

Established TDR Programs in New Jersey

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New Jersey Pinelands Development Credit Program

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

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

The Pinelands Commission established the PDC Program to offset the severe development restrictions imposed within the Preservation Area District, Agricultural Production Areas and Special Agricultural Production Areas. These management areas serve as sending zones for the PDC Program. PDCs are allocated to landowners in these districts based upon the land type and number of acres of a given parcel. For example, within the Preservation Area District, PDCs are allocated at one PDC per 39 acres of upland and two-tenths a PDC for 39 acres of wetlands. (N.J.A.C. 7:50-5.43(b)1.iii and iv) No PDCs are allocated to a parcel if it is 10 acres or less and is already developed for a commercial, industrial or other such use. For parcels less than 39 acres, the property owner receives fractional PDCs at the same ratio established for the management area in which the parcel is located. The number of PDCs is also reduced by one quarter PDC for each single family dwelling existing on a parcel. Each PDC allocated to a parcel equals four transferable development rights.

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

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

Before a property owner may sell his or her PDCs, the PDCs must be certified by the Pinelands Development Credit Bank. The Legislature established the bank in 1985 to promote the marketability of PDCs as well as record and track all PDC activity. As part of these activities, the bank certifies the number of PDCs allocated to a property through the LOI process. This is done to ensure that the property owner owns the property free of encumbrances. To obtain certification, the property owner submits an application, the deed, a 60-year title search, a 20-year upper and lower court search of liens and judgments, a copy of the tax map showing the property in question, a letter from any mortgage holder indicating that they understand the land will be encumbered with a deed restriction, and a signed deed restriction appropriate for the location of the property. Once this information is submitted to the bank and there are no issues, the deed restriction is recorded with the county clerk and a Pinelands PDC Certificate is issued to the property owner. No PDCs may be sold without the deed restriction being recorded. A landowner selling PDCs retains title to the land and is allowed to continue using it for any non-residential use authorized by the CMP. Any future purchaser of that property is bound by the terms of the deed restriction.

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

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

As noted above, to conform to the CMP, municipalities are required to allow for the use of PDCs in their land use regulations. To distribute the bonus housing units evenly and maintain consistent housing types in various neighborhoods, municipalities designate

zoning districts in which residential development will be permitted at densities ranging from less than 0.5 dwelling units per acre to 12 or more dwelling units per acre with PDCs. Using PDCs, development can take place at the high end of the density ranges.

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

New Jersey Pinelands Commission Website: <http://www.nj.gov/pinelands/>

Pinelands Development Credit Bank Website:
<http://www.state.nj.us/dobi/pinelands/pinelandsbank.htm>

Burlington County

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

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

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

Chesterfield Township

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

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

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

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

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

Chesterfield's receiving area comprises 560 acres in the northwest corner of the township. This area is most adjacent to the employment center of Trenton and the major transportation corridors, I-295 and route 130. The receiving area was also selected because of it's proximity to existing water treatment facilities in Bordentown. In an effort to implement the TDR plan and support the viability of the receiving area, Chesterfield provided sewer and water services to the receiving area tract. The receiving area is planned to accommodate 1,200 residential housing units. The Old York Village Plan includes a variety of attached and detached single family housing types as well as a new elementary school, which is adjacent to centralized active recreation areas. The site plan for the village incorporates a network of neighborhood parks and a mixed-use village center hosting retail, office and convenience uses intended to serve local market needs. The site plan also seeks to promote non-motorized transportation within the village. Preserved stream corridors and walking paths connect the respective neighborhoods and extend north to the existing neighborhood of Crosswicks Village.

All development within the new village will be in accordance with site planning and architectural design standards which have been incorporated within the Township's

implementing zoning ordinances. “The site planning standards address the spatial relationships between buildings and the roadways, streetscape elements and open spaces which form their context. The architectural design standards will ensure that the residential and commercial buildings echo the architectural styles and details, building materials and colors which are characteristic of buildings within Chesterfield’s historic villages.” (Clarke Caton and Hintz, 2004)

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

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

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

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

Prior to enactment of Chesterfield’s TDR ordinance, the Township and Burlington County conducted and commissioned a number of studies and considered both simple and creative approaches toward estimating the value of a Chesterfield TDR credit. There was considerable pressure to render TDR credit values somehow comparable to the values achieved through the State’s Farmland Preservation Program. The results of a

study conducted by Dr. Jim Nicholas revealed a TDR credit value of \$26,000. Dr. Nicholas' study estimated TDR credit values over a range of densities using a multiple linear regression model that utilized data on building and land costs and recent residential sales in and around Chesterfield. The analysis found that the value of a TDR credit changed as density changed, increasing at first to reflect high construction savings, but then decreasing once reduced home values offset any gains in construction economies of scale.

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

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

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

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

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

Lumberton Township

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

program to preserve farmland in the municipality's eastern portion. As of March 2006, TDR had permanently preserved over 850 acres of farmland within the Township.

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

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

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

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

The process of selling TDR credits is termed "assignment" under Lumberton's TDR program. To assign credits to another, the owner submits an application for assignment to the Township, including information regarding the potential purchaser and information concerning the recorded TDR easement. Once approved by the municipality, the assignment must be recorded within 90 days or the assignment is deemed null and void. Like enrollment, the process of assigning credits is done administratively. No public hearing is required. Initial credit values were established by

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

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

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

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

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

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