

Realizing the Promise: Transfer of Development Rights in New Jersey

**A Report of the New Jersey TDR
Statewide Policy Task Force**



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Acknowledgments



Message from the Task Force Co-Chairs

This report culminates a significant effort by members and government liaisons of the New Jersey TDR Statewide Policy Task Force, convened and supported by staff at New Jersey Future. The Task Force represents a diverse and broad range of perspectives on land use policy. As a result, there was a robust, in-depth debate on the recommendations. However, the shared belief in TDR as an important tool to shape New Jersey's preservation and growth patterns led members to work together and find compromise.



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Phil Caton and Chris Sturm
Co-Chairs, New Jersey TDR Statewide Policy Task Force

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Task Force Members

Don Asay, Mannington Township
Candace Ashmun,
Sandy Batty, ANJEC
Dianne Brake, PlanSmart NJ
Michael Catania, Jon Wager, Conservation Resources Inc.
Philip Caton, Task Force Co-chair, Clarke Caton Hintz
Jim Coe, Hatch Mott McDonald
Tim Dillingham, Matt Blake, American Littoral Society
Tony DiLodovico, CMX Engineering
William Dressel, Mike Cerra, NJ State League of Municipalities
David Fisher, The Matzel & Mumford Org.
Wilma Frey, NJ Conservation Foundation
Peter Furey, Helen Heinrich, Ed Wengryn, Tom Beaver, New Jersey Farm Bureau
Richard Goldman, Drinker Biddle & Reath LLP
Frederick Hardt, Law Offices Of Frederick Hardt
James Hartling, Urban Partners
John Hasse, Rowan University
Brian Kelly, Chesterfield Township
Suzanne McCarthy, DVRPC
Kevin McManimon, McManimon & Scotland LLC
Robert Melvin, Caroline Armstrong, Group Melvin Design
Courtenay Mercer, Mercer Planning
Bruce Paparone, Bruce Paparone, Inc.
Richard Reading, Richard Reading Associates
Brian Schilling, Rutgers University
Edwin Schmierer, Mason, Griffin and Pierson
Chris Sturm, Task Force Co-chair, New Jersey Future
Bob Wagner, American Farmland Trust
Jim Waltman, Jennifer Coffey, Stony-Brook Millstone Watershed Association

Government Liaisons

Larry Baier, NJDEP Division of Watershed Management
Brent Barnes, NJDOT
Susan Craft, Stephen Bruder, Tim Brill, NJ State Agriculture Development Committee
Caren Franzini, Maureen Hassett, Kim Ehrlich, NJ Economic Development Authority
Matthew Johnson, Burlington County Planning Department
Louis Joyce, Salem County Planning Department
Christine Marion, Morris Co. Dept. of Planning, Dev. & Technology
Marc Pfeiffer, NJDCA Division of Local Government Services
Monique Purcell, NJ Dept. of Agriculture
Donna Rendiero Joy Farber, Karl Hartkopf, Office of Smart Growth
Elizabeth Semple, Rick Brown, Jennifer Feltis, NJDEP, Office of Planning & Sustainability
Kathy Stuart, Office of Senator Sweeney
John Stokes, Pinelands Commission
Eileen Swan, Jeff LeJava, NJ Highlands Council
Keith Henderson, Council on Affordable Housing

Executive Summary

TDR: Achieving Land Preservation AND Economic Growth

Transfer of Development Rights, or TDR, offers communities and regions an important tool to simultaneously achieve both land preservation and economic growth. By incorporating TDR provisions in their land-use regulations, municipalities and regions can preserve natural, agricultural, or historic areas and direct growth where it is desired. Owners of land targeted for conservation may sell their building rights to developers, agreeing in return to a restrictive covenant that preserves their land in perpetuity. Builders gain the right to build at a higher density, in areas planned for growth by the community. Resources are preserved with private, not public, funds by harnessing forces in the real estate market. And landowners gain another option for extracting the equity from their land. TDR thus advances many of the state's overarching goals: conserving farmland, open space and historic resources; expanding economic growth and creating jobs; promoting compact development and redevelopment that uses land efficiently; strengthening communities; and implementing the state's energy conservation and climate change agenda.

TDR preserves land and historic resources with private, not public funds, by harnessing forces in the real estate market.

Lessons from the New Jersey Experience

New Jersey has witnessed successful deployment of TDR on the municipal level in two Burlington County municipalities and on the regional level in the Pinelands region. These efforts have been recognized nationally. Subsequent efforts to implement TDR, however, have stalled or are moving slowly. Since the State TDR Act was passed in 2004, despite widespread interest, only Woolwich Township in Gloucester County has passed a TDR enabling ordinance, and it faces implementation hurdles. A handful of municipalities are engaged in TDR planning but are hampered by the obstacles addressed in this report. The 2004 legislation creating the Highlands regional planning council created the opportunity for a regional TDR program, but implementation is lagging.

Why has such a promising tool been used successfully in only a few places? Planning for TDR is a complex process because it requires site-specific details for a vast area, as well as careful consideration of private market forces. Where TDR programs include the creation of new communities, the municipality must plan for a host of infrastructure and public services at once. Statutory planning requirements add extra, sometimes unnecessary, burdens, which increase up front municipal costs. Municipalities need major coordination and assistance from state agencies, but they often lack the stature to resolve inter-agency conflicts and ensure delivery of needed financial and regulatory support. Regional TDR programs face additional hurdles. Not only is development

transferred across municipal boundaries, but with it comes the attendant “costs of growth,” including education expenses, traffic and affordable-housing obligations. Municipalities generally resist accepting such growth from outside their borders.

Why TDR Is Worth Fixing

Many of the obstacles facing TDR also confront other smart growth initiatives, including transit-oriented development and downtown revitalization.

Given all these complexities, the threshold question is whether TDR is worth fixing. An analysis of TDR obstacles shows that many of the problems encountered by TDR programs also confront other smart growth initiatives, including transit-oriented development and downtown revitalization. Addressing them will advance sustainable economic growth and job creation, coordination of state agencies and local governments behind sound planning and cutting red tape. TDR offers all levels of government a model for long-term financial savings through a wise up-front investment in planning, by permanently preserving land with private funds and reducing the cost to build, maintain and service infrastructure. Meanwhile, there is broad recognition that we cannot afford to purchase all the land that needs protecting, and a variety of approaches, including TDR, will be needed if New Jersey is to remain “the Garden State.”

Recommendations to Facilitate Widespread Use of TDR

In late 2009, the William Penn Foundation funded New Jersey Future to convene a task force to recommend ways to achieve widespread implementation of TDR on both the municipal and regional level. The TDR Statewide Policy Task Force represents a strategic group of more than 40 stakeholders: local and county officials, municipal planners, engineers and attorneys, environmentalists, developers, smart growth advocates and farming representatives, as well as liaisons from regional and state agencies. They have met in a variety of settings since December 2009, not only as a full group but also in seven subcommittees, ad-hoc working groups, and through frequent email communications.

This report contains the task force’s recommendations for statutory, regulatory, programmatic and policy changes to facilitate the use of TDR at the municipal level. The recommendations also set a direction for addressing obstacles to regional programs.

1. **Empower local governments with a full spectrum of planning tools to transfer growth and preserve resources.** Municipalities lack adequate planning tools for preserving farmland, open space and historic resources on different scales, from municipality-wide to site-specific. Planning tools that transfer development from one location to another should be made simpler and less expensive to use.
 - Municipalities are currently authorized to create TDR programs that are considered “voluntary” or “mandatory” from the perspective of sending area landowners. The planning requirements for voluntary TDR programs should be less involved than those for mandatory programs, since in voluntary programs landowners retain all their pre-existing rights (to sell their land for development) in the event the TDR program falters.
 - Through the non-contiguous cluster tool, municipalities may allow development to be transferred from one site to another, even if the sites are non-contiguous. This tool should be strengthened and made more accessible for municipalities to utilize.

- Municipalities may allow development to be clustered on a portion of a site. Some municipalities have adopted ordinances that require such clustering, and they have been upheld in court. Additional statutory clarification that such authority exists may be helpful.

Amendments are also needed to make TDR easier to use in urban areas, ensure developers can purchase development rights when needed, ease redundant notification requirements and prevent sprawl development in receiving districts.

2. **Provide a streamlined planning review and collaborative partnership with state government.** TDR planning stalls in the face of state requirements for plan endorsement that are unnecessarily burdensome, unclear due to inter-agency conflicts and/or that fail to deliver needed technical and financial support.

Municipal, county and state governments should collaborate in a TDR planning process that allows for early feedback from state agencies on a conceptual plan, followed by more thorough state review of a refined TDR plan and, finally, state agency approval and commitment to a proactive, problem-solving partnership with the town and county.

The statutory requirement for “Initial Plan Endorsement” should be changed to facilitate this partnership by allowing towns to obtain either a streamlined, tailored version of plan endorsement or an alternative state approval process. Plan endorsement (or its replacement) should:

- Integrate planning for natural resource protections, affordable housing, market forces and other goals.
- Limit requirements to those needed for a successful TDR program that is not inconsistent with state policies. Allow requirements to be limited to TDR sending and receiving areas when appropriate.
- Offer tangible state benefits commensurate with the local planning effort. Ensure agencies incorporate their agreed-upon contributions into their own functional plans to ensure necessary follow-through.
- Be facilitated by a single point of contact (presumably at the State Planning Commission in conjunction with the TDR Bank Board) with the authority to facilitate solutions and ensure state agency follow-through on commitments, with the support of staff and a high-level interagency body.

3. **Support well-planned receiving districts through regulatory reform.**

Conservation in TDR sending areas cannot occur without developers building in receiving districts. Too often, receiving districts stall, because they are either inappropriately located or get caught in red tape.

Municipalities must locate and size receiving districts carefully so that they can obtain infrastructure and development permits. Once state government approves a TDR program, it must facilitate the provision of infrastructure and provide a stable, responsive regulatory environment for development through:

- Priority permitting
- A sector permit/general development plan approach that provides regulatory stability over time

- A clear regulatory path for small-scale wastewater solutions
- Integrating water and wastewater planning with TDR planning

In addition, the Department of Environmental Protection (DEP) should publicize where water and wastewater capacity exists. The Department of Transportation (DOT) should evaluate transportation access permits based on overall mobility. DEP should develop a habitat planning tool to determine fair options for mitigation, when warranted.

4. Make TDR a sound fiscal choice for local government.

TDR programs save the public money over the long run by permanently preserving land with private (not taxpayer) funds and by reducing the cost of building, maintaining and servicing infrastructure with compact receiving areas. However launching TDR requires a large up-front investment, which can be daunting for any municipality, but especially intimidating for rural municipalities that have a limited tax base and limited planning resources.

To ensure TDR makes financial sense to municipalities, the state should provide the necessary tools to fund, finance, and recover costs associated with:

- Planning, including education and outreach, design and market analysis
- Infrastructure for the receiving district
- General expenses related to the accelerated pace of growth

State law can also provide TDR municipalities with legal protections to reduce their risk. The State TDR Bank, which facilitates the exchange of TDR credits and provides planning grants, should also provide educational materials for local officials, local residents, landowners and developers. Special incentives for developers in TDR receiving districts should be identified.

5. Explore ways to make regional TDR programs viable.

Regional TDR programs face additional hurdles, especially when the designation of receiving districts is voluntary.

The following general approaches merit greater review:

- Identify additional financial resources to encourage municipalities to create regional receiving districts.
- Substantially increase the demand for development rights by requiring credit purchases for a variety of development opportunities statewide.

With award-winning TDR programs under its belt, an array of natural resources to protect and a multitude of communities to strengthen, New Jersey needs a TDR program that works.

Taking TDR to the Next Level in New Jersey

The goal of the task force is to provide municipalities and regions with workable tools to shape future development through TDR and other density-transfer tools. Toward that end, New Jersey Future and its colleagues from the task force will pursue these recommendations through changes to statutes, regulations, policies and programs.

