

REPORT

THE FEASIBILITY OF SUCCESSFUL TDR PROGRAMS FOR MARYLAND'S EASTERN SHORE

Submitted to the Maryland Center for Agro-Ecology, Inc.

January 2007

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Acknowledgements

At a time when several Eastern Shore counties were evaluating the potential for a transferable development rights program to supplement existing land preservation efforts, this study developed out of the Strategic Plan for the Eastern Shore Land Conservancy, Inc. (ESLC) approved by its Board of Directors, Chaired by The Honorable Harry Hughes. The Comprehensive Plans of several counties called for studies of TDR programs as a way of accelerating land preservation and providing an alternative source of funds at a time when State budgets for land preservation programs were reduced. The Board of Directors and staff of the ESLC are to be commended for their foresight and leadership in land preservation and responsible planning. Sarah Taylor-Rogers, Assistant Director of the Maryland Center for Agro-Ecology (MCAE) and Nina White of the ESLC staff were very helpful in the administration of the grant from the MCAE. Special thanks to the USDA CSREES program for funding this research.

This study has benefited from some of the nation's most experienced and knowledgeable advisors in the field of transferable development rights. Denis Canavan administered the Montgomery County TDR program for 20 years, before becoming Planning Director in Anne Arundel and St. Mary's Counties. John Zawitoski currently provides lead staff services to the Montgomery County TDR program for the Department of Economic Development. Virginia McConnell and Margaret Walls have researched and prepared the most detailed reports ever conducted for a local TDR program, in Calvert County Maryland, and are preparing another report on other TDR programs in Maryland for Resources for the Future, with funding from the Maryland Center for Agro-Ecology. Elgin Perry has conducted economic research and statistical analysis for other projects funded by the Maryland Center for Agro-Ecology, including *Downzoning: Does it Protect Working Landscapes and Maintain Equity for the Landowner?* This report was significantly enhanced by their expertise and advice.

In addition, MCAE requested peer reviews of the draft report from Professor Tom Daniels of the University of Pennsylvania, and King Burnett, attorney in Salisbury Maryland and Chairman of the Maryland Environmental Trust. Their comments led to several important changes and improvements.

This research involved detailed interviews with about 50 individuals, including county commissioners; a town mayor, a town council member and town administrators; planning commission members, planning directors, staff planners, developers, planning consultants, lawyers, sanitary and civil engineers, realtors, researchers, farmers, farm managers, and citizen and environmental activists. Interviews were also conducted with TDR program managers in New Jersey and King County Washington. Each of these individuals contributed an hour or more of their time and provided valuable information, insights and documentation for this study, all in confidence as required by the University of Maryland Informed Consent Agreement. These interviews provided the primary base of knowledge about TDR and zoning related matters in each county. We would prefer to recognize their significant contributions and leadership roles in their counties by name, but we agreed that participants involved will remain confidential and the information provided will be kept confidential with respect to attribution of the information provided.

I. EXECUTIVE SUMMARY

Local land management programs for the Transfer of Development Rights, hereinafter referred to as TDRs, authorize landowners to sell unused development rights from farmland and natural areas for transfer to other private lands in preferred receiver sites, usually developed or developing areas that have utilities and services to support higher density growth, but in some counties from one rural area to another rural area. This utilizes private rather than public funds to protect land from future development.

The objectives of this study were to:

1. Identify the attributes or key ingredients of the most successful TDR programs in Maryland and identify why other TDR programs in Maryland are less successful;
2. Develop objective criteria for analyzing certain Eastern Shore counties to determine the probability that a successful TDR program (including inter-jurisdictional programs) could be designed for counties without programs, or determine measures needed to enhance existing TDR programs, and
3. Provide an analysis of each County within the Eastern Shore Land Conservancy's *Eastern Shore 2010* assessment area with recommendations on whether and how a successful TDR program could be implemented.

The purpose of this study was not to promote or advocate the use of TDRs in each county, or in the Eastern Shore in general. Rather, it was to conduct an objective evaluation of whether these counties would meet the criteria for a successful TDR program, based on the experience of other counties in Maryland and other states. The Eastern Shore Land Conservancy's Eastern Shore 2010 assessment area includes the Counties of Caroline, Cecil, Dorchester, Kent, Queen Anne's and Talbot, which participated in the conservancy's *Eastern Shore 2010: A Regional Vision*. This is hereafter referred to as the "assessment area."

TDR programs in Maryland are among the most successful in the nation. A national survey of TDR programs conducted in 2001 by the American Farmland Trust found that sixty percent (60%) of all farmland protected by TDR transfers in the nation were in Maryland (over 55,000 acres), yet only four of the ten TDR programs in the state at that time and only one on the Eastern Shore had protected more than 1,000 acres. Maryland counties have protected about 67,823 acres of agricultural, forest and natural land with TDRs, more than any other state. About 89% of this land was protected by the two most successful TDR programs in Calvert and Montgomery County. Five counties with TDR programs have had limited success, protecting a total of 7,587 acres, ranging from 345 acres in Caroline County to a high of 2,644 acres in Queen Anne's County.

Three counties in the Eastern Shore, including Caroline, Queen Anne's and Talbot adopted TDR programs between 1987 and 1991 after the Chesapeake Bay Critical Area Act passed in 1984, and others are either studying the feasibility of adopting new TDR programs or planning to amend their existing programs as called for in their Comprehensive Plans. Two Eastern Shore counties have recently adopted new TDR programs or enacted revisions to their existing TDR ordinance, including Caroline and Cecil.

The most successful programs in Maryland have common features or attributes that contribute to their success, including:

- TDRs make economic sense to developers.
- Elected officials were willing to adopt significant downzoning of farmland to preserve agricultural land or maintain the demand for TDRs.
- Large or multiple receiver areas provide bonus density for using TDRs that significantly exceeds base zoning density, and there is a market demand for higher density.

- The demand for TDRs was carefully balanced with the total supply of TDRs.
- County policy requires the use of TDRs for increasing zoning density in receiver areas.
- TDRs were combined with other land preservation tools.
- Permanent easements restrict TDR sending sites for agricultural, forestry or open space.
- Sufficient professional staff support was provided to administer the program.

These counties protect more private farm and forest lands with TDRs than with any other land preservation program. There are also several characteristics common to other TDR programs that have been less successful, described in the report.

Criteria for Successful TDR Programs

Based on the experience of existing TDR programs in Maryland and other States, the study team and Technical Advisory Committee developed a set of criteria for measuring the potential for success of TDR programs in the Eastern Shore assessment area in Phase II. There are four major criteria each with a number of sub-criteria that were used to prepare assessments of each county in the Eastern Shore assessment area, including the three counties that already had TDR programs, and three others that had considered or were planning to adopt a program. The major criteria were:

- a. TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals,
- b. The county has strong Comprehensive Plan and Zoning policies that support use of TDRs,
- c. Administration of TDRs is simple, efficient and predictable, and
- d. The TDR program has broad public support.

The Feasibility of Successful TDR Programs in Eastern Shore Counties

TDR programs are more likely to be successful in robust real estate markets, where there is a strong demand for housing at a higher density than existing zoning permits. These markets are stronger in Cecil and Queen Anne's Counties than in Caroline, Dorchester, Kent and Talbot Counties.

Not all counties in the Eastern Shore want or are likely to enact a TDR program. TDRs are often associated either with downzoning, because they have typically been authorized in the same downzoning ordinance to offset perceived losses of land value from such zoning changes; or with development, by communities or citizens who fear increased density and more development when TDRs are used in the receiver areas. As a result, those that oppose downzoning, on the one hand, or increased development, on the other hand, often oppose TDR programs.

While each county is different in many ways, there were several constraints to the adoption and successful implementation of a TDR program that were found to be in common. High water tables and hydric soils in several counties limit higher density housing on lots less than 2 acres with well and septic. While higher densities can be achieved with shared septic systems with spray fields, such systems are more expensive and approvals take longer and are unpredictable. The capacity of public sewage treatment systems to handle TDRs is a limiting factor in some growth or Priority Funding Areas, and the capacity of other infrastructure, such as roads and bridges, may also limit development, with or without TDRs.

Community opposition to large development projects, higher densities, and the public infrastructure needed to support such projects is widespread in most counties, especially those that have been going through the most rapid change in recent years. Some developers are now seeking to avoid confrontation by proposing smaller projects in counties with less organized citizen opposition. Insufficient cooperation between municipal and county officials in several counties, and interjurisdictional conflicts over annexations for large new developments, has inhibited the potential

for cooperation needed to achieve interjurisdictional agreements for the transfer of TDRs from counties to municipalities.

TDR programs are difficult to design, enact and implement, compared with other state and local land preservation programs. While TDRs have preserved about 68,000 acres of private lands in Maryland since 1978, other easement programs have protected more than 570,000 acres.

Counties and local communities often prefer to preserve farmland and natural resources through other State and local purchase of development rights (PDR) programs or gift conservation easements, and some counties have been very successful in preserving farmland through strict agricultural protective zoning ordinances. In some counties organized landowners have opposed protective agricultural zoning that would be necessary for a TDR Program to work.

Caroline County has a new TDR program with a moderate probability of success due to the recent downzoning of the Rural Zoning District, and designation of a specific 6,000 acre receiver area north of Denton, where suburban density development is already occurring. It is remarkable for the strong farming and community leadership that advocated the changes needed for its success.

Cecil County has recently enacted a TDR Program that has a high probability of success, due to the downzoning of sending areas and TDR bonus densities in receiver areas. While there has been a recent downturn in the housing market, in the long term a high market demand for new housing is expected from the BRAC Commission's decision to relocate 5,224 high-tech defense jobs and a new Technology Enterprise office complex within 8 miles from the county's southern border. Increasing development for commuters from Delaware and the Baltimore Region is expected to continue. The capacity of public water and sewer or shared septic systems could limit the demand for TDRs. A rush for approval of concept plans for subdivisions before the law becomes effective in January, 2007 could establish several "grandfathered" subdivisions in the rural sending areas. A current slump in the housing market could affect the initial market for TDRs.

Dorchester County will be conducting a study of the feasibility of a TDR program, but there are significant obstacles to a TDR program in the county. Half of the county is in the Critical Area, under six-foot elevation, with high water tables or wetlands that would not support TDR densities without sewage treatment. More than 30% of the county is permanently preserved by federal and state landholdings or permanent easements and much of the remaining farmland cannot be developed because of soil and water table limits, so there is no widely perceived threat to open space or sense of urgency to protect it. The success of a TDR program may depend on the willingness of municipalities such as Cambridge to accept TDRs, through interjurisdictional agreements with the County, but they have been willing to increase densities to attract development without TDRs. Further downzoning or establishing new growth centers in the county with TDRs will be explored, but these measures are highly controversial and could change the character of the county.

Kent County has the smallest population and the largest average farm size in Maryland. It has adopted protective agricultural zoning that is among the best in the State, which is strongly supported within the agricultural community. Together with other tools, it appears to be accomplishing the land preservation goals of a TDR program. A TDR program was proposed in 2001, but it was rejected after significant public opposition, and is unlikely to be reintroduced. A limited TDR program targeted to protect greenbelts around a few municipalities and unincorporated towns will be studied in the coming year.

Queen Anne's existing TDR program is unlikely to change even though there have been no transfers outside of the Critical Area since 1994, when TDR receiving areas were first limited to zoning districts in designated growth areas. A competitive Non-Contiguous Development (NCD) program allows density transfers between non-contiguous lands in common ownership. Organized

citizen opposition to development both inside and outside of growth areas has led to reductions of development proposals to densities lower than existing zoning, so there is no market for TDRs. There appears to be little support in the farming and development communities for amending the existing TDR program.

Talbot County's 1991 zoning and TDR ordinance was proposed to be amended to establish new zoning districts, reduce the overall development potential in rural areas, and require mandatory clustering with TDRs. The amendments were expected to increase the demand for TDRs, but they were rejected by the County Council in September 2006. Rural-to-rural TDR transfers are continued unless municipalities are willing to accept them to preserve greenbelts. The proposed changes would not have been sufficient to overcome weaknesses in an earlier TDR program which had few transfers. Soils and septic rules limit rural development to two acres or more per lot, and shared septic systems for projects using TDRs, such as the Preserve at Wye Mills, are difficult and expensive for developers. There is insufficient municipal-county cooperation for TDR inter-jurisdictional transfers, although negotiations with Easton continue. The county plans to evaluate and upgrade its land conservation programs in the coming year, and may reintroduce proposed revisions to the TDR program.

Conclusions and Recommendations

1. Counties considering the adoption of a new TDR program or enhancement of an existing program should try to meet the Criteria for a Successful TDR Program, as more fully described in this report:

- TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals,
- The county has strong Comprehensive Plan and Zoning policies that support use of TDRs,
- Administration of TDRs is simple, efficient and predictable, and
- The TDR program has broad public support.

2. State actions could help facilitate successful TDR Programs, including:

Adoption of State TDR Legislation similar to the *New Jersey State Transfer of Development Rights Act*, providing state review, guidance and technical assistance for the establishment of county TDR programs. The State could also establish a framework and guidelines for coordination and cooperation in the annexation process established by the General Assembly in 2006 by H.B. 1141, where TDRs would be part of the discussions.

3. Counties with TDR programs should establish a policy to utilize TDRs for any upzoning to increase density for new development projects, and work with municipalities to incorporate TDRs into new annexations and infill redevelopment.

Calvert, Montgomery and Charles Counties have established such a policy, which has and will create demand for TDRs.

4. Counties should protect TDR sending sites with permanent conservation easements, rather than deed restrictions that are less than permanent.

All existing Eastern Shore TDR programs in the assessment area except Cecil County's allow land from which TDRs are sold to be protected by deed restrictions, restrictive covenants or reservation of development rights agreements, rather than by perpetual conservation easements. Such restrictions can be extinguished by property foreclosures or other events, and impermanent deed restrictions do not prevent these lands from being assessed by the IRS at unrestricted fair market

value for estate tax purposes, even though they may be prevented from being developed by local law.

5. TDR programs need to serve the goals and objectives of local comprehensive plans. New growth or development should be guided by comprehensive plans, not planned merely to create more demand for TDRs.

The Eastern Shore of Maryland is a special place, with one of the largest concentrations of productive agriculture and forests, hunting and fishing resources, and unique cultural resources of anywhere on the East Coast. These are dependant on a sustainable base of undeveloped lands. The special historic character of waterfront towns and villages, scenic roads, Rural Legacy and Heritage Areas and wildlife preserves is essential to the growing tourism industry of the Eastern Shore. While communities need to plan for anticipated growth, they do not need to attract more growth to make TDR programs work. A significant change in the character of the Eastern Shore should not be the price of having successful TDR programs.

6. Counties should seek to preserve farmland, natural resources and open space by limiting development through zoning, to help ensure a successful TDR program while redirecting development pressure away from rural areas.

Success with TDRs is more likely in counties that have zoned rural lands to protect agricultural and natural resource lands, limiting allowable residential densities to 1 dwelling per 20 acres or more, as several counties in Maryland have done.

7. Counties with TDR programs should establish procedures to monitor, review and periodically adjust the design of the program and the zoning for sending and receiver areas, in order to maintain TDR demand and ensure that the goals of the program are being met.

Few if any TDR programs are perfectly designed or 100% complete when they are adopted, and successful programs do not remain static after they are adopted.

Summary

Millions of dollars of private investment have gone directly to farmers in Maryland as a result of TDR sales, allowing them to continue to own their land, keep farming, pay for improvements, or pass ownership to the next generation of farmers. These programs have also helped to stabilize speculative land costs in large agricultural areas resulting in permanently preserved land, ensuring that farming will continue as one of the State's most important industries. While there are many technical considerations in the adoption of a TDR program discussed in this report, political leadership may be the most important factor for the future success of TDR programs in the Eastern Shore counties. This leadership was evident in the Eastern Shore counties in 2004, when they endorsed the Eastern Shore 2010 goal to *“Strive to protect from development through the use of voluntary preservation programs 50% of Eastern Shore land outside of locally designated growth areas by 2010.”*

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III. INTRODUCTION

1. Background and Purpose of Study

Local land management programs for the Transfer of Development Rights, hereinafter referred to as TDRs, authorize landowners to sell unused development rights from farmland and natural areas for transfer to other private lands in preferred receiver sites, usually developed or developing areas that have utilities and services to support higher density growth, but in some counties from one rural area to another rural area. This utilizes private rather than public funds to protect land from future development.

