743 acres. This receiving zone will contain 3,217 homes, but only 100 will be single-family dwellings with the balance of the residential housing consisting of twins, townhomes, condominiums and unit above shops. This receiving zone will also have a commercial main street with a mix of non-residential development and areas of other commercial development. All together, the US Route 322 Corridor Receiving Zone will have up to 3.6 million square feet of commercial development including office, retail and flex space.

The Auburn Road Receiving Zone is located adjacent to the Weatherby development and is comprised of 125 acres. This receiving zone is primarily residential with 502 homes of which 130 will be single-family dwellings. It will also contain a small commercial area that fronts along Auburn Road.

Under Woolwich's TDR ordinance, TDR credits are allocated based upon a sending zone parcel's actual development potential. Calculations are made using a formula based upon the suitability of different soils for septic systems and current zoning model after the allocated method used in Chesterfield's TDR program. The formula also deducts a certain amount of each parcel for development efficiencies that account for formerly needed infrastructure (3% or 12% depending on zoning district). Property owners may challenge the allocation method as applied to their individual parcels.

Although participation in the program is voluntary, the TDR ordinance changed the underlying zoning in the sending zone to encourage property owner participation. Upon adoption of the TDR ordinance, the minimum lot size increased generally from 2 to 15 acres. Consequently, by participating in the TDR program and placing the appropriate conservation restriction on a parcel, a property owner receives more development potential in the form of TDR credits than if he or she chooses to exercise the by-right development.

HIGHLANDS TDR PROGRAM

The Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq., charged the Highlands Water Protection and Planning Council (Highlands Council) with developing a TDR program for the Highlands Region and the seven Highlands counties. The Highlands Council adopted the TDR Program as part of the Highlands Region Master Plan.

The Highlands TDR Program allocates transferrable development rights called Highlands Development Credits or HDCs to sending zone property owners, which HDCs may be sold to developers for use in appropriate voluntary receiving zones. Use of HDCs by developers in the receiving zones that have been established by participating municipalities will permit developers to increase the density or intensity of proposed projects in those zones.

Under the Highlands Act, participation by a municipality as a receiving zone is strictly voluntary. To encourage receiving zone designation, the Act provides a number of incentives to municipalities, including the ability to impose impact fees on development within a receiving zone up to a maximum of $15,000 per unit. Additionally, the Highlands Council established a receiving zone feasibility grant program to provide municipalities with financial and technical assistance to assess the likelihood of designating such areas. To date, eleven municipalities are conducting feasibility studies under the grant program.

The Highlands Council established the Highlands Development Credit (HDC) Bank by resolution on June 26, 2008. Under the provisions of the Regional Master Plan, the HDC Bank performs several functions, including recording and tracking all HDC activities, and serving as a buyer and seller of HDCs. The Bank Board of Directors has adopted by laws and the Bank's operating procedures, which govern the day-to-day activities of the Bank.

The Council, along with the HDC Bank, is currently implementing the TDR Program throughout the seven Highlands counties. The Highlands Council has initiated the HDC allocation process for property owners in eligible areas of the Highlands Preservation Area while the Bank has launched its initial HDC Purchase Program for the acquisition of credits from Preservation Area property owners that satisfy specific hardship criteria.

ISSUES AND CONCERNS WITH TDR IMPLEMENTATION

As noted above, only one municipality (Woolwich) has adopted a TDR ordinance under the State TDR Act since its adoption in March 2004. It is evident that TDR can work in New Jersey as demonstrated by the regional Pinelands PDC Program and the intra-municipal TDR program in Chesterfield Township, Burlington County. However, we need to understand why more municipalities have not implemented TDR and whether statutory, regulatory and/or programmatic changes could make a difference.

Based upon the State's TDR experiences to date, a number of concerns have arisen that need to be addressed if TDR is to become a viable land use technique to aid in the protection of critical resources while ensuring long-term sustainable development. The remainder of this paper sets forth a number of possible issues to consider when proposing recommendations to facilitate use of TDR. The issues are not presented in any particular order of importance.

1. TDR planning costs

The cost of planning for a TDR program is significant given that the planning work must be done up front, prior to receiving state approvals. These planning costs (to the extent State grants are insufficient) are often being borne by rural municipalities which have a limited commercial ratable base and, consequently, limited budget capacity. TDR planning costs can easily approach a half-million dollars to achieve a township-wide TDR program.

Currently, the State TDR Bank Act (N.J.S.A. 4:1C-49 et seq) provides only limited resources to help a community offset those costs. It authorizes the State TDR Bank to provide Planning Assistance Grants to municipalities to cover up to 50 percent of the cost of preparing planning documents, up to a total of $40,000.

