

PINELANDS DEVELOPMENT CREDIT BANK

20 West State Street
Trenton, NJ

Minutes

April 15, 2010

Meeting Location: 20 West State Street, Room 828, Trenton, NJ

Members Present: Terry K. McEwen, Commissioner's Chair Designee
Guillermo Vivas, Executive Director, Pinelands Development
Credit Bank
Daniel M. Kennedy, Pinelands Commission Designee
Fawn McGee, Esq., NJDEP Commissioner's Designee
Brian Smith, Esq., Alternate Dept. of Agriculture Designee
Robert C. Shinn, At Large Member

Members Absent: Susan Craft, Department of Agriculture Designee
Assistant Attorney General Gerard Burke, Designee
Edward J. McGlinchey, At Large Member

Others Present: William Schnurr, Deputy Attorney General, Department of Law
and Public Safety (Board Counsel)
Marilyn Harvin-Henley, PDC Bank Staff

Chairman Terry McEwen called the meeting to order at 2:10 p.m. and read the Statement of Compliance with the NJ Open Public Meetings Act.

Roll Call: Mr. Vivas noted that he keeps a written record of all members in attendance and absent. At this time the Board did not have a quorum, so Chairman McEwen postponed approving the minutes until later in the meeting. (Mr. Smith arrived at 2:25 p.m., and from that point forward there was a quorum.)

Round Table Discussion re: Enforcement of Deed Restrictions

Guests: Judeth Piccinini Yeany, Esq., NJ DEP
Chris Jage, NJ Conservation Foundation

Mr. Vivas explained why the guests present had been invited to the meeting a situation that arose from Mr. Jage attending the last Board of Directors meeting and presenting to the Board the problem that exists with the enforcement—or lack of enforcement—of recorded deed restrictions. As Mr. Jage described, much of the problem is with deed restricted lands in the Preservation Area District, not so much in the Agricultural or Special Agricultural areas, that have absentee owners—who live in places like Florida and Canada—and they are de facto vehicle parks, solid waste dumps and Atlantic White Cedar being harvested from these properties; all in violation of the deed restrictions. He suggested that because of the nature of the deed restrictions, the Green Acres inspectors are a logical connection with enforcement of the deed restrictions.

Judeth Yeany introduced herself and mentioned that she has been with Green Acres for over ten years (with the state government for twenty years). She explained that they inspect every property that—since 1961—has been acquired or improved with Green Acres funds throughout the State, in over three hundred municipalities, on a 3-year cycle. The approach for many years had been to hire 2 or 3 college students during the summer and do as many of the inspections that way and pick up the difference with their own existing staff, but they were falling further and further behind. A couple of years ago they switched over to their existing model and tried to bring in more experienced inspectors. But they are still part-time, hourly employees. Although the two inspectors are well qualified, they are about a year behind with their inspections, and are already contemplating whether they may have to go to a 4-year cycle. She explained that she was not opposed to Mr. Jage's suggestion but they have hundreds of thousands of acres that have to be inspected by two people who are limited to 900 hours of work per year. She also mentioned that there are other types of easements that the Pinelands Commission is creating, that they will probably have to get involved with monitoring, in addition to their regular inspections. She saw the issue raised by Mr. Jage as part of a much larger issue. She didn't envision making any commitments on the spot and wanted to come learn more about the extent of the problem and hear what people had to suggest.

In response to the Chairman's question about what happens if they do an inspection and find a violation, she explained that Green Acres does not have any provisions for penalties. They enter into funding contracts under which the funding recipients pledge to only use the land for recreation and conservation purposes, and sometimes there is some more specific language prohibiting certain activities, so they rely on a combination of the fact that they have signed a contract and that there is a State Statute prohibiting them from using Green Acres funded property for uses other than certain purposes. They can threaten to withhold future funding or—if they have to—go into Court to enforce the contract and enforce the Statute.