With award-winning TDR programs under New Jersey's belt, an invaluable array of natural resources to protect and a multitude of communities to strengthen, New Jersey needs a TDR program that works.

About the NJ TDR Statewide Policy Task Force

In late 2009, the William Penn Foundation funded New Jersey Future to convene a task force to recommend ways to achieve widespread implementation of Transfer of Development Rights (TDR) on both the municipal and regional level. The TDR Statewide Policy Task Force represents a strategic group of more than 40 stakeholders: local and county officials, municipal planners, engineers and attorneys, environmentalists, developers, smart growth advocates and farming representatives, as well as liaisons from regional and state agencies. (They are listed in the Acknowledgements section at the front of this report.) They have met in a variety of settings since December 2009, not only as a full group but also in seven subcommittees, ad-hoc working groups, and through frequent email communications.

The goal of the task force is to provide municipalities and regions with workable tools to shape future development through TDR and other density-transfer tools. New Jersey's experience with TDR has led to a sound understanding of the obstacles and a comprehensive set of recommendations to address them. New Jersey Future looks forward to working with task force members to advance the recommendations, while noting that their participation does not limit their ability to take positions on future implementation steps that have yet to be developed.

With award-winning TDR programs under its belt, an invaluable array of natural resources to protect and a multitude of communities to strengthen, New Jersey needs a TDR program that works.

TDR: The Opportunity and the Challenge

New Jersey is Losing the Battle to Save Open Lands

Despite its nickname as the Garden State and the current economic downturn, New Jersey is on track to become the first state in the nation to be fully built-out. If present trends continue, the nature of this build-out will be primarily inefficient, low-density sprawl development that continues to transform New Jersey's landscape on a massive scale. Between 1986 and 2007, more than 15,000 acres per year (or 32 football fields a day) of farmland, forests and wetlands were developed in New Jersey, often in areas designated for conservation by the State Development and Redevelopment Plan. Homes on lots larger than one-half acre consumed the most land, accounting for two-thirds of the residential land development, but housing only a small share of the population increase. While full build-out may be inevitable for New Jersey, the rate and manner in which development takes place is very much an open question.¹

People in New Jersey are beginning to question why the forests and productive farmlands have to be replaced by large tracts of housing, strip malls and super shopping centers, many of them located in the "middle of nowhere". And people are asking whether it makes sense to fill in all the open spaces when so much infrastructure capacity exists in and around areas already built up. The reality is beginning to set in that by building out beyond the suburban fringe, soon there won't be any more fringe left.

Besides the aesthetic and economic impacts of losing open space in the Garden State, probably the most significant long-term repercussions of sprawl are the loss of valuable wildlife habitat and natural resources, including aquifers and wetlands that ensure the quality and quantity of New Jersey's drinking water as well as the land base for agriculture, an important part of our economy and source of local produce, nursery stock, livestock and farm-based recreation and tourism. Other impacts are less direct and include increased traffic congestion and air pollution, and growing infrastructure, maintenance and repair costs, which increase when development is spread out.

Traditional zoning and public purchase of threatened land resources comprise the usual defenses against sprawl development. While important, these tools are not adequate on their own. In fact, traditional zoning often seems to be more a part of the problem than the solution as towns attempt to reduce the number of new housing units either by zoning primarily for non-residential development or by downzoning (increasing lot size

¹ "Changing Landscapes in the Garden State: Urban Growth and Open Space Loss in NJ, 1986 through 2007." John E. Hasse and Richard G. Lathrop. Rowen University/Rutgers University. July 2010.

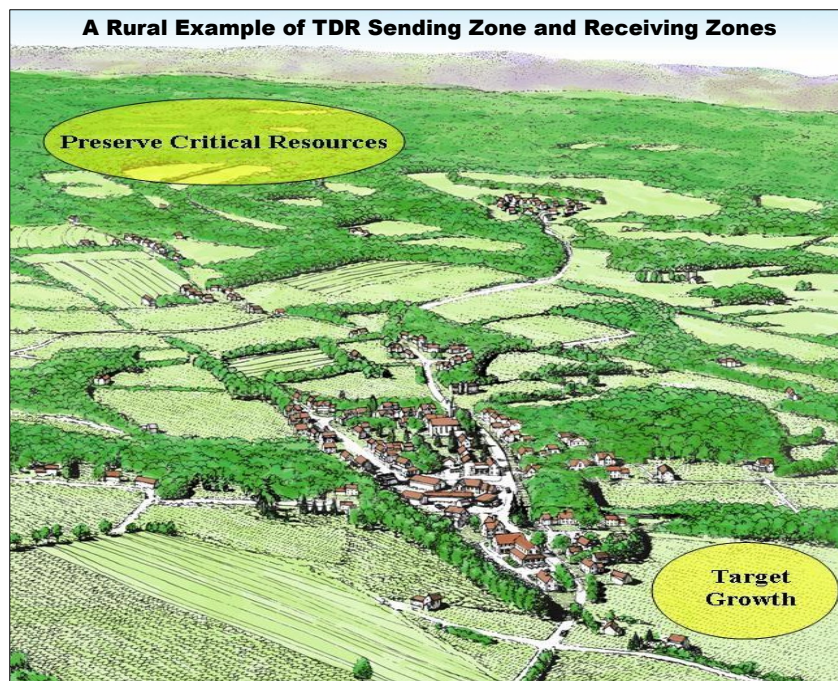
Within the Farmland Preservation Program alone, counties and municipalities have targeted more than 250,000 additional acres of land for preservation at a projected cost to the public of more than \$3.5 billion.

requirements) in residential areas. The latter approach frequently results in a larger impact/footprint on the landscape as each new home consumes more space (unless it is also accompanied by requirements for clustering or transfer of development). Further increasing zoning restrictions to severely limit or outright prohibit residential development on open lands plays an important role in local and regional plans to protect natural resources but may be impeded by political opposition and the risk of “taking” claims and subsequent costly legal battles (which occur even though such downzoning is often upheld in court, if properly done).

Likewise, the limits on using public funds, such as DEP’s Green Acres Program and the State Agriculture Development Committee’s Farmland Preservation Program to purchase open space and or development easements are obvious; it is simply too expensive and available dollars are inadequate to the task. The State of New Jersey cannot afford to buy everything worth saving. Within the Farmland Preservation Program alone, counties and municipalities have targeted more than 250,000 additional acres of land for preservation at a projected cost to the public of more than \$3.5 billion. And, through land purchase alone, the state would probably not be able to preserve the contiguous open spaces needed for viable agriculture and healthy ecosystems.

The Promise of TDR

TDR offers another, more innovative approach to the toolkit – using private funds both to save open space and farms, and to concentrate or cluster development in places with existing or well-planned infrastructure capacity. Using TDR, towns have the opportunity to take the initiative and determine how they want to look at full build-out, instead of just letting sprawl happen. The great promise of TDR is that if done well, it can accomplish two important objectives simultaneously – the preservation of farmland, forests, other open space or historic resources for future generations, and, at the same time, the

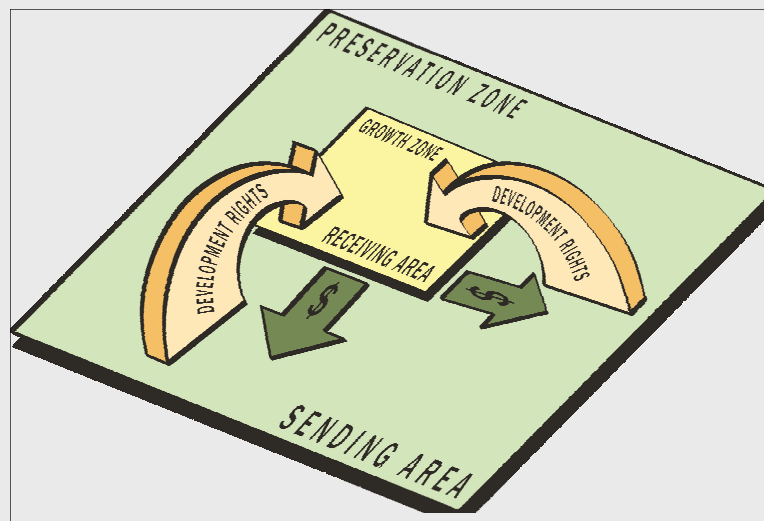


Source: New Jersey State Development and Redevelopment Plan, 2001

What Is TDR?

TDR, or Transfer of Development Rights, is a land-use strategy that seeks to protect valued land resources (such as farmland, aquifer recharge areas, forests or historic architecture) from being developed by actually transferring the landowner's "right to develop" in the protected zone (sending area) to an alternative site or district where denser development is desired (receiving area).

TDR is based on the concept that property ownership involves a number of different rights, including the rights to farm and develop, among others. These rights can be separated one from another, sold to developers and transferred to other properties. Through TDR, a developer can buy a property's development potential (or rights) and use it in a designated receiving area to develop at greater density. The sending area property is then preserved from development through a conservation easement.



Source: Clarke Caton Hintz

Development rights, or credits, are allocated to sending area parcels based on pre-existing zoning, environmental restrictions and other program criteria. A TDR bank is often established to facilitate the buying and selling of credits by acting as a clearinghouse.

A slightly different variation of TDR can also be used to protect architectural, historic or cultural properties or urban parks. For example, in the same way that a farm's development potential can be assessed and sold to developers, the ability to change a historic building's façade or to demolish it and redevelop the site can likewise be assessed, sold and transferred. In both cases, the property owner is compensated for loss of his property's development potential. Another variation used in the Pinelands allows landowners the ability to develop a substandard parcel provided they purchase a development right.

Structurally, there are two basic types of TDR: 1) intra-municipal – where a town identifies both sending and receiving areas within its own boundaries; 2) and regional – which can be a small inter-municipal program where two or more towns collaborate to identify shared sending and receiving zones that make sense across municipal borders or a large regional TDR program authorized by state law that can cover vast areas, such as the New Jersey Pinelands and Highlands.

development of attractive, quality communities built at sustainable densities in environmentally appropriate locations.

TDR is an option that provides for balanced economic growth in rural, suburban and even urban areas, while preserving large areas of farmland, open space and historic resources. This makes good economic sense for New Jersey, as changing demographics indicate there will be fewer traditional families with children and more retired baby-boomers and young workers that favor accessible walkable communities. The demand for large single-family homes in suburban and rural areas is expected to decline, perhaps even below the existing supply. When implemented in combination with other farmland-preservation and land-acquisition programs, TDR can have a powerful impact on both the planned and preserved environments.

It may come to a surprise to many that TDR is not new to New Jersey. In fact, to some extent, New Jersey has been at the forefront of TDR efforts in this country. Since the 1980s, TDR has been used successfully in the Pinelands to preserve more than 50,000 acres of environmentally sensitive land, while allowing for development of more than 3,200 new housing units and many new commercial enterprises. In 1989, the state passed pilot TDR legislation allowing for the implementation of TDR in Burlington County. After many years of planning, preparation and construction, the Burlington County townships of Lumberton and Chesterfield both completed TDR projects that resulted in the preservation of more than 3,000 acres of farm and forest lands, along with the development of hundreds of new housing units.

As a result of these successes, legislation allowing the use of TDR by municipalities anywhere in the state was finally passed in 2004. However, after six years and much effort by a number of towns, not a single municipality has been able to complete the statewide TDR planning process, satisfy all the requirements and begin implementing TDR.

In the meantime, the state's open spaces, natural resources and farmland come under greater threat. Development pressures on New Jersey's open lands do not disappear, even in a recession. Indeed, the great challenge of crafting a workable TDR program for New Jersey's towns in the current economy is the limited window that we have to try to get it right. While this is an opportune time to plan, one should have no illusions that the pace of land development won't pick up again.

The Local Perspective on TDR Implementation

Since 2004, not one community has been able to actually implement a TDR program. Only one municipality, Woolwich Township, has managed to adopt a TDR ordinance.

