

A Review of American State *Transfer of Development Rights* (TDR) Legislation and the Applicability to Alberta

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Introduction

Approximately 23 of the American states currently have some form of enabling legislation for the Transfer of Development Rights (TDR) tool, while at least 33 states have active TDR programs operating in counties and cities within those states (Pruetz and Pruetz 2007, Pruetz 2003). While enabling legislation is clearly not a requirement in the United States (nor Canada - see Kwasniak 2005), many states have chosen to enable and support their TDR programs legislatively.

As the discussion in Alberta surrounding the Transfer of Development Credits (TDC)¹ tool evolves and becomes more pragmatic, many communities have indicated a desire to see enabling legislation in Alberta. as well, the *Draft Land-use Framework* (Government of Alberta 2008) makes reference to the value of the TDC tool in reconciling conservation and development planning.

The following review examines the legislation, legislative framework and legislative approaches taken by several jurisdictions in the United States, then draws out the key characteristics and messages applicable to the potential enactment of Transfer of Development Credits legislation in Alberta. The conclusions are drawn from a review of sources examining trends in state legislation, then from a detailed consideration of nine American states: Arizona, Colorado, Connecticut, Delaware, Florida, Maryland, New Jersey, Pennsylvania, and Washington. These states were chosen for their range of character (geographically, level of detail, etc.), and demonstrated local program success. The full text of the applicable legislation for those nine states is included.

The review represents the opinions of the author, and is developed from an implementation perspective based on the expertise in TDR programming acquired by the Miistakis Institute. It has not been developed explicitly from the perspective of a legislative draftsman or other legal view, and should not be construed as a legal opinion. Rather, this review should be considered as a resource for discussion by Alberta legislators and Government of Alberta staff.

Background

A few brief points about the legal and planning context in the United States - and more specifically their differences from Canada's - are important in considering this review.

Similar to Alberta municipalities who derive their power from the Province, American local governments derive their power from the State. This can be through a state constitution, general enabling statutes, or legal enactments (Pruetz 2003). Unlike Alberta municipalities, some counties do not derive a full suite of powers, and are subject to a greater governing hand on the part of the State. Most germane to this

¹ In the United States, Transfer of Development Credits programs carry many different names, but are referred to generically as Transfer of Development Rights (TDR) programs. Because property rights are not constitutionally enshrined in Canada as they are in the United States, Transfer of Development Credits has become the commonly accepted generic term in Canada.

review, it is important to note that some counties must forward their Comprehensive Plan (akin to a Municipal Development Plan in Alberta) to the state legislature for approval, and mandate that subsequent implementing ordinances, including local zoning codes, maintain consistency with these objectives (Pruetz 2003). In those cases, it follows that their ability to pursue a TDR program is much more dependent on state-level direction than counties with so-called “home rule.”

The term “local government” is used throughout this review, as opposed to the more common Alberta term of “municipality.” It is important to note the significant difference between the term “municipality” in Alberta versus the United States, and the related differences in jurisdictional interface. In the United States, a city or town will exist inside a county, and is generally referred to as a “municipality”. Such municipalities are generally still considered to be part of the county, and citizens generally pay taxes to both jurisdictions. This implies an important difference for “inter-jurisdictional” TDR programs in that negotiations and agreements in the U.S. occur in the context of overlapping jurisdictions, while such potential discussions would occur in the context of abutting jurisdictions in Alberta.

TDC Legislative “Key Points”

TDC legislation should be ‘enabling’ more than ‘prescriptive’

Keep legislation simple to the greatest extent possible

Because the implementation of Transfer of Development Credits programs requires a significant attention to the details, there is a natural urge to include that detail in the enabling legislation. However, the majority of TDR legislation in the United States focuses on explicitly giving municipalities the power to enact local TDR programs, and leaves the implementation detail to the local ordinances created by local governments.

For example, the following is the FULL text of the Maryland and the Washington legislation that enables basic TDR programs:

Maryland: “Establishment of programs for transfer of development rights. A local legislative body that exercises authority granted by this article may establish a program for the transfer of development rights to: (1) Encourage the preservation of natural resources; and (2) Facilitate orderly growth and development in the State.”

Washington: “Comprehensive plans. Innovative techniques. A comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights.”

Having said this, in several cases (including the Washington case) additional legislation has been created to enable inter-county transfers, TDR credit banks, and to address other more complex or regional-scale facets of TDR programs.

Provide program guidance while leaving the detail to the municipal bylaws and plans

Notwithstanding the point above, it is possible and appropriate to provide guidance without being prescriptive, giving general criteria and direction for applying a TDC program. For example, the stakeholder/staff process undertaken in the Puget Sound area of Washington state to review their state legislation include this recommendation:

“Conservation priorities for sending areas should be regionally and locally determined with guidance from the state similar to the goals of the GMA. Broad criteria for sending area designation would be developed in statute.”

As well, Arizona state legislation outlines what ‘sending areas’ should include at a general level, while specifically charging the local government with creating the detailed description:

“ ‘Sending property’ means a lot or parcel with special characteristics, including farmland, woodland, desert land, mountain land, floodplain, natural habitats, recreation or parkland, including golf course area, or land that has unique

aesthetic, architectural or historic value that a municipality desires to protect from future development.”

Preserve the voluntary character of the TDC tool

While some aspects of TDC tool may be obligatory (e.g., increased development in receiving areas requiring purchase of credits, sale of credit requiring deed-restriction on sending area parcel, etc.), the attractiveness of the TDC tool to local communities is the promotion of equity (economic advantage for developing OR conserving), and the voluntary nature of the programs. To the greatest extent possible, TDC legislation should promote the voluntary character, while still maintaining the integrity of the program. While most often reflected in the local ordinances, some state legislation has striven to promote this voluntary character by promoting such features as voluntary enrollment, a base development ability, ability to opt out, grandfathering, or even just in their definitions. Some examples include:

Connecticut: “Any zoning regulations adopted pursuant to section 8-2 concerning development rights shall authorize the transfer of the development rights to land only upon joint application of the transferor and transferee.”

Florida: “Land within a rural land stewardship area may be removed from the rural land stewardship area through a plan amendment.”

Washington: “Transfer of development rights: includes methods for protecting land from development by voluntarily removing the development rights from a sending area and transferring them to a receiving area ...”

Connect TDC programs to overarching planning and conservation goals

Ensure a connection between the enabling of the TDC tool and the promotion of provincial-level sustainability goals

Operationally, TDCs are equally about conservation and development. However, a review of the American legislation indicates that the underlying statutes generally speak to an overarching purpose related to conserving the valued landscapes within a community, and guiding development in such a way as to promote conservation of those landscapes. The statutes - even the very short ones - take pains to identify the connection between any powers granted under the TDR laws and the use of those powers to guide development in such a way as to maintain open space, rural landscapes, agricultural productivity, environmental integrity, etc. Actual implementation is left to the local government, and outlined in detail in their community-specific ordinance (bylaw).

A selection of purpose statements from various American state legislation illustrates this:

Maryland: “A local legislative body that exercises authority granted by this article may establish a program for the transfer of development rights to: 1) Encourage the preservation of natural resources; and 2) Facilitate orderly growth and development in the State.”

Colorado: “... preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of lands with contiguity to agricultural lands suitable for long-range farming and ranching operations.”

Florida: “It is the intent of the Legislature that rural land stewardship areas be used to further the following broad principles of rural sustainability: restoration and maintenance of the economic value of rural land; control of urban sprawl; identification and protection of ecosystems, habitats, and natural resources; promotion of rural economic activity; maintenance of the viability of Florida's agricultural economy; and protection of the character of rural areas of Florida.”

New Jersey: “Accommodating vital growth while maintaining the environmental integrity, preserving the natural resources, and strengthening the agricultural industry and cultural heritage of the Garden State.”

Ensure a connection between TDC programs and the goals reflected in municipalities' Municipal Development Plans and Land-use Bylaws

While the purpose statements above identify the connection to state (provincial) priorities, enabling legislation should also ensure that in the use of the TDC tool there is consistency with the municipality's governing documents, as well. This is not a challenge in the sense that most TDR programs are aimed at conserving environmentally, agriculturally or historically significant properties - goals regularly identified in Alberta municipalities' Municipal Development Plans. The challenge addressed by some American legislation is to ensure there is a *process* for aligning these goals (see *Integrate TDCs into municipal planning structure*, below).

Some American legislation goes so far as to suggest the local goals which the TDR program could support:

Colorado: “A process should be available for the development of parcels of land for residential purposes that will authorize the use of ... transfer of development rights and fulfill the goals of the county to preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of lands with contiguity to agricultural lands suitable for long-range farming and ranching operations.”

Support / incent high-quality conservation planning

Identify planning requirements for TDC programs

Several states have used the development of TDC legislation as an opportunity to promote more sustainable planning. The details of the pre-planning work are, again, left to the individual municipalities, but the components are itemized in the legislation. The effect is the creation of a much higher level of sustainability planning

For example, the New Jersey legislation requires that local governments must satisfy certain criteria to be eligible to create a local TDR program by ordinance, including:

- Adopt a development transfer plan element of its master plan, including:

- 10 year estimate of population and economic growth
- identification of prospective sending and receiving zones
- analysis of how growth will be accommodated in municipality and receiving zones
- estimate of existing/proposed infrastructure in receiving zone
- presentation of procedure for instruments to convey development potential
- planning objectives and design standards for development in receiving zone
- Adopt a capital improvement plan ... for the receiving zone
- Adopt a utility servicing element of the master plan
- Prepare a real estate market analysis

In some cases, the requirements are simply related to the mechanisms that must be in place to operate a TDR program. For example, Arizona requires that before a local government can enact a TDR ordinance, the must have in place a method for issuing/recording/affixing transferred development potential, and for a mechanism for deed-restricting sending areas parcels.

Facilitate municipal power to require “innovative planning and development techniques”

Several pieces of American legislation make reference to “innovative planning and development techniques” (in fact, the TDR measures are often included in the planning legislation under such a heading). In some cases, legislation includes a simple encouragement that comprehensive plans (similar to Alberta’s Municipal Development Plans) incorporate such approaches. For example:

Washington: “**Comprehensive plans. Innovative techniques.** A comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights.”

Florida: “The Legislature recognizes the need for innovative planning and development strategies which will address the anticipated demands of continued urbanization of Florida’s coastal and other environmentally sensitive areas.”

Likely more effective measures are those that explicitly enable innovative approaches. For example, the New Jersey legislation allows local governments to make TDR programs a more fundamental part of the planning structure, but requiring that:

- “Non-receiving zone parcels for which development potential is increased >5%, shall become receiving zones (except ‘minor subdivisions’)”
- Density increases are not achievable except through TDR

It will be important to consider whether such approaches should be legally required of municipal TDR programs, or rather made available for discretionary use.

Ensure receiving areas are in defined (or capable) growth areas

One area to which American state legislation devote significant consideration is how to legislatively ensure that the receiving areas identified in local TDR programs are 1) in fact capable of accommodating the growth, and 2) appropriate locations for increased development density locally and regionally.

- *Arizona* legislation simply states that those are requirements and leaves it to the local government to show that is the case:
“*Receiving property shall be appropriate and suitable for development and shall be sufficient to accommodate the transferable development rights of the sending property without substantial adverse environmental, economic or social impact to the receiving property or to neighboring property.*”
- *New Jersey* legislation requires that receiving areas must be sufficient to accommodate all sending zone development potential.
- *Delaware* requires that local governments identify Special Development Districts to be used as receiving areas that that “growth be planned for and funded in advance of construction.” To ensure that capability, the legislation allows for a tax-exempt bond ultimately paid for by a special assessment on future residents and businesses in the SDD (not the rest of the municipality).
- *Florida* legislation is very explicit about the minimum characteristics of designated receiving areas. It states that “criteria for [the designation of receiving areas] shall at a minimum provide for the following:
 - adequacy of suitable land to accommodate development so as to avoid conflict with environmentally sensitive areas, resources, and habitats;
 - compatibility between and transition from higher density uses to lower intensity rural uses;
 - the establishment of receiving area service boundaries which provide for a separation between receiving areas and other land uses within the rural land stewardship area through limitations on the extension of services; and
 - connection of receiving areas with the rest of the rural land stewardship area using rural design and rural road corridors.”

Integrate TDCs into municipal planning structure

Control of the TDC program must ultimately be in the hands of the municipality

In all of the U.S. state legislative structures that we reviewed, provisions for Transfer of Development Rights were included in the legislation that transferred power from the state to the local government (specifically the sections dealing with planning and land use) legislation, or an associated Act (e.g., the Growth Management Act in Washington).

In most cases, this dictated that the TDR provisions be included in their comprehensive plans (akin to Alberta’s Municipal Development Plans), and more specifically in a specific ordinance (akin to Alberta’s land-use bylaws). For example, Pennsylvania’s legislation emphasizes the role of the local ordinance:

“To and only to the extent a local ordinance enacted in accordance with this article and Article VII so provides, there is hereby created, as a separate

estate in land, the development rights therein, and the same are declared to be severable and separately conveyable from the estate in fee simple to which they are applicable.”