Mr. Kennedy felt that a good starting point would be creating the best baseline possible, starting as Commissioner Shinn had suggested, by using GIS mapping. He also commented on some of the existing shortfalls in the Pinelands (a lot of small parcels that were carved out before the Pinelands Act). In other areas things like hedge rows or fences help identify property boundaries but in the Pinelands you have a contiguous forest without true markers. It would be difficult for someone doing an inspection to say where a property starts; but, you could create a good baseline, update them with the technology we have, get a good sense of who the owners are, and then start to come up with a strategy of how to apply that in the field. He felt it is not good to use interns or unqualified staff or using a helicopter or relying on static maps; that it is necessary to actually be on the property to really know what is going on. Everyone could work together but without that baseline, everyone is wasting their time.

Mr. Jage explained (for the benefit of those who may not be familiar with what a baseline is), that when they buy a conservation easement, there is an inspection done at the time of closing, of the present conditions of that property (usually done with maps, photographs and written documentation). You have a fair justification if you see

something change in a number of years, to say I can state that the property did not use to look like this and I can document this. He said that—having been involved in litigation regarding the enforcement of the easement and having very good baselines—it is still extremely difficult to prove a case in a court of law. The deference always goes to the property owner.

Commissioner Shinn mentioned a property that he had worked on jointly with Mr. Jage, the Diamond Shamrock. Mr. Jage—coincidentally—had brought copies of some aerial photographs with overlays depicting that property and the adjacent Zemel property (Block 4209, Lot 2, Woodland Twp.), and distributed copies to those present. He explained that this Diamond Shamrock property was acquired by the NJ Conservation Foundation in the mid-nineties and had a significant off-road vehicle problem. PDCs were not severed at the time but it was an absentee landowner. The adjacent property is an example of an on-going PDC violation problem. Their (NJ Conservation Foundation) solution for the Diamond Shamrock problems—not just off-road vehicles, but also included drinking, fire arms, dumping, etc. They finally organized a small group of individuals and organized them into a small non-profit, the NJ Off Road Vehicle Park. By special agreement between the Department of Environmental Protection, the Pinelands Commission and the township, they created (and allowed them to operate for a period of ten years) an off-road vehicle park, with the hopes of them finding a more suitable site because this was in violation of the Pinelands Act later on. That never happened. This property has now been restored; the off-road vehicle park bull-dozed and re-planted and it is now a nature park. They are now in the process of severing their PDCs.

The adjacent property is the Zemel property. Mr. Zemel passed away and his children now live all over the country. The property is one 475-acre lot of his 1,500-acre holdings. All PDCs have been severed. You can see that the “illegal off-road vehicle park” has moved next door to the Zemel property from the Diamond Shamrock property. You can see the impact area which is loaded with trash and all the trails throughout. It is right off Route 72, with easy highway access. This is just one example of a PDC restricted property that has significant management issues, and the land owner sits in Florida and doesn't care. This is one of the most egregious violations and one of the few that I could point out that there's clearly a violation going on.

Chairman McEwen asked Mr. Jage, in an ideal situation, what would he like seeing done in a situation like this?

Mr. Jage responded that ultimately—lands like this—ought to be acquired by an agency, be it the State, County or non-profit, whose mission is in concert with the PDC restriction. But short of that, if this land owner received these credits, cashed them in and made money; he entered into a contract with the State of New Jersey saying that I am going to abide by these restrictions, either by my actions or by preventing others from violating these restrictions.

Chairman McEwen added: Once you're inspected and caught it, you talked to the owner and the owner does nothing; no signs are posted, nothing else is done...

Mr. Jage commented that he has no authority to do that. He just happens to care. What he has identified is that he does not know who (what enforcement agency) to call. He has not been able to establish who has taken authority over those PDC restrictions.

Ms. Yeany acknowledged that the issue to be addressed is whether that would fall upon DEP Enforcement. Even if their program were to add this responsibility to its roster of things that they inspect, they lack the specific authority “go after anyone”. They could notify an owner of violations but acting beyond that, they would have no authority unless there were changes made to the existing Statutes. Whether this is the responsibility of the Green Acres Program to enforce, they have not had the opportunity to brief their Commissioner about this issue. She added that there has been somewhat of a statewide effort—that has included participation by the Pinelands Commission and the NJ Conservation Foundation—to explore a comprehensive mapping of preserved lands, to gather together in one place all these different GIS data sets that have where these easements and other areas of preserved lands are located. Ultimately her hope is that this information will be reflected on the I-map that the DEP interphased that any member of the public can go online and see by the color of the map that they have a PDC restricted land next to them or, ultimately fold it into the tax records because it is one place where there would be more awareness of the restriction.