At the time the Statewide TDR Act was adopted in 2004, the State of New Jersey seemed uniquely situated to embark on a promising new approach to land management. The actual experience of towns across the state, however, has been problematic.

Since the passage of the 2004 law, 14 municipalities have received state planning grants to pursue intra-municipal TDR, and three counties/groups of municipalities received planning grants to pursue inter-municipal TDR. Since that time, however, not one community has been able to actually implement a TDR program. And only one municipality, Woolwich Township in Gloucester County, has reached the important milestone of adopting a TDR ordinance. A handful of municipalities are actively proceeding with TDR planning, including Berkeley Township, Ocean County; Hillsborough Township, Somerset County; and Jersey City, Hudson County. (See box on page 21 for details.)

Other TDR efforts are in earlier stages in Ocean Township, Ocean County; and Mansfield and North Hanover Townships in Burlington County. TDR programs are on hold, at least temporarily, in Hopewell Township, Cumberland County; Frankford Township, Sussex County; and Mannington Township, Salem County.

According to interviews with municipal planners conducted by New Jersey Future earlier this year, there are several factors that have impeded progress during the last six years. The primary issues from the local perspective are:

- Infrastructure planning. Complications and costs of planning, and receiving approvals, for infrastructure improvements in receiving areas represent a major hurdle. Planning for new, relatively dense neighborhoods in TDR receiving areas, instead of sprawl, requires sophisticated infrastructure planning and sizable investments upfront, as well as cooperation by multiple entities including utility authorities, private water and wastewater providers, county and municipal governing bodies and state regulators.
- Changes in regulations. Changes in state agency regulations during the planning process can require major adjustments to the TDR plan. Rules that have changed in the last few years include: DEP's wastewater quality management planning rules, Council on Affordable Housing (COAH) rules, and plan endorsement regulations of the Office of Smart Growth (OSG).
- Lack of sustained local leadership. Sustained political leadership, commitment and/or continuity at the local level is needed to see TDR through. Not only must local leaders set up an education and outreach process so stakeholders understand how TDR will work in their community, but they often have to overcome local concerns about higher-density development in the receiving district. Typically TDR is not an initiative that can be accomplished within one political cycle.
- Cost, time and unpredictability of plan endorsement requirements. The extensive plan endorsement requirements, combined with the lack of continuity (high staff turnover) and state agency conflicts about requirements has made plan endorsement an expensive and anxiety-filled experience for some communities.
- Insufficient high-level state agency support. Communities need continuity and predictability as they seek plan endorsement and permits for infrastructure improvements. Despite the best efforts of dedicated staff, neither DEP nor DOT leadership appears to have adopted TDR as its own and made resolving TDR-related issues a priority.
- Inadequate guidance for conducting the Real Estate Market Analysis (REMA). Inadequate guidance for how to integrate the REMA into the TDR planning process has led, in some communities, to a time-consuming "back and forth" process of revising the size of the receiving/sending area and the development transfer plan to correspond to the REMA. Economic factors inform the design and size of the receiving area and must be incorporated early in the process.
- Lack of a TDR coordinator. There is currently no designated agent at the state level to work with TDR participants, provide much-needed technical guidance, streamline the planning process and act as a liaison with the state agencies.

- Cost. The TDR Bank has provided Planning Assistance Grants of up to \$40,000, and OSG has provided grants ranging from \$45,000 to \$120,000. OSG has since lost its funding, however, and these grants cover only a fraction of the planning costs.

Obstacles to TDR implementation: A Summary

Why has statewide TDR been so difficult to implement in New Jersey? The main obstacles to TDR implementation, while overlapping, can be divided into four categories:

1. **Burdens of the TDR Planning Process.** Planning for TDR is a complex process because it requires detailed planning for the entire sending and receiving area, which may comprise the entire town, as well as careful consideration of market forces. Extensive community outreach and education must occur. Statutory planning requirements add extra burdens; towns that want to pursue TDR are required to receive Plan Endorsement from OSG, adopt various master plan elements and a TDR ordinance, and prepare a complicated REMA to demonstrate the economic soundness of their TDR plans. While these planning efforts help ensure workable TDR programs to a point, they are expensive, especially for small rural townships, and planning grants are inadequate. Needless to say, towns that choose to continue to allow sprawl development can avoid these requirements completely.
2. **Inadequate state support for municipalities preparing for concentrated development and full build-out.** The place for TDR to have the most dramatic effect on New Jersey's growth pattern is in the still-rural and undeveloped parts of the state. In these regions, however, municipalities typically have very small populations, a limited ratable base and a relative lack of available public infrastructure to support new growth. These rural municipalities have tended to change their zoning to require larger residential lots where the gradual "creep" of development allows for incremental decision-making and short-term infrastructure planning.

TDR, in contrast, requires comprehensive, up-front planning and decision-making on many levels. Unlike traditional sprawl zoning, TDR implementation requires the municipality to fully understand and plan for full build-out at the beginning, not the end, of the planning process. Therefore, these often very rural municipalities need to decide issues related to the public water supply; sewer service; the transportation network; stormwater management; new school students; affordable-housing requirements; and recreational facilities. The same planning issues face suburban and urban TDR towns, albeit on a smaller scale.

Preparing for well-planned and relatively rapid growth is complex and interdependent, not only from a local perspective, but also because there are multiple state regulatory requirements to meet. Municipalities lack the capacity to manage it alone without major coordination and assistance from state agencies. To date, however, the lack of commitment to ensuring successful TDR implementation from all affected state agencies at the top level has impeded this degree of proactive planning and decision-making, despite the best efforts of many state agency staff.

3. **The Fiscal Impacts of Accelerated Growth.** TDR receiving districts typically offer attractive, low-risk opportunities for development, because they are well-planned, infrastructure is either in place or on its way, and the municipality welcomes development proposals since they will result in permanent land preservation. As a

result, TDR receiving districts may be rapidly built-out and create a burgeoning demand for municipal services. The municipality meanwhile, is likely struggling to cover the costs of infrastructure that was put in place before new ratepayers were in place. The result is a temporary, but significant, fiscal challenge for local government.

4. **The Difficulty of Finding Receiving Districts for Regional TDR Programs.** As demonstrated in the Pinelands, TDR can be used to direct growth to the best locations in a region, by transferring growth from one municipality to another. The Pinelands Commission has the authority to require municipalities to create regional receiving districts. Where they have a choice, though, such as in the Highlands TDR program, or smaller inter-municipal efforts, municipalities so far have been unwilling to create regional receiving districts to accept extra growth from outside their boundaries. Special complications arise. Development brings obligations to the host municipality, such as to educate schoolchildren and to provide affordable housing, which impedes affluent communities from participating. Less affluent cities and towns may welcome new growth, but their real estate markets are typically too weak for developers to afford the purchase of TDR credits.

The Statutory and Historic Context for TDR in NJ

A National Perspective on TDR

Although the first TDR occurred in New York City in 1968 in order to preserve historic landmarks (Grand Central Station in particular), on a national level TDR has been used much more widely as a means to prevent the loss of farmland and environmentally sensitive land resources in the face of indiscriminate suburban development. TDR programs have preserved more than 400,000 acres of land and are now used in over 200 cities, towns and counties across the country. Twenty-three states have been identified as authorizing some or all jurisdictions to use TDR to implement a broad range of land use goals. The largest TDR programs in the country are regional. They include King County, Washington; Montgomery County, Maryland; and the New Jersey Pinelands. Other states such as Pennsylvania have many municipal TDR programs.²

TDR Programs in New Jersey

1. New Jersey Pinelands

New Jersey's Pinelands TDR Program is considered an early and successful model for regional TDR. Under the New Jersey Pinelands Protection Act of 1979, the New Jersey Pinelands Commission began to evaluate how to guide future development and protect the Pinelands' important natural and cultural resources. The resulting Comprehensive Management Plan (CMP) identified a Preservation Area with severe restrictions on growth and a larger Protection Area, which was divided into eight land-use categories: Agricultural Production Areas, Special Agricultural Production Areas, Forest Areas, Regional Growth Areas, Rural Development Areas, Pineland Towns, Pinelands Villages and Military and Federal Installation Areas. Within these areas, certain uses were identified as preferred activities, others were strictly regulated and others prohibited completely. The seven counties and 53 municipalities of the region were required to bring their plans into conformance with the CMP.

The Pinelands Development Credit (PDC) Program was instituted in 1981 to aid in land preservation. It is administered jointly by the Pinelands Commission and the Pinelands Development Credit Bank. The first PDC allocations were made in 1981, the first land was protected in 1983 and the Pinelands Development Credit Bank was established in 1985. As a result of the PDC program, more than 50,000 acres of environmentally sensitive forest and agricultural land in the Pinelands have been protected.

² "TDR-Less TDR Revisited: Transfer of Development Rights Innovations and Gunnison County's Residential Density Transfer Program." Mike Pelletier, Rick Pruetz, FAICP, and Christopher Duerksen. American Planning Association, Planners Advisory Service Memo, May/June 2010.

The Pinelands TDR program is essentially a mandatory one. Mandatory sending areas in the Pinelands include the preservation and agricultural lands of the designated Preservation Area, Agricultural Production Areas and Special Agricultural Production Areas; development restrictions have been imposed on these areas. The designated Regional Growth Areas serve as mandatory receiving zones. While municipalities are able to determine zoning within the regional growth areas, they are required to give density bonuses to developers choosing to use PDCs. Developers do have the option of building at lower base densities without PDCs.

2. The New Jersey Highlands

In contrast with the Pinelands, the Highlands TDR program has only just begun. Charged with establishing a TDR program by The Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 *et seq.* (2004), the Highlands Council has fully analyzed the resource capacity within its boundaries, an area comprising portions of seven counties. Much of the Highlands Region could become a TDR sending area, since for the most part Highlands municipalities are required to be in conformance with the Highlands Regional Plan, which imposes limits on growth. Under the Highlands Act, however, participation by municipalities as receiving zones is strictly voluntary. To encourage such participation, the act allows towns to impose a \$15,000 per unit impact fee and receive up to \$250,000 in planning grants. In addition, the Highlands Council has established a receiving zone feasibility planning grant program for interested communities. Currently 11 communities are engaged in the feasibility planning process. In 2010, the Highlands Act was amended to allow any municipality in the state to volunteer to become a Highlands Region receiving area.

The Highlands Council established the Highlands Development Credit (HDC) Bank by resolution on June 26, 2008. Under the provisions of the Regional Master Plan, the HDC Bank performs several functions, including recording and tracking all HDC activities, and serving as a buyer and seller of HDCs.

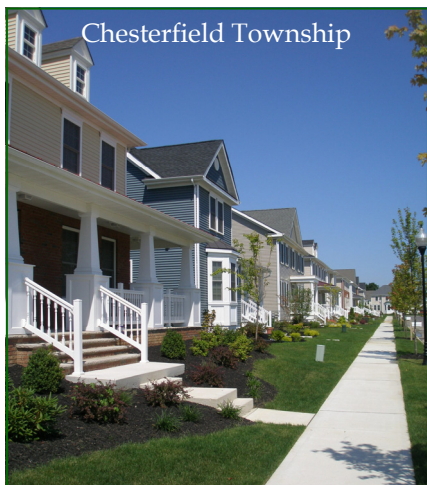
The Council, along with the HDC Bank, is currently implementing the TDR Program throughout the seven Highlands counties. The Highlands Council has initiated the HDC allocation process for property owners in eligible areas of the Highlands Preservation Area while the Bank has launched its initial HDC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

3. Burlington County Pilot Program

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

a. Chesterfield Township

The Chesterfield TDR program has received much attention as New Jersey's premier municipal TDR success story. After nearly a decade of planning, Chesterfield began implementing its program in 1997 and now, 13 years later, it is near full build-out, with more than 7,000 acres of farmland preserved, through both TDR and the state Farmland Preservation Program, and almost 800 residential units approved for construction. The receiving area, called Old York Village, incorporates a network of neighborhood parks and a mixed-use village center hosting retail, office and convenience uses intended to serve local market needs. The village design is patterned on historic villages in Chesterfield.