Three counties in the Eastern Shore, including Caroline, Queen Anne's and Talbot adopted TDR programs between 1987 and 1991 after the Critical Area Act passed in 1984, and others are either studying the feasibility of adopting new TDR programs or planning to amend their existing programs as called for in their Comprehensive Plans. Two Eastern Shore counties have recently adopted new TDR programs or enacted revisions to their existing TDR ordinance, including Caroline and Cecil. Talbot County introduced amendments to their TDR and zoning ordinance which were rejected by the County Council in September, 2006.

TDR programs in Maryland are among the most successful in the nation. A national survey of TDR programs conducted in 2001 by the American Farmland Trust found that sixty percent (60%) of all farmland protected by TDR transfers in the nation were in Maryland (over 55,000 acres), yet only four of the ten TDR programs in the state at that time and only one on the Eastern Shore had protected more than 1,000 acres. There is a lot to learn from both the successful TDR programs and the less successful programs in Maryland and other states, to help determine what works and what doesn't work in other counties.

In 2005, the Eastern Shore Land Conservancy project team submitted a proposal to the Maryland Center for Agro-Ecology¹ to analyze the real estate economics, planning, zoning, and other factors such as political and community support, in the six counties of Maryland's Eastern Shore, to determine whether these counties have the necessary ingredients for a successful TDR program. Where such programs have already been established, the team evaluated what changes might be needed to make them more effective.

This report represents more than a year of detailed investigation into the workings of existing TDR programs in Maryland, and of the political, legal, economic and planning context for new or existing TDR programs in the Eastern Shore of Maryland. This region of the Delmarva Peninsula is undergoing significant development pressure. Large new developments seeking to attract retiring "baby-boomer" populations and commuters from the Western Shore seeking more affordable housing and the Eastern Shore lifestyle, are transforming many small historic towns and communities in all six of the subject counties.

The first TDR programs in the State in Calvert and Montgomery Counties are among the most successful in the nation. Millions of dollars of private investment have gone directly to farmers in these counties, allowing them to continue to own their land, keep farming, pay for improvements, or pass ownership to the next generation of farmers. These programs have also helped to stabilize speculative land costs in large agricultural areas resulting in permanently preserved land, and ensuring that farming will continue as an important industry in these counties and the State of Maryland.

¹ Hereinafter referred to as the ESLC and MCAE.

However, the context for these programs was and is very different than in the Eastern Shore counties today. It took bold political leadership in these counties to adopt the programs and supporting zoning ordinances when they were designed and enacted, and since then to maintain a strong private market in TDRs. While there are many technical considerations in the adoption of a TDR program discussed in this report, this kind of political leadership may be the most important factor for the future success of TDR programs in the Eastern Shore counties.

2. Study Methods and Procedures

After funding was awarded in August 2005, the project team formed a Technical Advisory Committee made up of experienced managers of Maryland's most successful TDR programs, and researchers in resource management and land use economics. These members are listed on the cover and in the acknowledgements. The principal investigators reviewed the characteristics and performance of existing TDR programs in Maryland and two other states. Planning directors or their staffs responsible for the programs were interviewed on site. This work in Phase I of the study resulted in the preparation of TDR Profiles found in Section VI, findings about the common characteristics of successful TDR programs and less successful programs, and the development of a set of criteria for successful TDR programs, for use in evaluating the counties in the Eastern Shore assessment area in Phase II. Phase II involved a detailed review of plans, maps, ordinances and documents, and field interviews with farmers, planners, developers, engineers, citizen activists, county and municipal officials and others, to learn the real estate economics, planning, zoning, and other factors, such as political and community support for TDR programs in six counties of the Eastern Shore. This resulted in a detailed assessment and diagnosis of whether these counties have the necessary ingredients for a successful or improved TDR program, and in the preparation of a TDR Assessment for each county, including Caroline, Cecil, Dorchester, Kent, Queen Anne's and Talbot, found in Section V. Since three of the six counties were in the process of changing their TDR program or developing a new one, the principal investigators consulted with county officials on how the new programs were being designed.

While there are many ways to count success of TDR programs, for the purpose of this study the project team measured overall success primarily by how many properties or acres of land were permanently protected by TDR transfers from the most important resource lands in sending areas, since the adoption of the program. However, the Criteria for a Successful TDR Program provided in Section IV suggest other measures of success.

The purpose of this study was not to promote or advocate the use of TDRs in any county, or in the Eastern Shore in general. Rather, it was to conduct an objective evaluation of whether these counties would meet the criteria for a successful TDR program based on the experience of other counties in Maryland and other states.

The objectives of this study were to:

- 1) Identify the attributes or key ingredients of the most successful TDR programs in Maryland and identify why other TDR programs in Maryland have failed;
- 2) Develop objective criteria for analyzing the Eastern Shore counties to determine the probability that a successful TDR program could be designed for counties without programs, or determine measures needed to enhance existing TDR programs, and
- 3) Provide an analysis of each county in the Eastern Shore assessment area with recommendations on whether and how a successful TDR program could be implemented.

The ESLC TDR study team also coordinated with a parallel study by Resources for the Future, conducted with a grant from the MCAE, of four counties in Central and Southern Maryland, including Calvert, Charles, Montgomery and Charles County. Principal investigators of both TDR studies served on the advisory committees of the other study.

Chapter IV will summarize the findings of the principle investigators, and the *Criteria for a Successful TDR Program* reviewed by the Technical Advisory Committee in Phase I. These findings also provide an overall assessment of the potential feasibility of new or existing TDR programs and the likelihood of success for TDR programs that are being redesigned or modified. Chapter VII offers conclusions and recommendations for TDR programs for counties in the Eastern Shore assessment area, but could also apply to other counties in Maryland and in other states that are considering adoption of a TDR program or improvements to an existing program. They include actions that the State of Maryland might take to provide guidance or direction to local governments seeking to develop TDR programs in other parts of Maryland, as the State of New Jersey did by enacting the *State Transfer of Development Rights Act* in 2004.²

Two existing TDR programs in Maryland were not studied in Phase I, and other local development density transfer programs were not evaluated, because they were not described or considered as TDR programs by the counties. The TDR program in Caroline was not evaluated until the assessment in Phase II, because it was being redesigned and the legislation approving the new program was not adopted until March 2006. Harford, Howard and Wicomico Counties have legislation that allows the transfer of development densities from one property to another within limited geographic boundaries, and do not have many of the characteristics of the State's more successful TDR programs. Wicomico County's TDR program was adopted in 2002 and had no TDR transfers at the time the Phase I evaluation was being conducted. Queen Anne's County also has a Non-Contiguous Development program allowing development of land through transfer of density between the commonly owned non-contiguous parcels. This program is briefly discussed in the Queen Anne's County TDR assessment, but only as it affects the county's TDR program.

Four tables are provided in the Appendix, Chapter IX, to summarize detailed information about the characteristics of Maryland's TDR programs and farms, and to report the numerical performance of these programs to date and the recent values and transfer ratios for TDRs in these counties.

IV. FINDINGS

1. Common features of Maryland's TDR Programs

This is a summary of key observations of the principle investigators about the experience of existing TDR programs in Maryland, with findings about what has caused or affected the success of these programs in protecting land, guiding growth, and meeting the objectives of county comprehensive plans. These findings were based primarily on interviews with the principal staff managing the TDR programs, and reviewed and edited by the Technical Advisory Committee in January 2006 as part of this overall report.

Maryland counties have protected about 67,843 acres of agricultural, forest and natural land with TDRs, more than any other state. About 89% of this land was protected by the two most successful TDR programs in Calvert and Montgomery County. Five counties with TDR programs have had limited success, protecting a total of 7,587 acres, ranging from 345 acres in Caroline County to a high of 2,644 acres in Queen Anne's County.

Recently, proposals for changes to existing TDR programs or adoption of new programs have been made or are being studied in Caroline, Cecil, Charles, Montgomery, Saint Mary's, Talbot, Washington and Wicomico Counties.

² Op. Cit. Chapter 2, P.L. 2004, Chapter 2, *State Transfer of Development Rights Act*,

- a. **The most successful programs** in Maryland (Calvert³ and Montgomery) have the following common features or attributes that contribute to their success. These counties protect more private farm and forest lands with TDRs than with any other land preservation program.
- TDRs make economic sense to developers in a robust real estate market for new housing development, where the demand for additional dwelling units greatly exceeds the base-level zoning density in designated receiver areas.
 - Forward thinking elected officials considered the broad public interest in land preservation and were willing to make unpopular decisions that impacted a large number of people. They adopted TDR programs to gain political support for and mitigate anticipated negative impacts of downzoning, but this was only one part of a larger implementation strategy for managing growth and land preservation.
 - Counties calibrate zoning rules for sending and receiver areas in support of the TDR program. In Montgomery County TDRs were established in connection with significant downzoning of farmland to preserve the agricultural land base of the community, and in Calvert County downzoning was implemented after TDRs were adopted to limit growth and maintain the demand for TDRs.
 - Several large receiver areas were designated, with bonus density ratios for using TDRs that exceed the base level as-of-right density by more than 100% and as high as 700% in Montgomery and 1900% in Calvert.
 - The demand for TDRs was carefully balanced with the total available supply of TDRs during the administration of the program, with public intervention in the market when necessary to sustain the price of TDRs through occasional purchases of TDRs by the county.
 - County government requires TDRs for any increase in zoning density in receiver areas.
 - TDRs were offered as one tool in a menu of land preservation alternatives to landowners, including active and well-funded Purchase of Development Rights (PDR) programs.
 - TDR sending sites are protected by easements on land from which TDRs have been sold, permanently restricting the land to agricultural or forestry uses.
 - Sustained professional staff support for implementation of the TDR program was provided to explain the program to the landowners and the public, monitor the progress of the program, and recommend changes to make it more effective, such as rezoning to increase demand for TDRs in receiver areas.
 - The TDR program and the zoning supporting it were changed over time to maintain a demand for TDRs and to control development in rural areas. The original program was not complete when it was first enacted, but was modified as experience was gained.
- b. **The less successful programs** also appear to share some common features, listed below. These counties protect less land with TDRs than with any other State or local land preservation program.
- A TDR voluntary program was established as an option for private landowners to protect their equity and enable them to sell development rights, while the county maintained permissive rural zoning also allowing these landowners to utilize the development rights on the sending sites.

³ While Calvert County has been successful in protecting much of its most important farmland with TDRs, it has allowed TDRs to be transferred to other semi-rural lands on wells and septic systems, and would not meet all of the Criteria for a Successful TDR Program prescribed in 2.b. below.

- TDRs were initially established at a time when comprehensive plans or other proposals recommended downzoning to preserve farmland (e.g. 1 du/20 acres or more), but elected officials decided not to downzone, or to couple limited downzoning with incentives allowing cluster development at higher densities within the agricultural sending areas.
- Weak real estate markets for new development in either the sending or receiving areas or both, where the base-level zoning density in the receiver area is rarely exceeded by what developers can build by right.
- Community opposition to higher density residential development in receiver areas, in some cases even to densities allowed by the base level zoning without TDRs.
- Prices for TDR sales that are lower than the per acre sale value of easements to MALPF or other local or state PDR programs, and substantially lower than the sale value of development lots permitted by local zoning in TDR sending areas.
- The availability of other alternatives for developers to obtain density bonuses to achieve the desired market for new development, including upzoning, variances, cluster zoning, non-contiguous development, planned-unit development, or project design features or amenities committed to in Developers Rights and Responsibility Agreements.
- Administrative constraints to the free-market sale of TDRs, causing uncertainty and delays in their sale. These include government approvals of the use of TDRs on the receiver sites which include discretionary public hearings for new development that can limit the use of TDRs for higher density; simultaneous joint approvals of sending and receiving site transfers delaying the sale of TDRs until they are approved for use in the receiving project; or required documentation of the development potential of the sending sites to qualify for eligible TDRs (e.g. net-area TDRs).

2. Criteria for a Successful TDR Program

Based on these findings from TDR Program Profiles in Maryland, New Jersey and Washington State, and an earlier draft of Measures of a Successful TDR Program reviewed and discussed by the principal investigators with the Technical Advisory Committee, the following key criteria were developed and used in evaluating the feasibility of successful TDR programs in selected Eastern Shore counties. A summary checklist of these criteria was developed, applied to each of the counties in the Eastern Shore assessment area and included as an attachment to each of the TDR Program Assessments. Three counties had existing TDR programs, Caroline, Queen Anne's and Talbot, but Caroline's has been revised and reenacted. These criteria could be used to help other counties evaluate ways to improve existing programs, or to help those counties that are designing new TDR programs avoid problems that have inhibited program performance in some Maryland counties. These criteria are listed generally in the order that the principle investigators believe are most important to TDR program success. It is unlikely that any county will have a perfect program, or a 100% score when measuring their TDR program with these criteria. However, those that cannot meet many of these performance measures are unlikely to have success, and some criteria tend to be more essential than others. Successful TDR Programs are characterized by the following features:

a. TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals. They are characterized by:

- A balance of supply and demand for TDRs has been created in the design of the TDR program.
- Receiver areas are large enough to absorb authorized TDRs.
- As-of-right base density in TDR receiving areas is zoned lower than the market demand for the type and density of housing that developers want to build.
- Developers in TDR receiver areas can achieve the desired market density only with TDRs.

- Density bonuses for using TDRs are sufficiently high to justify the increased cost of purchasing TDR.
- Buying TDRs is more profitable to developers than building to base density or alternative ways to achieve higher density in receiver areas.
- Purchasing TDRs and the public approval process of using them in receiver sites is faster and more predictable than alternative ways to achieve the desired density.
- Selling TDRs is reasonably competitive in value to landowners, considering the residual value of land restricted by TDR easements or covenants, with developing the sending site, selling an easement to other state or local PDR programs, or is the only alternative zoning allows.
- There is an active market for higher density housing types allowed with TDRs in receiver areas.
- The county takes steps to maintain TDR values that are attractive to buyers and sellers by adding TDR receiver capacity, purchasing TDRs, adjusting the TDR allocation rate (amount of TDR/acre or du/TDR), allowing TDRs for increases in non-residential floor area, or other means.

b. The County has strong Comprehensive Plan and Zoning policies that support use of TDRs

- The TDR program is established as part of a larger strategy to preserve land and redirect growth.
- Goals are established in the Plan for the types, location and amount of land to preserve.
- TDR sending areas are designated to protect the most valuable rural land, unique natural and historic resources, or other resources in the Plan's protection goals.
- TDRs are received only where the county and municipalities want development to occur.
- TDRs will not add new residences where they will contribute to the fragmentation of the best agricultural lands, conflict with existing farming operations or contribute to a sense of impermanence of farming in the community.
- TDRs help mitigate the perceived effects of downzoning, help gain support from landowners, and help avoid litigation over rezoning actions.
- Zoning limits or prohibits the use of development rights on the sending site, and reduces the as-of-right base density in receiver sites below the level of market demand.
- Zoning provides for additional density needed to accomplish comprehensive plan goals in receiver areas, only or primarily with the use of TDRs.
- The county adopts a policy that future increases in zoning density in receiving areas is allowed only with TDRs, until land preservation goals are met.
- County water and sewer plans anticipate and plan for development in receiving areas at the density needed to accommodate TDRs.
- Subdivision rules and procedures ensure that receiving area infrastructure is capable of absorbing development with TDR bonus density, including water and sewer service, septic systems, schools and roads.

c. Administration of TDRs is simple, efficient and predictable

- Buyers of TDR can obtain all approvals for their use in receiver sites with certainty and predictability, and can use TDRs for additional density as-of-right in receiver projects.
- Buyers and sellers of TDR are provided clear rules for use of TDRs in receiver areas and restrictions on using development rights on sending site.
- Buyers and sellers of TDR are informed about the current market values of TDRs.
- Receiver areas for TDR are designated and zoned for densities needed to absorb TDRs, without uncertain discretionary or conditional use review.
- TDRs are allowed on a gross land area basis; the number of TDRs authorized for sale is not reduced by environmental conditions for development on the sending parcel.
- Arbitrary rules limiting the transfer or use of TDRs are avoided (e.g. distance between selling and receiver sites, use of TDRs in the same political districts, etc.).
- Special rules for development in receiver areas do not discriminate against TDR projects.
- Land records, mapping and administration of TDRs are complete, maintained and publicly accessible.