It will need to be considered whether the Alberta enabling legislation would need to explicitly allow density variance for the purpose of a TDC.

Require explicit connection of TDC sending and receiving areas to zoning

American state legislation requires an integration of TDR sending and receiving areas to local zoning to some degree or another. In some cases, the legislation (as noted above) outlines the criteria for such zones. In other cases, states have chosen to integrate the TDR tool into a larger program objective, and have reflected that in their zoning requirements.

Delaware legislation requires receiving areas to be Special Development Districts, and lays out a broad range of criteria and implications that speak to sustainable planning and land use well beyond simply TDR implementation.

Maryland identifies Agricultural Preservation Districts with a host of program and implementation goals, one of which is to delineate eligible sending areas.

Florida legislation creates Rural Land Stewardship Areas which have a range of characteristics and associated programs related to conservation, but requires that TDRs can only exist within such a zone.

Create an oversight structure

Most American TDR legislation includes some measure of state or third-party oversight and associated reporting, and occasionally required performance benchmarks.

Florida and New Jersey require annual reporting and benchmarks as such:

Florida: “The department shall report to the Legislature on an annual basis on the results of implementation of rural land stewardship areas authorized by the department.”

New Jersey: Must do an annual report on activity, as well assessment of effectiveness; TDR ordinance and real estate assessment are reviewed after three and five years to ensure at least 25% of development potential has been transferred.

Several states have incorporated citizen-advisory bodies to help guide and assess TDR programs. In Washington, the current review of the TDR legislation and its application in a regional context is heavily dependent on the direction of the Puget Sound Regional Council association of local governments. In Maryland, Calvert County uses a government-appointed Agricultural Land Preservation Committee to oversee its program. Such bodies should at a minimum be enabled and encouraged in provincial legislation.

Provide for program support within legislation

As noted above, implementation of new or dynamic, knowledge-based programs requires support, especially for smaller municipalities with limited access to resources. Many American programs have concluded that beyond simply enabling TDR programs, state legislation is a practical vehicle for outlining the state-level support for local TDR programs, both funding and technical support. As well as providing necessary resources, this support reflects a commitment from the state. This raises the comfort level for local governments considering programs, who (like Alberta municipalities) derive their power and ultimate direction from the state.

Designate provincial departments as program resources

To ensure both efficiency in program development, and integration/consistency with provincial/regional land use initiatives, enabling legislation should identify provincial agencies as program resources for municipalities.

In both New Jersey and Maryland, the Office of Smart Growth is designated as a support agency, providing technical assistance and ensuring coordination with state-level goals. In Florida, the Department of Community Affairs provides “technical assistance to local governments in order to promote the transfer of development rights within urban areas for high-density infill and redevelopment projects. Additionally, the Florida legislation tasks that department to work “in cooperation with the Department of Agriculture and Consumer Services, the Department of Environmental Protection, water management districts, and regional planning councils [to] provide assistance to local governments in the implementation of [innovative planning and development strategies]” such as Transfer of Development Rights.

The Florida legislation goes on to outline key types of technical support to be provided by those departments, including geographic information systems (GIS) land cover database and aerial photogrammetry, information and assistance regarding land acquisition programs, and establishment of rural land stewardship areas in smaller rural counties with limited resources.

Provide funding for program establishment and participation incentives

Many state TDR laws outline financial support available to municipalities for establishing programs, undertaking background studies, equipping receiving areas. Such funding may be critical for ensuring proper structuring and catalyzing participation. In many cases, as noted above, these municipal efforts constitute superior planning in general, not just for TDR programs.

In Washington state, as they explore establishing a regional TDR program, state legislation has directed that “Subject to the availability of amounts appropriated for this specific purpose, the department shall fund a process to develop a regional transfer of development rights program.” This legislation also directs that funding mechanisms be actively sought as incentives for participation:

“Identify opportunities for cities, counties, and the state to achieve significant benefits through using transfer of development rights programs and the value in modifying criteria by which capital budget funds are allocated, including

but not limited to, existing state grant programs to provide incentives for local governments to implement transfer of development rights programs.”

The New Jersey legislation, which guides the largest and most complex TDR programs in the U.S., provides for planning assistance grants for municipalities of up to 50% of / \$40K (whichever is less) of cost of TDR-based elements of master plan. This is to include utility service plans, development transfer plans, real estate market analyses, and capital improvement programming.

Allow for creative financing and incentives

Enabling TDC legislation should allow municipalities to generate creative financing and incentive approaches in support of establishing and engendering participation in TDC programs.

For example,

- Delaware’s legislation allows for 10% of proceeds from transfers go to municipality to cover costs of infrastructure in receiving areas.
- Florida’s legislation specifically outlines potential incentives for landowners:
“Owners of land within rural land stewardship areas should be provided incentives to enter into rural land stewardship agreements ... [including] but not be limited to, the following:
 - a) Opportunity to accumulate transferable mitigation credits,*
 - b) Extended permit agreements,*
 - c) Opportunities for recreational leases and ecotourism,*
 - d) Payment for specified land management services on publicly owned land, or property under covenant or restricted easement in favor of a public entity, or*
 - e) Option agreements for sale to public entities or private land conservation entities, in either fee or easement, upon achievement of conservation objectives.”*
- In Washington state’s exploration of a regional TDC program for the Puget Sound area (covering four counties), they are exploring fast-tracking/exempting designated TDR receiving areas from state environmental review requirements as an incentive to participate in TDR programs.

Enable the market, but don’t define it

Ultimately, the market for development credit purchases and sales will be determined by the willing buyers and sellers in a given community. Although it is important to set the boundaries around that market, it is likewise important that the legislation does not seek to set those parameters in a way that stifles the unique and evolving character of these emerging markets.

Do not prescribe specific credit transfer rates / allocation ratios

The credit transfer rate or allocation ratios (i.e., how many credits a sending area parcel merits and how many credits additional building density requires) is vital

component of a successful TDC program. However, the calculation will be very site-specific, and does not lend itself well to provincial legislation. The community/staff working group in Washington state looking at establishing a regional TDR program, summarize the issue well in their recommendations to the state legislature:

- *“An allocation ratio should not be included in legislation. It would be too difficult to come up with a single ratio and could not be easily changed to respond to the market.*
- *No allocation ratio should be established for the private market. Buyers and sellers should be able to freely negotiate a price.*
- *The TDR bank should establish an allocation ratio framework that would apply to small projects. However, larger projects should be able to negotiate an allocation ratio with the sending and receiving jurisdictions. The framework should be kept flexible to allow values to be defined locally, depending on sellers’ asking price and developers’ willingness to pay.*
- *Don’t limit the allocation ratio to residential density. Allow translation to floor area ratio, parking, carbon offsets, etc.”*

Having said that, there are important aspects of that calculation that can and should be guided by provincial legislation. For example, the Arizona legislation outlines the factors that should be taken into consideration in developing that local ratio:

“Development rights may be calculated and allocated in accordance with factors including dwelling units, area, floor area, floor area ratio, height limitations, traffic generation or any other criteria that will quantify a value for the development rights in a manner that will carry out the objectives of this section.”

As well, the New Jersey legislation includes direction to the county assessor regarding how to account for the change in value associated with development potential being removed or added to a parcel.

Use caution in establishing power to set credit prices or prescribe purchase scenarios

A challenge, even down to the local level, is for governing bodies to avoid ‘setting’ the market unduly. This is virtually impossible to avoid entirely, especially when the local government or a TDC bank are involved in purchasing credits and disseminating information about an emerging market. In those cases, citizens will naturally view the price paid by the government for a credit as the benchmark.

The only case of American legislation we reviewed which included provisions related to setting the price of credits related to the activity of TDR Banks. In this case, the legislation enabled the TDR Bank Board to set “municipal average(s)” of development potential price, and directed the state TDR Bank to enter into transactions only by purchasing 80% of the development potential value (with the affected municipality contributing the other 20%, or by donation). The legislation also, wisely, directs that proposed purchases must be appraised with before/after methodology (currently used in Canada to determine the value of conservation easements).

Do not prescribe credit volume, but encourage connection of credit volume to overall goals and receiving area capacity

Setting a limit on the number of credits available in a market is critical, otherwise there is no limit on bonus development, and an inability to track whether conservation goals are in fact being met. However, that prescription is also very specific to individual circumstances, and does not lend itself to broad, province-wide direction and calculation.

However, directing that there should be some limit and some connection of that limit to the overall program goals may be an important consideration in TDC legislation. For example, the Florida legislation contains this direction:

“The total amount of transferable rural land use credits within the rural land stewardship area must enable the realization of the long-term vision and goals for the 25-year or greater projected population of the rural land stewardship area, which may take into consideration the anticipated effect of the proposed receiving areas.”

Enable necessary deed-restriction devices

Make specific reference to the deed-restriction devices available for TDC programs

It is vital that enabling TDC legislation speak to the mechanisms and procedures for restricting future development in the sending area parcels. These mechanisms must be ‘deed-restricting’ such that they are registered at the land titles office, and are binding on future landowners, ensuring the long-term conservation central to the TDC concept. Some examples include:

Florida: “The use or conveyance of transferable rural land use credits must be recorded in the public records of the county in which the property is located as a covenant or restrictive easement running with the land in favor of the county and either the Department of Environmental Protection, Department of Agriculture and Consumer Services, a water management district, or a recognized statewide land trust.”

New Jersey: Ordinance must provide for the necessary deed restriction instrument enforceable by the county, the State, or “any interested party”, as well as for recording procedures and registration on title (Registered with the land titles office and the State Transfer of Development Rights Bank in the Development Potential Transfer Registry).

Pennsylvania: “The development rights shall be conveyed by a deed duly recorded in the office of the recorder of deeds in and for the county in which the municipality whose ordinance authorizes such conveyance is located.”

Alberta legislation must expand the deed-restriction devices relative to the landscapes to be conserved

In Alberta, we have conservation easements, environmental reserve easements, restrictive covenants, and provisions in the Historical Resources Act (HRA) which may

work to varying degrees to accomplish the deed-restriction needs of TDC programs. The first two will apply only to lands which are ecologically sensitive or valuable; restrictive covenants' requirement for a 'benefited' parcel makes them cumbersome; and the HRA's powers are appropriate for cultural and historical landscapes, but untested in this sort of application.

Much of the discussion in Alberta around TDCs focuses on agricultural land conservation, yet there is no mechanism to deed-restrict these lands for long-term conservation. TDC legislation will either have to include TDC-specific easements, or the conservation easement legislation (Environmental Protection and Enhancement Act) will have to be modified to include agricultural conservation as one of its allowable purposes.

Enable TDC Banks

Allow for TDC Banks to catalyze and stabilize credit markets

TDC banks buy and sell development potential credits, acting as a third-party go-between for buyers and sellers of development credits. These banks function to catalyze markets if developers and conservation landowners are not in the market at the same time, and to provide one-stop, regulated credit transfer services.

Many TDR programs in the United States operate without any sort of TDR Bank, and they are by no means a requirement. However, many programs - especially mature programs seeking to revitalize activity - look to the establishment of banks. For example, current Washington state legislation speaks only to exploring regional TDRs for Puget Sound area, but stakeholder input and department research indicates a strong preference for a TDR Bank that would catalyze markets and act as a clearinghouse/registry.

Some of the TDR bank features included in state TDR legislation include:

- Ability for each municipality to create its own bank
- Legislated authority for municipalities or county / regional / provincial banks to buy and sell credits
- Appointment of a non-profit, non-government or arms-length entity or board members to protect against conflicts of interest
 - Delaware: Boards generally have representation from broad array of affected stakeholders (the state, homebuilders, farmers, conservation organizations, etc.)
- Provision for fees in lieu (payment from developer rather than actual purchase of credit), but only if the fees are provided to a designated bank, and used to purchase credits.

Allow for TDC Banks to play broad coordination role

TDR Banks are often envisioned in state legislation as more than credit buyer/sellers. They are often viewed as "implementation" mechanisms, providing several functions such as:

- credit registry,
- bureaucratic structures for support programs,
- state grant coordinator,
- program expertise/advice,
- market information clearinghouse,
- program evaluator/reporter,
- credit holder,
- TDR plan reviewer, and/or
- loan guarantor (e.g., New Jersey) for landowners borrowing against their development potential.

Allow for non-bank credit transfers

States that have legal provisions for TDR Banks, and active banks - still allow for and encourage private transactions, especially for larger developments. In Delaware, the legislation permits private TDC transactions, even though each county can create its own bank.

As well, third-party brokers exist in some jurisdictions, providing an entrepreneurial option that may be important to facilitating and promoting the TDC programs.

Relate TDCs to local and regional levels

Maintain local control, but connect to regional context

Although the operation of TDC programs will ultimately be in the hands of local municipalities, as noted above, there is great value to be had in using TDC planning and implementation to focus efforts to coordinate local and regional land use planning goals.

In American legislation, local program implementation is often related to regional growth management or conservation areas. With Alberta's new Land-use Framework, and the regional plans being developed under its auspices, TDC sending/receiving areas should be subject to consideration of their consistency with regional plans (designated growth management areas, identified environmentally/agriculturally/historically at-risk landscapes).