Source: Clarke Caton Hintz

The receiving area site was selected based on its proximity to existing water treatment facilities and its location adjacent to major transportation corridors. While the original zoning of the Old York Village area was one unit per three acres, the built-out density of Old York Village is now about two or three units per acre. TDR credits were allocated to sending area parcels based on a combination of properties' pre-TDR zoning and pre-existing development regulations regarding soil suitability for septic systems.

Currently, Chesterfield Township's TDR program is reaching build-out. Not one application for conventional subdivision in the sending area has been processed through the Planning Board since the adoption of voluntary TDR in 1998. By contrast, five applications for development in the receiving area, consisting of more than 800 housing units, have been approved by the Planning Board. As of October 2009, the development status of Old York Village included 555 Certificates of Occupancy (COs) with 60 additional building permits issued. As a result, 460.9 TDR credits have been retired and their corresponding sending area lands preserved.

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

b. Lumberton Township

Lumberton's smaller TDR program was developed in two phases. The first phase sending area, adopted in 1995, targeted 1,513 acres of farmland in the western side of the township. After some success, Lumberton adopted a second phase in 2000 to protect an additional 1,355 acres of farmland on its eastern side. All told, more than 850 acres have been permanently protected by TDR. As in Chesterfield, credits were allocated based on both pre-existing zoning and soil suitability.

Lumberton's TDR program differed from Chesterfield's in the approach taken toward developing the receiving zone. Instead of developing a single new

village neighborhood, Lumberton designated five different receiving sites where the density could be increased from a minimum of 0.7 units per acre to a maximum of four units per acre. The second phase includes 185 acres zoned for an age-restricted community with mixed uses.

4. New Jersey State TDR Act

The State Transfer of Development Rights Act (N.J.S.A. 40:55D-137 et seq), enacted in March 2004, authorizes municipalities to establish intra-municipal TDR programs by ordinance and, with county planning board approval, also authorizes TDR between two or more municipalities not necessarily in the same county.

Before adopting (or amending) a TDR ordinance, a municipality is required to conduct several planning actions. The first is for the town to adopt a development transfer plan element of its municipal master plan, which, among other items, must include an analysis of anticipated growth, a description of proposed sending and receiving zones and an estimate of existing and proposed infrastructure of the proposed receiving area.

Other requirements prior to adopting a TDR ordinance include adopting a capital improvement program for the receiving zone, describing location and cost of infrastructure; adopting a utility service plan element of the master plan; preparing a REMA analyzing current and future land markets and examining the capacity of designated receiving zones to accommodate necessary development; and receiving approval (plan endorsement) of the town's municipal master plan by the State Planning Commission .

Review and approval of the TDR plan element and ordinance by the Office of Smart Growth is required. OSG also received authority to prepare the rules governing the REMA. County planning board review and official recommendation is also required, and if farmland is involved, county agriculture development board review is required as well.

The act requires that the TDR ordinance provide that any variance granting more than 5 percent increase in density outside of a designated receiving zone shall be considered a receiving zone, and shall require a purchase of development potential credits. The act makes provisions for periodic review of the municipal TDR program by the local planning board. Specifically, after years three and five, the planning board must review the TDR ordinance and REMA, and assess the performance of the municipal TDR program. If after five years, at least 25 percent of the development potential has not been transferred, the TDR ordinance is presumed no longer valid unless specific measures are taken.

The act further promotes the purchase, sale and exchange of development credits by authorizing municipalities and counties to establish development transfer banks, or to use the State TDR Bank. These local TDR banks are empowered to determine the development potential of properties to be bought or sold and the banks may establish a municipal average of the development potential of all property in a sending zone of a participating municipality.

Municipalities across New Jersey are pursuing TDR to reach many goals, including to preserve farmland, forests and historic buildings, improve urban parks, create transit districts, foster redevelopment and build walkable town centers.

Municipal TDR Programs in the Works

Woolwich Township, Gloucester County: In August, 2008, Woolwich Township became the first municipality to adopt a TDR ordinance under the authority of the State TDR Act. Traditionally a farming community, by the early 2000s, Woolwich Township became the fastest growing community in New Jersey and the second fastest in the entire northeastern United States. Seeking to create a plan that would enable the community to maintain its rural character and agricultural viability, the township produced a TDR plan that created two receiving zones for 700 acres of mixed-use development while preserving 4,100 acres of farmland and open space. The receiving area includes a mix of uses — residential, retail and office — and a variety of housing types. The plan incorporates a grid network and other pedestrian-friendly features and makes use of integrated and regional stormwater management systems that also function as green amenities. Implementation of the TDR plan cannot advance, however, until a wastewater solution is identified.

Berkeley Township, Ocean County: In 2003, Berkeley residents chose a vision for their township that includes walkable, mixed use areas for future growth and the preservation of environmentally sensitive lands not served by infrastructure. To achieve this vision, Berkeley has designed a Transfer of Development Rights program that will preserve approximately 840 acres of forested land threatened by scatter-shot development. Growth will be transferred into three compact, mixed-use town centers and an industrial node. Berkeley hopes to have its program up and running within a year, once they receive plan endorsement (which should facilitate resolution of a few outstanding issues) and adopt remaining master plan elements and the TDR ordinance. Three of the receiving zones will also require approval from the DEP CAFRA program.

Hillsborough Township, Somerset County: Hillsborough Township is pursuing a TDR program that could be implemented in phases. The program proposes four mixed use centers as receiving districts. The largest is a new transit village that on one hand will be contingent upon provision of express bus service or reactivation of NJTRANSIT's West Trenton rail line, and on the other hand could help to bring those services to the town. A walkable town center and two small commercial corridors comprise the other receiving districts. Construction in these areas would allow for the preservation of over 6,000 acres of farmland, some of which is in the Duke Farms estate, and forested habitat on the Sourland mountain. The proposed TDR program has been deemed economically viable through the REMA process. Next, Hillsborough's planning board will review draft master plan elements in July 2010 and determine how to proceed.

Jersey City, Hudson County: Jersey City is embarking on a comprehensive planning study to utilize Transfer of Development Rights in an urban setting. The City will capitalize on the tremendous demand for additional density in this growing metropolis "across the Hudson" to preserve and enhance community resources. The study includes several types of project areas and innovative preservation concepts to restore existing parkland, acquire and develop new parkland, permanently preserve, restore and/or adaptively reuse historic resources, as well as to encourage and support community gardens and urban agriculture. The program will include neighborhood-based transfers similar to other urban models, but will also transfer development rights from critical "scattered sites" around the City to areas with demand and capacity. Once implemented, the Jersey City project will offer a new model for TDR in an urban setting.

Additional TDR programs are in earlier stages of development in Mansfield and North Hanover Townships, Burlington County and Ocean Township in Ocean County.

5. New Jersey TDR Bank

A number of TDR programs also utilize a TDR credit bank to support program administration. The bank can serve as the clearinghouse for information regarding the program and can administer the recording, transferring and tracking of TDR credits. In addition to serving these administrative functions, a TDR credit bank may also assist sellers and purchasers of TDR credits by providing or serving as a buyer or seller of last resort of TDR credits, or guaranteeing loans utilizing the TDR credits as collateral. Where a bank does not actively buy and sell TDR credits, the bank often facilitates private transactions by bringing buyers and sellers together.

New Jersey's State TDR Bank was created in 1993 and capitalized at \$20 million (\$10 million of these funds have since been transferred to the Highlands TDR Bank). The function of the State TDR Bank is to support development transfers in municipalities that have adopted TDR ordinances. As TDR is market-based, the actions of the bank must not impede private market transactions.

In New Jersey, municipalities that have established development transfer ordinances may use the State TDR Bank, establish their own TDR bank or use a county-managed bank, if available, to facilitate transfers within their jurisdiction.

Located in, but not of, the State Agriculture Development Committee, the State TDR Bank functions under the direction of a 10-member board of directors. Under their guidance, the major tasks of the State TDR Bank include:

- The purchase or provision of matching grants for the purchase of 80 percent of the value of development potential from properties within designated TDR sending areas;
- The provision of a financial guarantee with respect to any loan secured using development potential as collateral;
- The provision of planning assistance grants to municipalities to help cover the cost of preparing the planning documents required to enact viable TDR ordinances;
- Service as a development transfer bank for any municipality that has adopted a TDR ordinance, or any county in which at least one municipality has adopted a TDR ordinance; and
- The establishment and maintenance of a Development Potential Transfer Registry to record all development potential.

Recommendations to Facilitate the Use of TDR

The following are the comprehensive recommendations of the New Jersey TDR Statewide Policy Task Force. There is a mix of both big and small statutory, regulatory, programmatic and policy changes that will facilitate the use of TDR at the municipal level and set a direction for addressing obstacles to regional programs.

#1: Empower local governments with a full spectrum of planning tools to transfer growth and preserve resources.

The *Municipal Land Use Law* (MLUL), N.J.S.A. 40:55D-1 et seq provides municipalities the authority to adopt a handful of planning tools to transfer growth, or “density,” from one location to another. These tools range in scale from a single land parcel to multiple parcels to part or all of a municipality to groups of municipalities. They include:

- Clustering: where the development allowed on a single parcel can be “clustered” onto the most suitable portion of the site, preserving the remainder as open land;
- Clustering on Non-Contiguous Lots: where a developer who owns two or more non-contiguous parcels can “cluster” all of the potential development on a single site, preserving the undeveloped parcel(s) as open land. (See N.J.S.A. 40:55D-65(c)); and
- Transfer of Development Rights, where landowners in an area designated for preservation (the “sending area”) can sever development rights from their property and sell them to developers in the area designated for growth (the “receiving area”), thus simultaneously facilitating preservation and more intense growth, each in appropriate locations.

Today’s density transfer tools are inadequate. Municipal experience with each of these tools has uncovered several flaws.

Today’s density transfer tools are inadequate. Municipal experience with each of these tools has uncovered several flaws:

- The MLUL gives municipalities clear authority to allow development to be clustered on a portion of a site. Some municipalities have adopted ordinances that *require* such clustering in environmentally sensitive areas and these ordinances have been upheld in court. Additional statutory clarification that such authority exists may be helpful.
- The non-contiguous cluster tool may only be used in limited circumstances. When municipalities have attempted to “stretch” its use, the courts have struck

down their ordinances.³ There is significant demand for such a tool. Many municipalities desire to preserve land on a relatively modest scale where a full TDR program would not be needed and lack the appetite for the cost and complexity of TDR. Others want to emulate the New Jersey Pinelands, where landowners may develop nonconforming lots, provided they purchase a credit.

- TDR programs today must meet the same requirements, whether they are “mandatory” or “voluntary” from the perspective of landowners in the sending area. In a mandatory TDR program, sending area landowners have experienced a substantial “downzoning” of their land in order to ensure conservation of the land resources, and are provided the opportunity to sell TDR credits as the primary vehicle to extract the equity from their land. To protect that equity and ensure TDR credits have good value, the TDR statute imposes a variety of requirements on municipalities. These requirements are warranted for mandatory programs; however, they should be eased for voluntary programs where landowners retain their pre-existing development options, and are afforded the opportunity to sell TDR credits as a second option to extract equity.

Detailed Recommendations

Amendments to the non-contiguous cluster tool in the MLUL could make it much easier and less expensive to facilitate small-scale preservation efforts.

Municipalities should be offered more and better tools for preserving farmland, open space and historic resources through programs that transfer density from one location to another. See Appendix A, “Development Transfer Alternatives” on page 41 for a comparison of the characteristics of three transfer tools: non-contiguous clustering (recommended in #1 below), voluntary TDR (recommended in #2 on page 25) and mandatory TDR (existing).