- Restrictions on TDR sending sites are permanent, recorded in land records, used in the subdivision and zoning approval process, and sending sites are monitored for compliance.
- Lengthy delays in recording and using TDRs are avoided.
- Local government monitors and modifies TDR program as needed to improve effectiveness and efficiency, and adds receiving areas or increases their TDR capacity as needed to maintain demand.

d. The TDR program has broad public support.

- Rural landowners are motivated to protect land and farming as an industry, more than by profit from selling land for development; and they support TDRs, easement purchase programs and zoning to preserve agricultural uses.
- Real estate developers support TDRs to obtain increased density in receiving areas, and as a flexible and expedient alternative to purchasing additional land.,
- Farming, community and environmental groups support TDRs as one means to protect more land.
- TDR receiving site communities accept or support the density, design quality and compatibility of development using TDRs.
- Elected government officials accept TDRs as a viable method to protect land with private funds, protect the equity of rural landowners, control the location and quality of growth and implement the comprehensive plan.

3. The Feasibility of Successful TDR Programs in selected Eastern Shore Counties

a. Overview:

In the past few years a new market for large higher density housing projects, often presented as Traditional Neighborhood Design (TND), has emerged in the Eastern Shore. TNDs typically have densities of 3.5 to 6 dwellings per acre, and emulate the historic character and patterns of turn-of-the 20th century houses on narrow streets in a grid pattern, with street trees, front porches, walking distances to community shopping areas, and architectural details and materials reminiscent of older residences. The incentive for the developers is to locate more dense housing on public water and sewer facilities, through annexation by small municipalities in order to take advantage of a growing market of “empty-nesters” or “baby-boomers,” or those moving from Maryland’s Baltimore – Washington metropolitan area or Delaware for lower cost new housing. Proposals for large developments of thousands of homes in mixed use planned communities are pending or approved in Cambridge, Denton, Chestertown, Trappe, St. Michaels and Queenstown. Municipalities are approving these developments through annexations and increasing zoning densities without TDRs, undercutting the potential demand for TDR transfers that might have been achieved through interjurisdictional agreements.

There is also a strong market for suburban lower density housing within commuting distance of the Western Shore employment centers. Houses on 1 to 2 acre lots with well and septic typically cost \$250,000 less on the Eastern Shore than the same house would sell for on the Western Shore,. Whether this cross-Bay commuter market continues when the lines and delays at the Bay Bridge become longer, remains to be seen. A task force considering a new Bay bridge is finding that no one wants to be near a landing zone for a new bridge.

TDR programs are more likely to be successful in robust real estate markets, where there is a strong demand for housing at a higher density than existing zoning permits. These markets are stronger in Cecil and Queen Anne’s Counties and weaker in Caroline, Dorchester, Kent and Talbot Counties.

Not all counties in the Eastern shore want or are likely to enact a TDR program. TDRs are often associated either with downzoning, because they have typically been authorized in the same

downzoning ordinance to offset perceived losses of land value from such zoning changes, or with development, by communities or citizens who fear increased density and more development when TDRs are used in the receiver areas. As a result, those that oppose downzoning, on the one hand, or increased development, on the other hand, often oppose TDR programs.

While each county is different in many ways, there are several common constraints to the adoption and successful implementation of a TDR program in counties of the Eastern Shore assessment area. These are discussed below.

High water tables and hydric soils in several Eastern Shore counties limit higher density housing on lots less than 2 acres with well and septic. Higher densities on 0.5 to 1.5 acres per dwelling can be achieved with shared septic systems with spray fields, but such systems are more expensive per unit than deep trench systems, and approvals tend to be longer and unpredictable. There is also a limited market in some communities at densities higher than 1 to 1.5 acres per unit, unless they are located in large multi-use projects on public sewer systems. See the Cecil and Talbot County TDR Assessments for a more detailed discussion of shared septic systems.

In the Eastern Shore counties where TDRs are required to be sent to zoning districts in designated growth areas, the capacity of public sewer systems to handle additional housing density with TDRs is a limiting factor, as it could be in other counties that are considering a TDR program that requires the sending of TDRs to growth areas or Priority Funding Areas. According to one engineer interviewed during the study, *“The sewer capacity issue is probably the main limiting factor anywhere you go on the Eastern shore.”*

There are other infrastructure limits to higher density development that are unique to some counties, and affect local support for TDRs, but these are not shared by all of the counties. For example, the capacity of a two-lane drawbridge for all north-south traffic through Chestertown, may limit new development with or without TDRs.

Community opposition to large development projects, higher densities, and the public infrastructure needed to support such projects is widespread in most counties, especially those that have been going through the most rapid change in recent years. For example, in Queen Anne’s County, proposals for the Gibson’s Grant project started out at 750 units and then dropped to 450 units and is currently proposed at 280 units; the Four Seasons project started out at 1,505 units with a commercial component and is currently proposed at 1,350 units; and a developer withdrew an application to annex 493 acres adjacent to Queenstown for constructing 1,400 houses and a new sewage treatment plant, after four years of strong citizen opposition. An approved TND development of 312 dwellings in St. Michaels has been held up in court for about seven years by a citizen’s suit. Because of setbacks in Queen Anne’s and Talbot Counties, developers that could not achieve even base-zoning densities, or whose projects were held up in Court or reduced in size by elected officials, are now seeking the “path of least resistance” by proposing smaller projects in areas with less organized citizen opposition. It is unknown whether the added preservation to be gained by requiring TDRs for these developments would lessen citizen opposition.

Counties that recommended consideration of TDR programs in their Comprehensive Plans have also recommended pursuit of interjurisdictional agreements with municipalities for use of TDRs. There appears to be insufficient cooperation over growth policy between municipal and county officials in several counties, as evidenced by interjurisdictional conflicts over annexations for large new developments. In the past year these conflicts statewide have led to litigation and new State legislation (H.B.1141). Caroline County recently sued the Town of Denton over an annexation on the West side of the Choptank River for a 3,000 unit TND mixed-use development proposal. This political climate has inhibited the potential for cooperation needed to achieve interjurisdictional

agreements for the transfer of TDRs from counties to higher density new developments in existing parts or annexed areas of the towns of the Eastern Shore assessment area.

Landowners, planners and existing communities often prefer to preserve farmland and natural resources through other State and local programs, such as the Maryland Agricultural Land Preservation Foundation (MALPF), the Rural Legacy Program, local Purchase of Development Rights (PDR) programs or gift conservation easements to the Maryland Environmental Trust (MET), the Eastern Shore Land Conservancy (ELSC) or other local land trusts. Some counties, especially Kent and Caroline, have been very successful in preserving farmland through strict agricultural protective zoning ordinances. Some of these programs require large public expenditures to meet local land preservation goals, which are not always available or predictable. Historically, both the MALPF program and the Rural Legacy program have been able to purchase less than 25% to 30% of the easements offered for sale by landowners. These voluntary programs often enjoy broader public and landowner support, because they do not require receiving sites for the development rights and do not result in an increase in density on these sites, two of the most difficult aspects of TDR programs to implement. In some counties organized landowners have also opposed protective agricultural zoning that would be needed to make a TDR Program work.

b. County TDR Program outlook:

Based on the TDR Profiles in Chapter VI, the TDR Program Assessments in Chapters V, and the Criteria for a Successful TDR Program, the following is a characterization of the feasibility of successful TDR programs being adopted or implemented in the counties in the Eastern Shore assessment area. To fully understand these observations, the reader needs to review the TDR Program Assessments for each county. It is very possible that other researchers or local planners, using different criteria could have other observations. The most important judgment, however, is whether the citizens and local officials in each county believe that TDRs would be a useful supplement to other tools for preserving remaining farmland and open space, and whether elected officials have the will to enact changes in zoning that are necessary to make a TDR program effective.

Caroline County

Caroline County's new TDR program has a moderate probability of success due to the recent downzoning of the Rural Zoning District, and designation of a specific 6,000 acre receiver area north of Denton, where suburban density development is already occurring. The March 2006 improvements greatly enhance the feasibility of the program's success, over the prior 1989 program which had only transferred 17 TDRs and preserved 345 acres.

The program's future success could be limited by the capability of soils in the receiver area for septic systems needed to absorb the new TDR density, by the strength of the market for housing on two acre lots, or by the limited number of undeveloped farms available for TDR use in the receiver area. The permanency of sending sites will be an issue, because conservation easements are not required when TDRs are sold. Negotiations with municipalities over use of TDRs or payments-in-lieu of TDRs for county purchase of development rights may be needed to maintain demand. The new TDR program is remarkable for the strong farming and community leadership that advocated the changes needed for its success, including elimination of major subdivisions and limiting minor subdivisions to four lots per parcel in most of the agricultural lands in the county. These changes should remove economic pressures to convert agricultural lands to development, even if the TDR program is not completely successful. Caroline County's new TDR program meets most of the Criteria for a Successful TDR Program.

Cecil County

The new Cecil County TDR Program has a high probability of success in the long term, due to the downzoning of sending areas, TDR bonus densities in receiver areas and a high market demand for new housing expected in the next six to ten years. Congress approved the Defense Department's Base Relocation and Closure (BRAC) Commission's recommendation to relocate 5,224 high-tech defense jobs to Aberdeen Proving Ground in Harford County, a few miles from the Susquehanna River border with Cecil County. Additional growth of business and housing is expected for commuters to Baltimore and Delaware using I-95, which passes through the receiver area. The program requires conservation easements on sending sites, making the restrictions on Cecil's TDR sending sites permanent, unlike other Eastern Shore TDR programs. The capacity of public sewer services or community septic systems could limit the density of development with TDRs in the designated receiver zones. Increases in public wastewater treatment capacity could be limited in some areas by State nutrient loading caps. Strong organized landowner opposition to the downzoning adopted to preserve rural farms and forests and to make the TDR program work could inhibit implementation. There could also be a rush to obtain concept plan approval for subdivisions in the TDR sending zone before the law takes effect in January 2007.

Dorchester County

Dorchester County has not adopted a TDR program but will be conducting a study of the feasibility of a TDR program, as called for in their Comprehensive Plan. There are significant obstacles to a feasible TDR program in the county. About half of the county is in the Critical Area, under six-foot elevation, with high water tables or wetlands that would not support housing densities high enough to serve as a TDR receiving area without sewage treatment. Allowable zoning densities in designated development districts are as high as or higher than underlying soil conditions can support on septic systems, and municipalities that control sewage treatment are eager to attract development without TDRs. The success of a TDR program may depend on the willingness of municipalities such as Cambridge to accept TDRs, through interjurisdictional agreements with the County, but they have been willing to increase densities to attract development without TDRs. More than 30% of the county is permanently preserved by federal and state landholdings or permanent easements and much of the remaining farmland cannot be developed because of soil and water table limits, so there is no widely perceived threat to open space or sense of urgency to protect it. To create a market for TDRs without municipal cooperation, controversial steps would likely be needed, e.g. to downzone designated development districts requiring TDRs to develop to the density soils would permit, use of shared septic systems, or creation of a new community using TDRs, with its own public water and sewer service. These steps might make a TDR program feasible, but they could also significantly change the character of the county. These steps would also engender opposition from many citizens and organizations, as the county and the City of Cambridge have experienced with the Egypt Road annexation north of Blackwater for a development project recently stopped by the State Critical Area Commission, which denied the necessary Critical Area growth allocation. Dorchester meets few of the Criteria for a Successful TDR Program at this time.

Kent County

Kent County has protective agricultural zoning that is among the best in the State, along with Baltimore and Montgomery County. The county's Planning Commission and staff introduced a TDR program as a part of a draft Land Use Ordinance in 2001, but the County Commissioners rejected it after opposition in public hearings related to development associated with TDRs in neighboring Queen Anne's County, and the difficulty of finding receiving areas willing to accept TDRs. While the ordinance was well designed and would have met many of the Criteria for a Successful TDR Program, it is unlikely that it will be reintroduced. The planning staff will be studying a very limited TDR program, targeted to the use of TDRs to protect greenbelts around a

few municipalities and unincorporated towns. There is strong support within the agricultural community to maintain restrictive zoning and for other land preservation alternatives. Kent has the smallest population and the largest average farm size in Maryland, and viable farming and sports hunting industries. The county appears to be accomplishing the land preservation goals of a TDR program through other means.

Queen Anne's County

Changes in Queen Anne's existing TDR program are unlikely even though there have been no transfers outside of the Critical Area since 1994, when TDR receiving areas were first limited to zoning districts in designated growth areas. A competitive Non-Contiguous Development (NCD) program allows density transfers between non-contiguous lands in common ownership, which satisfies the rural-to-rural transfer market, avoids limits on sewage treatment capacity or higher utility costs in many growth areas, and can avoid affordable housing requirements.

Organized citizen opposition to development both inside and outside of growth areas has led to reductions of development proposals to densities lower than existing zoning, so there is no market for TDRs. The permanency of the deed restrictions on TDR sending sites is an issue, because they can be removed by municipal annexation and by the County Commissioners, and conservation easements were not required. There is little support in the farming and development communities for amending the existing TDR program. The county is planning a major new growth center at its southern border near Chesapeake Community College, which could provide a non-residential demand for TDRs if the zoning is not given away to attract business and institutional development. Less than a third of the Criteria for a Successful TDR Program are met by the county's TDR Program, not including its NCD option.

Talbot County

Proposed amendments to the 1991 Talbot County zoning ordinance and TDR program were rejected by the County Council on September 26, 2006. These would have reduced the overall development potential in a new Western Rural Conservation zoning district, the greenbelts around incorporated towns included in a new Countryside Preservation zoning district, and in a new Agricultural Conservation district in the East side of the county. Mandatory clustering with TDRs to achieve maximum density in rural areas would have been expected to increase the demand for TDRs, if soils support higher density on 2 acre lots or larger. However, the zoning changes would have allowed only rural-to-rural TDR transfers, unless municipalities were willing to accept TDRs from their greenbelts. These changes would not have been sufficient to overcome weaknesses in the earlier TDR program that have not been corrected, which limited performance and the amount of land protected with TDRs. Weaknesses in the current TDR program include a requirement for joint subdivision approval for the sending and receiving site, impermanent deed restrictions through Reservation of Development Rights agreements allowing sellers of TDRs to buy them back at a later date to build on the TDR sending sites, and limiting TDR transfers to the same zoning and election district. Soils and septic rules limiting rural development to two acres or more per lot, and the costs and lengthy procedures for shared septic systems to overcome these limits, would likely have constrained future performance of the proposed changes. There is insufficient municipal-county cooperation for interjurisdictional TDR transfers, with the possible exception of Easton, and this would likely have limited the future performance of the proposed new TDR program. Less than a third of the Criteria for a Successful TDR program would have been met by the proposed ordinance and changes to the TDR program, leaving many opportunities for additional improvement later in 2007, if the county redesigns the TDR program when it plans to upgrade its land conservation programs.

V. EASTERN SHORE COUNTY TDR PROGRAM ASSESSMENTS

(Phase II Findings)

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1. CAROLINE COUNTY TDR PROGRAM ASSESSMENT

The Feasibility of Successful TDR Programs for the Eastern Shore

Introduction

The first Caroline County TDR program was adopted in 1989 as a part of comprehensive rezoning. In the following sixteen years, only three or four TDR transactions were conducted, protecting 345 acres of farmland on the sending sites. On March 21, 2006 the Caroline County Commissioners enacted Ordinance #2006-001, amending Chapter 175 of the Zoning Code, and Chapter 162 of the Subdivision of Land Code of Public Laws, establishing a new Transfer of Development Rights program, which became effective April 1, 2006.