Mr. Vivas asked who was leading this effort. Ms. Yeany responded that it is a committee that was organized by the New Jersey Geological Forum (NJGF). It is not exactly an entity out of OIT (Office of Internet Technology) but a lot of the people at the OIT office participate in it. It is an open forum type of group where people can sign up to participate. They have just finished with the digital mapping of tax records and close to reconciling that information. They are starting to gain momentum for their next big initiative and a lot of people feel that they need to know where the preserved properties are located.

Mr. Kennedy asked whether any other local governments besides Burlington County hold deed restrictions. He described the process they are going through to create a baseline for the Burlington Co. SADC Program.

Ms. Yeany added comments regarding the existing shortage of resources across the board—including at the Attorney General’s Office—that preclude initiating suit against any entity to enforce their restriction. Having some different kind of penalty authority might help.

DAG Schnurr asked if their statute allow for an injunction against these land owners in order to stop a violation. Ms. Yeany responded in the negative; that it is just a straight statutory prohibition on not using the land for other than recreation and conservation purposes; and, conveyances of property without certain approvals being legally void.

Chairman McEwen asked Mr. Jage what exactly is in the land areas that show as white in the aerial photograph. Mr. Jage responded that it is unvegetated soil or sand. You can see the spider web of trails that emanate from there due to the use of motorized vehicles. They (NJ Conservation Foundation) had to “armor” their boundaries with

concrete and large truck tires embedded in sand to prevent any migration into their property.

Mr. McEwen asked if it could be argued that the use of ATVs constitutes "recreation". Mr. Vivas responded that the deed restrictions contain specific language limiting the use of motorized vehicles. Ms. Yeany mentioned that she has never seen an actual PDC easement or deed restriction and Mr. Jage offered a sample. Mr. Vivas cautioned that the form in question being shown was an old form and some of those forms contained statutory citations that were incorrect and the forms currently in use contain language that has been change to reflect changes made to the *Pinelands Comprehensive Management Plan*. He informed everyone that the current forms are available on the PDC Bank's web site. Ms. Yeany just wanted to see the enforcement language, which states: "This conservation restriction shall be fully enforceable by the GRANTEE [*which in this case is the NJ DEP*] as well as by the New Jersey Pinelands Commission, which is a specific beneficiary of this conservation restriction, in an action at law or equity or both." But then you have to figure out what it is that they are asking in these circumstances, whether they want it restored. She did not know whether you could ask for penalties. Mr. Schnurr commented that you may not be able to ask for penalties but you could get an injunction to have the conditions enforced against the owner even if he is in Florida.

Commissioner Shinn asked where the legal recreational vehicle area is now. Mr. Jage explained that there is not one. The ten years expired in 2008 and the operation was shut down. The NJ Conservation Foundation had to spend a lot of money to restore it, re-vegetate it, and hire somebody to make it secure. Unfortunately, that organization never secured another location, never raised the money, even though they were pointed to a lot of grants sources. Ms. Yeany added that the DEP also got involved to assist in making it happen but the ORV groups never followed thru, and also a lot had to do with community groups saying "not in our back yard". Mr. Jage added that only 5% of the ATVs purchased in the State of NJ were ever used in a licensed state park. So, the other 95% are somewhere else. You could build all the parks you want and this will still happen because it is free.

Chairman McEwen suggested to those present that everyone should start to think about possible avenues to find a solution to this problem. He indicated the need to table the discussion for now and come back to it in the future.

Mr. Kennedy commented that similar to what he has said about the auction issue, we are in a lull right now, and we should think about it and come back to it. Ms. Yeany added that we should take a two-pronged approach and, to deal with this [Zemel] property while dealing with the bigger picture. If someone could get her a copy of the easement for that property, she would try to talk to some people at the DEP, whether it would be Enforcement or the Pinelands Commission. She commented that the situation requires more analysis since they have to look at their own existing cycle of inspections and the reality that they will not be in a position to hire additional staff. There are other sections of the DEP that deal with enforcement and violations and it needs to be explored whether they could be brought into this enforcement process.