In the past, the State Office of Smart Growth (OSG) has provided grants to assist a number of municipalities in exploring TDR; however, these grants typically cover only a fraction of the planning expenses and, in any event, OSG currently has no funds to devote to TDR planning. The new DEP Local Government Greenhouse Gas Reduction Program allows grants to municipalities to create Transfer of Development Rights programs, provided they can be demonstrated to reduce greenhouse gas emissions, but it is not clear how much – if any - funding for TDR will actually be provided.

Under the Burlington County TDR pilot legislation, a municipality could recoup the cost of amending its master plan and land use regulations by imposing application fees for development in the receiving area. However, this provision was not included in the statewide TDR enabling Act, therefore, no other municipalities possess this opportunity of cost recovery.

In the Highlands, however, municipalities do have access to funding for planning in preparation of TDR implementation. Under the Highlands Act, municipalities have the ability to receive up to $250,000 in enhanced planning grant funds to offset the planning and other related costs of designating and accommodating voluntary receiving zones, and the ability to receive a grant to reimburse the reasonable costs of amending municipal development regulations to accommodate voluntary receiving zones.

Possible solutions to the issue of TDR planning costs include increased funding for planning grants from a variety of state and local sources.

2. Other municipal incentives

Beyond planning costs, municipalities implementing TDR are often confronted with having to pay certain costs (or having to pay them sooner rather than later) that are not otherwise associated with staying with “status quo”, suburban sprawl-type zoning. This is particularly true in those cases where the municipalities are rural, with little to no existing infrastructure in the form of municipal services, excess school capacity, public water and sewer systems, and comprehensive recreation systems.

For example, if a rural municipality with 5-acre zoning would eventually need a new elementary school once the township approaches build-out, the decision to raise the $25-$35 million that may be necessary to build the school is a decision that is likely going to be put off until sometime in the future, when development pressure has really hit and transformed the town’s landscape and character. However, if that same township embraces TDR, it may cause the rate of growth to accelerate (albeit in a compact area), and therefore force the township to grapple with those costs within a few short years of TDR implementation.

Similarly, a rural township with low-density zoning dependent on individual septic tanks and wells will now have to grapple with costs of extending sewer and water service to its designated TDR receiving area to make the TDR program work.

In addition, the State of New Jersey can have a profound impact on the viability of TDR implementation. To what extent can and should the State focus its funds related to infrastructure improvements, site remediation, land conservation and affordable housing in TDR municipalities? Clearly, the viability of TDR implementation is improved to the extent State funds can be used to lessen or replace the need for municipalities to front all such associated costs.

Currently the TDR enabling law does not provide any assistance in offsetting these increased infrastructure costs for townships enacting TDR. However, the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq. does offer incentives to municipalities to designated receiving zones for participation in the Highlands TDR Program. Provided certain conditions are met, for municipalities within the Highlands Region these incentives include:

- Authorization to charge up to $15,000 per unit impact fee for all new development within the voluntary receiving zone;

- The ability to receive legal representation by the State in actions challenging municipal decisions regarding TDR, provided that certain pre-requisites are met; and

- The ability to receive priority status for any State capital or infrastructure programs.

Municipalities outside of the Region but within the seven Highlands counties, are entitled to the same benefits as set forth above except for legal representation and priority status. (Importantly, municipalities outside the Region must receive plan endorsement from the State Planning Commission to participate in the Highlands TDR Program. Similarly, under the State TDR Act municipalities desiring to implement TDR must proceed through Plan Endorsement before the TDR ordinance amendments are effective.

Possible sources of incentive funding for municipalities that develop and implement a TDR program include things like: authority for municipal impact fees; redirected realty transfer fees; PILOTS (Payments In Lieu of Taxes); dedicated state sales taxes; prioritized state infrastructure funds to plan endorsed communities and TDR receiving zones in particular:

3. Minimum program requirements

A related question to what incentives should be provided to municipalities under the State TDR Act, is what minimum program requirements must be met to secure those incentives. Minimum requirements can help ensure that sufficient receiving zone opportunities are created and that the TDR bonus units get built. However, the minimum requirements currently required by the State-wide TDR Act, such as the Real Estate Market Analysis and the need for Initial Plan Endorsement, make the process very expensive and unpredictable.

These minimum requirements are the same whether a TDR program is voluntary (i.e. all sending zone property owners have the option of participating in TDR but could also choose to subdivide and develop their land) or mandatory (i.e. the only mechanism available to property owners in the sending zone to realize the value of the development potential of their property is to sell development credits; subdividing and building on site is prohibited). The issue is whether all requirements for developing and implementing a TDR program should be the same, or whether the requirements should be less onerous when a program is made voluntary.