Other considerations would include:

- Allowing for provincial /regional TDC banks
- Relating TDCs to annexation and intergovernmental plans
 - Delaware: Proposed legislative amendments would require that greenfield annexations be allowed only at county's base density and that any up-zoning require TDRs)
- Enabling regional associations to implement TDC programs
 - Washington: Puget Sound Regional Council association of local governments is taking the lead on exploring the possibility of regional (including urban-rural) TDR transfers in their four-county region

- Identifying shared costing approaches and guidelines

Enable and incent inter-municipal and urban-rural transfers transfers

Transfers of development potential between jurisdictions are not the norm in the United States, but they are not unheard of. In Alberta, regional planning would be better facilitated by having the ability to conduct transfers between jurisdictions. In particular, transfers of development potential from rural landscapes to urban centres, promoting open-space conservation and higher-density city development, should be facilitated and incented.

Several state TDR laws allow for inter-jurisdictional transfers:

Florida: “Rural land stewardship areas may be multi-county in order to encourage coordinated regional stewardship planning.”

Washington: Puget Sound-focused legislation gives greatest consideration to urban-rural transfers, but also looking at transfers to any Urban Growth Area (in rural landscapes).

Connecticut: “Any two or more municipalities which have adopted the provisions of this chapter ... may, with the approval of the legislative body of each municipality, execute an agreement providing for a system of development rights and the transfer of development rights across the boundaries of the municipalities which are parties to the agreement.”

New Jersey: Allows for “two or more local governments to establish joint program.”

Pennsylvania: “No development rights shall be transferable beyond the boundaries of the municipality wherein the lands from which the development rights arise are situated, except ... in the case of a joint municipal zoning ordinance, or a written agreement among two or more municipalities ...”

Conclusion

Crafting TDC legislation that is suited to Alberta will be a balancing act between too much and too little direction, being ever cognizant of the state of evolution of the TDC discussion in Alberta. Some American TDR legislation has very prescriptive regulations, detailing exactly how TDR programs should be set up. This is likely more detail than is needed, and may in fact hinder programs. American TDR guru, Rick Pruetz counsels that when it comes to TDR legislation, “less is more” (pers. comm.).

However, some American legislation is very vague, comprising only a few short lines. This likely not appropriate for Alberta, but may be well-suited to those areas with a higher level of awareness and comfort with the TDR tool - some jurisdictions have been using the TDR tool for several decades, and their citizenry have a shared and familiar sense of the tool.

Alberta legislators will also have to be cognizant of the fact that TDC programs are already being developed in Alberta, and more likely exist before legislation is drafted

and enacted. It will be important to include “grandfather” clauses that ensure these early adopters are not penalized for their leadership and vision.

Enabling TDC legislation would represent a critical step forward in reconciling conservation and development planning at the local municipal level, by giving municipalities and stakeholders the confidence that the TDC tool is provincially supported, basic guidelines for its implementation, and common language and assumptions around the tool.

Selected References

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Appendix 1: Coordinating TDC Legislation with Other Alberta Legislation

It perhaps goes without saying that any TDC legislation will need to be coordinated with other laws. The following pieces of legislation are likely the key ones to consider when seeking to integrate TDC legislation with other legislation:

Land-use Framework legislation

Proposed legislation to support the implementation of the Land-use Framework should include specific reference to the Transfer of Development Credits as an implementation option with regard to regional plans. Depending on how this legislation is framed, it may also be that this is the logical place to situate and legislative clauses enabling the TDC tool. If the TDC is enabled through other legislation, the land-use framework legislation should speak specifically to regional implementation of the tool, inter-municipal credit transfers, and regional/provincial TDC banks.

Municipal Government Act

American state legislators traditionally add their Transfer of Development Rights provisions into their equivalent of the Municipal Government Act. Like Canadian provinces, local governments derive their powers - and their direction - from the state government. Some include specific TDR clauses, while others make reference to the establishment and operation of the tool in the planning, zoning, and/or inter-municipal relations clauses.

Environmental Protection and Enhancement Act

A key piece of a Transfer of Development Credits program is the deed-restriction device which ensures enduring conservation of the community's valued landscapes. The most common tool used in the United States is the conservation easement, which has fundamentally the same characteristics in Alberta as any other North American jurisdiction. Consideration of the conservation easement provisions under the Alberta Environmental Protection and Enhancement Act should take at least these three dimensions. First, the conservation easement as described in the Act should be referenced as a key tool in TDC programs. Second, any inclusion of TDC Easements in a stand-alone TDC legislation should adopt the same well-tested structure as the conservation easements. Third, conservation easements in Alberta are currently applicable to ecologically valuable landscapes, but there is no ability to apply conservation easements to agriculturally valuable land; the Act should be changed to address this gap.

Historical Resources Act

The first American TDR programs - as well as the programs/activity in Vancouver, Calgary and Toronto - are focused on protection of historically significant properties. As this will likely be an area of focus for Alberta municipalities (especially urban municipalities), any TDC legal provisions should make specific reference to the Historical Resources Act. In particular, TDC legislation should look to the existing power within the HRA to deed-restrict properties in favour of historical conservation.

Real Estate Act

The provincial Real Estate Act governs the conduct of the real estate industry in the sale and transfer of real property. It should be considered whether there is an intersection between the guidelines governing real estate transactions and those needed to govern the sale and transfer of development credits, as enabled by potential TDC legislation.

Appendix 2: American State TDR Legislation Summaries

Arizona

Arizona State Legislature

9-462.01. Zoning regulations; public hearing; definitions

A. Pursuant to the provisions of this article, the legislative body of any municipality by ordinance may in order to conserve and promote the public health, safety and general welfare:

....

12. Establish procedures, methods and standards for the transfer of development rights within its jurisdiction. Any proposed transfer of development rights from the sending property or to the receiving property shall be subject to the notice and hearing requirements of section 9-462.04 and shall be subject to the approval and consent of the property owners of both the sending and receiving property. Prior to any transfer of development rights, a municipality shall adopt an ordinance providing for:

- (a) The issuance and recordation of the instruments necessary to sever development rights from the sending property and to affix development rights to the receiving property. These instruments shall be executed by the affected property owners and lienholders.
- (b) The preservation of the character of the sending property and assurance that the prohibitions against the use and development of the sending property shall bind the landowner and every successor in interest to the landowner.
- (c) The severance of transferable development rights from the sending property and the delayed transfer of development rights to a receiving property.
- (d) The purchase, sale, exchange or other conveyance of transferable development rights prior to the rights being affixed to a receiving property.
- (e) A system for monitoring the severance, ownership, assignment and transfer of transferable development rights.
- (f) The right of a municipality to purchase development rights and to hold them for resale.

....

H. For purposes of this section:

1. "Development rights" means the maximum development that would be allowed on the sending property under any general or specific plan and local zoning ordinance of a municipality in effect on the date the municipality adopts an ordinance pursuant to subsection A, paragraph 12 of this section respecting the permissible use, area, bulk or height of improvements made to the lot or parcel. Development rights may be calculated and allocated in accordance with factors including dwelling units, area, floor area, floor area ratio, height limitations, traffic generation or any

other criteria that will quantify a value for the development rights in a manner that will carry out the objectives of this section.

2. "Receiving property" means a lot or parcel within which development rights are increased pursuant to a transfer of development rights. Receiving property shall be appropriate and suitable for development and shall be sufficient to accommodate the transferable development rights of the sending property without substantial adverse environmental, economic or social impact to the receiving property or to neighboring property.
3. "Sending property" means a lot or parcel with special characteristics, including farmland, woodland, desert land, mountain land, floodplain, natural habitats, recreation or parkland, including golf course area, or land that has unique aesthetic, architectural or historic value that a municipality desires to protect from future development.
4. "Transfer of development rights" means the process by which development rights from a sending property are affixed to one or more receiving properties.

Colorado

Colorado Revised Statutes
TITLE 30 GOVERNMENT - COUNTY
ARTICLE 28 COUNTY PLANNING AND BUILDING CODES
PART 4 CLUSTER DEVELOPMENT
30-28-401. Legislative declaration.

30-28-401. Legislative declaration.

(1) The general assembly hereby finds and declares that:

(a) It is in the public interest to encourage clustering of residential dwellings on tracts of land that are exempt from subdivision regulation by county government pursuant to section 30-28-101 (10) (c) (X), thereby providing a means of preserving common open space, of reducing the extension of roads and utilities to serve the residential development, and of allowing landowners to implement smart growth on land that is exempt from subdivision regulations.

(b) Landowners should have the option to consider cluster development when subdividing land into parcels in a manner that constitutes an alternative to the traditional thirty-five acre interests described in section 30-28-101 (10) (c) (I).

(c) A process should be available for the development of parcels of land for residential purposes that will authorize the use of clustering, water augmentation, density bonuses, not to exceed two units for each thirty-five acre increment, or other incentives, and the transfer of development rights and fulfill the goals of the county to preserve open space, protect wildlife habitat and critical areas, and enhance and maintain the rural character of lands with contiguity to agricultural lands suitable for long-range farming and ranching operations.

Source: L. 96: Entire part added, p. 1880, § 2, effective June 6.

Connecticut

Statutes of Connecticut CHAPTER 124 ZONING

Sec. 8-2. Regulations. (a) The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes, including water-dependent uses as defined in section 22a-93, and the height, size and location of advertising signs and billboards.

... Such regulations may provide for a municipal system for the creation of development rights and the permanent transfer of such development rights, which may include a system for the variance of density limits in connection with any such transfer. Such regulations may also provide for notice requirements in addition to those required by this chapter.

....

Sec. 8-2e. Municipal agreements regarding development rights. Any two or more municipalities which have adopted the provisions of this chapter or chapter 125a or which are exercising zoning power pursuant to any special act may, with the approval of the legislative body of each municipality, execute an agreement providing for a system of development rights and the transfer of development rights across the boundaries of the municipalities which are parties to the agreement. Such system shall be implemented in a manner approved by the legislative body of each municipality and by the commission or other body which adopts zoning regulations of each municipality.

Sec. 8-2f. Joint applications necessary for transfer of development rights. Any zoning regulations adopted pursuant to section 8-2 concerning development rights shall authorize the transfer of the development rights to land only upon joint application of the transferor and transferee.

Delaware

Delaware TDR Legislation

Subchapter III. Transfer of Development Rights and Banking Program

§9131. Findings and Purposes.

The General Assembly finds that a critical need exists to provide for orderly growth that maintains a desirable quality of life, to encourage well-designed and efficient communities rather than inefficient sprawl, to preserve farmland, cultural and

historic lands, and other sensitive lands identified by State and local governments, and to assist in the creation and maintenance of a market for the sale and purchase of development rights. The adoption of a transfer of development rights and banking program is a means of achieving those objectives. It is the purpose of this subchapter to establish the framework, guidelines and incentives for the adoption of transfer of developments rights programs by Counties and Municipalities that serve to direct growth and development to areas having adequate infrastructure to accommodate such growth and development, while providing permanent protection to valuable agricultural lands, open space, cultural and historic lands, and critical and sensitive areas. Furthermore, the purpose of this subchapter is to develop financial mechanisms that will enable county and local governments to finance necessary improvements in receiving areas to provide services and infrastructure to support the quality of life for Delaware residents.

§9132. Definitions.

For purpose of this subchapter the following definitions shall apply:

(a) 'Bank' shall mean the depository for TDR Units, which are purchased or received by the Board.

(b) 'Board' shall mean the TDR Banking Board established by each County under this subchapter.

(c) 'Special Development District' or 'SDD' or 'District' means one or more parcel(s) of land so designated by a Local Government pursuant to the provisions of this chapter. Parcels of land in a District need not be contiguous, but they must all be located within the same local government.

(d) 'County' shall mean any county in Delaware; namely, New Castle County, Kent County or Sussex County.

(e) 'Delaware Agricultural Lands Preservation Program' shall mean the program established and operated by the Foundation pursuant to the provisions of Chapter 9, Title 3 of the Delaware Code.

(f) 'Development Unit' shall mean a residential dwelling unit or defined equivalent for nonresidential uses.

(g) 'Foundation' shall mean the Delaware Agricultural Lands Preservation Foundation.

(h) 'Guideline' shall mean the substantive provisions adopted by a Board, Foundation or Non-profit after consultation with a County and Municipalities within such County and after public hearings to be used by Municipalities and Counties in:

(1) developing the criteria for determining and utilizing TDR Units; and

(2) adopting provisions for operation of a TDR Program subject to this subchapter.

(i) 'Municipality' shall mean a municipal government established by the State of Delaware and having defined geographic boundaries.

(j) 'Non-Residential Use' shall mean a commercial, industrial, or other developed land use that does not involve the construction of residences for human habitation and not waived under the provisions of §9133(a)(8) of this Title.

(k) 'Preservation District' shall mean an agricultural preservation district as referenced in Subchapter II, Chapter 9, Title 3 of the Delaware Code.

(l) 'Preservation Easement' shall mean an easement as defined in 3 Del. C. §902(15).