1. **Enhance the non-contiguous cluster tool to offer greater flexibility for small-scale density transfers.** Such amendments to the Municipal Land Use Law would clarify that this less intensive tool could be used legally instead of a full TDR program as long as severable credits were not utilized. This change would be appropriate for small-scale preservation efforts where one developer could manage the transactions needed to build the entire receiving area. (Non-contiguous cluster programs work when there are only a few sending area parcels needed to build out the receiving district; TDR programs, in contrast, require several sending area landowners in order to work.) Non-contiguous cluster could also be used on a smaller scale, such as for preserving a single historic site and/or landscape. No REMA would be required, as for TDR, but a master plan amendment would be in order. In addition, the non-contiguous cluster would:
 - a. Be voluntary on the part of landowners, as it is now.
 - b. Not have to be executed through the Planned Unit Development provisions of the MLUL, as it is now. Although a developer would still be required to “control” both the sending and receiving sites, he could do so through either purchase of an easement or fee ownership. The use of severable credits, however, would be prohibited. (The developer would pay to have an easement recorded on the “sending” property but would not actually control it. Another entity would be assigned to hold the easement in perpetuity.)

³ “Courts Fluster Non-Contiguous Cluster.” Courtenay D. Mercer, PP/AICP. The Jersey Planner. March/April 2008.

- c. Allow municipalities several *options*:
 - i. To designate “cluster growth areas” and/or “cluster preservation areas.”
 - ii. To require sewage treatment in the growth area.
 - iii. To create a transfer ratio (provided it was justified by a simple financial feasibility analysis) and to allow bonus units as an incentive to transfer.
 - iv. To allow towns to consolidate sending and receiving lots for tax and stewardship purposes, as is done in the Pinelands.
 - v. To specify a maximum lot size in the growth area.

2. **Amend the TDR statute to ease the planning requirements for voluntary TDR programs in situations where the sending area has not been recently significantly down-zoned in association with a TDR program.** Municipalities often find voluntary TDR programs more politically acceptable, because sending area landowners have fewer concerns. Voluntary programs can result in full preservation in the sending area, provided the receiving district is ready for development and sending area landowners do not face intense development pressure; Chesterfield Township’s successful TDR program, for example, was fully voluntary. No major subdivisions have been approved in the sending area since TDR was enacted, not because subdivision was prohibited but rather because landowners have chosen to sell TDR credits.

In a voluntary program, sending area landowners retain the ability to sell their land for development or for preservation, but are also able to sell TDR credits. Because landowners have good alternatives to TDR, many of the program requirements imposed upon municipalities to protect landowner equity in the current TDR statute should be relaxed through amendment to the TDR statute, as described below. (Note that these provisions should not be extended to mandatory programs.)

- a. To ensure that the program is voluntary on the part of sending area landowners, “voluntary” TDR means that there has been no adoption of any change in zoning in the sending area that results in the reduction of development potential (lot yield) by 50 percent or more⁴ that has occurred within twenty-four months of adoption of the TDR ordinance, unless the zoning change was required by state regulation, such as the Water Quality Management Planning Rules.
- b. Towns would be required to do only the first part of the full REMA, called the “Economic Feasibility Analysis,” which affirms the fundamentals of the TDR program –the size of sending and receiving districts based on a precise determination of the number of credits and acres; types of units in the receiving district; transfer ratios; etc. This is done as an iterative planning process with the municipal TDR planning process, where the real estate consultant provides feedback at each stage of the planning process to help the town refine the program. Municipalities would not be required to provide the formal documentation required for the full REMA, which formally demonstrates that sending area lands will retain their value and thus protects the town in the

⁴ For example, a 50 percent reduction in development potential would occur if a 100 acre parcel with a lot yield of 50 dwelling units was down-zoned so that the lot yield was reduced to 25 dwelling units.

event of litigation. Municipal expenses for the REMA would be reduced by about one-half.

- c. Municipalities would need to review the TDR program's effectiveness (including TDR zoning and transfer ratios) as part of regular master plan updates and re-examinations, but would not be subject to the existing statutory performance requirements that could nullify a mandatory TDR program after five years.
 - d. Municipalities need not make the receiving district large enough to accommodate all of the credits from the sending area, since sending area landowners retain all the other options to realize the value of their land, but should be able to accommodate at least 75 percent of sending area credits at the time of ordinance adoption. Towns could consider phasing in receiving areas as needed.
 - e. Since preservation of all of the sending area lands is not guaranteed, towns should not necessarily be eligible for some of the permitting enhancements being considered for the receiving area in a mandatory TDR program.
3. **Explore additional statutory clarification for mandatory clustering in order to assist towns interested in using that tool.** The MLUL gives municipalities clear authority to allow development to be clustered on a portion of a site. Some municipalities have adopted ordinances that *require* such clustering in environmentally sensitive areas and these ordinances have been upheld in court.
 4. **Authorize municipalities to set maximum lot sizes in the receiving area for all TDR programs, whether voluntary or mandatory.** This amendment to the State TDR Act. This will preserve the opportunity to build using credits in the receiving district at a later time, regardless of whether a developer initially builds units based only on the development potential provided by the underlying density, without utilizing TDR credits.

A similar mechanism was used in Chesterfield Township's TDR program to ensure that, in the event that a receiving district developer did not want to build using credits, he would be prevented from building out his parcel at low densities and thereby preclude future development of the receiving area with credits.
 5. **Refine municipal authority to assign a limited number of credits to preserved land they own in order to prevent a shortage of credits available for sale.** This amendment to the State TDR Act would assist developers building in TDR receiving districts that occasionally have trouble finding willing sellers of sufficient TDR credits at the time they are ready to build. This situation can be ameliorated if, when the program is set up, the municipality assigns some credits to preserved land it owns. (This practice is authorized by the TDR statute,⁵ but should be limited to 10 percent of the total number of credits so as not to affect the value of credits appreciably.) The municipality would then hold the credits and could offer them

⁵ See section 8 (b) of the State TDR Act: "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."

for sale if there were a shortage of willing sellers, provided its involvement did not substantially impair the private sale or transfer of development potential. The TDR statute should be amended to specify that proceeds from such a sale would be used to refund the agency which funded the preservation, with any remainder going to the municipality to advance the TDR program.⁶ This practice should be described in any TDR training materials, especially for mandatory TDR programs, where the supply of credits is likely to be more constrained.

6. **Relax (slightly) the limitations on variances; municipalities should have the option to waive them altogether in urbanized areas.** For towns with an approved TDR program, the TDR statute currently designates any parcel granted a density variance that increases the development potential by more than 5 percent as automatically part of a receiving district (if it is not already in one). The threshold should be increased from 5 to 10 percent to simplify municipal zoning administration. Also, municipalities should be provided with the option to exclude highly urbanized planning areas (State Plan Urban Centers and land in Planning Area 1) from this provision.
7. **Improve notice requirements.** In order to ensure awareness of the TDR program among landowners and the farming community, the State TDR Act should be amended to require municipalities to provide registered notice to the County Agriculture Development Board, County Board of Agriculture, and the Farm Bureau regarding: 1) the first public meeting or hearing dedicated to TDR; 2) the receipt of a state TDR grant; or 3) entering into a contract with a REMA consultant, whichever occurs first.

At the same time, the statute should be amended to eliminate redundant notice requirements such that when a municipality rezones based upon a master plan re-examination, the notice to each landowner within 200 feet of boundaries of the zone is not required. In this case, the rules regarding hearings for revision or amendment of the master plan apply. See N.J.S.A. 40:55D-10(a). Accordingly, the provision in the TDR Act with respect to notice needs to be revised to reflect this alternative notice requirement. Since extensive visioning is performed by necessity during the TDR planning process and includes extensive notice, and since master plan updates equivalent to or greater than a re-examination are performed for TDR, then notice to all residents within 200 feet of the new zones should not be required when rezoning sending and receiving areas. (See N.J.S.A. 40:55D-143.) This small change in the TDR Act is necessary to accurately reflect MLUL requirements.

8. **Explore ways to increase the demand for development rights.** There is no shortage of *supply* of development rights in New Jersey, but there is a limited *demand* by developers to purchase them, in exchange for increased density. Other TDR programs around the country have experimented with ways to increase the demand for development rights by offering other commodities in exchange, such as a reduction in parking requirements, an increase in impervious coverage or access to extra wastewater capacity. In addition, other TDR programs also allow monetary payments in lieu of actually purchasing credits, which can facilitate transactions. These approaches should be explored to ascertain their ability to increase the demand for credits in TDR programs in New Jersey.

⁶ See section 24 of the State TDR Act, which governs the sale of credits by a county.

#2: Provide a streamlined planning review and collaborative partnership with state government.

Municipalities need state government guidance and support to design a TDR program that will work and meet state regulations.

Municipalities need state government guidance and support to design a TDR program that will work and meet state regulations. TDR requires comprehensive, up-front planning and decision-making on many levels. Unlike traditional sprawl zoning, TDR implementation requires the municipality to fully understand and plan for full build-out at the beginning, not the end, of the planning process. Therefore, municipalities need to decide issues related to the public water supply; sewer service; the transportation network; stormwater management; new school students; affordable-housing requirements; and recreational facilities. The same planning issues face suburban and urban TDR towns, albeit on a smaller scale.

Preparing for well-planned and relatively rapid growth is too complex and interdependent for the municipality to manage alone without coordination and assistance from state agencies. The purpose of plan endorsement was both to ensure local plans were aligned with state objectives and to assist such coordinated planning. The requirements have expanded, however, beyond what is required to ensure a successful TDR program. Also, the lack of high-level commitment to ensuring successful TDR implementation by all relevant state agencies has impeded timely conflict resolution among state agencies and provision of promised benefits.

Detailed Recommendations

1. **Commit state government to work with TDR municipalities through a “State-Local TDR Partnership.”** As part of this relationship, the state, county and municipality progress through the following steps:
 - a. The exploration phase, where the municipality decides whether or not to pursue TDR through preliminary planning studies, community outreach and possibly informal state feedback;
 - b. The assessment phase, where the municipality presents the state with its conceptual TDR plan and receives formal feedback on the viability of the plan, with respect to a variety of state planning, policy and regulatory objectives including infrastructure capacity;
 - c. The refinement phase, where the municipality refines the TDR plan through an iterative planning process (based on state assessments, the REMA, developer feedback and community input) and the state reviews/approves the TDR plan through plan endorsement or an alternate process; and
 - d. The implementation partnership, where all levels of government work as partners to implement the approved TDR plan, according to a formal Memorandum of Agreement. (See Appendix B on page 42 for a complete description.)
2. **Revise and reconcile the statutory requirement for “Initial Plan Endorsement” according to the needs of municipalities and state agencies, per the “State-Local TDR Partnership.”** Specifically the TDR statute should be amended to clarify that

in order to adopt a TDR ordinance, a municipality obtain one of the following types of a “TDR Partnership Agreement”:⁵

- a. A streamlined version of plan endorsement for TDR municipalities from the State Planning Commission, as described in (3) below and in the table in Appendix C on page 44; or
- b. A determination by the State Planning Commission that the municipality has designated appropriate sending and receiving areas that are sufficiently aligned with the State Plan and other state requirements to be successfully implemented (as described by regulations to be adopted by the SPC), and which contains commitments by state agencies to support the TDR program; or
- c. At the discretion of the SPC, a Certificate of Eligibility for Plan Endorsement that incorporates TDR planning, provided the required elements of the municipal master plan are up to date, and the TDR receiving district is located in a Sewer Service Area with an up-to-date Wastewater Management Plan.