If the requirements for a voluntary program should be less stringent than for a mandatory program, a related issue is how to clarify the distinction between voluntary TDR and non-contiguous tract transfers. A number of planners have begun recommending non-contiguous tract transfers to municipal clients since they involve only a fraction of the investment in pre-planning studies as required by statute for TDR. This relationship needs clarification, as does the legal authorization for non-contiguous clustering.

4. Coordination with COAH requirements

A significant concern for many municipalities is what effect COAH regulations will have on their communities under a TDR scenario. Because many TDR programs require transfer ratios greater than 1:1 (i.e. the programs create more receiving zone building opportunities than sending zone credits), the total number of residential units in the municipality will increase. Under COAH's current growth share regulations, such an increase in units will also increase a municipality's affordable housing obligation. (This is also true for a municipality that participates in a regional TDR program like that being developed for the Highlands Region.) This has discouraged municipalities from pursuing TDR.

The issue to be discussed is how the constitutional obligation embodied in the *Mount* Laurel doctrine and the smart growth principles of TDR can co-exist.

5. Non-residential credit transfer

The State TDR Act currently contemplates TDR programs premised on residential development. The creation and transfer of TDR credits generated from non-residential development should be explored, which may allow greater program flexibility to meet the needs of individual municipalities.

6. **Priority permit review and financial assistance for projects within designated receiving zones**

   In addition to incentives to encourage municipal participation, it may also be necessary to include incentives to encourage developers to build in TDR receiving zones with credits. DEP's Permit Efficiency Task Force has recommended that appropriate development in TDR receiving districts should be eligible for priority permit review through the Readiness Checklist process. What this will actually mean is unclear, but it should be explored. The newly created Economic Redevelopment Growth Grant program can theoretically be used in State Plan centers such as TDR receiving districts to provide gap financing for developers provided such assistance as is deemed necessary. Its viability should also be explored. Other incentives for the development community can also be explored and discussed.

7. **Coordination with DEP's Water Quality Management Planning (WQMP) process and wastewater permitting**

   The lack of approved wastewater treatment facilities is a key obstacle to development in a receiving district. The approval process is long and unpredictable. This issue is complicated by the new WQMP planning process underway at the county level. According to the DEP regulations, zoning densities in septic areas must meet nitrate dilution standards, which in many locations will require significant down zoning. Close coordination with the WQMP planning process will be essential to TDR implementation.

8. **Special issues for regional (Highlands and Pinelands programs) and inter-municipal programs.**

   - **Separate out Highlands and Pinelands Programs.** In at least two of the TDR bills pending before the Legislature, the use of language excepting the Highlands and Pinelands TDR programs from certain provisions of those bills may cause some confusion. These two programs could be given separate sections under any proposed State TDR Act amendments.

   - **Allowing more flexibility in where TDR credits are transferred.** Under the State TDR Act two or more municipalities may develop and implement similar TDR ordinances for the purpose of implementing an intermunicipal TDR program (i.e. development credits generated in one municipality are used in the receiving zone of another municipality). TDR credits generated in the Pinelands and Highlands can only be used in those respective regions. Allowing TDR credits to be used anywhere in the State could open up potential receiving zone markets that might not otherwise be available for program implementation.

- **Address concerns about the cost of transferred growth from the municipal perspective.** Although many municipalities are eager to send growth outside of their boundaries, there are few eager to create regional receiving districts. A key factor, is the cost of accommodating growth, including providing municipal services and schools, and providing for the accompanying affordable housing. Regional TDR programs are unlikely to work well unless the growth areas are made mandatory, such as in the Pinelands, or mechanisms are in place to address the substantial fiscal impacts of voluntary programs. These might range from negotiated cost-sharing agreements, to regional tax-based sharing, to more comprehensive property tax reform.

- **Evaluate need to coordinate minimum requirements across TDR programs.** Under the Highlands Act, the incentives discussed above (in section 2) are not available until a municipality establishes a receiving zone which provides for a minimum residential density of five (5) dwelling units per acre or its non-residential equivalent. Under one bill currently pending before the Legislature, a certain percentage of all development in a receiving zone must be TDR bonus units. The percentage varies depending on whether the program is intramunicipal, intermunicipal, or is involved in the Highlands or Pinelands programs. What minimum requirements should be met to receive any incentives provided, and is there a need to coordinate those minimum requirements across all TDR programs?