(m) 'Receiving Parcel' shall mean the parcel of land that is subject to the transfer of TDR Units, and for which the owner of the parcel is entitled to an increase in development density.

(n) 'Sending Parcel' shall mean the parcel of land from which TDR Units are obtained and use restrictions are imposed.

(o) 'TDR' shall mean transfer of development rights.

(p) 'TDR Unit' shall mean a residential development unit or equivalent in accordance with the local government's TDR program, which is acquired from the Bank or from a private property owner and utilized by the owner of the Receiving Parcel to increase development density. A TDR unit shall equal one residential unit. The county TDR program, as enabled by this chapter, shall determine the conversion value of a TDR unit that is to be used for non-residential density transfers, which shall be between 3,000 to 6,000 square feet of building space per acre of restricted land.

(q) 'Vacant or Undeveloped Land' shall mean lands that are currently open, fallow, in agricultural use, or otherwise not fully utilized for residential, commercial or other urban land uses.

§9133. County and Municipal Authorization.

(a) Notwithstanding any provision of the law to the contrary, each County, and each Municipality prior to any annexation action, shall adopt as part of its Comprehensive Development Plan and subsequent land use ordinances developed pursuant to the requirements of Titles 9 or 22, and certified pursuant to Chapter 91, Title 29 of the Delaware Code, a TDR program which at a minimum.

(1) Establishes the criteria for determining the number of TDR Units available on each Sending Parcel or part thereof, so that the available number of TDR Units for a parcel can be readily calculated.

(2) The number of TDR Units available from a parcel shall be determined through the county TDR program.

(3) No action taken by the County or Municipality shall result in an effective downzoning as a result of activities related to the TDR program.

(4) Any land parcel(s) annexed into a municipality which is vacant or undeveloped and larger than ten acres and/or five lots shall become a receiving parcel(s). Parcels shall be annexed at existing county residential density. Projects that are intended to be primarily non-residential in nature may be placed into an appropriate non-residential zoning district upon annexation.

(5) Any parcel(s) which are part of a certified municipal annexation area, if developed by a county, shall become receiving parcel(s).

(6) The transfer of TDR Units to parcels in areas designated by the Office of State Planning Coordination as Investment Level 4 shall not be permitted unless the area becomes a designated growth area pursuant to a certified local government comprehensive plan.

(7) As part of each receiving parcel(s), a property owner or owners must purchase or otherwise obtain TDRs so that overall density of the receiving parcel(s) shall increase over the base gross density by at least

2 residential units per acre and shall be at least 4 residential units per acre for the residential portion of the receiving parcel(s). The property owner or owners must purchase or otherwise obtain TDRs so that at least two TDR units are utilized per acre for any non-residential portion of the receiving parcel(s). TDRs may be obtained through Subchapter III hereof, or by private purchase, provided that if by private purchase, the property transferring development rights is restricted by preservation easement duly recorded in the appropriate Recorder of Deeds Office in accordance with the applicable rules and regulations of the local government in which the receiving parcel(s) are located. The restricted property need not be in the same jurisdiction as the receiving parcel(s). (8) Lands in municipal annexation areas or designated as receiving parcel(s) in county jurisdictions are exempt from the requirement to utilize TDRs if the use of the property is to be open space; recreational facilities; state, county or municipal buildings or facilities; utility facilities or structures (including substations); schools; hospitals; and/or related public or private facilities essential to the public health, safety and welfare of the community.

(b) Any TDR program which is adopted by a County or Municipality as part of a Comprehensive Development Plan and subsequent land-use ordinance pursuant to the Land Use Planning Act, Chapter 92, Title 29 of the Delaware Code, shall be subject to review for consistency with the Guidelines under the provisions of Subchapter I, Chapter 91, Title 29 of the Delaware Code.

(c) Any County or Municipality operating a certified TDR program which allows for Receiving Parcels within its jurisdiction, shall receive from the Board (or Foundation or other private non-profit entity as the case may be), at the time of transfer and final approval of use of TDR Units to an approved project, in the County or Municipality as the case may be, an amount equal to ten percent (10%) of the proceeds received by the Board from the sale of the TDR Units by the Board. In the case of a private transfer of TDR Units not involving the TDR Bank, the County or Municipality shall receive ten percent (10%) of the fair market value as established by the Board's appraisal criteria. This amount shall be paid by the receiving entity. Said monies shall be used by the County or Municipality for new infrastructure improvements and municipal services demanded by the new higher density development of the Receiving Parcel.

(d) The use of TDR Units on any Receiving Parcel shall be subject to compliance with all other applicable federal, state and local requirements, provided however, that no separate or conditional or discretionary approval shall be required with respect to the application of TDR Units in accordance with a TDR program.

(e) In special circumstances a waiver from the requirements of §9133 (a) (7) of this Title for a particular project or parcel may be granted by the Cabinet Committee on State Planning Issues and the legislative body of the local government. In the case of parcels proposed for annexation, the local government shall be that of the municipality that is considering the annexation request. These circumstances may include, but are not limited to, projects which will provide an extraordinary benefit to the State and the local jurisdiction through economic development, job creation, educational

opportunities, public services or facilities, agricultural preservation or protection and enhancement of the natural environment. In order to grant such a waiver, a simple majority of both the Cabinet Committee on State Planning Issues and the legislative body of the local government must vote affirmatively for the requested waiver. Upon granting such a waiver, both the Cabinet Committee and the local legislative body shall provide the applicant a written notice which shall include an explanation of the findings and reasoning which led to the approval of the waiver.

§9134. Private TDR Transactions.

- (a) Nothing in this Title shall be construed to prohibit the private sale of Transfer of Development Rights credits between willing buyers and willing sellers. Private TDR transactions are not required to utilize any TDR banking program established under this Title.
- (b) All private transactions shall adhere to requirements of the relevant local government's TDR program and ordinances.
- (c) TDR credits purchased from a private property owner may not be resold or sold to other third parties, but TDR credits may be sold or resold to the bank at a price not to exceed the original purchase price.

§9135. TDR Banking Board.

- (a) Each County may establish a TDR Bank and a TDR Banking Board. In lieu of establishing a TDR Banking Board, a County may authorize the Foundation or other non-profit entity to administer the TDR program in accordance with §9139 of this Title.
- (b) Should a County establish a Board, the Board shall have at least 7 but no more than 9 members, and shall include at least one member or representative as follows:
 - (1) A representative from the Office of State Planning Coordination shall serve as an ex-officio member, to be selected by the Governor;
 - (2) An active, full-time farmer land-owner nominated by the County Farm Bureau;
 - (3) A representative of the home building industry, to be nominated by the Delaware Homebuilders Association from the county establishing the Board;
 - (4) A representative of the Delaware League of Local Governments, to be selected by the Delaware League of Local Governments from the county establishing the Board; and
 - (5) A representative from the Delaware Agricultural Lands Preservation Foundation, to be selected by the Secretary of Agriculture.
- (c) Each Board shall be empowered:
 - (1) To adopt procedural rules to conduct its affairs and carry out and discharge its powers, duties, functions, and select a chairperson.
A simple majority of the Board shall be required for all actions by the Board. Two-thirds of the total members of the entire Board shall constitute a quorum.
 - (2) To adopt substantive rules and regulations, after public hearing to carry out and discharge its powers, duties and functions.

A simple majority of the Board shall be required for all actions by the Board.

(3) To enter into agreements for consultant, appraisal, legal, accounting, audit and other services deemed advisable or necessary in the exercise of its purposes and powers and upon such terms as it deems appropriate, subject to available funding.

(4) To establish the criteria for the purchase and sale of TDR Units, which may include transactions that do not involve the TDR Bank.

(5) To purchase or receive, by gift or otherwise, and retain if desired, TDR Units under such terms and conditions deemed appropriate.

(6) To sell TDR Units under such terms and conditions as deemed appropriate.

(7) To develop and utilize documents as desirable or necessary to engage in TDR transactions.

(8) To enter into agreements with Counties and Municipalities, State agencies, Authorities, Foundations and instrumentalities of the State and adopt guidelines for participation and operation of the TDR program.

(9) To receive, deposit, withdraw and expend monies from dedicated State accounts for the purpose of engaging in and completing TDR transactions, including the payment of transaction costs related thereto.

(10) To establish use restrictions on Sending Parcels as deemed desirable and necessary, which restrictions shall not, at a minimum, prohibit any agricultural uses, including but not limited to crops or the breeding and boarding of horses.

(11) To do all acts and things reasonable and necessary or convenient to carry out its functions and operations of the TDR and Bank program.

(d) Each Board shall act in accordance with adopted local land use plans and ordinances.

(e) The members of a Board shall receive no compensation from the Bank but may be reimbursed for travel, out of pocket expenses, and other expenses related to the performance of duties as Board members at the established federal rates.

(f) Term lengths for members of a Board shall be established by each County, but no term shall be more than three years and no Board member shall serve for more than six consecutive years.

§9136. Reports.

Each Board shall make an annual report to the Governor, the General Assembly, and local jurisdiction setting forth its operations and transactions, and may make such other additional reports from time to time as it desires.

§9137. Tax Status.

(a) The powers and functions exercised by a Board are and will be in all respects for the benefit of the people of the State. A Board will exercise essential governmental functions. To this end no Board shall be required to pay any taxes on assessments or charges of any character, including, without limitation, real property taxes, real estate transfer taxes, taxes on any of its property used, leased or

exchanged, or any income or revenue derived from its activities, including, without any limitation, any profit from any sale or exchange of TDR Units. Nothing in this Section shall be construed to mean that a tax parcel resulting from a TDR unit, once recorded, is exempt from taxes.

(b) There shall be no real estate transfer tax levied on the purchase, transfer, exchange or sale of any TDR Unit.

(c) Land subject to a preservation easement shall be taxed according to the farmland assessment provisions codified in 9 Del. C. §8335, or its successor.

(d) There shall be no recording fee or cost charged for the recording of documents relating to the transfer of TDR units from Sending Parcels.

(e) The Tax Assessment Office, the Planning and Zoning Offices and the Recorder of Deeds office for each County shall cooperate and assist each Board and the Foundation in effectuating the provisions of this subchapter.

§9138. TDR Bank.

(a) Except for private, property owner to property owner transactions, all TDR Units acquired by purchase, transfer, donation or otherwise shall be held in the TDR Bank for sale and use in TDR programs adopted by Counties and Municipalities under this subchapter.

(b) The proceeds from the sale of TDR Units shall, after payment to Counties and Municipalities as provided in §9133(c) of this Title, be used to purchase TDR Units and pay for the transaction costs related thereto.

(c) TDR Units may be transferred within any part of the same County (and/or any Municipality in the County). For Municipalities located in more than one County, TDR Units may be transferred from either County into any part of the Municipality only with county to county agreements.

(d) TDR Units shall be sold on a 'first come/first serve' basis. At the time of purchase, the purchaser shall designate the Receiving Parcel or Receiving Parcels for which the TDR Units are intended. Unused TDR Units purchased from a Bank may not be resold or sold to other third parties or transferred to other TDR parcels not identified at the time of the original purchase. Unused TDR Units purchased from a Bank may be resold back to a Bank at their original purchase price. The Bank shall be required to repurchase the same. This Section shall not be construed to allow the property owner to purchase the development rights back at the original price.

§9139. Administration of Voluntary TDR Program and Banking System

(a) The administration of the TDR bank and voluntary program may be conducted in lieu of a Board: (i) by the Foundation under the terms and conditions of a Memorandum of Agreement between the County and the Foundation; or (ii) by another non-profit entity selected by a County, under the terms and conditions of a Memorandum of Agreement between the County and such entity and provided such entity is approved by the Office of State Planning. In the event a non-profit entity administers the TDR bank, the portion of the meetings of the board of directors or other governing body of such entity dealing with the TDR program shall be open to the public as if the entity were subject to Chapter 100 of this Title.

(b) The Foundation, Board or other authorized non-profit entity as the case may be shall be authorized and responsible for monitoring compliance and enforcing use restrictions imposed on Sending Parcels.

(1) The Foundation, Board or other authorized non-profit entity shall be entitled to take action in any court of competent jurisdiction to enforce any

restrictions or requirements imposed under this chapter, duly adopted regulations and binding legal instruments. In any such action the Foundation, Board or authorized non-profit entity shall, if it prevails, be entitled to recover its reasonable costs and expenses, including reasonable attorney's fees.

(2) The Foundation, Board or authorized non-profit entity shall also be entitled to recover in any such action all tax benefits conferred under this chapter, plus one and one-half percent per month of tax benefit amounts computed on a compound basis from the date the tax benefit was first realized to the date of judgment.

(3) Any person who violates the requirements imposed by this chapter shall after notification and failure to correct the violation, be subject to a civil penalty of not less than \$50 but not more than \$200 for each completed violation. If the violation continues for a number of days, each day of such violation shall be considered a separate violation. Unless joined to an action under subsection (1) of this Section, a civil penalty claim hereunder shall be filed in any Court of Common Pleas. Any civil penalties recovered shall be paid to the Foundation, Board or authorized non-profit entity.