Phase I of this study of the Feasibility of Successful TDR Programs for the Eastern Shore examined six existing TDR programs in Maryland and two in other states, as described in Chapter VI. Caroline County's first TDR program was not examined in Phase I because the study team was aware that the program was being substantially redesigned.

This is an assessment of the county's new TDR program adopted April 1st. It is based on *Criteria for a Successful TDR Program* adopted by the Technical Advisory Committee for this study, the *Findings* of Phase I found in Chapter IV, and the collective experience of the committee members and principle investigators in the use of TDRs. Interviews were conducted with county planners, developers, farmers, and municipal officials, in order to assess how the program relates to the *Criteria*.

Summary

The new TDR and zoning ordinance continues to allow four lots per parcel⁴ as a minor subdivision in the R-Rural Zoning District, as allowed in the prior ordinance, but no longer allows an additional dwelling for each 20 acres to build a major subdivision of up to 25 dwellings per parcel outside of receiver areas. Under the current ordinance each landowner in the R District is allowed one TDR for each 15 acres of land, less any area contained in minor subdivision lots or subject to existing easements. Within designated receiver areas, each landowner in the R District is allowed the same four minor subdivision lots per parcel, plus one lot per 15 acres, but they can build a major subdivision of up to 50 lots per parcel at a maximum density of one dwelling per acre by buying or transferring TDRs from other properties in the R District.

The most promising characteristics of the program are:

- The county has established designated receiver areas, including about 6,000 acres of land between Denton and Greensboro plus a small 10 acre area near Preston. The law requires the county to conduct an annual review of the boundaries of these areas to meet the goals of the program.
- While these receiver areas are not serviced with public water and sewer, most of the area is likely to support water and septic systems for development with TDRs at one dwelling per acre.
- By allowing landowners in the receiver areas to develop major subdivision projects with TDRs, with a maximum 50 units per parcel up to one dwelling per acre, a significant bonus density is provided over as-of-right densities without TDR to drive the demand for TDRs.

⁴ Recorded after November 30, 1972.

- With an estimated maximum of 7,776 TDRs available from 127,665 acres of R District lands, the initial size of the receiver area appears to be large enough to absorb the number of TDRs that are likely to be for sale in the next several years.⁵
- Elimination of major subdivisions from most of the R District agricultural lands in the county, limiting minor subdivisions to four lots per parcel created after November 1972 should eliminate most economic pressures to convert agricultural lands to development and constrain further fragmentation of the agricultural land base of the county.⁶

Concerns and uncertainties that could affect the feasibility and success of the new program include whether:

- The value of TDRs will be sufficiently high to ensure that significant numbers of landowners will sell them, restricting the sending properties with covenants,
- Roads, schools and public services in the receiving areas can support more dense TDR developments, to maintain demand for TDRs until a master plan and capital improvements can be completed,
- Soils in the receiver areas will support the supply of TDRs in more dense developments on well and septic systems without changes in technology to protect water quality acceptable to the Environmental Health Department,
- Landowner costs to document that sending parcels have the potential for development with the number of lots proposed to be transferred, will discourage the sale of TDRs, and
- Restrictive covenants required on properties that sell TDRs will be permanent and withstand future pressures and political forces to allow development of sending sites.

In summary, Caroline County has taken the most important steps necessary to make their new TDR program successful, and has designed into the new ordinance other requirements to adjust parts of the program when needed to keep it working. The design of the county's new program meets most of the *Criteria for a Successful TDR Program*, as indicated below and in the evaluation Chart, page 32. The new program more closely resembles Maryland's most successful TDR programs in Montgomery and Calvert counties, than it does the other less successful TDR programs in the state.

The following steps could be taken to enhance the new TDR program if a robust market for TDRs does not develop by the time of the next October review of the receiver areas:

- Eliminate the option of creating a major subdivision in receiver areas by the "overall gross density standard" standard (1 du/15 gross acres). This would apply the same base density standard to all parts of the R-1 Rural zoning district. Any increase above this standard in the receiver areas would require the use of TDRs. This option may compete with the use of TDRs for obtaining higher density in receiving areas, particularly on properties that have soils that will not perc.
- Increase the number of TDRs required to build an additional housing unit, from one TDR per unit, to two or more, as Calvert (1 du/5 TDRs), or St. Mary's (1 du/2 TDRs) have done.
- Allow all TDRs from R Rural zoning districts on a gross density ratio, allowing one TDR for each 15 gross acres of the entire sending parcel. Eliminate detailed rules and documentation to show that these development rights can be used on the sending site by amending §175.28.7 E.

⁵ Many landowners that could sell their TDRs will likely participate in Maryland's other land preservation programs if sufficiently funded. (e.g. MALPF, Rural Legacy, CREP, and the USDA Forest Legacy and Farm and Ranch Protection Programs)

⁶ The County's average farm size was 227 acres, with 114,843 acres in farms, USDA 2002 Census of Agriculture.

- Seek agreements with municipalities to require TDRs for any increase in number of units or lots resulting from rezoning of land in any future annexations, and to extend public water and sewer service to the TDR receiving area. This policy might be pursued through the new consultation procedures required by H.B.1141.⁷
- Require perpetual conservation easements in lieu of “covenants” required by documents on TDR sending parcels, by amending §175.28.7 I (6) through (9)

Applying the *Criteria for a Successful TDR Program*

The following is an assessment of how the new Caroline County TDR ordinance and its planning, zoning, economic and political context relate to the Criteria outlined in Chapter IV.

Criterion 1.

TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.

Supply and demand

According to recent figures released from the U.S. Census, Caroline is now the fastest growing county in the state. The county’s population grew by 2.4% from 2004 to 2005,⁸ up from the county’s 1% average annual growth from 1970 to 2000. In 2005, 338 new homes were built in the county, 132 in unincorporated areas and 206 in incorporated areas. Prior to the enactment of the new zoning ordinance, the county Department of Planning and Codes Enforcement projected a doubling of the county population from about 30,000 in 2000 to nearly 60,000 in 2025, if no new growth management policies are enacted.⁹

As one Town Councilman explained:

“In the 1990s, we experienced stagnant growth. From what I have seen, our population was on a flat line. Suddenly, for whatever reason, other counties on the western shore overbuilt, and have become more cautious and restrictive. That has caused developers to look over here to us, and we’re the next natural place to develop. We are benefiting from highways that are bringing the population here. For example, you go to the southern parts of the shore, to Crisfield or southern Somerset County, or to Cambridge, 15 years ago, no one wanted to live there. Now they are growing as rapidly as we are. They’re facing the same kind of pressures. This creates a challenge for the entire eastern shore. We cannot prevent growth, but we can better manage the growth.”

Development trends in the Town of Denton illustrate the forces of market demand that may affect the demand for TDRs in the nearby receiver areas. Denton currently has about 1,264 existing housing units. From 1990 to 2002 the town recorded 86 new homes, or about six per year. Between 2003 and 2005, 279 new homes were built in town, many of which were annexed into the town boundary over the last five years. There are current proposals in the planning process for about 4,500 new housing units in Town, including a planned community of 300 units near Route 404, 58 units off Legion Road, 26 units on Fifth Avenue, and 3,000 units in West Denton Farms, on a 853 acre farm annexed into the town on the west side of the Choptank River. This last proposal has

⁷ House Bill 1141, *Land Use–Local Government Planning*, 2006, Chapter 381, Article 23A – Corporations – Municipal; Article 66B – Land Use

⁸ Table 1B, Change and Rank of Change in Total Resident Population for Maryland’s Jurisdictions, 2000-2005, U.S. Census Bureau, March 16, 2006, prepared by Maryland Department of Planning, Planning Data Services, March 2006, reported by John Evans, *Caroline fastest growing county in state last year*, The Star Democrat, March 24, 2006.

⁹ *Anticipating and Adapting to Growth Pressures: Strategic Thinking for the Future of Caroline County to the Year 2025*, Strategic Planning Committee for Public Finance, Draft July 14, 2005.

become highly controversial, resulting in a lawsuit by the county challenging Denton's right to annex non-contiguous land across the river.

While the large receiving area north of Denton may not have the same attraction for development as Denton, with its public water and sewer services, historic town center, and proximity to public services, schools and shopping, there appears to be a strong demand for single family detached housing in the triangle between Denton, Greensboro and Ridgely where it is located. Since 2001, 130 new homes have been built in Greensboro, twice as many as in the prior eleven years; and the town has approved sewer allocations for 327 new units in three new developments. In Ridgely, 78 new homes were built in the last two years, after averaging less than five per year in the previous six years,¹⁰ and Elm Street Development is proposing the McNamee TND project with about 400 units.

There are three TDR receiving areas established in the new ordinance, including a mid-county area of about 5,997 acres extending along the eastern shore of the Choptank river from Greensboro to Denton and to Garland Road on the east, and including a smaller area on the west shore of the river north and west of North Caroline High School. A smaller 10 acre parcel of land near Preston is also designated as a TDR receiver area. All of the 6,007 acres in receiver areas are zoned R-Rural, except 476 acres that are zoned R-1, Single Family Residential, which allows two dwellings per acre. These are typically lands that are already partially developed.

The maximum build-out density of the receiver areas will be dependent upon the individual sizes, configurations, and environmental characteristics of the remaining undeveloped lots, as well as the capacity of the soils to support septic systems. The characteristics of the remaining lots are too diverse to estimate the total theoretical demand for TDRs, i.e. the "gap" between the as-of-right densities of four lots per parcel plus one unit per 15 acres, and the maximum TDR density of one dwelling per acre or 50 units per parcel.

The new TDR law provides significant bonus densities for the use of TDRs in the receiver areas, but these will be dependent on the size of the parcel and how many parcels can be aggregated for each development project. If a landowner with a 100 acre farm in the R District was in a designated TDR receiver area, he/she could develop a major subdivision of 10 units, with four minor development rights plus one dwelling per 15 acres. But if this landowner in the receiver area were to purchase development rights from another landowner in the R District, or transfer development rights from another parcel they owned in the R District, they could build a major subdivision of 50 units on the 100 acre parcel, an increase of 40 or four times the number of units with TDRs.

Under the new TDR law, a landowner with a 100 acre farm in one parcel in the R District outside of a TDR receiving area could create a minor subdivision of four lots on this parcel, and would be eligible to sell 6 TDRs to a parcel in the receiver area. The landowner could also sell three of the four minor subdivision development rights as TDRs, but would have to retain a minimum of one development right on the parcel. The county's planning staff estimated that there are 127,665 acres of land in the R zoning district with potential to sell TDRs, which could produce a maximum of 7,776 TDRs after deducting lots created prior to 2003 and land in restricted Agricultural Preservation Districts.

Many landowners in the TDR sending area are likely to continue enrolling in the MALPF, Rural Legacy and other state and federal land preservation programs that purchase and extinguish these development rights. Others will not choose to restrict their land with easements or TDR covenants, and are likely to hold on to their four minor subdivision rights for their children or their higher value. According to one developer, *"As bad as agriculture has been financially, there are very few farms for sale. People are hanging onto the properties. They see them as a good investment."*

¹⁰ John Evans, The Star Democrat, March 24, 2006.

It appears that the strength of the current housing demand and limited supply of TDRs could be sufficient to start a market in TDRs, but the market may be uncertain in the receiving areas due to the current pattern of development already occurring there. Some of those interviewed during this assessment questioned whether there would be a strong market for TDRs in the near term.

Farmer: *“The problem is that [the receiver area] is already largely developed. They don’t need many TDRs. It’s too developed and it’s too concentrated in one place in the county. They’re already building 10 houses per month there right now. If you look there, you’ll see a lot of deeds are fairly small; they can’t get their four houses per parcel.”*

Developer: *“We used to sell primarily to individuals or builders that have a buyer, buying lots to build homes. A saturation rate for me would be five to six lots per year. So it might take five years to go through a 25 lot subdivision. That’s all you could sell because there wasn’t any market for more. Now people call me every day, including Ryland homes, Pulte homes, and others call and they are looking to buy the entire development. So it’s now very different.”*

What is driving the market in this direction is affordability. Some of these larger developers will put up a model house on the Western shore for sale at about \$600,000 or \$700,000, but in the same interview with a potential buyer, they’ll say, ‘You know, I have a project over on Eastern shore, with about 80 lots and I can sell this home there for \$200,000 less than this exact house.’ He puts him in a car and drives him over here, and the buyer will make a decision. He has a need for a house, he’s going to save \$200,000, he drives through Caroline County and all that he sees is open space, so he says ‘I love it. I’ll take it.’ So now he’s over on this side. It’s pretty simple how it works. It’s not complicated.”

Developer: *“There is not a strong market today [in the receiver areas]. Large developers are not looking to develop in these areas, they want to develop in or near towns where there is public water and sewer. The county identified this receiving area, because it was already developing. If you drive along this road between Denton and Greensboro, there has been a lot of development; there’s not much farmland left. If you’re looking to build a 50 lot subdivision, the land is just not there. There is some potential, and some fill in areas, and this is a good area for soils.”*

The county responded to similar concerns expressed during the deliberations over the location and size of the receiver area, by including in the TDR ordinance a requirement that, *“Each year in October, the Planning Commission shall review the TDR receiving area map to consider receiving area boundary line adjustments to be approved by the County Commissioners.”*¹¹ This review process includes notice to the public and affected property owners and a public hearing. It provides the opportunity to adjust the receiver area boundaries to maintain sufficient demand for TDRs, addressing criterion 1.j. of this study. This has been successful in the Montgomery and Calvert County TDR programs. A farmer describing the deliberations said: *“One thing that was a sticking point in the discussions was how to create the receiving area. The only agreement that we reached was that the receiving area had to be revisited each year. That seemed to be a successful solution.”*

TDR values

TDRs are currently being sold for \$13,000 to \$15,000 each, or \$866 to \$1,000 per acre, but there have been few sales since the new ordinance took effect April 1, and the list of buyers and sellers of TDRs required to be kept by the Planning Department recently listed a couple of names on the

¹¹ §175.28.7 D (2)(a)[1].

selling side, and one name on the buying side. With increased funding for the MALPF program in FY2006, landowners are reporting that current values for MALPF easements range from \$2500 to \$3000 per acre in the county. However, TDRs may not need to compete directly with MALPF values before landowners will sell them. After a landowner enters into an Agricultural Preservation District, it typically takes MALPF about two years before the landowner gets a check, and funding has been unpredictable in the past. As one landowner explained,

“The MALPF money comes and goes. This program keeps the state out of the process. It is a local matter. It’s fluid and adjustable.”

Another said:

“One thing about selling TDRs, though, is if you are in the MALPF program you are subject to the restrictions associated with that program. Whereas, if you sell your TDRs you don’t have an outside agency coming in and trying to police what you’re doing on your property. It is a little cleaner from that standpoint to sell TDRs.”

The expense of developing property has gone up dramatically in the recent past. According to one developer, *“It used to be, for about the last 10 years, you could spend about \$10,000 to \$12,000 and create a \$30,000 lot. It stayed that way for a long time. That has now changed. We’re now spending about \$40,000-\$50,000 to create a lot. So the numbers have gone up.”* This cost includes purchase of the property, soil testing, engineering and surveying, permits and fees, interest for borrowing, road construction and utility installation, among other costs. While the cost of creating lots has gone up, the resale value of finished lots in the receiver area has also gone up. Recent sales of finished lots prior to the new ordinance were reported from \$100,000 to \$150,000 in the R zoning district, to as high as \$190,000 in the R-1 part of the receiver area. However, the price of TDRs compared to the increasing cost of raw land only addresses part of the project costs to the developer. If the cost of TDRs gets too high, e.g. \$30,000 to \$40,000 for each TDR, as the planning office estimated they might reach in some of their documents; developers are likely to purchase entire farms, transfer the TDRs to their receiver area projects, then resell the covenant restricted farms rather than purchase development rights from other landowners. While this would preserve the farms and provide more profit to the developer, it could undercut the market for TDRs from working farmers.

Criterion 2.