3. **Require any “TDR Partnership Agreements” to fully support essential TDR planning and allow for adequate state government review.** Specifically, the agreements should:

- a. Be tailored to the needs of municipalities engaged in TDR and avoid penalizing interested towns by imposing planning requirements beyond what is needed for a successful TDR program or to be consistent with state policies. The process should establish limits to the ability of OSG and state agencies to add to established requirements, as long as such limitations do not obstruct the agencies from carrying out their statutory obligations. For example, if a municipality is pursuing TDR as a means to protect habitat, DEP and OSG should recommend additional tools beyond TDR to help accomplish that goal. But if a municipality is pursuing TDR for other reasons, they should not be required to adopt additional habitat protections beyond the TDR program, unless as described in (c) (ii) below.
- b. Conduct TDR planning in the context of comprehensive municipal planning by requiring municipalities to have a legal (i.e. up-to-date) master plan that reflects the TDR program, and includes a utility service plan element and capital improvement plan, and where relevant, a conservation element, housing element and circulation element. However, authorize OSG to waive requirements outside of TDR sending and receiving districts (and any adjacent, affected areas) where appropriate, based on the scale of the TDR program relative to the municipality and its impact.
- c. Integrate information on natural, agricultural and historic resources in order to protect them in the sending area and avoid them in the receiving area to the greatest extent possible.
 - i. Incorporate early consideration of natural resources and infrastructure capacity into planning for the receiving district location and size. Integrate

⁵ Note that any proposals in this report for statutory changes will be reviewed before being introduced, in light of any change in circumstances. For example, the status of the State Planning Commission (which oversees the plan endorsement process) may change in the next few months, and that could affect the best way to accomplish these recommendations.

TDR planning with water and wastewater planning, as described in recommendation #5 on page 34.

- ii. If an approved TDR receiving area negatively impacts regulated environmental features, the TDR program must include appropriate measures to mitigate the impacts and ensure that overall environmental values are maintained. The prevention of development in the TDR sending area should be considered as a possible means of mitigation, but only if commensurate with the amount and level of disturbance and when it will ensure that overall environmental values are maintained.
 - iii. The state should review the deed restriction used for sending area properties to ensure that it provides the intended restrictions. The state should provide municipalities with a model deed restriction form that includes required provisions and also suggests optional provisions that provide additional protections.
 - d. Incorporate early consideration of market forces by establishing “TDR planning parameters,” which arrive at a reasonably sized TDR program by starting with a look at the receiving area. The parameters should: (1) identify acceptable long-term population projections to assess the town’s potential for growth; (2) estimate what portion of that growth should be absorbed in the receiving area; (3) estimate what portion of receiving area growth could be accommodated through credit purchase; and (4) determine how big the sending area could be given the potential receiving area credit absorption.
 - e. Offer tangible benefits commensurate with the local planning effort and expected outcomes. Ensure all agencies work with the municipality to identify costs for infrastructure/other and a funding approach, and incorporate their contribution into an official functional plan. For example, DOT should place any agreed-upon transportation improvements into its 10-year capital program.
4. **Reinstate a single point of contact for municipalities pursuing TDR.** By doing so, the state can:
- a. Market TDR to towns and provide education to local officials and planners, landowners, developers and the general public (as described on page 38, #6);
 - b. Assist towns with implementation, including overcoming obstacles; and
 - c. Coordinate with other state agencies through an interagency “TDR Implementation Team” with high-level membership and quarterly meetings to make the state accountable for TDR, to be an advocate for TDR before the agencies, and to remove obstacles and to ensure coordination.

If the SPC is strengthened, as recommended by Governor Christie’s Red Tape Review Commission, this point of contact should be located under the auspices of the SPC. The role of the SPC and its staff and the TDR Bank Board must be coordinated to maximize assistance given to towns.

5. **Maintain adequate staff support for TDR implementation, both under the SPC and in DEP, DOT, Department of Agriculture and the TDR Bank Board.**

6. **Use the Real Estate Market Analysis (REMA) to set appropriate densities for the receiving district.** The REMA determines densities based on careful consideration of the local development market, transfer ratios between sending area and receiving area units needed to make the program work, etc. As such, plan endorsement, affordable housing requirements and any other state review of TDR programs should rely on the REMA numbers.
7. **Align affordable-housing requirements and TDR programs to be mutually supportive.** More specifically:
 - a. Affordable-housing requirements should be designed to minimize any potential negative impacts on municipal TDR programs.
 - b. Municipalities should address requirements for affordable housing in their receiving districts.
 - c. In communities with a transfer ratio greater than one (i.e. where more than one unit can be built in the receiving area for every development right sold from the sending area), TDR not only speeds up growth but increases the total number of housing units relative to the build-out under the prior zoning. In these cases, affordable-housing requirements should ensure that there will not be an increased obligation beyond what the town would have provided under pre-existing zoning.

#3: Support well-planned receiving districts through regulatory reform.

Getting new growth in the receiving district is often the “Achilles heel” of TDR programs.

Receiving district implementation is often the “Achilles heel” of TDR programs. TDR programs only result in land preservation when development in a new receiving district takes place. Planning for development in a receiving district is complex, especially when compared to the typical alternative of passive zoning for sprawl development. TDR stalls when the receiving district infrastructure (including water, wastewater and roads) is not in place, or if development is unable to obtain needed permits. This issue is complicated by several factors, including:

- Uncertainty in, or changes to, the wastewater planning process, the Water Supply Master Plan, habitat protection requirements, etc.
- Lack of guidance regarding acceptable small-scale wastewater treatment systems.
- The need for state agency follow-through and commitment over a multi-year time period that may span changes in regulations, staff, administrations, etc.
- “Catch-22” situations towns and state government are often subject to, namely, that towns need state agency support for infrastructure improvements that the state can’t or won’t approve without being assured of how they will be financed, and towns are not able to obtain infrastructure financing without permit approvals.

To prevent such roadblocks, municipalities must work closely with state agencies early in the TDR planning process to ensure the proposed receiving district is viable. Once TDR plans receive conceptual approval from state agencies, municipalities need a stable regulatory environment and proactive, consistent state agency support for infrastructure planning, design and permitting all the way through the process.

Detailed Recommendations

1. **Integrate protections of natural, agricultural and historic resources into municipal TDR planning in order to minimize or avoid altogether the potential for regulatory conflicts.** Municipalities should work closely with county and state government, according to the “State-Local TDR Partnership” (described in Appendix C page 44), to define sending and receiving areas based on a comprehensive planning process that includes an assessment of natural, agricultural and historic resources, seeking to protect them in the sending area and avoid them in the receiving area to the greatest extent possible. Where the receiving area includes environmental features, plans and ordinances should minimize the impact of development.
2. **Pilot Governor Christie’s initiative to eliminate governmental “red tape” by offering priority permitting for infrastructure and development in all approved TDR programs.** This can be accomplished by:
 - a. A unique point of entry to facilitate the review (one-stop permitting).
 - b. A team approach to coordinate the review of projects needing multiple permits, including a case manager to follow the project from inception to decision. The case manager should identify critical path parameters, including any potential fatal flaws. Timelines for action should be established for the regulatory agency and the applicant. A permitting team of the best staff from each permit program should be created and made accountable to an assistant commissioner.
 - c. Accountability to the TDR Implementation Team (see page 30, #4 (c)) to report on the resolution of permit issues within specified timeframes, consistent with their regulatory and statutory obligations. Within the agencies, division directors should be made accountable for progress within timelines, and performance should be incorporated into their annual review.
 - d. Flexibility as allowed (but not always applied) under existing regulations.
 - e. Education of all permit staff on agency policy toward TDR, the TDR review process (and how it is different from a project advanced by political connections), the appropriate range of permitting flexibility within existing regulations, etc., such that arising environmental issues in agreed-upon growth (receiving) areas be “managed” so as to protect the environment as required by statute and regulation, but not to derail the TDR program.

This recommendation is consistent with Governor Christie’s emphasis on cutting red tape and the recommendations for priority permitting adopted by the Permit Efficiency Task Force.

3. **Offer municipalities with approved TDR programs the opportunity to apply for a “Sector Permit”/“General Development Plan” (GDP) that provides a stable regulatory environment.** Because the TDR planning process is so comprehensive, lengthy and expensive, and because TDR is recognized as benefiting the general public and the environment by preserving land from sprawl, the state should make every effort to offer consistency in regulatory requirements for development in approved TDR receiving districts. The committee recommends developing the following conceptual approach for an area-wide sector permit, similar to what was done in Long Branch and offering it as an option to municipalities with approved TDR plans:

-
- a. DEP would consider a municipal application for a sector permit by reviewing a detailed General Development Plan for the receiving district as part of an overall TDR program.
 - b. DEP would provide guidelines for development projects that conform to the approved GDP, which would be good for 10 years. The use of the General Development Plan approach would be conditioned upon a comprehensive TDR plan involving both the receiving district and the sending area. The issue of whether municipalities should be given a greater role in facilitating state permits under the sector permit guidelines should be explored.
 - c. Sector permit guidelines would be tailored to the receiving district based on the application of state policies and regulatory requirements and a comprehensive assessment of natural resources in the district. The guidelines would allow for innovative “management” of environmental resources in a way that recognized the special benefits that derive from the TDR program. The guidelines would operate in a variety of ways: a) evaluating in detail the nature of the issue; b) avoiding environmental problems where possible; and/or c) allowing for a site-specific solution, based upon demonstrated achievement of comparable or improved environmental outcomes and mitigation of any impacts.
 - d. DEP would retain the right to rescind any inappropriate municipal. The program would remain in place only as long as all local required elements were implemented and maintained, which would recognize the comprehensive and integrated nature of the program.
 - e. A “time of decision” provision would allow all permit applications for development in the receiving area to be subject to the rules, including DOT, DEP and affordable-housing rules, as they existed when the TDR program was approved, unless the applicant chose to accept newer regulations, and except as needed to address pressing public health and safety concerns. This would not apply in the sending area.
 - f. The portion of the Wastewater Management Plan (WMP) covering the TDR sending and receiving district would be held constant during the time period, except for the six-year review of wastewater generation vs. capacity, unless health or public safety concerns arose.
 - g. The municipality would agree not to make any substantive changes to the TDR master plan element or TDR ordinance (covering both the sending and receiving areas) unless as approved by the State Planning Commission and DEP to the extent activities under its jurisdiction are affected.
4. **Provide a clear regulatory path for small-scale wastewater systems within DEP.** Many towns are interested in small-scale density transfers (through TDR or non-contiguous clustering) that create small receiving areas on the scale of hamlets (less than 200 dwelling units). Such transfer programs have proven difficult to implement, however, because it is unclear what small-scale wastewater treatment options are acceptable to DEP. To facilitate small-scale density transfers, DEP should:
- a. Define acceptable management entities, including the municipality, the utility authority or a private wastewater provider, but not including a homeowners’ association.
 - b. Clarify the specific types and technologies for “package treatment plants” or

“community owned wastewater systems” that are likely to be appropriate for different scales of development. Clarify the regulatory standards they must meet.

- c. Ensure the wastewater facility cannot be significantly expanded without DEP approval.
- d. Publish information on acceptable small-scale wastewater treatment systems. Post information on package treatment plants that have received approvals from DEP in the recent past.
- e. Formally acknowledge when the geography of a proposed growth area is acceptable for designation as a Sewer Service Area (SSA) based on the regulatory standards in the WQMP rule, but cannot be actually designated as an SSA until a wastewater solution is approved as viable by DEP, through a letter to the wastewater agent and ultimately in the WQMP.