(c) The sale and purchase of TDR Units shall be on a voluntary basis, and the Foundation, Board or other authorized non-profit entity shall not be required to purchase TDR Units from eligible landowners. Eligible landowners shall not be required to sell TDR Units to the Board, or to the Foundation or other authorized non-profit entity acting on behalf of the County.

(d) A Board may join with the Foundation and/or the Open Space Council in the funding of purchases of both TDR units under this Subchapter, and Preservation Easements under the Foundation's purchase program.

(e) In the event that a property on which a TDR preservation easement exists is incorporated in a designated growth zone in a certified county or municipal comprehensive plan, or is designated as Investment Level 1, 2 or 3 as part of a future update of the Strategies for State Policies and Spending, the property owner may petition the board, foundation or non-profit entity to re-purchase their development rights. The bank shall be obligated to sell the development rights back to the property owner at the market value of the TDRs on the date of repurchase. This Section shall not be construed to allow the property owner to purchase the development rights back at the original price.

§9140. Additional Benefits.

Municipalities and Counties with TDR programs certified pursuant to 29 Del. C. §9103(f) shall be entitled to seek priorities in participation in available State grant and funding programs, including programs which provide local assistance for infrastructure improvements.

§9141. Saving.

(a) Transfer of development rights programs adopted by Municipalities and Counties and existing at the time of enactment of this subchapter shall remain in force and effect until modified or abolished, and any transaction, determination or approval which has occurred or which may occur in the future involving an existing transfer of developments rights program shall not be affected by this subchapter.

(b) The provisions of this subchapter and any TDR program adopted by a County or Municipality shall have no effect on the right of such property owner to

develop the property consistent with relevant codes and ordinances governing land use and development.

(c) any provision of this subchapter or the application thereof to any person or circumstance if held invalid, such invalidity shall not affect other provisions or applications of the subchapter which can be given effect without the invalid provision or application, and, to that end, the provisions of this subchapter are declared to be severable."

Subchapter IV. Special Development Districts

§9150. Findings and Purposes.

The General Assembly finds that in order to better coordinate development, encourage well-designed and efficient communities rather than inefficient sprawl, and to better provide for infrastructure needed for development, a better mechanism needs to be created for the coordination between the state, local governments, and local property owners. Special Development Districts are hereby authorized pursuant to the terms and conditions of this chapter.

§9151. Definitions.

For purpose of this subchapter the following definitions shall apply:

(a) 'Bonds' or 'bond' means a special obligation bond, revenue bond, note or other similar instrument issued by any county or municipality in accordance with this subchapter.

(b) 'Special Development District' or 'SDD' or 'District' means a parcel or parcels of land so designated by a Local Government pursuant to the provisions of this chapter. Parcels of land in a District need not be contiguous, but they must all be located within the same Local Government.

(c) 'Cost' or 'Costs' includes the cost of:

(1) Construction, reconstruction and renovation, and acquisition of all lands, structures, real or personal property, rights, rights-of-way, franchises, easements and interests acquired or to be acquired by a municipality for a public purpose;

(2) All machinery and equipment including machinery and equipment needed to expand or enhance municipal services to the Special Development Districts created pursuant to § 9152 of this Title;

(3) Financing charges and interest prior to and during construction, and, if deemed advisable by the municipality, for a limited period after completion of the construction, interest and reserves for principal and interest, including costs of municipal bond insurance and any other type of financial guaranty, liquidity support and costs of issuance;

(4) Extensions, enlargements, additions and improvements;

(5) Architectural, engineering, financial and legal services;

(6) Plans, specifications, studies, surveys and estimates of cost and of revenues;

(7) Administrative expenses necessary or incident to determining to proceed with the infrastructure improvements; and

(8) Other expenses as may be necessary or incident to the construction, acquisition, financing and operation of the infrastructure improvements

including administrative expenses charged to collect and/or administer the tax revenues.

(d) 'County' or 'county' means New Castle County, Kent County and/ or Sussex County.

(e) 'Investment Level' means a designation by the Office of State Planning Coordination regarding planned infrastructure and state investment in the area so designated and ranging from level 1 through level 4.

(f) 'Local Government' means a County or Municipality.

(g) 'Special Development District Master Plan' or 'SDDMP' or 'Master Plan' means a document and maps prepared to guide the implementation of a Special Development District. The purpose of the SDDMP is to define infrastructure needs for the SDD area (including, but not limited to: sewer; water; transportation; and stormwater management) as well as to define financing mechanisms and the percentage of contributions required from each parcel participating in the SDD. The SDDMP shall consider land use and the cumulative impacts and infrastructure needs of existing and planned development in the area in order to define the maximum permissible development potential and the resulting infrastructure requirements for all parcels participating in the SDD.

(h) 'Municipality' means any town or city located within the State.

(i) 'TDR' shall mean transfer of development rights.

(j) 'TDR Unit' shall mean a residential development unit or equivalent in accordance with the local government's TDR program, which is acquired from the Bank or from a private property owner and utilized by the owner of the Receiving Parcel to increase development density. A TDR unit shall equal one residential unit. The county TDR program, as enabled by this chapter, shall determine the conversion value of a TDR unit that is to be used for non-residential density transfers, which shall be between 3,000 to 6,000 square feet of building space per acre of restricted land.

§9152. Creation of Special Development Districts.

A Special Development District may be created by ordinance of a Local Government in (1) any growth zone in any County or Municipal comprehensive plan that has been certified in accordance with Chapter 91, Title 29 of the Delaware Code; or (2) any parcel(s) in a county or municipality as consistent with the certified comprehensive plan and the Strategies for State Policies and Spending.

§9153. Base Density and TDRs.

(a) Notwithstanding any other regulation or restriction of a Local Government, all Special Development Districts shall have a base gross density (calculated based upon the total acreage of the site) as follows:

(1) As part of the Special Development District, the base density shall be the existing county residential density, regardless of whether the parcel remains in the county jurisdiction or is annexed into a municipality. Projects that are intended to be primarily non-residential in nature may be placed into an appropriate non-residential zoning district.

(2) As part of each Special Development District, a property owner or owners must purchase or otherwise obtain TDRs so that overall density of property in the District shall increase over the base gross density by

at least 2 residential units per acre and shall be at least 4 residential units per acre for the residential portion of the SDD. The property owner or owners must purchase or otherwise obtain TDRs so that at least two TDR units are utilized per acre for any non-residential portion of the receiving parcel(s). TDRs may be obtained through subchapter III hereof, or by private purchase, provided that if by private purchase, the property transferring development rights is restricted by preservation easement duly recorded in the appropriate Recorder of Deeds Office in accordance with the applicable rules and regulations of the Local Government in which the SDD is located. The restricted property need not be in the same jurisdiction as the SDD.

(b) A Special Development District shall include both residential and non-residential uses.

§9154. Infrastructure Master Plan for Special Development Districts.

Property in a Special Development District shall be developed in accordance with a Master Plan adopted by the Local Government at the time of the creation of the SDD. The Master Plan shall set forth the maximum permitted development for each parcel in the SDD and, based upon such development, the amount of infrastructure resources and/or improvements (sewer, highway and road capacity, water, and other utilities) needed for the development of such SDD. The Master Plan shall also set forth the percentage contribution each parcel owner is to pay towards the cost of the infrastructure resources and improvements. To the extent infrastructure improvements will alleviate existing shortfalls or provide excess capacity beyond that required by the parcels making up the SDD, the cost of such alleviation or excess capacity shall be paid by the Local Government (in the case of services provided by the Local Government such as sewer) or by the Delaware Department of Transportation (in the case of road and highway improvements). The Master Plan shall be required to address existing infrastructure shortfalls but the SDD shall only be required to fund additional infrastructure necessary for the planned development of the District. The Master Plan shall allow for multi-jurisdictional funding of infrastructure through the use of memoranda of agreements. The Infrastructure Master Plan shall be required to be reviewed through the pre-application review process described in Chapter 92, Title 29 of the Delaware Code.

§9155. Infrastructure Development Agreements and Special Development Districts.

(a) The cost of the infrastructure improvements called for in the Master Plan for a Special Development District may be paid for in one of two ways:

(1) pursuant to a private agreement (such as multi-jurisdictional memoranda of agreements) entered into between all of the property owners and the Local Government(s) and, to the extent road or highway improvements to any roads which are the responsibility of the Department of Transportation; or,

(2) For purposes of this subchapter and the creation of SDDs, any local government is hereby authorized to develop financial mechanisms for infrastructure funding as described in Title 9, Chapters 32, 54, or 71 or in Title 22, Chapter 18.

(b) At the time of creation of the Special Development District by the Local Government, each property owner in the District shall sign an agreement (the

"Infrastructure Development Agreement") with the Local Government. The Infrastructure Development Agreement shall set forth the infrastructure required by the Master Plan (if known) or the process by which the infrastructure needs will be determined. It shall also set forth the manner of payment for such infrastructure. Where the financing option set forth in subsection (a)(l) above is to be used, the Infrastructure Development Agreement shall also set forth the timing and method for payments required for the infrastructure to be built. Where a Special Development District is to be used, the Infrastructure Development Agreement shall so state and the requirements of 22 Del. C. §1803(a)(2) are deemed waived. The agreement (or a memorandum thereof) shall be recorded with the appropriate Recorder of Deeds and shall bind future property owners.

(c) As part of the Infrastructure Development Agreement, a property owner or property owners may agree to construct all or a portion of the infrastructure called for under the Master Plan, and shall receive a credit against payments for infrastructure, the terms and conditions thereof to be set forth in the agreement.

§9156. Land Use Approval Process in a Special Development District.

Notwithstanding the requirements of a Local Government which might otherwise be applicable, no proposed development for a parcel in a Special Development District which does not exceed the development permitted for such parcel in the Master Plan shall

- (i) be subject to pre-application review process under Chapter 92, Title 29 of the Delaware Code;
- (ii) be required to prepare or submit a traffic impact study; and
- (iii) be subject to any limitations on the amount of development otherwise applicable to the proposed development due to limited amounts of infrastructure or utility capacity. Development within a SDD may be phased.

§9157. Conflict with Existing Charters.

To the extent a municipal charter is in conflict with the provisions of Subchapter IV of this Chapter as of July 1, 2007, the municipal charter shall be controlling as applied to that particular municipality. This subchapter as applied to all other municipalities shall remain in effect and shall be applicable to all projects initiated after July 1, 2007.”.

Florida

CHAPTER 163, PART II: Growth Policy; County and Municipal Planning; Land Development Regulation

163.3177 Required and optional elements of comprehensive plan; studies and surveys.—

....

(11)(d)6. Upon the adoption of a plan amendment creating a rural land stewardship area, the local government shall, by ordinance, establish the methodology for the creation, conveyance, and use of transferable rural land use credits, otherwise referred to as stewardship credits, the application of which shall not constitute a

right to develop land, nor increase density of land, except as provided by this section. The total amount of transferable rural land use credits within the rural land stewardship area must enable the realization of the long-term vision and goals for the 25-year or greater projected population of the rural land stewardship area, which may take into consideration the anticipated effect of the proposed receiving areas. Transferable rural land use credits are subject to the following limitations:

(11)(d)6a. Transferable rural land use credits may only exist within a rural land stewardship area.

(11)(d)6b. Transferable rural land use credits may only be used on lands designated as receiving areas and then solely for the purpose of implementing innovative planning and development strategies and creative land use planning techniques adopted by the local government pursuant to this section.

(11)(d)6c. Transferable rural land use credits assigned to a parcel of land within a rural land stewardship area shall cease to exist if the parcel of land is removed from the rural land stewardship area by plan amendment.

(11)(d)6d. Neither the creation of the rural land stewardship area by plan amendment nor the assignment of transferable rural land use credits by the local government shall operate to displace the underlying density of land uses assigned to a parcel of land within the rural land stewardship area; however, if transferable rural land use credits are transferred from a parcel for use within a designated receiving area, the underlying density assigned to the parcel of land shall cease to exist.

(11)(d)6e. The underlying density on each parcel of land located within a rural land stewardship area shall not be increased or decreased by the local government, except as a result of the conveyance or use of transferable rural land use credits, as long as the parcel remains within the rural land stewardship area.

(11)(d)6f. Transferable rural land use credits shall cease to exist on a parcel of land where the underlying density assigned to the parcel of land is utilized.

(11)(d)6g. An increase in the density of use on a parcel of land located within a designated receiving area may occur only through the assignment or use of transferable rural land use credits and shall not require a plan amendment.

(11)(d)6h. A change in the density of land use on parcels located within receiving areas shall be specified in a development order which reflects the total number of transferable rural land use credits assigned to the parcel of land and the infrastructure and support services necessary to provide for a functional mix of land uses corresponding to the plan of development.

(11)(d)6i. Land within a rural land stewardship area may be removed from the rural land stewardship area through a plan amendment.

(11)(d)6j. Transferable rural land use credits may be assigned at different ratios of credits per acre according to the natural resource or other beneficial use characteristics of the land and according to the land use remaining following the transfer of credits, with the highest number of credits per acre assigned to the most environmentally valuable land or, in locations where the retention of open space and agricultural land is a priority, to such lands.