The County has strong Comprehensive Plan and Zoning policies supported by TDRs.

The revisions to Caroline County’s zoning and TDR program grew out of a strategic planning process initiated in 2003 when the County Administrator contracted with Institute for Governmental Services of the University of Maryland to update the county strategic plan. A Strategic Planning Committee of twelve citizens and town and county representatives was formed. The committee met monthly for a year from July 2004 to June 2005, and gathered information through staff briefings, written surveys, focus groups, a field trip to Calvert County, and informal discussions. Their draft report¹² in July 2005 suggested seven policy strategies, one of which was: *“A combination of transferable development rights, downzoning of unincorporated land, and the creation of greenbelts around existing towns.”*

In October 2002 the county completed a Draft West Caroline County Comprehensive Plan, for the county’s 6th and 7th Election Districts and the towns in a 68 square mile area of the county between the Choptank River, and Queen Anne’s and Talbot Counties. This Plan identified a 1,257 acre TDR Receiving Area *“comprised of former Residential and Rural Conservation areas, to accommodate*

¹² Op Cit, Strategic Planning Committee

*new growth that is transitioning away from traditional agriculture.”*¹³ This plan identified a “West County Greenbelt” of approximately 12,912 acres or 30% of the regional land area, with a mix of low density residential and agricultural land uses surrounding towns and higher density land uses in rural villages. It also identified “Rural Conservation Areas” of approximately 21,634 acres or 50% of the region’s land area. These areas are zoned R-Rural and encompass active agricultural areas, large forested areas, natural resources and scattered historic and cultural sites. Much of it is protected by easements. A new regional planning process has begun for the region east of the Choptank River, where most of the TDR receiving area is located, for the purpose of preparing a Comprehensive Plan for this region.

Caroline County’s 2006 Land Preservation, Parks, and Recreation Plan (LPPRP) calls for “Implementation of regional comprehensive plan recommendations,” including, “Refinements to the county’s Transfer of Development Rights program.” It indicates that the county needs to preserve approximately 57,000 additional acres to achieve its long range 100,000 acre preservation goal, and recommends that these acres come from the following target areas, most of which are in R-districts, and qualify to sell TDRs:

- The county’s R-District, especially in designated Rural Legacy Areas,
- TDR sending areas,
- The area east of Denton between Gravelly Branch and MD 404,
- Greenbelts around incorporated towns,
- The Upper Choptank River Watershed, and
- Caroline County’s Green Infrastructure.

In the last USDA Census of 2002, there were 506 farms in the county, with 111,843 acres, or 56% of the county’s land area. The average farm size was 227 acres.

To help mitigate the effects of the rezoning of the R-Districts, which eliminated the option of developing major subdivisions of 25 units throughout the zone (at a rate of one du/20 acres of land, minus any minor subdivision after November 30, 1972), landowners are now allowed to transfer TDRs at a ratio of one TDR/15 acres instead of at the previous TDR ratio of one TDR/20 acres, but only to the receiving areas.

The TDR receiving areas were designated in an area of the county which was already starting to develop. The planners said:

“We took a look at the natural resources in the entire county, and made sure that there weren’t wetland areas, hydric soils and other resources, and this receiving area was one where growth could be accommodated.”

“It is already an area where growth is going anyway. This is the ideal place to concentrate infrastructure and services, in this triangle between Denton, Greensboro and Ridgely. If we could just get a partnership with the towns for the infrastructure, we could get this area served with rapid infiltration systems, spray irrigation and other services.”

While the receiver area is identified for future growth with TDRs, the staff do not anticipate the area developing into another town or city, or being annexed into any of the three incorporated municipalities. Since the county does not have its own Sanitary District or any wastewater treatment plants, public water and sewer service is not planned for the receiver area. As one said:

“We are still a rural county. Even though we have defined the receiving areas, we don’t want them to become one big town stretching from Denton to Greensboro. We don’t want them to join and become one big municipality. We are all for setting limits. The limit was

¹³ Draft Executive Summary, West Caroline County Comprehensive Plan, October 2005.

set to say, a subdivision can be located here, but it should remain a rural appearing subdivision. We don't want the receiving area to look like one big metropolis”

However, if a significant amount of new development begins to occur in the receiver area without water and sewer service, there is concern that houses on septic systems at higher densities with TDRs will leach into the nearby Choptank River and the Chesapeake Bay.

The staff recognizes that the receiver area has serious transportation problems and lacks specific design guidelines for the new TDR projects. They plan to initiate rural design guidelines and a transportation study for the receiver area, and to study other infrastructure issues as part of the regional Comprehensive Plan for this area. Four or five projects budgeted for about \$375,000 in the Department’s Budget Report for FY2007 may address these receiver area needs.¹⁴

Criterion 3.

Administration of TDRs is simple, efficient and predictable.

The use of TDRs in designated receiver areas is expected to be relatively simple and predictable, compared to development in the R-Rural districts prior to the April 1st zoning amendments.

While the administration of the new ordinance has not yet been fully tested, at least one developer was optimistic that the process may be more predictable than developing in the R-District before the changes.

“My position was that it was going to be better for me. The reason is that I do most of my work in the county, and not in the towns. So it makes things clearer for me about land-use issues. In other words, when you propose a project in the TDR receiving area and go before the Planning Commission and the public to present it, you're not there so much to talk about land-use issues, you're there to talk about the technical aspects of your development and how it's going to impact that particular area, such as the road system or the drainage system.”

When asked if the receiver area was zoned as-of-right to develop with TDRs, he said:

“You can put a project together in that area by just following the rules and regulations. We haven't had that in the past. Each and every time you proposed a project under the old regulations you would have to first deal with the land-use issues. Is this the right place for this project? Should this land be used for that purpose? Those issues, from the developer’s perspective are gray issues and we don't know how those are going to turn out. It's better for me now. I would much rather pick up a set of regulations and read those regulations, and then say, OK now I know how to use those criteria. We're not going to be dealing with the land-use issues any more, because this TDR receiving area has been designated for this particular use. So I like it.”

“I don't think that land use is an issue in this area, and I don't think it should become an issue because that would really put a constraint on the use of TDRs. It would make developers question whether or not to purchase TDRs or to purchase certain property within TDR receiving areas. It would also put a hardship on those that are trying to sell the TDRs, so I would hope that land-use issues that come up within the TDR receiving areas would not be subject to review.”

The new law also requires the county planner to maintain a record of names and addresses of those persons interested in buying and selling TDRs (the “TDR Registry”), which shall be made available

¹⁴ Department of Planning and Code Administration, Budget Report FY2007

to the public for review. This is designed to increase public knowledge, especially between potential buyers and sellers, to facilitate a strong private market for TDRs. However, it does not require that the values of TDR purchases be disclosed.

Three instruments are required to be approved by the county attorney and are to be recorded among the land records of the county when a subdivision record plat is recorded or subsequent to final site plan approval, but before construction permits are issued:

- An instrument of original transfer,
- An instrument of transfer to the owner of the receiving parcel, and
- Instruments of transfer between any intervening transferees.

By allowing an instrument of transfer to the owner of the receiving parcel or instruments of transfer between intervening transferees, the program allows “banking” or speculative holding of TDRs. This will greatly facilitate the liquidity of TDRs, and remove the uncertainty and delay in selling TDRs for the landowner. They will not have to wait long periods until the development project is approved and recorded to be able to get their money for the sale. This has helped to facilitate a robust market for TDRs in Montgomery and Calvert Counties.

However, another provision of the new TDR law partially retains a feature of the old law that may inhibit TDR sales, by reducing the number of TDRs available from an eligible property. It will likely result in unnecessary costs to TDR sellers to document, *“to the satisfaction of the Planning Commission that the sending parcel has a legal potential for development with the number of lots proposed to be transferred.”*¹⁵ This holdover provision provides that the Planning Commission may require reasonable proof of development potential of the sending parcel, including but not limited to percolation tests, hydrogeological studies, topographic surveys, site and soils evaluations and other studies or tests. It requires documents and information from the seller (or buyer on the seller’s behalf), including a completed *Initial Subdivision Review* form, completed TDR application form, tax map, plat or site plan, and a zoning map, recent aerial photograph and soils maps of the property. All of these tests, studies, forms and maps can result in significant costs to the sellers. It could delay the sale of TDRs for many months. The seller cannot predict or finalize the sale of the number of TDRs until the process is completed and approved by the Planning Commission.

Caroline County is one of two TDR programs in the State that require this “net area” calculation of the number of TDRs authorized on the sending sites, the other is in St. Mary’s County. All others use a “gross land area” calculation where the entire sending parcel is eligible to send TDRs, without having to seek the same approvals for selling TDRs as they would to build the development rights on the sending parcel. Now that the county has eliminated the possibility of creating lots in addition to the four minor subdivision rights on all sending sites outside of the TDR receiver areas, this provision may unnecessarily inhibit a healthy market in TDRs. In order to sell TDRs, landowners would have to demonstrate to the Planning Commission that they could “theoretically” build one house on 15 acres of the sending farm, when the new law actually prohibits it. Because of similar problems in administering their TDR program, St. Mary’s County has recently proposed to eliminate the “net area” authorization of TDRs from sending sites. They plan to begin using a “gross area” calculation.

In a compromise with the farming community over this issue, the new TDR ordinance exempts properties over 50 acres (or groups of properties exceeding 50 acres) from seeking approval from the Caroline County Environmental Health Department for an individual well and on-site septic system for each development right that is intended for transferred from the sending parcel. However, it would still require owners of less than 50 acres (i.e. those that would have a maximum of 3 minor

¹⁵ §175.28.7 E

development rights plus 3 TDRs to sell) to obtain this approval before their few TDRs could be transferred, even though the 3 TDRs could not legally be used on the sending parcel. It is very unlikely that any owner of a farm under 50 acres would go to this expense, uncertainty and delay in order to sell so few TDRs from the parcel. No other state or federal easement purchase or donation program requires landowners to demonstrate that development rights extinguished with the easement could theoretically be used on the subject property, and they don't require the kind of documentation that §175.28.7 E requires.

The most successful TDR programs in Maryland and other states require that a permanent TDR easement or conservation easement be recorded on the sending parcel, at the time the TDRs are sold or transferred to another party, or used on a receiver site. These easements provide similar protection to the properties as the State's easement purchase and donations programs.

TDR sending sites under the Caroline County program are protected by the policy of §175.28.7 F, *Effect of Transfer*, and by the *instruments of transfer* recorded with the Clerk of the Circuit Court. [§175.28.7 I]. When a development right is initially removed from a sending parcel, these instruments are required to contain covenants that (in abbreviated form):

- The sending parcel may not be subdivided to a greater extent than permitted by the remaining development rights and the subdivision regulations at the time of the request,
- The sending parcel is restricted to residential development as permitted by the remaining development rights, and
- All provisions of the instrument of transfer shall run with and bind the sending parcel and may be enforced by the County Commissioners, the Planning Commission and their designees.

The new ordinance allows landowners that sell or transfer their development rights to purchase and reestablish these rights on the sending parcel, in the event that their property becomes a part of a receiving area. But they would have to purchase these rights from another parcel in the R district.

During the revisions of the ordinance, it was clear that members of the task force involved in discussing the changes wanted to maintain more flexibility for future development of the sending property than permanent easements would allow. As one member said:

“One of the things I prefer is that it isn't a permanent thing. If somewhere down the road that ground was needed for development, or if it's rezoned by the county, someone could buy development rights and put them back there, whereas, with agricultural land preservation that piece of ground could end up in the middle of the city, and you couldn't build houses on it. Right now there are some MALPF lands that could be sold for development, and you could use the funds to buy five times the number of acres to put into ag preservation. It was one of those things that the farmers thought that if the land ever changed, or where the boundary for the receiving area would be expanded, they would be able to put TDRs back on the land. Most of us realize that even tomorrow, let alone many years from now, we don't know what the best use of that ground will be. If the county is highly developed, and you use up those 7,000 development rights, then it's a moot point.”

Criterion 4.

The TDR Program has broad public support.

The current TDR ordinance is a product of a deliberative process over two years involving the Strategic Planning Committee, the Planning Commission and staff, municipalities, the county Commissioners and many citizens and organized interest groups.

One of the leading groups that initiated changes to the TDR program was a group of twelve young farmers. As the planning staff described:

“When this process got started, our young farmers group actually came to the Planning Commission and said to us, “Can we start some kind of communication, because we don't like what we're seeing happen around our farms. We don't like seeing these developments happen out in the farming area.” So it was actually the farmers that came to the Planning Commission asking them to look at how to change this. It hasn't been easy to get to where we are now, but we respected everyone's opinion, and they respected our suggestions, and it worked. We kept the public process going and kept the planning commissioners and County Commissioners in the loop. When it went to the County Commissioners for a vote, there was support for it”

Members of the Caroline County Farm Bureau were actively involved in the work group that helped refine the ordinance. When it was redrafted and presented to the Planning Commission and Board of County Commissioners, it was widely supported within the farm community. As a leader of the Farm Bureau described it:

“Yes, it was the young farmers that initiated the discussion. They took it and formed a task force that I was on, and we met with other farm representatives throughout the county. That's where we hashed out many of the main points of the new ordinance.”

Another member said:

“We have had very little negative reaction to it to. I'd say you have 75% to 80% support for it from the farm community. And you're not going to get any better than that. We were lucky to get that much.”

While representatives of the real estate and development community attended work group meetings and public hearings on the new TDR ordinance, they played a less active role than others. The planners said:

“There were a lot of them that sat through the hearings and listened, but none actually spoke. A lot of them live in our community and they understand our goals, but they are just waiting for the details to know how they can use the program. We have had very little negative reaction to it.”

One developer who participated described his interest:

“I didn't want to try to sell the TDR program, because it was going to be beneficial to me. I was trying to open people's eyes to what they were agreeing to. I can say that at the hearing, there was some opposition, but there were more people that spoke in favor than against the proposal. So hopefully it did happen that way. I don't have any way of measuring whether or not people were really educated on the issues before the regulations were adopted, but I hope they were, and I applaud them for doing what they did. My position was that it was going to be better for me.”

As part of the Strategic Planning process, the Strategic Planning Committee and their facilitators surveyed over 400 county residents and 52% responded.¹⁶ Of the 188 replies, 69 said that they liked “farming landscapes” most about living in Caroline County (topped only by 70 who said they liked “relatively safe communities.”). More than any other statement about what to expect in the next 10 years, 88 expected that “agriculture will be threatened or diminished in the future.”

Support and cooperation from incorporated municipalities may affect the full utilization of TDRs authorized by the new ordinance. The new ordinance at §175.28.7 D (2) provides that: “Receiving areas shall be located in the R, Rural District or in a municipality with an approved inter-

¹⁶ Op Cit, Strategic Planning Committee, Appendix C

governmental agreement between the county and municipality for use of transferred development rights (an 'IGA Area')."

The county planning staff explored the concept of utilizing TDRs in town with several municipalities, but there was very little interest. When asked whether any of the new development proposals in towns were expected to use TDRs to obtain their proposed density, one town official explained:

"They are required to develop at the density of 3.5 dwellings per acre or higher as a result of the smart growth guidelines. When you're talking about TDRs there are no bonus densities in the municipalities to be purchased, because of the 3.5 du/acre standard."

However, the towns are willing to consider a proposal by the planning staff to charge developers in town an in-lieu of TDR payment to help fund both county purchases of development rights and open space and historic preservation amenities in the towns. One town official said:

"[The town] submitted a letter to the county when they were considering their TDR program. This said that there really wasn't a place for TDRs in town, because of the density that already existed. We certainly supported the intent of a TDR program for ag land preservation, because the growth really should be in the municipalities. However, we would support a fee in lieu of TDR program, which was an idea that was discussed by their planning staff."

In Denton, progress on working out the details of this concept will have to wait until the litigation over the West Denton Farms annexation is concluded. As one Town Councilman said:

"I believe both the Town Council and the County Commissioners want to achieve the same goal: better management of growth. But both sides have a different perspective of how to accomplish this goal. Until we improve communications with one another, our differences of opinion will not be resolved."