Mr. Kennedy suggested that once an inventory has been established, letters should be sent out to the municipalities informing them that these properties have been identified as being deed restricted. Ms. Yeany offered to include these properties in their on-line mapping to help publicize where these properties are located.

Mr. Jage suggested that, once it has been established where the enforcement responsibility will rest, the PDC Bank should start forwarding them the deed restrictions as they are recorded.

Reading and Approval of Minutes:

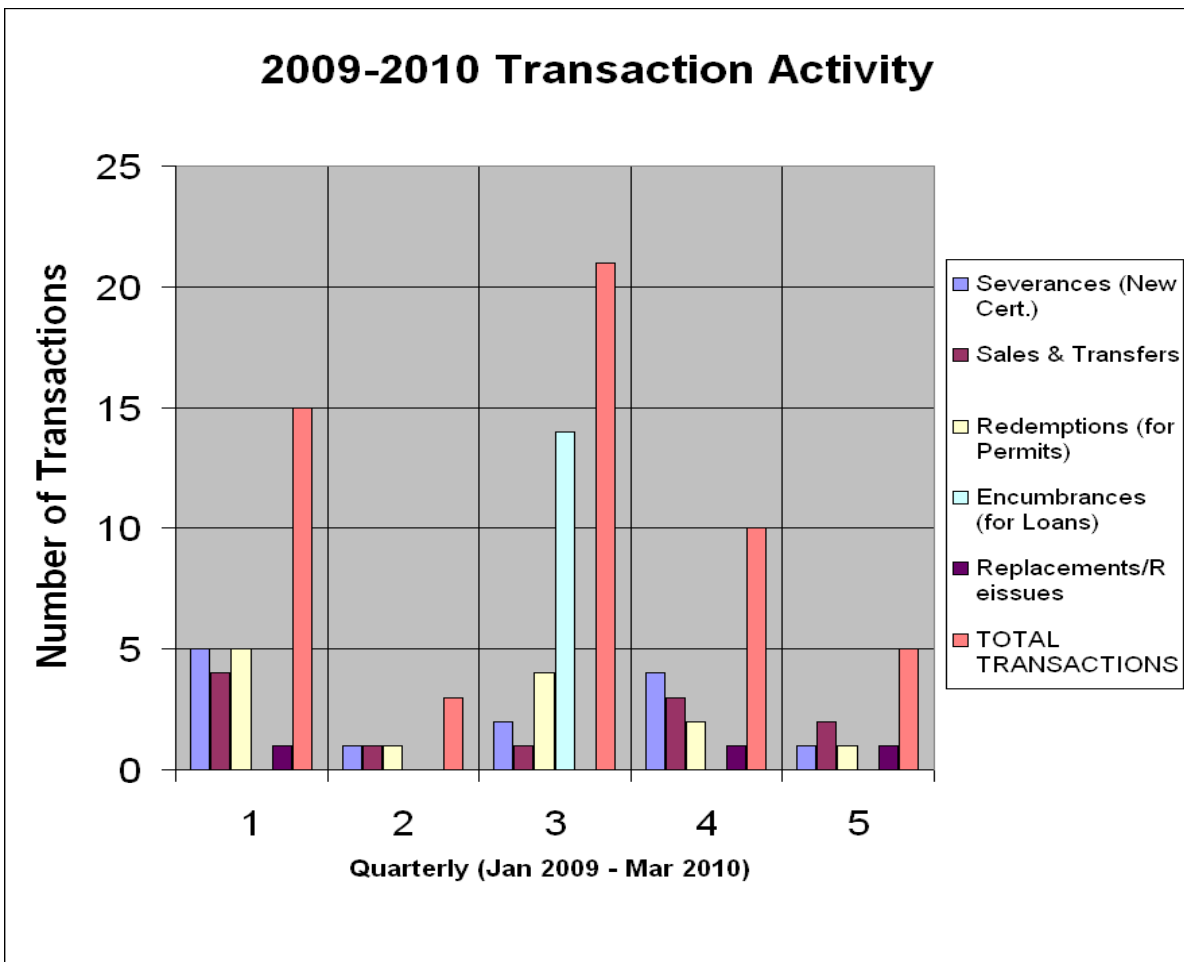
Chairman McEwen called for a motion to accept the minutes of the September 1, 2009 special meeting and the September 1, 2009 executive session minutes. Mr. Kennedy moved for approval (with minor corrections) and Commissioner Shinn seconded; motion carried. Abstentions: None.