(11)(d)6k. The use or conveyance of transferable rural land use credits must be recorded in the public records of the county in which the property is located as a covenant or restrictive easement running with the land in favor of the county and either the Department of Environmental Protection, Department of Agriculture and Consumer Services, a water management district, or a recognized statewide land trust.

Maryland

Maryland Code

Article 66B Land Use

§ 11.01. Establishment of programs for transfer of development rights.

A local legislative body that exercises authority granted by this article may establish a program for the transfer of development rights to:

- (1) Encourage the preservation of natural resources; and
- (2) Facilitate orderly growth and development in the State.

[1986, ch. 605; 2000, ch. 426, § 2.]

New Jersey

New Jersey State Transfer of Development Rights Act 40:55D-137 Short title.

1. Sections 1 through 27 of this act shall be known and may be cited as the "State Transfer of Development Rights Act."

L.2004,c.2,s.1.

40:55D-138 Findings, declarations relative to transfer of development rights by municipalities.

2. The Legislature finds and declares that as the most densely populated state in the nation, the State of New Jersey is faced with the challenge of accommodating vital growth while maintaining the environmental integrity, preserving the natural resources, and strengthening the agricultural industry and cultural heritage of the Garden State; that the responsibility for meeting this challenge falls most heavily

upon local government to appropriately shape the land use patterns so that growth and preservation become compatible goals; that until now municipalities in most areas of the State have lacked effective and equitable means by which potential development may be transferred from areas where preservation is most appropriate to areas where growth can be better accommodated and maximized; and that the tools necessary to meet the challenge of balanced growth in an equitable manner in New Jersey must be made available to local government as the architects of New Jersey's future.

The Legislature further finds and declares that the "Burlington County Transfer of Development Rights Demonstration Act," P.L.1989, c.86 (C.40:55D-113 et al.), was enacted in 1989 as a pilot transfer of development rights (TDR) program to demonstrate the feasibility of TDR as a land use planning tool; and that the Burlington County pilot program has been a success and should now be expanded to the remainder of the State of New Jersey in a manner that is fair and equitable to all landowners.

The Legislature therefore determines that it is in the public interest to authorize all municipalities in the State to establish and implement TDR programs.

L.2004,c.2,s.2.

40:55D-139 Transfer of development potential within jurisdiction.

3. a. The governing body of any municipality that fulfills the criteria set forth in section 4 of P.L.2004, c.2 (C.40:55D-140) may, by ordinance approved by the county planning board, provide for the transfer of development potential within its jurisdiction. The governing bodies of two or more municipalities that fulfill the criteria set forth in section 4 of P.L.2004, c.2 (C.40:55D-140) may, by substantially similar ordinances approved by their respective county planning boards, provide for a joint program for the transfer of development potential, including transfers from sending zones in one municipality to receiving zones in the other, regardless of whether or not those municipalities are situated within the same county. Any such program shall be carried out by the municipal planning board or boards.

A program may include the designation of one or more sending or receiving zones.

b. The Office of Smart Growth shall provide such technical assistance as may be requested by municipalities or a county planning board, and as may be reasonably within the capacity of the office to provide, in the preparation, implementation or review, as the case may be, of the master plan elements required to have been adopted by the municipality as a condition for adopting a development transfer ordinance pursuant to section 4 of P.L.2004, c.2 (C.40:55D-140), capital improvement program or development transfer ordinance.

L.2004,c.2,s.3.

40:55D-140 Actions prior to adoption, amendment.

4. Prior to the adoption or amendment of any development transfer ordinance, a municipality shall:

a. Adopt a development transfer plan element of its master plan pursuant to paragraph (14) of subsection b. of section 19 of P.L.1975, c.291 (C.40:55D-28) in accordance with the requirements of section 5 of P.L.2004, c.2 (C.40:55D-141);

b. Adopt a capital improvement program pursuant to section 20 of P.L.1975, c.291 (C.40:55D-29) for the receiving zone, which includes the location and cost of all infrastructure and a method of cost sharing if any portion of the cost is to be assessed against developers pursuant to section 30 of P.L.1975, c.291 (C.40:55D-42);

c. Adopt a utility service plan element of the master plan pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) that specifically addresses providing necessary utility services within any designated receiving zone within a specified time period so that no development seeking to utilize development potential transfer is unreasonably delayed because utility services are not available;

d. Prepare a real estate market analysis pursuant to section 12 of P.L.2004, c.2 (C.40:55D-148) which examines the relationship between the development rights anticipated to be generated in the sending zones and the capacity of designated receiving zones to accommodate the necessary development; and

e. Either receive approval of: (1) its initial petition for endorsement of its master plan by the State Planning Commission pursuant to P.L.1985, c.398 (C.52:18A-196 et seq.) and regulations adopted pursuant thereto either individually, or as part of a county or regional plan, provided that the petition included the development transfer ordinance and supporting documentation, or (2) the development transfer ordinance and supporting documentation as an amendment to a previously approved petition for master plan endorsement by the State Planning Commission pursuant to P.L.1985, c.398 (C.52:18A-196 et seq.) and regulations adopted pursuant thereto.

L.2004,c.2,s.4.

40:55D-141 Development transfer plan element, required inclusions.

5. In order to serve as the basis for a development transfer ordinance pursuant to subsection a. of section 4 of P.L.2004, c.2 (C.40:55D-140), a development transfer plan element of a masterplan shall include:

a. an estimate of the anticipated population and economic growth in the municipality for the succeeding 10 years;

b. the identification and description of all prospective sending and receiving zones;

c. an analysis of how the anticipated population growth estimated pursuant to subsection a. of this section is to be accommodated within the municipality in

general, and the receiving zone or zones in particular;

d. an estimate of existing and proposed infrastructure of the proposed receiving zone;

e. 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

f. 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.

L.2004,c.2,s.5.

40:55D-142 Procedure for municipality located in pinelands area.

6. a. Any municipality located in whole or in part in the pinelands area, as defined in the "Pinelands Protection Act," P.L.1979, c.111 (C.13:18A-1 et seq.), shall submit the proposed development transfer ordinance, development transfer and utility service plan elements of the master plan, real estate market analysis, and capital improvement program to the Pinelands Commission for review for those areas included in that proposed ordinance that are situated within the pinelands area. The Pinelands Commission shall determine whether the proposed ordinance is compatible with the provisions of the "Pinelands Development Credit Bank Act," P.L.1985, c.310 (C.13:18A-30 et seq.) and is otherwise consistent with the comprehensive management plan adopted by the Pinelands Commission pursuant to P.L.1979, c.111 (C.13:18A-1 et seq.). If the commission determines that the proposed development transfer ordinance is not compatible or consistent, the commission shall make such recommendations as may be necessary to conform the proposed ordinance with the comprehensive management plan. The municipality shall not adopt the proposed ordinance unless the changes recommended by the Pinelands Commission have been included in the ordinance.

b. No development transfer ordinance that involves land in the pinelands area shall take effect unless it has been certified by the Pinelands Commission pursuant to the provisions of the "Pinelands Protection Act," P.L.1979, c.111 (C.13:18A-1 et seq.) and the comprehensive management plan.

L.2004,c.2,s.6.

40:55D-143 Preparation, amendment of development transfer ordinance.

7. A municipality which provides for the transfer of development as set forth in section 3 of P.L.2004, c.2 (C.40:55D-139) shall prepare or amend a development transfer ordinance that designates sending and receiving zones and is substantially consistent with or designed to effectuate the development transfer plan element of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) and the capital improvement program adopted pursuant to section 20 of P.L.1975, c.291

(C.40:55D-29). A governing body that chooses to adopt an ordinance or amendment or revision thereto which in whole or in part is inconsistent with the development transfer plan element of the master plan or the capital improvement program may do so only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such an ordinance.

In creating and establishing sending and receiving zones, the governing body of the municipality shall designate tracts of land of such size and number and with such boundaries, densities and permitted uses as may be necessary to carry out the purposes of P.L.2004, c.2 (C.40:55D-137 et al.).

The adoption or amendment of a development transfer ordinance shall be considered a change to the classifications or boundaries of a zoning district and therefore subject to the notification requirements of section 2 of P.L.1995, c.249 (C.40:55D-62.1).

L.2004,c.2,s.7.

40:55D-144 Characteristics of sending zone.

8. a. A sending zone shall be composed predominantly of land having one or more of the following characteristics:

(1) agricultural land, woodland, floodplain, wetlands, threatened or endangered species habitat, aquifer recharge area, recreation or park land, waterfront, steeply sloped land or other lands on which development activities are restricted or precluded by duly enacted local laws or ordinances or by laws or regulations adopted by federal or State agencies;

(2) land substantially improved or developed in a manner so as to present a unique and distinctive aesthetic, architectural, or historical point of interest in the municipality;

(3) other improved or unimproved areas that should remain at low densities for reasons of inadequate transportation, sewerage or other infrastructure, or for such other reasons as may be necessary to implement the State Development and Redevelopment Plan adopted pursuant to P.L.1985, c.398 (C.52:18A-196 et al.) and local or regional plans.

b. Notwithstanding subsection a. of this section, lands permanently restricted through development easements or conservation easements existing prior to the adoption of a development transfer ordinance may be included in a sending zone upon a finding by the municipal governing body that this inclusion is in the public interest.

c. The development transfer ordinance may assign bonus development potential to specified properties in the sending zone based on specified criteria in order to encourage the permanent protection of those lands pursuant to the

development transfer ordinance.

L.2004,c.2,s.8.

40:55D-145 Characteristics of receiving zone.

9. a. A receiving zone shall be appropriate and suitable for development and shall be at least sufficient to accommodate all of the development potential of the sending zone, and at all times there shall be a reasonable likelihood that a balance is maintained between sending zone land values and the value of the transferable development potential.

b. The development potential of the receiving zone shall be realistically achievable, considering: (1) the availability of all necessary infrastructure; (2) all of the provisions of the zoning ordinance including those related to density, lot size and bulk requirements; and (3) given local land market conditions as of the date of the adoption of the development transfer ordinance.

c. The development potential of the receiving zone shall be consistent with the criteria established pursuant to subsection b. of section 13 of P.L.2004, c.2 (C.40:55D-149).

d. All infrastructure necessary to support the development of the receiving zone as set forth in the zoning ordinance shall 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.

e. No density increases may be achieved in a receiving zone without the use of appropriate instruments of transfer.

L.2004,c.2,s.9.

40:55D-146 Provisions of development transfer ordinance.

10. Except as otherwise provided in this section, a development transfer ordinance shall provide that, on granting a variance under subsection d. of section 57 of P.L.1975, c.291 (C.40:55D-70) that increases the development potential of a parcel of property not in the designated receiving zone for which the variance has been granted by more than 5%, that parcel of property shall constitute a receiving zone and the provisions of the ordinance for receiving zones shall apply with respect to the amount of development potential required to implement that variance.

This section shall not apply to any development that fulfills the definition of a minor site plan or minor subdivision.

L.2004,c.2,s.10.

40:55D-147 Issuance of instruments, adoption of procedures relative to land use.

11. a. A development transfer ordinance shall provide for the issuance of such instruments as may be necessary and the adoption of procedures for recording the permitted use of the land at the time of the recording, the separation of the development potential from the land, and the recording of the allowable residual use of the land upon separation of the development potential.

b. A development transfer ordinance shall specifically provide that upon the transfer of development potential from a sending zone, the owner of the property from which the development potential has been transferred shall cause a statement containing the conditions of the transfer and the terms of the restrictions of the use and development of the land to be attached to and recorded with the deed of the land in the same manner as the deed was originally recorded. These restrictions and conditions shall state that any development inconsistent therewith is expressly prohibited, shall run with the land, and shall be binding upon the landowner and every successor in interest thereto.

c. The restrictions shall be expressly enforceable by the municipality and the county in which the property is located, any interested party, and the State of New Jersey.

d. All development potential transfers shall be recorded in the manner of a deed in the book of deeds in the office of the county clerk or county register of deeds and mortgages, as appropriate. This recording shall specify the lot and block number of the parcel in the sending zone from which the development potential was transferred and the lot and block number of the parcel in the receiving zone to which the development potential was transferred.

e. All development potential transfers also shall be recorded with the State Transfer of Development Rights Bank in the Development Potential Transfer Registry as required pursuant to section 5 of P.L.1993, c.339 (C.4:1C-53).

L.2004,c.2,s.11.

40:55D-148 Real estate market analysis.

12. a. Prior to the final adoption of a development transfer ordinance or any significant amendment to an existing development transfer ordinance, the planning board shall conduct a real estate market analysis of the current and future land market which examines the relationship between the development rights anticipated to be generated in the sending zone and the likelihood of their utilization in the designated receiving zone. The analysis shall include thorough consideration of the extent of development projected for the receiving zone and the likelihood of its achievement given current and projected market conditions in order to assure that the designated receiving zone has the capacity to accommodate the development rights anticipated to be generated in the sending zone. The real estate market analysis shall conform to rules and regulations adopted pursuant to subsection c. of this section.

b. Upon completion of the real estate market analysis and at a meeting of the planning board held prior to the meeting at which the development transfer ordinance receives first reading, the planning board shall hold a hearing on the real estate market analysis.