CAROLINE COUNTY TDR PROGRAM			
Established	1989		
Major changes	2006		
General features			
Mandatory or voluntary	Mandatory		
Type of protection of TDR sending site	Covenant		
Sending areas			
TDRs authorized per acre & base density	TDRs/acre	Base density	
Rural (R)	1:15	4 du/parcel	
Eligible Receiving areas			
TDRS needed per du in Growth Areas:	1	TDR	TDR
	Base Density	Max Density	Density Bonus
Rural (R) in designated Receiver Areas:	4 du/parcel + 1du/15 acres	4 du/parcel + 1:1 w/50 unit max	(based on parcel) 200%-600%±
Municipalities with Intergovernmental Agreements	n/a	n/a	n/a
Performance			
Total county land area in acres	204,744		
TDRs transferred*	17		
Acres of Land protected with TDRs*	345		
% of county Land Area protected with TDRs*	0.17%		
Acres of Land protected with all Programs	42,759		
% of county Land Area protected with all Programs	20.9%		

Density = number of dwelling units per acre

* From 1989 through 2005; prior to 4-1-06 effective date of current TDR ordinance

Caroline County TDR Program - Options for Major Development in Receiver areas								
	Development Alternatives in Receiver Area							
Parcel in Acres	ALTERNATIVE 1 Major subdivision with OGD*			ALTERNATIVE 2 Major subdivision with OGD + TDR				BONUS % w/ TDR
	4 minor (4/parcel)	Major OGD (1:15 acres)	Total units	4 minor (4/parcel)	Major OGD (1:15 acres)	Major TDR (+# TDRs)	Total (1/ac max 50)	TDR vs. OGD
25	4	1	5	4	1	20	25	400.00%
50	4	3	7	4	3	43	50	614.29%
100	4	6	10	4	6	40	50	400.00%
150	4	10	14	4	10	36	50	257.14%
200	4	13	17	4	13	33	50	194.12%

* OGD = Overall Gross Density @ 1 du/15 acres [§175.28.1 B.(1)]

CAROLINE COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
1) TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.			
a) A balance of supply and demand for TDRs has been created in the design of the TDR program.	✓		6,007 acre receiver area for maximum of 7,776 TDRs
b) Receiver areas (RAs) are large enough to absorb authorized TDRs.	✓		Boundaries of receiver areas are reviewed ea. year
c) As-of-right base density in TDR receiving areas is zoned lower than the market demand for the type and density of housing that developers want to build.	✓		Current market is for 1 du/acre; base density is 4 du/parcel + 1/15 acres
d) Developers in TDR receiver areas can achieve the desired market density only with TDRs.	✓		
e) Density bonuses for using TDRs are sufficiently high to justify the increased cost of purchasing TDR	✓		Density bonus varies with parcel size, 300% -700%
f) Buying TDRs is more profitable to developers than building to base density or alternative ways to achieve higher density in receiver areas.	✓		
g) Purchasing TDRs and the public approval process of using them in receiver sites is faster and more predictable than alternative ways to achieve the desired density.	✓		Approval process the same with TDRs; use of intermediate TDR allowed
h) Selling TDRs is reasonably competitive in value to landowners, considering the residual value of land restricted by TDR easements or covenants, with developing the sending site, selling an easement to other state or local PDR programs, or is the only alternative allowed.		X	Sending sites limited to 4 du/parcel. \$13K to \$15K TDR value (\$1K/acre) vs. \$2K-\$3K/acre for MALPF
i) There is an active market for higher density housing types allowed with TDRs in receiver areas,	✓		Receiving area already developing
j) The county takes steps to maintain TDR values that are attractive to buyers and sellers by adding TDR receiver capacity, purchasing TDRs, adjusting the TDR allocation rate (amount of TDR/acre or du/TDR), or allowing TDRs for increases in non-residential floor area.	✓		RA boundaries reviewed & expandable annually. Fee in-lieu funds may allow Co. TDR purchases
2) The County has strong Comprehensive Plan and Zoning policies supported by TDRs			
a) The TDR program is established as part of larger strategy to preserve land and redirect growth.	✓		Rezoning, greenbelts & TDR strategy approved
b) Goals are established in the Plan for the types, location and amount of land to preserve.	✓		100,000 acre goal focused on Agricultural lands
c) TDR sending areas are designated to protect the most valuable rural land, unique natural and historic resources, or other resources in the Plan's protection goals.	✓		127,000± acres of farmland (62.3% of Co.) max eligible for TDR
d) TDRs are received only where the county and municipalities want development to occur.	✓		TDRs can be transferred only to receiver areas
e) TDRs will not add new residences where they will contribute to the fragmentation of the best agricultural lands, conflict with existing farming operations or contribute to a sense of farming impermanence.	✓		Receiver areas are in regions that are already developing in low-density
f) TDRs help mitigate the perceived effects of downzoning, help gain support from landowners, and help avoid litigation over rezoning.	✓		TDR rate increased to 1/15; 70%+ farm support
g) Zoning limits or prohibits the use of development rights on the sending site, and reduces the as-of-right base density in receiver sites below the level of market demand.	✓		Sending sites limited to 4 du/parcel. Base density in rec. area 4/parcel+1:15 ac.
h) Zoning provides for additional density needed to accomplish comprehensive plan goals in receiver areas only or primarily with TDR.		n.a.	Receiver area goals to be established in West Co. Plan
i) The County adopts policy that future zoning density increases in receiving areas are allowed only with TDRs.		n.a.	No specific policy established re: upzoning
j) County water and sewer plans anticipate and plan for development in receiving areas at the density needed to accommodate TDRs.		X	Public water & sewer are not planned for RAs
k) Subdivision rules and procedures ensure that receiving area infrastructure is capable of absorbing development with TDR	✓		Health Dept. septic rules require TDR projects perc

CAROLINE COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
3) Administration of TDRs is simple, efficient and predictable			
a) Buyers of TDR can obtain all approvals for their use in receiver sites with certainty and predictability, and can use TDRs for additional density as-of-right in receiver projects.	✓		TDR projects can achieve higher density as-of-right in receiver areas
b) Buyers & sellers of TDR are provided clear rules for use of TDRs in receiver areas and restrictions on using development rights on sending site.	✓		Sending sites limited to 4 du/parcel. Receiver site rules are clear.
c) Buyers and sellers of TDR are informed about the current market values of TDRs.	✓		County Planner keeps list of TDR buyers & sellers
d) Receiver areas for TDR are designated and zoned for densities needed to absorb TDRs, without uncertain discretionary or conditional use review.	✓		TDR densities are as-of-right in receiver areas
e) TDRs are allowed on a gross land area basis; the number of TDRs authorized for sale is not reduced by environmental conditions for development on the sending parcel.		X	Seller must prove that sending parcel can use number of TDRs sold
f) Arbitrary rules limiting the transfer or use of TDRs are avoided (e.g. distance between selling and receiver sites, use of TDRs in the same political districts, etc.).	✓		Only restriction is on use of TDRs in receiving areas
g) Special rules for development in receiver areas do not discriminate against TDR projects.	✓		TDR projects treated the same as non-TDR ones.
h) Land records, mapping and administration of TDRs are complete, maintained and publicly accessible.		n.a.	TDR staffing gearing up after 4/1/06 enactment
i) Restrictions on TDR sending sites are permanent, recorded in land records, used in the subdivision and zoning approval process, and sending sites are monitored for compliance.		X	TDR law requires restrictive covenant; TDRs can be restored if RA expanded
j) Lengthy delays in recording and using TDRs are avoided.		n.a.	No experience yet to evaluate with new law
k) Local government monitors and modifies TDR program as needed to improve effectiveness and efficiency, and adds receiving areas or increases their TDR capacity as needed to maintain demand.	✓		Receiver area boundaries reviewed & expandable annually
4) The TDR program has broad public support.			
a) Rural landowners are motivated to protect land and farming as an industry, more than by profit from selling land for development; and they support TDRs, easement purchase programs and zoning to preserve agricultural uses;	✓		Farming is Co's largest industry; 70%-80% of farmers supported rezoning & new TDR law
b) Real estate developers support TDRs to obtain increased density in receiving areas, and as a flexible and expedient alternative to purchasing additional land,	✓		Developers support availability of TDRs for receiving area
c) Farming, community and environmental groups support TDRs as one means to protect more land,	✓		Farming communities support land preservation
d) TDR receiving site communities accept or support the density, design quality and compatibility of development using TDRs.		n.a.	No opposition from RA in hearings; jury still out. Town payment-in-lieu of TDRs negotiations pending.
e) Elected government officials accept TDRs as method to protect land with private funds, protect equity of rural landowners, control the location and quality of growth and implement the comprehensive plan.	✓		Co. officials supported Strategic Plan, rezoning and new TDR ordinance

2. CECIL'S COUNTY TDR PROGRAM ASSESSMENT

The Feasibility of Successful TDR Programs for the Eastern Shore

Introduction

The Cecil County TDR program was adopted by the County Commissioners on August 14, 2006, along with significant changes to the zoning ordinance which reduced allowable densities for housing development in rural zoning districts, and allowed increases in density with the use of TDRs in three zoning districts in the growth corridor. The County has been studying the use of TDRs since the adoption of their 1990 Comprehensive Plan which called for a study of a TDR program. Prior TDR proposals were developed with the assistance of consultants, the Maryland Department of Planning and a citizen's oversight committee, but were not enacted. A previous legislative proposal to downzone the rural land areas in the Southern and Northern parts of the county, without the use of TDRs, was also defeated.

Interviews were conducted with County Commissioners; county planning, administrative and engineering staff; citizen and environmental leaders; developers and farmers. Several laws, plans and related documents were reviewed, including the new TDR and zoning ordinance, the 1990 Comprehensive Plan as amended in 1995, the Land Preservation, Parks and Recreation Plan, the Master Water and Sewer Plan and the Urban Growth Boundary Plan.

This assessment of Cecil's TDR program is based on the *Criteria for a Successful TDR Program* adopted by the Technical Advisory Committee for this study, the *Findings* of Phase I found in Chapter IV, and the collective experience of the committee members and principle investigators in the use of TDRs.

Summary

The Cecil County TDR program will become effective in January 2007. The ordinance adopting the program and amending the zoning rules for sending and receiving areas establish the necessary structure for a successful TDR program. The following factors are likely to affect the program's future success:

- Cecil County is likely to have a strong market for residential development in the future due to its close proximity to expanding markets in adjacent Delaware and in Harford County. While there has been a recent downturn in the housing market, as elsewhere in Maryland, it is expected to increase as a result of the Base Relocation and Closing Commission's (BRAC) decision to locate 5,224 new defense jobs and build a Technology Enterprise office and research complex at Aberdeen Proving Grounds in nearby Harford County.
- The bonus density offered for residential development with TDRs should be attractive to developers in the receiving areas, if they can locate on sites in the growth corridor with public water and sewer service.
- Downzoning in the NAR and SAR rural zones, the TDR sending area, should reduce development pressures on farmland, redirect sprawl development to the growth corridor and provide the incentive for landowners to sell TDRs instead of selling farm lots for development.
- There is a potential receiving capacity of 55,000 TDRs in the designated receiving areas (TR, SR and DR zones), and a potential supply of 23,700 development rights from the sending areas (NAR and SAR zones), so there is a theoretical surplus of demand over supply which should help the TDR market.
- Farms and forest properties in the TDR sending areas will be permanently protected with TDR easements, when landowners sell their TDRs.

In the short term, there are other factors which could limit the TDR program's success in preserving large amounts of land in the rural areas of the county, including:

- A provision in the new ordinance that allows for *concept plans* to be filed and approved by the Planning Commission under the previous zoning rules, during a 4 ½ month period between August 14, 2006 and January 1, 2007, before the new ordinance takes effect. This has stimulated a rush to gain county approval of many subdivisions in the NAR and SAR sending zones. The Planning Commission has already approved 12 *concept plans* for 187 lots in the NAR and SAR zones in September and October 2006, and the Technical Advisory Committee was scheduled to review 11 new plans for 261 new lots in the NAR and SAR at its November 1 meeting.
- The limited availability of public water and sewage treatment capacity in the growth corridor may limit new residential projects that would use TDRs. Implementation of the County's 2004 Master Water and Sewer Plan to provide sewerage service to TDR receiver areas in the growth corridor could be affected by the proposed Maryland Tributary Strategy Implementation Plan.¹⁷ This Plan establishes nutrient waste load caps within the Chesapeake Bay Watershed to meet the nutrient reduction goals established in the *Chesapeake 2000 Agreement*. This could affect higher density development with TDRs in the growth area unless the county can find and fund adequate tradeoffs or offsets to allow further expansion of treatment plants.
- While TDRs are allowed to increase density for projects on community sewerage systems, few such projects have been built in the county and the feasibility of community systems has not been demonstrated in the county.
- Organized citizen or community opposition to higher density development has caused some developers to reduce the scale and density of proposed developments below that allowed by base zoning, or the Planning Commission to deny some proposals under existing zoning density limits, leading to an underutilization of land in the growth corridor.
- Farm community support for or opposition to downzoning and the TDR ordinance is divided, based on interviews and comments from farm owners at the Planning Commission and County Commission hearings on the proposal.
- All of the implementation structure, rules and procedures are not yet in place to support immediate TDR transfers. Potential buyers and sellers of TDRs are skeptical that the market will support a market strong enough for landowners to sell TDRs at a reasonable price.

As a result of these and other factors, the new Cecil County TDR program appears to meet most of the *Criteria for a Successful TDR Program* used for this evaluation, as discussed below and illustrated in the attached evaluation chart, page 50. TDR programs are rarely complete or perfectly designed when they are initially adopted, and are typically modified to adjust to the market. TDR purchases are often delayed when affected by market cycles. The most important first step in meeting the land preservation goals of successful TDR programs has been to stabilize or slow the rate of development of farms and forests in designated sending areas, until the market for TDR sales can develop. Cecil County has taken this step with the adoption of the new ordinance.

Applying the *Criteria for a Successful TDR Program*

The following is an assessment of how Cecil County's TDR ordinance and its planning, zoning, economic and political context relate to the Criteria outlined in Chapter IV.

Criterion 1.

¹⁷ Maryland's Tributary Strategy Statewide Implementation Plan, September 2004, www.dnr.state.md.us/bay/tribstrat

TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.

Supply and demand

Cecil County's population grew by 14,604 people between 1990 and 2000 or 20.5%. This was an annual rate of 2.05% compared to 0.75% in neighboring Kent County. It was the largest increase in population of any county in the Eastern Shore assessment area. While most of this increase was in the unincorporated areas of the County, the rate of growth in the incorporated towns (34%) was higher than outside of towns (15%). During this period, 60.2% of development occurred outside of Priority Funding Areas,¹⁸ but Cecil County guides new growth to the Comprehensive Plan's County Development Districts, which are larger than the PFAs and include significant portions of the growth corridor outside of municipalities.

In September 2005, the Maryland Department of Planning estimated that Cecil County's population grew to 97,300 by 2005, representing a 13% increase over 2000. By 2020 they project a 56.5% increase over the 2000 population of 85,951 to 134,550,¹⁹ an average annual rate of 2.83%, higher than any other Maryland county.

Cecil County's stretch of the I-95 corridor remains one of the least developed segments of the interstate corridor between New York and Washington, with large expanses of undeveloped farm and forest lands, in contrast to patterns of dense development east of the county in Delaware extending southwest of Wilmington. Some of those interviewed expect this to change as more people want to move to the county from Delaware, Pennsylvania and other Maryland counties, and with the expansion of jobs and related employment at the Aberdeen Proving Ground from BRAC. They worry that the pattern of high density development in Delaware will continue through Cecil County to the river, and that development will also expand into the county from Havre de Grace and Aberdeen Proving Grounds south of the Susquehanna.