5. Integrate water and wastewater planning with planning for TDR within DEP.

Specifically:

- a. Act expeditiously to provide clear, public information on where water and wastewater capacity exists, in order to clarify where TDR can be easily implemented.
- b. Prohibit sewer service areas in TDR sending areas.
- c. Identify mechanisms to allow municipalities and counties to prioritize the allocation of wastewater and water capacity to TDR receiving districts.
- d. Require an up-to-date WMP before a TDR ordinance is adopted or, under extenuating circumstances, allow a TDR ordinance to proceed, provided the geography of the receiving district meets regulatory standards for an SSA, feasible wastewater alternatives have been identified and realistic timeframes for WMP adoption are agreed upon by the wastewater agent and DEP.
- e. Include comprehensive infrastructure planning as part of TDR planning in the future, including an up-to-date WMP as described under recommendation (5) (d) above, and #2 on p. 23. However, in the event that a TDR ordinance is adopted before a wastewater alternative has been identified, and the municipality has received plan endorsement, such as in Woolwich Township, DEP should:
 - i. Facilitate SSA designations by formally acknowledging that the geography of the proposed receiving district is acceptable for designation as an SSA, but cannot be actually designated until a wastewater solution is approved as viable by DEP. This could be accomplished in a letter to the wastewater agent (typically the county) and ultimately in an approved WQMP. Essentially this would be an acknowledgement by DEP that it agrees that the proposed SSA geography can be included in the SSA and that the environs protections afforded by the plan are adequate. The purpose of this conditional approval is to give the town and county the confidence they need to move forward, bond or contract, for needed improvements.
 - ii. Allow limited incremental approvals of the SSA through site-specific WMP amendments, as developers, the municipality or the wastewater provider propose specific wastewater solutions for all or part of the SSA, provided that the proposed development utilizes TDR credits, results in permanent land preservation and complies with all other regulatory requirements.

Issues evaluated in the up-front planning would not have to be revisited as part of the site-specific amendment process, provided the assessment assured compliance with state requirements. The site-specific amendment would only have to address the wastewater flow for the site, identify the wastewater management alternative selected and water supply source (if that had not previously been determined), thus shortening the review time required and increasing the certainty of the outcome. This practice would allow for phased development of large receiving districts.

6. **Facilitate DOT transportation access permits for approved TDR receiving districts.** DOT should modify the access permit process for TDR receiving districts based on performance criteria that balance access with regional mobility and transit use. The modified process must ensure that DOT does not deny access permits simply because a project increases traffic congestion, especially if it is also becoming "transit-ready." County road departments should also prioritize support for TDR projects.
7. **Facilitate DEP habitat protection in a way that complements and supports TDR programs.** DEP should develop an easy-to-use, science-based habitat conservation tool that measures the level of impairment of proposed development upon habitat and offers the ability to determine options for mitigation that ensures maintenance of overall environmental values. DEP should pilot development of Habitat Conservation Plans in a variety of settings, including a municipality with a TDR program where sending area lands have been preserved.
8. **Ease the use of "Discharge to Groundwater" systems through TDR educational materials.** - For TDR districts using a new wastewater treatment plant with groundwater discharge and drip irrigation, provide education materials that explain cost-effective implementation mechanisms, such as integrating the drip field into the development project, or locating it in the sending area where credit allocation may be appropriate, provided there are no risks to public health.

While TDR saves public funds in the long run, it requires a significant up-front investment by municipalities. Planning costs often exceed \$300,000.

#4: Make TDR a sound fiscal choice for local government.

TDR requires a significant up-front investment by municipalities. Initially, both landowners and the development community were skeptical of TDR's efficacy. As a result, the Statewide TDR Act is chock-full of municipal planning requirements designed to prevent an impractical TDR plan from being adopted. These include conducting a full pre-TDR build-out analysis; performing a REMA to demonstrate the financial integrity of the proposed ordinances in the marketplace; and securing "Plan Endorsement" from the Office of Smart Growth. While all of these requirements address real issues, together they greatly increase planning costs, which often exceed \$300,000, and involve a long time delay associated with securing state agency approvals. While other recommendations in this report streamline planning requirements and lower their cost, municipalities still need additional planning resources.

In rural areas, TDR municipalities must also provide infrastructure to support planned new communities, including water, sewer, roads, stormwater management and recreation, much of it before new taxpayers and ratepayers are in place. Once development occurs, TDR towns face other growing pains in the form of a rapid escalation in demand for municipal facilities and services.

Detailed Recommendations

1. **Provide financial assistance to municipalities for the planning phase, including education and outreach, planning, design and market analysis.**
 - a. Reduce municipal costs associated with TDR by enacting other recommendations in this report to simplify statutory planning requirements for plan endorsement (see page 28, item 2) and the REMA for voluntary TDR programs (see page 25, item 2(b)), and to reduce bureaucratic logjams (see page 30, item 4)..
 - b. Provide adequate state funding to cover the estimated \$300,000 cost of the local planning bill by:
 - i. Raising the ceiling on the size of Planning Assistance Grants from the TDR Bank Board from \$40,000 to \$100,000. Maintain the requirement for a 50 percent local match.
 - ii. Amend the statute authorizing municipalities to assess dedicated tax revenue for purposes of funding open space, farmland and historic preservation to add as a permitted use of such funds the reimbursement to the municipality's general fund for TDR planning expenses up to \$100,000, once a town's TDR ordinance has been adopted.
 - iii. Recommend that the state expend funds in accordance with the Global Warming Solutions Fund starting in FY '12, and prioritize TDR planning grants as part of the proposed DEP Local Government Greenhouse Gas Reduction Program.
 - c. Recommend creation of a dedicated funding source for open-space and farmland preservation. Allow for replenishment of the TDR Bank, as needed to prevent its depletion. (Note that the TDR Bank was originally capitalized with funds raised for state land preservation programs. The Bank contains approximately \$9.1 million today.)
 - d. Authorize regional Planning Assistance Grants from the TDR Bank Board for counties and other entities planning regional TDR programs, provided they have identified willing host communities for receiving districts.
2. **Provide tools and priority funding to help TDR towns provide infrastructure.**
 - a. Clarify the authority of TDR municipalities to charge receiving district developers for their proportional share of the infrastructure improvements they typically fund on a subdivision basis, but which are built on a district-wide basis in a planned receiving district. Include stormwater, drinking water, sewer, roads and recreation in this authorization.
 - b. Ensure state agency funding commitments for TDR towns are included in their official capital plans and ranking systems.
 - c. Direct the New Jersey Environmental Infrastructure Trust (NJEIT) to market the benefits they provide to TDR municipalities, including their "smart growth financing" program that provides loans for water infrastructure at 75% below market rate. Direct them to work with the Division of Local Government Services to offer flexible repayment terms to TDR municipalities.
 - d. Direct the Green Acres program to increase its share of funding for community-scale local park acquisition and park development projects in TDR receiving districts. Consider mechanisms such as creation of a dedicated pool of funds.

- e. Direct DOT to prioritize TDR municipalities by providing extra points for receiving district projects in the DOT Local Aid formula.
- f. Direct the School Development Authority to prioritize TDR receiving districts for any school construction funding that is not restricted to Abbott or other special-needs districts.
- g. Direct DCA/HMFA to prioritize TDR receiving districts for any affordable housing funding which may be available to municipalities.

3. Provide resources to offset the early costs related to the fast pace of growth in TDR municipalities (infrastructure, schools and ongoing municipal services).

- a. Direct the Division of Local Government Services to study the fiscal impact of TDR on municipalities and recommend ways to provide transitional financial support for towns to cover the early costs of accelerated growth that arise before sufficient new taxpayers are in place to reasonably carry them, especially in situations where development stalls and/or the municipality approaches its debt limit.
- b. Direct realty transfer tax proceeds generated from a TDR receiving district to the municipality, provided a substantial portion of the growth in the receiving district is due to purchase of TDR credits. Dedicate proceeds to expenses associated with servicing the receiving district.
- c. Authorize municipalities with an approved TDR program to assess a local realty transfer tax on transactions in the receiving district, with proceeds dedicated to municipal expenses associated with servicing the receiving district.
- d. Explore expanding the role of the TDR Bank Board to provide bridge loans to towns for infrastructure and other early costs. Begin by identifying a source of funds to capitalize such a loan program.

4. Offer legal protections to TDR plans and ordinances, commensurate with the level of state review. For any municipality with a TDR master plan element and ordinance reviewed and approved by the state in accord with the TDR statute, establish a strong legal “presumption of validity” for TDR master plan elements and ordinances. This presumption would require the court to give extra deference to the municipality and raise the burden of proof required to challenge an approved amended master plan or development regulation. It mirrors a provision in the Highlands Act for municipal master plans and development regulations that have been approved by the Highlands Council as in conformance with the Regional Master Plan.

5. Create incentives for developers.

- a. Work with the Commissioner of the Department of Community Affairs (DCA) and the Economic Development Authority (EDA) to identify Urban Enterprise Zone-type incentives that could be applied (by statute) in TDR receiving districts, starting in FY '12, such as an exemption from sales and use taxes on construction materials.
- b. Direct DCA and the Housing and Mortgage Finance Agency (HMFA) to provide priority funding for affordable-housing subsidies to TDR receiving districts.

6. **Provide educational and planning assistance materials.** The TDR Bank Board should prepare educational and planning assistance materials, including written manuals and customizable presentations, as follows:
 - a. **For local officials and professional planners**, covering the range of transfer tools available, when each is appropriate and how they can be customized for a variety of situations in a variety of settings. Provide detailed “how-to” information on the planning process, including model ordinances, plan elements, etc. Explain the various decision points, and how to evaluate options.
 - b. **For landowners**, explaining how the different density transfer tools work and how they affect landowners. Address landowner concerns, including likely impacts on land values.
 - c. **For developers**, describing how the mechanics of TDR credits work and affect their bottom line.
 - d. **For the general public**, explaining density transfer options, and how they can be used by different types of communities to achieve their goals for land preservation, economic growth, etc. Compare outcomes with sprawl development.

#5: Explore ways to make regional TDR programs viable.

Regional TDR programs face special obstacles. In particular, local resistance to new growth in voluntary receiving areas has impeded implementation of any regional TDR programs in New Jersey.

Regional TDR programs face special obstacles. To date, none of the regional TDR programs in New Jersey with *voluntary* receiving districts have progressed to implementation, due to lack of municipal interest in accepting extra growth. Recent attempts include multi-municipal efforts in Salem, Cumberland and Cape May counties. The Highlands TDR program depends upon the creation of voluntary receiving districts by municipalities. This program has the advantage of offering municipalities planning grants and the ability to impose impact fees up to \$15,000 per unit if they create regional receiving districts. Eleven communities have accepted small planning grants to explore participation. This program is now open to municipalities statewide under legislation passed in 2010. The Pinelands has a successful regional TDR program where the Pinelands Commission *mandates* regional receiving areas. While successful, the program is constrained by limited demand among developers to increase density above that allowed by the base zoning, and thus to purchase credits.

The viability of regional TDR programs can be improved by finding ways to increase the demand for development credits in the receiving areas. The following general approaches merit greater review.

Detailed Recommendations

1. **Explore incentives for municipalities that create regional receiving districts.** This could include:
 - a. Additional state aid for education, to hold municipalities harmless for any new costs.
 - b. Regional tax-based sharing, where municipalities can share some portion of new tax revenues.
 - c. Regionalization of school districts, so municipalities share both property tax

revenues and expenses dedicated to education.

- d. Negotiated payments from sending area towns to receiving area towns, to address the costs of growth. Sending area towns benefit from having land preserved within their borders at no cost to them. They might be willing to authorize ongoing payments to the receiving district municipality, commensurate with levels of land preservation, similar to the way municipalities have authorized open space taxes.

2. **Explore more effective ways to facilitate the purchase of development rights on a much larger scale.** These approaches increase the demand for development credits by requiring their purchase in new situations, such as the following:

- a. For residential development in the Pinelands, especially for sprawl development.
- b. For any developments in areas served by water from the Highlands.
- c. In exchange for any increases in density or impervious cover granted by variance.
- d. In exchange for any increase in impervious cover limits above pre-determined region-wide caps.

Note that all of these approaches can be modified to create incentives for development that addresses other state objectives for smart growth locations, densities, affordable housing, etc.