The hearing shall be held in accordance with the provisions of subsections a. through f. of section 6 of P.L.1975, c.291 (C.40:55D-10).

c. The Commissioner of Community Affairs, in consultation with the board of directors of the State Transfer of Development Rights Bank established pursuant to section 3 of P.L.1993, c.339 (C.4:1C-51), shall within 180 days of the enactment of P.L.2004, c.2 (C.40:55D-137 et al.), adopt rules and regulations which set forth the required contents of the real estate market analysis.

L.2004,c.2,s.12.

40:55D-149 Submission by municipality prior to adoption of ordinance to county planning board.

13. a. Prior to adoption of a development transfer ordinance or of any amendment of an existing development transfer ordinance, the municipality shall submit a copy of the proposed ordinance, copies of the development transfer and utility service plan elements of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) and capital improvement program adopted pursuant to section 20 of P.L.1975, c.291 (C.40:55D-29), proposed municipal master plan changes necessary for the enactment of the development transfer ordinance, and the real estate market analysis to the county planning board. If the ordinance and master plan changes involve agricultural land, then the county agriculture development board shall also be provided information identical to that provided to the county planning board.

b. The county planning board, upon receiving the proposed development transfer ordinance and accompanying documentation, shall conduct a review of the proposed ordinance with regard to the following criteria:

(1) consistency with the adopted master plan of the county;

(2) support of regional objectives for agricultural land preservation, natural resource management and protection, historic or architectural conservation, or the preservation of other public values as enumerated in subsection a. of section 8 of P.L.2004, c.2 (C.40:55D-144);

(3) consistency with reasonable population and economic forecasts for the county; and

(4) sufficiency of the receiving zone to accommodate the development potential that may be transferred from sending zones and a reasonable assurance of marketability of any instruments of transfer that may be created.

L.2004,c.2,s.13.

40:55D-150 Formal comments, recommendation of county planning board.

14. a. Within 60 days after receiving a proposed development transfer ordinance and accompanying documentation transmitted pursuant to section 13 of P.L.2004, c.2 (C.40:55D-149), the county planning board shall submit to the municipality formal comments detailing its review and shall either recommend or not recommend enactment of the proposed development transfer ordinance. If enactment of the proposed ordinance is recommended, the municipality may proceed with adoption of the ordinance. Failure to submit recommendations within the 60-day period shall constitute recommendation of the ordinance.

b. The CADB shall review a proposed development transfer ordinance and accompanying documentation within 30 days of receipt thereof, and shall submit such written recommendations as it deems appropriate, to the county planning board.

c. If the county planning board does not recommend enactment, the reasons therefor shall be clearly stated in the formal comments. If the objections of the county planning board cannot be resolved to the satisfaction of both the municipality and the county planning board within an additional 30 days, the municipality shall petition the Office of Smart Growth to render a final determination pursuant to section 15 of P.L.2004, c.2 (C.40:55D-151).

L.2004,c.2,s.14.

40:55D-151 Review by Office of Smart Growth.

15. When the Office of Smart Growth receives a petition pursuant to subsection c. of section 14 of P.L.2004, c.2 (C.40:55D-150), it shall review the petition, the record of comment of the county planning board, any supporting documentation submitted by the municipality, and any comments received from property owners in the sending or receiving zones and other members of the public. Within 60 days after receipt of the petition, the Office of Smart Growth shall approve, approve with conditions, or disapprove the proposed development transfer ordinance, stating in writing the reasons therefor. The basis for review by the Office of Smart Growth shall be:

a. compliance of the proposed development transfer ordinance with the provisions of P.L.2004, c.2 (C.40:55D-137 et al.);

b. accuracy of the information developed in the proposed development transfer ordinance, the development transfer and utility service plan elements of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28), the real estate market analysis and capital improvement program adopted pursuant to section 20 of P.L.1975, c.291 (C.40:55D-29);

c. an assessment of the potential for successful implementation of the proposed development transfer ordinance; and

d. consistency with any plan that applies to the municipality that has been endorsed by the State Planning Commission pursuant to P.L.1985, c.398 (C.52:18A-196 et al.) and its implementing regulations.

L.2004,c.2,s.15.

40:55D-152 Approval of municipal petition; appeal.

16. If the Office of Smart Growth determines, in response to a municipal petition submitted pursuant to subsection c. of section 14 of P.L.2004, c.2 (C.40:55D-150), that the proposed development transfer ordinance may be approved, the municipality may proceed with adoption of the proposed ordinance. If the Office of Smart Growth determines that the proposed ordinance may be approved with conditions, the Office of Smart Growth shall make such recommendations as may be necessary for the proposed ordinance to be approved. The municipality shall not adopt the proposed ordinance unless the changes recommended by the Office of Smart Growth have been included in the proposed ordinance. If the Office of Smart Growth determines that the development transfer ordinance should be disapproved, the municipality may not proceed with adoption of the proposed ordinance.

The decision by the Office of Smart Growth on the petition shall have the effect of a final agency action and any appeal of that decision shall be made directly to the Appellate Division of the Superior Court.

L.2004,c.2,s.16.

40:55D-153 Transmission of record of transfer; assessment; taxation.

17. a. The county clerk or county register of deeds and mortgages, as the case may be, shall transmit to the assessor of the municipality in which a development potential transfer has occurred a record of the transfer and all pertinent information required to value, assess, and tax the properties subject to the transfer in a manner consistent with subsection b. of this section.

b. Property from which and to which development potential has been transferred shall be assessed at its fair market value reflecting the development transfer. Development potential that has been removed from a sending zone but has not yet been employed in a receiving zone shall not be assessed for real property taxation. Nothing in P.L.2004, c.2 (C.40:55D-137 et al.) shall be construed to affect, or in any other way alter, the valuation assessment, or taxation of land that is valued, assessed, and taxed pursuant to the "Farmland Assessment Act of 1964," P.L.1964, c.48 (C.54:4-23.1 et seq.).

c. Property in a sending or receiving zone that has been subject to a development potential transfer shall be newly valued, assessed, and taxed as of October 1 next following the development potential transfer.

d. Development potential that has been conveyed from a property pursuant to P.L.2004, c.2 (C.40:55D-137 et al.) shall not be subject to any fee imposed pursuant to P.L.1968, c.49 (C.46:15-5 et seq.).

L.2004,c.2,s.17.

40:55D-154 Rebuttable presumption that development transfer ordinance is no longer reasonable.

18. The absence of either of the following shall constitute a rebuttable presumption that a development transfer ordinance is no longer reasonable:

a. plan endorsement pursuant to P.L.1985, c.398 (C.52:18A-196 et seq.) or regulations adopted pursuant thereto is no longer in effect for that municipality; or

b. a sufficient percentage of the development potential has not been transferred in that municipality as provided in section 20 of P.L.2004, c.2 (C.40:55D-156).

If the ordinance of a municipality that is a participant of a joint program pursuant to section 3 of P.L.2004, c.2 (C.40:55D-139) is presumed to be no longer reasonable pursuant to this section, then the ordinances of all participating municipalities also shall be presumed to be no longer reasonable.

L.2004,c.2,s.18.

40:55D-155 Review by planning board, governing body after three years.

19. A development transfer ordinance and real estate market analysis shall be reviewed by the planning board and governing body of the municipality at the end of three years subsequent to its adoption. This review shall include an analysis of development potential transactions in both the private and public market, an update of current conditions in comparison to the development transfer plan element of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) and capital improvement program adopted pursuant to section 20 of P.L.1975, c.291 (C.40:55D-29), and an assessment of the performance goals of the development transfer program, including an evaluation of the units constructed with and without the utilization of the development transfer ordinance. A report of findings from this review shall be submitted to the county planning board, the Office of Smart Growth and, when the sending zone includes agricultural land, the CADB for review and recommendations. Based on this review the municipality shall act to maintain and enhance the value of development transfer potential not yet utilized and, if necessary, amend the capital improvement program adopted pursuant to section 20 of P.L.1975, c.291 (C.40:55D-29), the development transfer plan element of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) and the development transfer ordinance adopted pursuant to P.L.2004, c.2 (C.40:55D-137 et al.).

L.2004,c.2,s.19.

40:55D-156 Review after five years.

20. A development transfer ordinance and the real estate market analysis also shall be reviewed by the planning board and governing body of the municipality at the end of five years subsequent to its adoption. This review shall provide for the examination of the development transfer ordinance and the real estate market analysis to determine whether the program for development transfer and the permitted uses in the sending zone continue to remain economically viable, and, if not, an update of the development transfer plan element of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) and capital improvement program adopted pursuant to section 20 of P.L.1975, c.291 (C.40:55D-29) shall be required. If at least 25% of the development potential has not been transferred at the end of this five-year period, the development transfer ordinance shall be presumed to be no longer reasonable, including any zoning changes adopted as part of the development transfer program, within 90 days after the end of the five-year period unless one of the following is met:

a. the municipality immediately takes action to acquire or provide for the private purchase of the difference between the development potential already transferred and 25% of the total development transfer potential created in the sending zone under the development transfer ordinance;

b. a majority of the property owners in a sending zone who own land from which the development potential has not yet been transferred agree that the development transfer ordinance should remain in effect;

c. the municipality can demonstrate either future success or can demonstrate that low levels of development potential transfer activity are due, not to ordinance failure, but to low levels of development demand in general. This demonstration shall require the concurrence of the county planning board and the Office of Smart Growth, and shall be the subject of a municipal public hearing conducted prior to a final determination regarding the future viability of the development transfer program; or

d. 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 five-year period.

L.2004,c.2,s.20.

40:55D-157 Periodic reviews.

21. Following review of a development transfer ordinance as provided in section 20 of P.L.2004, c.2 (C.40:55D-156), the planning board and the governing body of the municipality shall review the development transfer ordinance and real estate market analysis at least once every five years with every second review occurring in

conjunction with the review and update of the master plan of the municipality pursuant to the provisions of section 76 of P.L.1975, c.291 (C.40:55D-89). This review shall provide for the examination of the ordinance and the real estate market analysis to determine whether the program and uses permitted in the sending zone continue to be economically viable and, if not, an update of the development transfer plan element of the master plan adopted pursuant to section 19 of P.L.1975, c.291 (C.40:55D-28) and capital improvement program adopted pursuant to section 20 of P.L.1975, c.291 (C.40:55D-29) shall be required.

If 25% of the remaining development transfer potential at the start of each five-year review period in the sending zone under the development transfer ordinance has not been transferred during the five-year period, the municipal governing body shall repeal the development transfer ordinance, including any zoning changes adopted as part of the development transfer program, within 90 days after the end of that five-year period unless the municipality meets one of the standards established pursuant to section 20 of P.L.2003, c.2 (C.40:55D-156).

L.2004,c.2,s.21.

40:55D-158 Provision for purchase, sale, exchange of development potential.

22. a. The governing body of any municipality that has adopted a development transfer ordinance, or the governing body of any county in which at least one municipality has adopted a development transfer ordinance, may provide for the purchase, sale, or exchange of the development potential that is available for transfer from a sending zone by the establishment of a development transfer bank. Alternatively, the governing body of any municipality which has adopted a development transfer ordinance and has not established a municipal development transfer bank may either utilize the State TDR Bank or a county development transfer bank for these purposes, provided that the county in which the municipality is situated has established such a bank.

b. Any development transfer bank established by a municipality or county shall be governed by a board of directors comprising five members appointed by the governing body of the municipality or county, as the case may be. The members shall have expertise in either banking, law, land use planning, natural resource protection, historic site preservation or agriculture. For the purposes of P.L.2004, c.2 (C.40:55D-137 et al.) and the "Local Bond Law," N.J.S.40A:2-1 et seq., a purchase by the bank shall be considered an acquisition of lands for public purposes.

L.2004,c.2,s.22.

40:55D-159 Purchase by development transfer bank.