Aberdeen Proving Grounds is about eight miles south of the Cecil County border on the north shore of the Susquehanna River. It is scheduled to receive 5,224 new technical defense jobs,²⁰ a new Technology Enterprise office and research complex of about 2 million square feet of new building space, and a \$300 million terrorism training facility for law enforcement officers. The new complex is estimated to bring an estimated 30,000 new high-tech government and private sector jobs to Aberdeen by 2012.²¹ Many more jobs are expected to come to the region through defense contracting and related industries outside of the Army base.²²

In 2005 the Cecil County Planning Commission processed 121 plans for development in the county, and approved 78 of these.²³ Most plans approved were preliminary or concept plans, providing a longer-term view of future development activity. Of those processed in 2005, 31 were final plans of which 17 were approved authorizing 187 new lots on 860 acres of land. About 70% of the lots approved in final plans were located in the TDR sending zones (114 in NAR, and 16 in SAR). Only 5 approved lots were in one of the new TDR receiving zones (SR). The plans that

¹⁸ *Smart Growth: How is Your County Doing? A Report on the Upper Eastern Shore*, 1000 Friends of Maryland

¹⁹ Maryland State Data Center, <http://www.mdp.state.md.us/Msdc/>

²⁰ *Challenges of a Growing Maryland, Balancing Land Use and Environmental Decisions*, MDP & MDE, 2006

²¹ *Army Approves Office Park for Aberdeen*, Washington Post, October 23, 2006

²² *BRAC Presentation, Baltimore-Washington Chamber of Commerce*, Mike Paone, MDP, December 14, 2005.

²³ Planning Commission Activity Spreadsheets, 2005, <http://www.ccgov.org/>

were not approved were disapproved, tabled or withdrawn, or requests for extensions were granted.

A September 2004 review of Cecil County development proposals by *Save Cecil County*, a non-profit organization dedicated to controlling growth, listed eight major development proposals in various stages of the approval process, totaling 2,162 dwelling units on 1,102 acres, in addition to three major projects under development, totaling 2,720 units. A County Office of Planning and Zoning map of Proposed Major Subdivisions dated February 9, 2006 shows about 120 proposed subdivisions throughout the county in various stages.

While the perceived increases in development pressures to accommodate BRAC and other forces may be on the near horizon, the number of development plans approved or housing units recently authorized for construction do not appear to indicate that the anticipated development boom is yet underway in the county. Many more plans are being proposed than are being approved, and according to developers interviewed for this study; there is currently a slow-down in the housing market, as there is elsewhere in the State.

As one developer described during the interviews:

“If you look in this County in the last three or four years, there has been a reduction in actual building permits issued. This County has not been suffering from tremendous growth. The problem is that the proposals that everyone talks about, such as 500 units here or 1000 units there; none of them are approved. None of them are even underway. It takes one to four years to even get the permits. We are now into a different cycle for housing, and the County actually missed a cycle.”

There were 743 new housing units authorized for construction in the county in 2005, the lowest number in the last six years. The highest number to be authorized during this six year period was 1,089 units in 2003. For the first six months of 2006, 260 housing units were authorized in the county.²⁴

For the Planning Commission and County Commissioner hearings on the TDR ordinance and rezoning, the Office of Planning and Zoning estimated a potential supply of 23,700 development rights from the sending area (NAR and SAR zones); and a potential receiving capacity of 55,000 TDRs in the designated receiving areas (TR, SR and DR zones).

The planning staff explained how this was calculated:

“We used Maryland Property View, and we looked at all the parcels that were over 50 acres in the SAR zone and NAR zone and got the total acreage. We divided that acreage by the one TDR per three acres in the south, and the one TDR per five acres in the north. We did not check soil capacity for them. Some of those parcels may not qualify, because of soils. We didn't do a soils analysis.”

About 63% of the County is in the TDR sending area (NAR: 37.86%; SAR: 25.07%) encompassing about 139,000 acres. In the NAR and SAR sending zones, there are 621 parcels 50 acres or larger that would qualify for TDR sales, totaling 84,650 acres, not counting parcels that are already protected with easements.

The planning staff also estimated that the TDR receiving zones encompass 31,420 acres of land or 14.23% of the county. There are 8,723 acres in unimproved lots in the receiving zones. They further explained:

²⁴ Ibid, Maryland State Data Center

“In the receiving areas, we looked at properties that were 10 acres or larger in the TR, DR and SR zones, and multiplied that acreage by the potential number of units for each category to get the 55,000 figure. Some people would argue that that is too ambitious, because not all of those areas are scheduled to be served by future water and sewer service. The counterargument to that is that they could potentially be added by amending the Water and Sewer Plan maps. It would just take an amendment to the Water and Sewer Plan maps to qualify if it's not already served by the water and sewer facilities. To leave the areas out that are not in a designated water and sewer service area would be limiting ourselves too much, because in an area on the map that is not in now, someone might come in and say ‘I want to do a shared facility in order to provide the sewage disposal for my project,’ and if they amend the map then they would qualify. We wanted to make sure that we didn't have a glut of TDRs that would drive the prices down.”

However, some developers are skeptical of the strength of demand for TDRs and the County's calculations. One said,

“If you start with the fact that there are existing zoning regulations in the growth corridor of this County, and you look at what all of that can support relative to residential or business units or whatever you want in a development corridor, I think you'll find that there is a significant supply of land that far exceeds the demand.”

Another was pessimistic about the current market, but also appeared optimistic about the future:

“Today the market is going in the tank. Right now, broadly speaking, the market is not what it was six to 12 months ago. I have projects where I deal with many of the national builders who come in and buy the subdivisions; the Ryans, the Richmonds, the normal suspects. They are all pulling out, backing off, and they are dropping contracts left and right now, because the market is dead. They're public companies and their bottom line is reflecting that they cannot park their money in a subdivision and come back several years from now. The whole dynamic of the market is changing. While in some ways, this may not make any difference, but if no one is going to buy them, what difference do TDRs make anyway?”

“In a good market, or in a BRAC market or a market that is robust, if the question is whether there will be buyers at six units per acre instead of four units per acre; hell yes. If you can get it to the point where you can get the project recorded, and overcome all of these institutional problems, you can build it and they will come. I don't think there will be resistance to six units per acre instead of four units per acre. The market will take care of itself.”

“The townhouse element is growing and over time as public transportation, rail lines, and all the connections east and west and north and south become available, those sorts of things are going to take care of themselves. I don't doubt for a second that in the right market a TDR program could work here. But creating that market and getting it into the market in such a way that it has a robust start, is not something we have done to this point.”

TDR values

Since the TDR program did not become effective until January 2007, no TDR transfers had been made, so the initial values of TDRs in Cecil County have not been established. One of the concerns most frequently expressed in the public hearings on the TDR ordinance and rezoning, was about the potential loss of land values to landowners in the SAR and NAR sending zones related to the reduction in housing density permitted after January 2007. As one farmer who attended the hearings characterized this sentiment:

“A lot of those people that spoke against it spoke from their wallet and not from their hearts. Deep down, those who stood up and spoke against the program were against downzoning. That was the only thing in the whole program that they were against. They were scared to death they were going to lose the value of their farm.”

However, from his personal observation and experience this farmer also said:

“A good example of what has happened there (in Kent County) is a big 400 acre farm near us that is all in one large block of tillable land under irrigation. It sold the first time several years ago for \$2,500 per acre, when it was zoned for one house per 10 acres. The next person that bought it paid about \$5,000 per acre for it, owned it for three years, and turned around and sold it for about \$8,000 per acre. There is now a contract on it for \$13,000 an acre. While he owned it, they changed zoning from one in 20 acres to one in 30 acres, and the price of that land still went up. You cannot tell me that downzoning hurts property values here on the shore.”

Another farmer interviewed for the study expressed concern about the affect of the downzoning on the State’s offers to landowners for MALPF easements:

“We asked the State tax assessor to talk to us, because we have about 40 farms on the MALPF list and most of them want to sell easements. We asked him what the downzoning would do to the value of the offers: ‘Will the downzoning make the offers go down?’ He said, ‘Oh definitely, because it will not be worth as much.’ I’m scared of that.”

However, the MALPF program no longer does “before and after” appraisals for easement purchase values. The after-easement value is not based on the number of development rights remaining on the farm. The MALPF web site describes the approach:

*“The Foundation calculates an Agricultural Value for the property, which is its agricultural production value. The Agricultural Value is determined by a formula that calculates land rent based on the soil productivity OR the five-year average cash rent in the county, whichever is lower. The Easement Value of the property is then calculated by subtracting its Agricultural Value from the Fair Market Value.”*²⁵

The question is whether the “before” Fair Market Value of the SAR and NAR lands will be reduced as a result of downzoning. That is a topic of great debate throughout the Eastern Shore today, one that is being examined by the Maryland Center for Agro-Ecology.²⁶

In general, the State has not seen an appreciable reduction in MALPF offers in counties that have downzoned their farmland. Some of the highest easement offers have been in such counties. Easement prices are also typically based on a competitive bidding process within the same county for ranking easements discounted below the appraised value. The State appraisal review staff for the MALPF program indicated that similar concerns about the loss of land values in the Critical Area after the enactment of the Chesapeake Bay Critical Areas Act in 1984 were unfounded, because land values increased dramatically in the Critical Area relative to other adjacent lands

²⁵ <http://www.malpf.info/fact2.html>

²⁶ Downzoning: Does it Protect Working Landscapes and Maintain Equity for the Landowner? Sarah Taylor Rogers, et.al., Maryland Center for Agro-Ecology, Inc., December 2003; Downzoning and Rural Land Markets: A review of two recent studies in Maryland and New Jersey, Dr. Jeffrey Michaels, et al., Maryland Center for Agro-Ecology, Inc. July 2006.

after enactment. Earlier studies projected both vacant and residential parcels of Critical Area land would increase in value after the enactment of the Critical Areas law.²⁷

Criterion 2.

The County has strong Comprehensive Plan and Zoning policies that support use of TDRs.

Cecil County's TDR program was adopted August 14, 2006 in response to suggestions in its Comprehensive Plan to consider TDRs, followed by a 2003 consultant's study of TDRs,²⁸ working with a local citizen's oversight committee. The Comprehensive Plan adopted in 1990 provided an excellent description of TDR programs and outlined the characteristics of successful growth management programs based on transferable development rights. These characteristics correspond closely with the Criteria for a Successful TDR Program found in Chapter IV of this report. The Plan adopted a farmland preservation goal of 30,000 acres in the Comprehensive Plan's Resource Protection Districts, and 25,000 acres in the Rural Conservation District by the year 2025, for a total goal of 55,000 acres, or 24.66% of the county land area.

The Plan recommended that: *"a TDR program be implemented to protect agricultural and forest land of the County where it can be demonstrated that the use of these resources for farming and forestry is feasible over the long term. This recommendation should be implemented when new sewers and roads are programmed for water service areas."* The plan also recommended a public education program on TDRs be designed and implemented.

The County Comprehensive Plan was amended in 2005. In May 2004 the Planning Commission transmitted recommendations on the draft Comprehensive Plan amendment to the Board of County Commissioners, one of which was to:

*"Implement agricultural protection by redrawing boundaries to reflect prime agricultural lands, reducing zoning densities in the northern and southern agricultural residential districts, adopting both transfer and purchase of development rights programs, and continuing aggressive progress toward achieving the County's agricultural land preservation goal of 55,000 acres."*²⁹

However, following the November 2004 hearing, the Board rejected the recommendation to lower residential development densities in the Rural Conservation and Resource Protection Districts. This rejection was reversed by the August 14, 2006 action of the Board to rezone the NAR and SAR zones.

The County's 2005 LPPRP³⁰ adopted the following program development strategy for agricultural land preservation:

- Adopt a Transfer of Developments Rights (TDR) Program,
- Provide attractive development opportunities in designated growth areas,
- Increase State funding for the MALPF program,
- Create a County Purchase of Development Rights (PDR) program,
- Consider providing local incentives for donated easements,
- Ramp up the pace of easement acquisitions,
- Reconsider permitted rural residential development densities if other steps are not succeeding,
- Increase business development assistance, marketing capacity, and access to financing and capital for resource-based industries.

²⁷ *The Impact of Regional Land Use Controls on Local Real Estate Markets: The Chesapeake Bay and The New Jersey Pinelands*, W. Patrick Beaton, Center for Urban Policy Research, Rutgers University, New Brunswick, NJ, July 1988

²⁸ *Transfer of Development Rights Report*, URS, for the Cecil County Office of Planning and Zoning, February 2003

²⁹ Cecil County 2005 Land Preservation, Parks and Recreation Plan (LPPRP), May 2005

³⁰ Ibid, LPPRP

In 2004 Cecil County supported a goal of preserving 50% of the land outside of locally designated growth areas by 2010 by endorsing the *Eastern Shore 2010* inter-county agreement, sponsored by the Eastern Shore Land Conservancy.³¹ This would be 61,515 acres of land or 27.6% of its total land area of 222,990. As of February 2006, 19,194 acres of land was preserved in the county with easements, and 14,868 acres was in publicly owned parkland or open space, for a total of 15.3% of the county land area.

The Cecil County TDR Program is designed to protect the most valuable rural lands in the County, and some of the most valuable land in Maryland for resource use.

The 2002 Census of Agriculture counted 77,089 acres of land in farms in Cecil County, down 11 percent from 86,419 acres in 1997. The number of farms also declined during that period, from 510 in 1997 to 468 in 2002.

Almost 75 % of the land in farms is cropland. The leading crops are corn and soybeans. The market value of agricultural products sold by Cecil County farms increased from \$58.7 million in 1997 to \$68.6 million in 2002, including crops, (\$30.2 mil.) and livestock (\$38.4 mil.). Cecil County has several large nursery and greenhouse farms, and is a center for thoroughbred horse farms and the racing industry around the Fair Hill Training Center. It is also home for the 2006 Kentucky Derby winner *Barbaro*.

The SAR TDR sending area in the southern part of the County below the C&D Canal has one of the largest concentrations of MALPF easements of any region in the State, and a designated Sassafras Rural Legacy Area (RLA). The NAR sending area has fewer MALPF easements but has several Agricultural Preservation Districts, a designated Fair Hill Rural Legacy Area, and the State's 5,613 acre Fair Hill Natural Resource Management Area, managed by DNR.

In order to be eligible to sell TDRs landowners in the SAR and NAR sending zones must have 50 acres of land with 50% Class I, II, or III USDA classified soils, or 50% woodlands in Group 1 or 2 soils (similar to MALPF requirements).

The provision of TDRs helped win a majority County Commissioner support for downzoning of the NAR and SAR rural zones, which had been defeated in 2004 without TDRs.

Under the new ordinance, TDRs are only allowed to be sent to eligible receiving areas in the SR, DR and TR zoning districts within the county's growth corridor. As described in Table C.1, maximum allowable density in the NAR sending area is now 1 du/10 acres (reduced from 1 du/5 ac.), and in the SAR sending area it is now 1 du/20 acres (reduced from 1 du/8 acres or 1 du/5 acres with clustering). In both the NAR and SAR zones, landowners must have a minimum of 50 acres to sell TDRs, and must cluster any development on the sending property on 40% of the parcel, restricting the remaining 60% for agricultural or open space uses.

While developers are also able to obtain increased density in the receiving zones with Planned Unit Development (PUD), only one PUD has been developed in the county in the 13 years since the ordinance was established in 1993. This PUD was developed at a density below the allowable base-level zoning, in order to obtain design flexibility and a mix of uses and housing types. PUDs are not expected to compete with TDRs for achieving higher density in future developments in the growth area. However, there was at least one case of where a developer initially proposed a PUD for increased density and mixed use, only to find the process so cumbersome that they applied for and received a rezoning to accomplish their development plan. One of those involved described the problem:

³¹ *Eastern Shore 2010: A Regional Vision, Tools Available for Attaining the Eastern Shore 2010 Land Protection Goal*, Eastern Shore Land Conservancy, January 2004.

“I think what has happened as a practical matter is that the development community does not utilize the PUD ordinance because of its cumbersome nature. We actually went to the planning office about a year and a half ago with a proposal for a new PUD ordinance. It got nowhere because there was no appetite for changing anything. It gets back to the question of why we aren’t looking universally at the codes in this whole thing. Why can’t we use the TDRs as part of the PUD, and not make them special exceptions, but matters of right? They should give us a mechanism or framework for these things.”