Executive Director's Report:

Mr. Vivas discussed with the Board the continued decline in the prices of the Pinelands Credits and the slow-down in transaction activity, as they relate to the current recession and on-going market conditions. He used the chart that follows to illustrate the trends:

**Pinelands Development Credit Bank
Application Activity 2009-2010**

	Jan-Mar 2009	Apr-Jun 2009	Jul-Sep 2009	Oct-Dec 2009	Jan-Mar 2010
Severances (New Cert.)	5	1	2	4	1
Sales & Transfers	4	1	1	3	2
Redemptions (for Permits)	5	1	4	2	1
Encumbrances (for Loans)	0	0	14	0	0
Replacements/Reissues	1	0	0	1	1
TOTAL TRANSACTIONS	15	3	21	10	5



Prepared By: Guillermo Vivas, Executive Director
Last updated: 4/5/2010

Mr. Vivas also reported about the new “Acres Preserved Report by Municipalities” that has now been fully automated and draws the information from our database. Up until now, this report was run manually every month and was easily subject to human error.

Mr. McEwen asked regarding the Board vacancies and Mr. Vivas responded that all the information has been turned over to the new DOBI Commissioner and his Chief of Staff to see if they can get something done by the Governor’s Appointments Office.

Regarding Budget and Funding, Mr. Vivas reported that he has met with Commissioner Considine and Ken Kobylowski, his Chief of Staff regarding this on-going problem. The Bank was funded originally with a \$5-million appropriation from the General Fund, but shortly after that, Treasury took two-thirds of it back, and nobody wants to hear about that. Now is not the best time to ask for money, nor is it the best time to try to sell some of the Bank-owned 107 Development Rights, but we need to start looking at it. Part of the discussions we have had in the past deal with bringing in private holders of PDCs into an auction and hiring an auctioneer to conduct the event. He then turned the subject over to DAG Bill Schnurr, to describe the option open—from a legal point of view—as it has been held in the past that to pass on any costs to the buyer or the seller because our Statute does not provide for the collection of any fees. There is also the question whether it can be done by amending the Rules only.

Commissioner Shinn asked if there was anything in the Statute prohibiting the Bank from contracting with Burlington County for the sale of the credits at auction. Mr. Schnurr responded that the case law is clear about an Executive Branch agency charging fees. You would need a statutory change to be able to charge a fee to the private owners for doing so. The Legislature is the only branch of government that has the authority to levy taxes and charge fees. Commissioner Shinn said the Bank would not be charging a fee. The services to sell the credits are pre-agreed to by the land owner, so it is not a fee. The sellers of credits (as in the Chesterfield Township auction) paid the auctioneer’s cost. Mr. Vivas corrected that it was the buyer who paid for the costs. Mr. Shinn added that the PDC legislation presented the “concept”; now go forward and make it work. It needs to be matured and made to work. He indicated that he had been involved in some form or another with every piece of TDR legislation since 1974. The Pinelands experiment was part of that process. When you see pieces that can make it work and someone says it wasn’t part of the legislative intent, he has a problem accepting that view. He could not see that there is a way to sell credits where it is most beneficial to the land owners and to the public; and that is selling it the best way that you know how to sell it. We found that after 20 years or so of beating our heads against the wall; and now we find that it requires a legislative change. It is very frustrating. If someone is out there selling six quarter credits for \$20,000, then we have all failed.

Mr. Schnurr added that he could not comment on some broad concepts; that he would have to see a proposal as to specifically what the Bank wants to do, then look at the Statute and tell us whether we have the legal authority to do that. So far the discussion has been about the Bank holding an auction and recovering its costs from the private landowners who sell their PDCs through this auction process. That, he could say, we do not have legislative authority to do; you would have to change the statute to do that. Commissioner Shinn indicated that we would work on some questions to submit to see if we can’t do this auction; that we can’t spend another year of doing what we are doing.