23. a. A development transfer bank may purchase property in a sending zone if adequate funds have been provided for these purposes and the person from whom the development potential is to be purchased demonstrates possession of marketable title to the property, is legally empowered to restrict the use of the property in conformance with P.L.2004, c.2 (C.40:55D-137 et al.), and certifies that the property

is not otherwise encumbered or transferred.

b. The development transfer bank may, for the purposes of its own development potential transactions, 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 development transfer ordinance. The establishment of this municipal average shall not prohibit the purchase of development potential for any price by private sale or transfer, but shall be used only when the development transfer bank itself is purchasing the development potential of property in the sending zone. Several average values in any sending zone may be established for greater accuracy of valuation.

c. The development transfer bank may sell, exchange, or otherwise convey the development potential of property that it has purchased or otherwise acquired pursuant to the provisions of P.L.2004, c.2 (C.40:55D-137 et al.), but only in a manner that does not substantially impair the private sale or transfer of development potential.

d. When a sending zone includes agricultural land, a development transfer bank shall, when considering the purchase of development potential based upon values derived by municipal averaging, submit the municipal average arrived at pursuant to subsection b. of this section for review and comment to the CADB. The development transfer bank shall coordinate the development transfer program with the farmland preservation programs established pursuant to the "Agriculture Retention and Development Act," P.L.1983, c.32 (C.4:1C-11 et al.) and the "Garden State Preservation Trust Act," sections 1 through 42 of P.L.1999, c.152 (C.13:8C-1 et seq.) to the maximum extent practicable and feasible.

e. A development transfer bank may apply for funds for the purchase of development potential under the provisions of sections 1 through 42 of P.L.1999, c.152 (C.13:8C-1 et seq.), or any other act providing funds for the purpose of acquiring and developing land for recreation and conservation purposes consistent with the provisions and conditions of those acts.

f. A development transfer bank may apply for matching funds for the purchase of development potential under the provisions of the "Garden State Preservation Trust Act," sections 1 through 42 of P.L.1999, c.152 (C.13:8C-1 et seq.) for the purpose of farmland preservation and agricultural development consistent with the provisions and conditions of that act and the "Agriculture Retention and Development Act," P.L.1983, c.32 (C.4:1C-11 et al.). In addition, a development transfer bank may apply to the State Transfer of Development Rights Bank established pursuant to section 3 of P.L.1993, c.339 (C.4:1C-51) for either planning or development potential purchasing funds, or both, as provided pursuant to section 4 of P.L.1993, c.339 (C.4:1C-52).

L.2004,c.2,s.23.

40:55D-160 Sale of development potential associated with development

easement.

24. If the governing body of a county provides for the acquisition of a development easement under the provisions of the "Agriculture Retention and Development Act," P.L.1983, c.32 (C.4:1C-11 et al.) or the "Garden State Preservation Trust Act," sections 1 through 42 of P.L.1999, c.152 (C.13:8C-1 et seq.), it may sell the development potential associated with the development easement subject to the terms and conditions of the development transfer ordinance adopted pursuant to P.L.2004, c.2 (C.40:55D-137 et al.); provided that if the development easement was purchased using moneys provided pursuant to the "Garden State Preservation Trust Act," sections 1 through 42 of P.L.1999, c.152 (C.13:8C-1 et seq.), a percentage of all revenues generated through the resale of the development potential shall be refunded to the State in an amount equal to the State's percentage contribution to the original development easement purchase. Notwithstanding the foregoing, such refund shall not be paid to the State in the event the State Treasurer determines that such refund would adversely affect the tax-exempt status of any bonds authorized pursuant to the "Garden State Preservation Trust Act," sections 1 through 42 of P.L.1999, c.152 (C.13:8C-1 et seq.). This repayment shall be made within 90 days after the end of the calendar year in which the sale occurs.

L.2004,c.2,s.24.

40:55D-161 Right to farm benefits.

25. Agricultural land involved in an approved development transfer ordinance shall be provided the right to farm benefits under the "Right to Farm Act," P.L.1983, c.31 (C.4:1C-1 et al.) and other benefits that may be provided pursuant to the "Agriculture Retention and Development Act," P.L.1983, c.32 (C.4:1C-11 et seq.).

L.2004,c.2,s.25.

40:55D-162 Annual report by municipality to county; county to State.

26. a. The governing body of a municipality that adopts a development transfer ordinance shall annually prepare and submit a report on activity undertaken pursuant to the development transfer ordinance to the county planning board.

b. The county planning board shall submit copies of these reports along with an analysis of the effectiveness of the ordinances in achieving the purposes of P.L.2004, c.2 (C.40:55D-137 et al.) to the State Planning Commission on July 1 of the third year next following enactment of P.L.2004, c.2 (C.40:55D-137 et al.) and annually thereafter.

L.2004,c.2,s.26.

40:55D-163 Construction of act relative to Burlington County municipalities.

27. a. Except as provided otherwise pursuant to subsections b. and c. of this section, the provisions of P.L.2004, c.2 (C.40:55D-137 et al.) shall not apply or be

construed to nullify any development transfer ordinance adopted by a municipality in Burlington County pursuant to P.L.1989, c.86 (C.40:55D-113 et al.) prior to the effective date of P.L.2004, c.2 (C.40:55D-137 et al.).

b. On or after the effective date of P.L.2004, c.2 (C.40:55D-137 et al.), any municipality in Burlington County may adopt a development transfer ordinance either pursuant to P.L.1989, c.86 (C.40:55D-113 et al.) or P.L.2004, c.2 (C.40:55D-137 et al.).

c. Any municipality in Burlington County may utilize a development transfer bank established by the municipality or county pursuant to P.L.2004, c.2 (C.40:55D-137 et al.), by the municipality or Burlington County pursuant to P.L.1989, c.86 (C.40:55D-113 et al.), or by the State pursuant to P.L.1993, c.339 (C.4:1C-49 et seq.) or P.L.2004, c.2 (C.40:55D-137 et al.).

L.2004,c.2,s.27.

Pennsylvania

Unconsolidated Pennsylvania Statutes; Title 53; Municipal Corporations

CHAPTER 30. PENNSYLVANIA MUNICIPALITIES PLANNING CODE.

Article VI. Zoning.

§ 10603. Ordinance provisions.

....

(c) Zoning ordinances may contain:

(2.2) provisions for regulating transferable development rights, on a voluntary basis, including provisions for the protection of persons acquiring the same, in accordance with express standards and criteria set forth in the ordinance and section 619.1;

....

§ 10605. Classifications.

In any municipality, other than a county, which enacts a zoning ordinance, no part of such municipality shall be left unzoned. The provisions of all zoning ordinances may be classified so that different provisions may be applied to different classes of situations, uses and structures and to such various districts of the municipality as shall be described by a map made part of the zoning ordinance. Where zoning districts are created, all provisions shall be uniform for each class of uses or structures, within each district, except that additional classifications may be made within any district:

....

(4) For the purpose of regulating transferable development rights on a voluntary basis.

....

§ 10619.1. Transferable development rights.

(a) To and only to the extent a local ordinance enacted in accordance with this article and Article VII so provides, there is hereby created, as a separate estate in land, the development rights therein, and the same are declared to be severable and separately conveyable from the estate in fee simple to which they are applicable.

(b) The development rights shall be conveyed by a deed duly recorded in the office of the recorder of deeds in and for the county in which the municipality whose ordinance authorizes such conveyance is located.

(c) The recorder of deeds shall not accept for recording any such instrument of conveyance unless there is endorsed thereon the approval of the municipal governing body having zoning or planned residential development jurisdiction over the land within which the development rights are to be conveyed, dated not more than 60 days prior to the recording.

(d) No development rights shall be transferable beyond the boundaries of the municipality wherein the lands from which the development rights arise are situated, except that, in the case of a joint municipal zoning ordinance, or a written agreement among two or more municipalities, development rights shall be transferable within the boundaries of the municipalities comprising the joint municipal zoning ordinance or, where there is a written agreement, the boundaries of the municipalities who are parties to the agreement.

Article VII. Planned Residential Development

....

§ 10702.1. Transferable development rights.

Municipalities electing to enact planned residential development provisions may also incorporate therein provisions for transferable development rights, on a voluntary basis, in accordance with express standards and criteria set forth in the ordinance and with the requirements of Article VI.

Washington

The State of Washington Growth Management Act and Related Laws

Revised Code of Washington

Chapters Included:

....

5. Growth Management-Planning by Selected Counties and Cities (36.70A)

....

10. Transfer of Development Rights - Regional (43.362)

....

36.70.320 Comprehensive plan. Each planning agency shall prepare a comprehensive plan for the orderly physical development of the county, or any portion thereof, and may include any land outside its boundaries which, in the judgment of the planning agency, relates to planning for the county. The plan shall be referred to as the comprehensive plan, and, after hearings by the commission and approval by motion of the board, shall be certified as the comprehensive plan. Amendments or additions to the comprehensive plan shall be similarly processed and certified. Any comprehensive plan adopted for a portion of a county shall not be deemed invalid on the ground that the remainder of the county is not yet covered by a comprehensive plan. *This 1973

amendatory act shall also apply to comprehensive plans adopted for portions of a county prior to April 24, 1973. [1973 1st ex.s. c 172 § 1; 1963 c 4 § 36.70.320. Prior: 1959 c 201 § 32.]

***Reviser.s note:** "This 1973 amendatory act" refers to 1973 1st ex.s. c172 § 1.

....

36.70A.090 Comprehensive plans.Innovative techniques.

A comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights. [1990 1st ex.s. c 17 § 9.]

Chapter 43.362 RCW REGIONAL TRANSFER OF DEVELOPMENT RIGHTS PROGRAM

Sections

43.362.005 Findings.

43.362.010 Definitions.

43.362.020 Regional transfer of development rights program.

43.362.005 Findings. The legislature finds that current concern over the rapid and increasing loss of rural, agricultural, and forested land has led to the exploration of creative approaches to preserving these important lands. The legislature finds also that the creation of a regional transfer of development rights marketplace will assist in slowing the conversion of these lands.

The legislature further finds that transferring development rights is a market-based technique that encourages the voluntary transfer of growth from places where a community would like to see less development, referred to as sending areas, to places where a community would like to see more development, referred to as receiving areas. Under this technique, permanent deed restrictions are placed on the sending area properties to ensure that the land will be used only for approved activities such as farming, forest management, conservation, or passive recreation. Also under this technique, the costs of purchasing the recorded development restrictions are borne by the developers who receive the building credit or bonus.

Accordingly, the legislature has determined that it is good public policy to build upon existing transfer of development rights programs, pilot projects, and private initiatives that foster effective use of transferred development rights through the creation of a market-based program that focuses on the central Puget Sound region. [2007 c 482 § 1.]

43.362.010 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Department" means the department of community, trade, and economic development.

(2) "Nongovernmental entities" includes nonprofit or membership organizations with experience or expertise in transferring development rights.

(3) "Transfer of development rights" includes methods for protecting land from development by voluntarily removing the development rights from a sending area and transferring them to a receiving area for the purpose of increasing development density in the receiving area. [2007 c 482 § 2.]

43.362.020 Regional transfer of development rights program. Subject to the availability of amounts appropriated for this specific purpose, the department shall fund a process to develop a regional transfer of development rights program that comports with chapter 36.70A RCW that:

(1) Encourages King, Kitsap, Pierce, and Snohomish counties, and the cities within these counties, to participate in the development and implementation of regional frameworks and mechanisms that make transfer of development rights programs viable and successful. The department shall encourage and embrace the efforts in any of these counties or cities to develop local transfer of development rights programs. In fulfilling the requirements of this chapter, the department shall work with the Puget Sound regional council and its growth management policy board to develop a process that satisfies the requirements of this chapter. In the development of a process to create a regional transfer of development rights program, the Puget Sound regional council and its growth management policy board shall develop policies to discourage, or prohibit if necessary, the transfer of development rights from a sending area that would negatively impact the future economic viability of the sending area. The department shall also work with an advisory committee to develop a regional transfer of development rights marketplace that includes, but is not limited to, supporting strategies for financing infrastructure and conservation. The department shall establish an advisory committee of nine stakeholders with representatives of the following interests:

(a) Two qualified nongovernmental organizations with expertise in the transfer of development rights. At least one organization must have a statewide expertise in growth management planning and in the transfer of development rights and at least one organization must have a local perspective on market-based conservation strategies and transfer of development rights;

(b) Two representatives from real estate and development;

(c) One representative with a county government perspective;

(d) Two representatives from cities of different sizes and geographic areas within the four-county region; and

(e) Two representatives of the agricultural industry; and

(2) Allows the department to utilize recommendations of the interested local governments, nongovernmental entities, and the Puget Sound regional council to develop recommendations and strategies for a regional transfer of development rights marketplace with supporting strategies for financing infrastructure and conservation that represents the consensus of the governmental and nongovernmental parties engaged in the process. However, if agreement between the parties cannot be reached, the department shall make recommendations to the legislature that seek to balance the needs and interests of the interested governmental and nongovernmental

parties. The department may contract for expertise to accomplish any of the following tasks. Recommendations developed under this subsection must:

(a) Identify opportunities for cities, counties, and the state to achieve significant benefits through using transfer of development rights programs and the value in modifying criteria by which capital budget funds are allocated, including but not limited to, existing state grant programs to provide incentives for local governments to implement transfer of development rights programs;

(b) Address challenges to the creation of an efficient and transparent transfer of development rights market, including the creation of a transfer of development rights bank, brokerage, or direct buyer-seller exchange;

(c) Address issues of certainty to buyers and sellers of development rights that address long-term environmental benefits and perceived inequities in land values and permitting processes;

(d) Address the means for assuring that appropriate values are recognized and updated, as well as specifically addressing the need to maintain the quality of life in receiving neighborhoods and the protection of environmental values over time;

(e) Identify opportunities and challenges that, if resolved, would result in cities throughout the Puget Sound region participating in a transfer of development rights market;

(f) Compare the uses of a regional transfer of development rights program to other existing land conservation strategies to protect rural and resource lands and implement the growth management act; and

(g) Identify appropriate sending areas so as to protect future growth and economic development needs of the sending areas. [2007 c 482 § 3.]