Conclusion

TDR offers New Jersey a valuable tool to realize goals for land preservation, sustainable development and redevelopment, economic growth and job creation, affordable housing and climate change, relying primarily on private funds. New Jersey's experience with municipal TDR programs has led to a sound understanding of the obstacles to broader implementation. To take advantage of TDR, we must:

- Empower local governments with a full spectrum of planning tools that make it easier to transfer growth;
- Implement a new model of local-state cooperation;
- Support well-planned receiving districts with regulatory reforms; and
- Make TDR a sound fiscal choice for municipal government and all local stakeholders.

Addressing these problems will help advance not only TDR, but also other smart-growth initiatives.

The answers for facilitating regional TDR are less obvious, but no less important. To protect New Jersey's precious open lands, farmlands and historic resources on a statewide scale, powerful new tools and resources will be needed. This effort requires more research on successful models from elsewhere in the country.

The next step is to implement the recommendations outlined in this report, working with the diverse membership of the TDR task force, other stakeholders, the Christie administration and the Legislature.

The next step in this effort will be to pursue the comprehensive recommendations outlined in this report, working with the diverse membership of the TDR Statewide Policy Task Force and other stakeholders. The recommendations will need to be refined into specific changes to statutes, regulations, programs and policies. We will seek support from the leadership in the Christie administration and the Legislature. New Jersey Future has received preliminary funding from the Bunbury Company to support this work, and we are in the process of obtaining other foundation funding.

At the same time that we pursue the body of recommendations, the TDR Task Force will support the municipalities that are actively working to advance TDR programs. Their success will provide a tremendous boost to this policy agenda. These municipalities also provide an excellent laboratory to pilot the regulatory reforms recommended in this report.

Development Transfer Alternatives—Principle Elements

Element	Non-Contiguous Cluster (recommended)	TDR	
		Voluntary ¹ (recommended)	Mandatory (existing)
Real Estate Market Analysis (REMA)	No REMA ²	Basic REMA "Economic Feasibility Analysis"	Full REMA
Severable Credits or Ownership	Easement or Fee Ownership	Severable Credits	Severable Credits
Credit Allocation	Local Option ³	Required	Required
Transfer Ratio	Local Option	Yes	Yes
Designated Receiving and Sending Area(s)	Local Option	Yes	Yes
Sewage Treatment Required	Local Option	Yes	Yes
Receiving Area sized to utilize Sending Area Credits	Local Option	Yes - at least 75%	Yes - 100%
Maximum Lot Size in Receiving Area	Local Option ⁴	Yes	Yes
Provisions for Regulatory Predictability	No	To Be Determined	Yes
State Role in Transfer	State Cooperation ⁵	State Partnership / Endorsement	State Partnership / Endorsement
Performance / Sunset Requirements	No	No	Yes

¹ A voluntary program will be defined as one in which no recent, significant downzoning occurred in the sending area associated with the TDR project.

² If a transfer ratio is proposed it must be justified by a financial feasibility analysis. Bonus development credits as an incentive to transfer are permissible.

³ Municipalities may utilize a "build-out" or "zoning capacity" analysis, soils characteristics or other suitable basis to determine the number of transferable units assigned to each tax lot in the Sending Area. Or, municipalities may require applicants to prepare conceptual subdivision/site plans to demonstrate the as-of-right zoned capacity of each Sending Area tax lot. This approach could work for limited transfer programs but might be too labor intensive for more expansive programs.

⁴ Enhanced Non-Contiguous Tract Clusters are intended for use in situations where the receiving area is of a scale which would be developed by only one or two builders, and where only a small number of sending area parcels is needed to reach build-out; consequently, maximum lot sizes should not typically be required.

⁵ State Cooperation would only be required for those cluster plans which involve sophisticated wastewater management planning or other state-level infrastructure improvements.

State-Local TDR Partnership Model

Phase	Purpose	Starting Point	Local Role	State Role	Outcome
1. Exploration Phase	Town develops TDR concept with assistance from the state as desired	Town decides to explore TDR	Town conducts community outreach, identifies goals and objectives for the TDR program, prepares build-out analysis, growth projections, sets preservation priorities, planning scenarios, conceptual TDR planning (testing notion of sending and receiving areas, densities for growth area), etc. Should draft "TDR planning parameters" for size of sending/rec. districts. Can engage market analyst. Might apply for Planning Assistance Grant (PAG)	State provides primary contact (at OSG or TDR Bank Board) Provides educational materials, presentations, and technical assistance. Provides feedback to town, if requested, identifying any "fatal flaws", esp for the size and location of the receiving district. Could provide Planning Assistance Grant	Town decides whether or not to pursue TDR State provides checklist of requirements for plan endorsement or replacement process.
2. Assessment Phase (Identify Problems)	State provides feedback on the preliminary TDR plan, including identification of problems and issues	Town presents "the state" with its conceptual TDR plan.	Town submits planning documents to the state describing the conceptual TDR program. Town engages county. Town engages REMA consultant to begin Economic Feasibility Analysis. Might apply for PAG Town engages infrastructure providers: water, wastewater, utilities, transit agency, etc.	Agencies conduct "Opportunity & Constraints Analysis". Provide feedback on population projections, receiving district: location and environmental constraints, water/wastewater capacity, transportation issues, transit score, affordable housing, consistency with regional and state land use plans, etc. Agencies identify problems/issues with TDR plan, potential solutions and sense of difficulty OSG reviews draft REMA. State facilitates conversations between town and others if needed.	State agencies provide Opportunities and Constraints Analysis with specific feedback on viability of TDR plan.

State-Local TDR Partnership Model (cont.)

Phase	Purpose	Starting Point	Local Role	State Role	Outcome
3. Refinement Phase (Identify and Pick Solutions)	Town refines TDR plan through iterative planning process, based on state assessments, REMA, developer feedback, and community input.	State meets with town to discuss possible solutions to problems/issues	Town engages local stakeholders. Town works with county to refine all aspects of TDR plan (sending/receiving area, credit allocation, transfer ratios, preliminary receiving area design, preliminary engineering design for infrastructure) Town completes REMA Town adopts Transfer element of master plan, capital improvement program, utility element; drafts TDR ordinance.	State and county provide ongoing technical assistance as needed to resolve problems/issues. OSG reviews and approves REMA. DEP approves any WMP changes or deems wastewater solution to be viable, pending future WMP review. Agencies place agreed-upon financial contributions & support into their functional plans.	State approves TDR plan through plan endorsement or replacement process MOA* between state and town and county is prepared.
4. Implementation Partnership	State and town work as partners to implement TDR plan, according to MOA	State and town sign MOA	According to MOA schedule, town adopts TDR ordinance, facilitates infrastructure for receiving district, etc., etc. County approves TDR ordinance.	State helps town advance TDR implementation, according to MOA. Could include facilitating state approvals, conditioned upon local follow-through. State provides final Planning Assistance Grant payment upon ordinance adoption. State provides financial assistance as spelled out in MOA.	Development and preservation occur according to TDR program.

* Memorandum of Agreement (MOA) is similar to the Planning and Implementation Agreement in Plan Endorsement.

Streamlined Plan Endorsement for TDR Municipalities

EXISTING PLAN ENDORSEMENT STEPS	Recommended Adjustments for TDR* Towns
Pre-Petition Meeting	√
Establish PE Advisory Committee	Identify which TDR planning entities fill this role.
Municipal Self-Assessment Report	Replace with requirement for “TDR planning parameters. (See ...)
Opportunities & Constraints Assessment (from State Agencies)	√
Community Visioning	Identify whether TDR visioning process meets this need.
Consistency Review	√
Development/Execution of Action Plan & MOU	√
Action Plan Implementation/Certificate of Eligibility	Give the SPC the ability to allow TDR ordinance to be adopted at this stage, provided wastewater conditions are met and required master plan elements are up to date.
OSG Recommendation & Draft PIA	√
SPC Endorsement	√
Monitoring & Benefits	√

PLAN ENDORSEMENT MATERIALS	Recommended Adjustments for TDR* Towns
Master Plan Elements	Required elements must be up-to-date.
Statement regarding planning objectives, etc.	√
Land Use Plan	√
Land Use Inventory Map	√
Natural Resource Inventory & Map	Prepared/updated with assistance from DEP
Official Map	Waivable
Redevelopment &/or Rehab Plans (Conditional)	If within or adjacent to TDR sending/receiving district
Zoning Ordinance, Schedule & Map	√
Recent & Upcoming Developments	√
Housing Element	√
Petition for Substantive Certification (COAH)	N/A – in flux
Draft Affordable Housing Documents	N/A – in flux
Conservation Plan Element	√ Should acknowledge any habitat protections provided by the TDR plan, if applicable.
Water conservation ordinance	√
Wellhead Protection Ordinance	√

Streamlined Plan Endorsement for TDR Municipalities (cont.)

PLAN ENDORSEMENT MATERIALS	Recommended Adjustments for TDR* Towns
Environmental justice inventory—	
Habitat Conservation Plan (conditional)—	TDR should be considered as rudimentary HCP since protections in sending area stabilize and help ensure that land treatment continues. (WQMP process should assure that receiving district does not have areas determined by DEP to be critical to the survival of a local population.) * If receiving area is in CAFRA zone and infringes on habitat, mitigation measures must be adopted commensurate with the level of disturbance.
Habitat Protection ordinance (conditional)—	See above
Environmental Assessment Ordinance to minimize impact of development in the environs.	Not applicable for TDR receiving districts. For residual development in a sending area with significant habitat, municipality will be encouraged to amend site plan and subdivision ordinances to be sensitive to environmental values. For example, they might limit clearing and disturbance and encourage development to be near the road.
	<i>Just for TDR towns</i> – state review of deed restrictions to ensure expected protections are in place. Residual development that occurs must strictly conform to municipal regulations.
Circulation Plan/ Access Plan	√
Utility Service Plan (Conditional)	√
Community Facilities Plan	If receiving district is large. (May be satisfied by capital facilities plan)
Economic Development Plan (As Needed)	Waive
Historic & Cultural Resources Inventory (Conditional)	√ Focus on sending/receiving
Historic Preservation Plan (Conditional)	√ Focus on sending/receiving
Municipal Recycling Element (Desired)	Waive

OTHER ITEMS	Recommended Adjustments for TDR* Towns
Wastewater Mgmt. Plan	√ Must be up-to-date, unless waived by DEP (which is possible in urban areas)
Stormwater Mgmt Plan & Ordinance	√
Stream corridor protection plan	√
Riparian zone model ordinance	√
Steep slope ordinance (conditional)	√
TMDL plan & ordinance (conditional)	√
Septic density ordinance (conditional)	√
Flood Control Plan (Conditional)	√

Streamlined Plan Endorsement for TDR Municipalities (cont.)

PLAN ENDORSEMENT MATERIALS	Recommended Adjustments for TDR* Towns
Board of Ed 5-year Facilities Plan (Informational)	√
Recreation & Open Space Inventory (Conditional)	√ (Could be in PIA unless the focus of the TDR Plan)
Open Space & Recreation Plan	√ (In PIA, unless focus of TDR plan)
Ag Retention/Farmland Preservation Plan (Conditional)	√ (In PIA, unless focus of TDR plan)
RTF Ordinance	√
Ag Advisory Committee	√
Implementation Plan	√
Recycling Statement of Consistency	Waive
Municipal Recycling Ordinance(s)	Waive
Hazard Planning Mitigation Measures (Conditional)	Waive
Letter from State Police approving local Emergency Operating Plan	Waive
Capital Improvement Program	√ (Required by TDR statute)

	Additional TDR Requirements
	Master Plan Elements:
	– Development Transfer Plan
	– Utility Service Plan
	Other:
	– Development Transfer Ordinance
	– Capital Improvement Plan (Receiving Zone)
	– REMA



About New Jersey Future

New Jersey Future is a statewide research, policy and educational organization that advocates for sustainable growth, environmental preservation, neighborhood revitalization and transportation choice. Founded in 1987, New Jersey Future is a nonpartisan, nonprofit 501(c)(3) organization focused on promoting smart growth in New Jersey and advancing implementation of the State Development and Redevelopment Plan.