We are not buying credits. We are not making a market for credits. We are not informing the public of the value of what they are holding. We are not doing a good job for the Pinelands land owners. We are setting up—to him—a challenge to the Pinelands Act because of loss of beneficial use; the compensation vehicle is the PDC. He said that he went to court on that issue during the Reagan years, when Jim Watts was the Secretary of the Interior. The litigation was focused on knocking out the PDC Program so they could use the “taking” issue. Without PDCs it was a taking. That was major litigation. Now, you could make a case with the PDCs being inactive, that there is no compensation for the loss of beneficial use. We have to do something sooner, rather than later.

Additional comments ensued about how to initiate legislative changes. The Chair and some members suggested that all comments or questions be channeled through the Executive Director and then be submitted to DAG Schnurr for his review. Mr. Kennedy added that we should be able with an RFP (Request for Proposal), to hire a private sector auctioneer and have land owners contact the auctioneer, register their credits to be auctioned, and the Bank would put a certain amount of our own credits on the table; to be auctioned at a minimum price. The landowners or buyers are not contracting with us. We are not charging them anything. If the auctioneer is charging them, it is a totally separate deal. He thought that perhaps something could be crafted with our existing legislation. Mr. Vivas added for the sake of clarification, based upon conversation with the auctioneer about the Chesterfield Twp. auction, that they referred to it as a “premium”, and that this premium was paid for by the buyer of the credits and not by the seller. This information was disclosed in their agreement to bid. That is how the auctioneer gets their compensation. The money is not funneled through any government entity; it went straight to the auctioneer. They also—as part of that compensation—take care of all the bookkeeping and the transfer of funds. It still would remain a private sector transaction.

Mr. Smith commented that it is like auctioning off a preserved farm and Max Spann does a buyers' premium—usually 10%. You go to buy a preserved farm for \$1,000,000 you have to come up with \$1,100,000 and Max gets \$100,000. But he was not clear if the consideration needs to appear on the deed, but it shows on the closing statement. Mr. Kennedy added that with transactional volume you can bring the cost down to—say—5%. Mr. Schnurr asked whether that might not have a negative impact on the price of the sale of the PDCs. Mr. Vivas explained that when the Bank has held an auction, it sets the minimum bid. Traditionally, when the bank has held auctions, the market value of the PDCs has gone up, not down. In the case of the model of Chesterfield Township, you invite the owners of privately held credits to put their credits on the block, and those get auctioned first. When those are exhausted, then the Bank's credits come into play. Mr. Kennedy added that they did it that as a hedge against unduly impairing the private market. Their goals were those of the program and not a fiduciary goal of generating revenues. Our goals here should not be solely to generate revenue for operations. That could be one of the goals but it should be a secondary or tertiary goal. Our goals should be promoting and implementing the PDC Program in the Pinelands. Commissioner Shinn suggested that the Executive Director should get together with the auctioneer and the DAG to see if something like this could be done. Mr. Vivas added that another positive reason for holding such an auction is that it would help the economy and especially help the PDC owners to sell their credits in a bad market.

Mr. Kennedy said the time had come to take immediate action because this has been under discussion for too long and asked Mr. Vivas to send the necessary memorandum requesting action to the appropriate individual in authority.

Business of the Board:

Chairman McEwen asked if there was any other business from the Board members. Commissioner Shinn mentioned that there were a couple of things that he was going to ask Mr. Vivas to do—and some of them have already been done. The acreage protected by PDCs is already nicely done; the overall costs of the PDCs and the value of the PDCs purchased. Mr. Vivas explained that all this data is available on our website and it is updated at the end of every month because that is the information he uses for his monthly reports. Commissioner Shinn asked to extrapolate from all this data the cost per acre of protected land.

Other Business: There was no one from the public in attendance for the meeting.

Adjournment: Chairman McEwen adjourned the meeting at 3:40 p.m. on a motion by Mr. Smith, seconded by Ms McGee and a unanimous affirmative vote.

Respectfully submitted,

Guillermo Vivas
Executive Director