Water and sewer service

In both the public hearings and the interviews for this study, the limits of public water and sewer infrastructure was the most often cited problem with implementation of the County’s new TDR program. The TDR ordinance requires that “all developments using TDRs shall be served by community facilities,” meaning public water and sewer service or community sewerage and water systems. As one official described:

“The main thing that I would like to do if I could, is to have all of the water and sewer capacity that we need in the growth area. Because, over the last 16 years we have never been able to fully implement the Comprehensive Plan as it should have been implemented because of the fact that our growth area has not been able to accommodate growth as it was envisioned in 1990. Consequently, more growth has occurred in the rural areas than would have occurred if development would have occurred at the densities permitted in the growth areas. Because of that, the plan has only been half as effective as it could have been. We have the growth pressure. It is coming, and it will always be steady, and the only place for people to go now is at low density on well and septic systems.”

Maryland’s Tributary Strategy to meet the *Chesapeake 2000 Agreement* could limit further expansion of some wastewater treatment plants, due to nutrient caps in the main tributaries of the Chesapeake Bay in Cecil County. Full implementation of the Enhanced Nutrient Removal (ENR) Strategy is designed to reduce nitrogen by 69% and phosphorus by 69% from 1985 levels. An annual load cap on nitrogen at each major treatment plant is established based on a 4 mg/l annual average concentration and design flow, and the approved design capacity of the plant. The point source strategy requires all wastewater treatment plants to maintain established nutrient waste load caps within the Chesapeake Bay Watershed. The County’s official comments on the Implementation Plan highlighted the potential affect of these caps on future development in the growth corridor:

*“Cecil County expressed concern that loading caps at the wastewater treatment plants would force development onto septic in the rural area, and greatly impact their ability to concentrate growth, avoid sprawl, and preserve their rural areas. A mechanism is needed to allow the concentration of growth in designated areas and provide offsets for increased loads at wastewater treatment plants.”*³²

One County engineer further explained:

“This may be the most significant limiting factor that will affect what we are going to be able to do to manage growth in the growth corridor. It is a potentially devastating program for Cecil County. On its face, it certainly could have the effect of saying our designated growth area is closed for business. That means that the inevitable growth pressure that will come will go to the farms and forests of the rural area, and will increase development of those areas at a greater pace than it otherwise would.”

³² http://www.dnr.state.md.us/bay/tribstrat/implmentation_plan.html

“For example, our Northeast River Advanced Wastewater Treatment Plant (aka Seneca Point), our key plant which serves the whole central part of the County, based on our Master Water and Sewer Plan of 2004, is capped at 4 mg per liter of nitrogen. We know the limits of technology for nitrogen are now 3 mg per liter of nitrogen. We could treat down to that level, so the idea is that they have allowed a little bit of room for expansion to go from 4 mg per liter down to three. The reality is that we are now listed at 2 million gallons per day design capacity. We could actually go to 2.67 million gallons per day design capacity and then we are done. We are prohibited from building a larger plant, because of the nutrient cap. The current plant in North East is running at a little over 1,000,000 gallons per day. It has about 600,000 gallons per day already allocated to projects that are as yet un-built, so there is only a little capacity left, but it is running out.

“The result is that the residential, commercial, and industrial development community is starting to get very nervous. The major concern is that residential developers that we have been working with for nine years to steer them toward the designated growth areas, will now say that we are going to be closed for business in the growth areas. They will go back out to the rural residential areas, which is exactly what we don't want to have happen.”

The county is now working to develop a program of nutrient trading or nutrient offsets to allow additional expansion of the County's wastewater treatment plants to overcome these problems. Under the MDE rules and the Tributary Strategy, if a jurisdiction is able to find some nutrient reduction somewhere else in the tributary watershed, they can then get part of that nutrient reduction as a credit, allowing further expansion of wastewater treatment plants in the tributary.

A county planning and zoning officer described the current situation as follows:

“A serious limitation that is likely to impede the full implementation of this plan is the lack of viable receiving areas. The reason I say that is that one of the things that a TDR program requires is that in order to get to the four units per acre in the SR zone, or six units per acre with TDRs, or 12 to one with TDRs in the DR zone, and six in the TR district, is that it is either already in an area presently served with public facilities, or that it is planned for such facilities. And in those areas that I mentioned, SR, DR, and TDR, we are severely limited in the provision of water and sewer services that could accommodate those higher densities. So consequently, demand is not going to be there immediately for TDRs.”

The new TDR ordinance also allows TDRs to be transferred to property served by community facilities in the SR, DR and TR zones. In August 2005, the County Commissioners adopted new rules for Community Sewerage Systems,³³ defined as “shared water or sewerage systems which serve a minimum of fifteen lots with water or sewer systems located on parcels owned in common by the users or the controlling authority.” Under these rules, developments using shared facilities cannot exceed a density of 2 units per acre in the SR zone, or 4 units per acre those in the DR zone, unless the projects use TDRs, which enables them to go to a maximum of four units per acre in the SR zone and 12 units per acre in the DR zone. This opens up the opportunity for significantly higher density in receiving areas not served by public water and sewer service, potentially increasing demand for TDRs.

Developers and County officials said that only one major community sewerage system has been proposed, at the Reynolds Farm, a project that has not been finalized and has an uncertain outcome. In the 1980s one community sewer system with a spray irrigation field was allowed on a property called the Highlands, east of Fair Hill on the Delaware border, but the project failed because they had a 30 acre spray field and 120 residents. This resulted in the extension of an

³³ Section 175, County Code

existing sewer line from Meadowview to provide sewage treatment to the homes on the failed system. The Master Water and Sewer Plan of 2004 lists 36 Private Community Sewerage Systems, all on septic systems or lagoons serving from 8 to 385 units.

There are also cost factors and other constraints for the use of shared or community sewer systems that may limit their use in TDRs receiving area projects. MDE has established 8 mg/l as the design point for total nitrogen for such systems, to better ensure that the groundwater nitrate level will be protected. The code also requires a minimum of 15 housing units for any development using a community sewerage facility, and a minimum of 10,000 square feet of suitable land area to be set aside for each dwelling unit for sewage disposal, and requires clustering on 30% of the development parcel. While the land area set aside for sewage disposal can be within the 70% of the land area, it is required to have enough area for the initial disposal field and two replacement fields. One official gave an example of the effects of these requirements:

“Now MDE is saying that if you're going to have over 2000 gallons per day or about eight houses, you need a wastewater treatment plant. You now have to treat for 8 mg per liter of total nitrogen -- to be protective of groundwater. That changes the whole world. Now, if you start talking about building a BNR wastewater treatment plant for 15 units, that amounts to 3,750 gallons per day, a pretty small wastewater treatment plant. You're probably going to have to pay about \$30 per gallon just to build the thing. So that's \$120,000 just to build it, and then provide for the field, and that might be a low number. To build a BNR facility that small is very difficult.”

“It is not obvious to me that townhouse communities or garden apartments would be suitable for a shared or community facility. It just seems to me that they would run out of land so fast at 10,000 ft.² per unit for septic. But at two units or four units per acre, it is very possible that it could work on community facilities. If you had a 60 unit subdivision, you would need 600,000 ft.², or about 14 acres of percolable land. I think there is an upper limit on the density that a community facility project can reasonably handle, in terms of sewer, and probably water too. At some point, you are going to be hard-pressed to justify a water recharge area to pull that much water out, and clustering just doesn't get you very far.”

Criterion 3.

Administration of TDRs is simple, efficient and predictable.

The administrative structure to implement the County's new TDR program is not fully in place, although the Office of Planning and Zoning has until January 1, 2007 before the law becomes effective.

The new ordinance does not specifically provide that a developer who buys TDRs has the right to the maximum additional density allowed with TDRs in the receiving area project, if all other requirements of the code are met. The experience of one developer suggests that Planning Commission approvals are discretionary whenever citizen opposition is presented in public hearings on a project involving cluster development:

“Under the current zoning ordinance there is a provision for cluster development. It says you can vary the lot size if you can achieve greater design goals and open space. If you produce a nice plan you can have smaller lots and increase the density beyond what the lot size would otherwise allow. So we have this property that we propose to cluster development on, with water and sewer, in the S1 and W1 sewer and water plan districts. It has SR zoning. We have a concept plat approval for a 92 unit project. We're in the development corridor with all conditions met. Before TDRs or this other stuff, we go to the planning commission. At the planning commission three neighbors appear, with the principal complaint that this is not

consistent with the surrounding neighborhood. They say that people here live on one and two acre lots and it would not be consistent to approve this type of development in their neighborhood, because it would create a different community. The planning commission agreed, and failed to approve the cluster. So I'm back with a 39 unit standard lot project that meets the minimum requirements of code, and the neighbors still object to it. Now suppose that I go out and find TDRs, and I will end with 25 TDRs that I'm going to put on top of the base density, and those same three people show up complaining because it's inconsistent with the surrounding neighborhood and I get turned down. There is a real case example of the specific issues with implementation of TDRs."

Clearer definitions of buyer's rights to use TDRs in designated receiving areas may be needed to gain the predictability or the certainty needed for a TDR market to develop.

The Office of Planning and Zoning or another entity should also prepare to maintain and share public records on the number, location and value of TDR transactions to help a new TDR market develop. Successful TDR programs within a strong market are often aided by either a public agency or a TDR bank that informs both buyers and sellers of the current values of TDR transactions.

The new code requires the Office of Planning and Zoning to send a certificate of availability of development rights to property owners that qualify as a sending area, upon request, and asks landowners eligible to sell development rights to notify the Office of Planning and Zoning of the transaction and the number of development rights sold, when they sell such rights. It does not provide for a "certificate of intermediate transfer" or official recordation of TDRs that might be sold prior to the use of the TDR in the receiving project. Such certificates required in other successful TDR programs allow speculative purchases of TDRs, increasing the predictability and value of the TDRs to the sellers. If a landowner who wants to sell TDRs has to wait years to know if they are going to be approved on the receiving parcel, the uncertainty and delay is likely to discourage sales.

An earlier draft of the TDR ordinance would have required only restrictive covenants to protect the lands from which TDRs were sold, at the time the development project using these TDRs is recorded. The final law now requires perpetual TDR conservation easements, greatly enhancing the permanence and predictability of the restrictions on sending parcels.

TDR easement monitoring and enforcement rules and their administration are not yet in place but are expected to be developed as TDR transfers are approved and the market develops. The Office of Planning and Zoning is aware that this needs to be in place before many transfers occur. They are also aware that the program will need to be monitored, adjusted and amended if needed to ensure that the goals of land preservation and directed growth are being met, and that the demand for TDRs is maintained.

"Yes, and that was brought up in the public hearings. It's not a perfect program yet, and we may need to go back and fix it if it's not working out as it was intended to do, and some things may be too cumbersome in another area or whatever. Until someone actually goes through the process for the first time, we won't know that."

Criterion 4.

The TDR program has broad public support.

More than half of the speakers that testified in the Planning Commission and County Commissioner public hearings on the TDR program, who were identified as owners of farmland, were in favor of the program. While the number of people who testified may not represent the

same proportion of those in the farming community who were for or against the proposed changes, the Commissioners received several points of view. One member of the County Farm Bureau explained how the organization tried to conduct a survey on the subject, but encountered problems:

“We took a survey earlier on, but we didn’t take a position. It is generally the Farm Bureau’s policy not to take a position on a policy issue. You need to have a written position paper. The majority of the organization has to vote in favor or against the issue before we can develop that. I couldn’t get up and say that the Farm Bureau was against this. There were various people involved in a committee that studied the TDR program, including developers, farmers, landowners, and then last fall some of us got busy with harvests and couldn’t participate in all of the meetings. We wanted a plan that would satisfy the farmers and if the developers didn’t like it, it wouldn’t be much good either way. A lot of that seemed to be ignored. We went back and prepared recommendations a second time. The main concern seems to be that anyone that had 50 acres or less was out; they didn’t qualify to sell TDRs. There are several small farms here, including three that I farm that are less than 50 acres. For these landowners, there are no options.”

An earlier draft of the proposed TDR ordinance that required a minimum of 100 acres to be eligible to sell TDRs in the NAR and SAR zones was modified to require a 50 acre minimum, partly in response to this concern from farmers.

As discussed under Criterion 1 above, several landowners in the downzoned areas and representatives of the real estate industry opposed the adoption of the program primarily because of the perceived loss value with downzoning, and the uncertainty that water and sewer service in the receiving zones could accommodate the higher densities with TDRs. They were concerned that TDRs would not be used in the growth area and would have no value to the sellers.

Several farmland owners in the southern part of the county, in the SAR zone below the C&D Canal, were in favor of TDRs and the rezoning in order to limit sprawl housing developments and to maintain the region primarily for farming. Several were younger farmers who took an active role in communicating to the County Commissioners who voted in favor of the ordinance, similar to the recent experience in Caroline County. In Caroline, a group of young farmers took the lead in advocating improvements to their TDR ordinance and downzoning to limit major subdivisions in agricultural areas. One of the younger Cecil County proponents for rezoning and TDR explained why:

“My theory about everything south of the C&D canal is that there are farmers coming down from Pennsylvania, New Jersey, the Western Shore and Delaware. They see Kent County as a safe zone. Because I have a farm in Kent County, I see it. If you talk to any of those farmers, they will tell you, ‘I came here because of the zoning; I know there is no development in this county so I can keep on farming.’ That is why they are here. Southern Cecil County could be the same safe haven for farming. These farmers are selling their land elsewhere and paying big money for land here. They’re paying what I call big money for farming.”

The TDR ordinance and downzoning was enacted on August 14, 2006 by three votes of the five member County Commission.

Many of those interviewed in this study, and others that testified before the Planning Commission and County Commissioners opposed adoption of the TDR program until there was water and sewer service in place to support higher density development in the receiver areas, and until the housing market could support a strong market for TDR purchases. However, those that supported the program, and who unsuccessfully supported prior efforts to downzone the rural areas of the

county, thought otherwise. They recognized that successful implementation of the program will take time. For example, one farmer said:

“You are not going to start off with a perfect program right off the bat. You have to pass something and then start tweaking it from there, because if you try to pass a perfect program right off the bat, you'll be there 10 years from now and still not have a program.”

Another citizen activist said:

“My thought was - get something out there in place and sell it to the public, build an implementation plan, and deploy that plan. Put it in action, get some TDR sold, see how it works, analyze it, and put together a public work group with citizens, developers and everyone that is involved, and review what is actually happening. Then go back, and figure out as we go along, almost on a scheduled basis, fix it, change it, modify it to get whatever you need to do to make it work. There is no point to have a TDR program if you don't make it work. That's why I was in support. We need to get something in place and get started, because, since 1990, there has been a Comprehensive Plan that says let's have a TDR program.”

Recommendations to enhance the feasibility of the TDR Program

In 2007 Cecil County should consider enhancements to its TDRs ordinance and other measures to make TDRs more attractive for future development in the growth area and enhance the value of TDRs to farmers in the NAR and SAR zones. These include:

- Adopting a policy to require all increases in residential or commercial density (i.e. upzoning) in the future be permitted only with the purchase of TDRs, including lands annexed by municipalities resulting in an upzoning. Calvert, Charles and Montgomery Counties have adopted such a policy and it has been a key to maintaining demand for TDRs.
- Developing interjurisdictional agreements with municipalities that would provide incentives for incorporated towns to use TDRs from the county on municipal water and sewer service. The new ordinance already provides that: *“Development rights may be used by developments in incorporated municipalities provided the Towns adopt mechanisms to utilize these rights within the Towns.”*³⁴ Several counties in Maryland, including others on the Eastern Shore, are working with municipalities to encourage interjurisdictional TDR transfers, or payments-in-lieu of TDRs to fund agricultural easements and open space purchases around Towns. While interjurisdictional TDR agreements and transfers have been successful in Colorado, Washington and other states; only one such transfer was identified in this study, between Montgomery County and Gaithersburg, after the town annexed a county TDR receiving area.
- Increase funding for matching MALPF and Rural Legacy easement purchases, and consider establishing a County Purchase of Development Rights (PDR) program to supplement TDRs, especially in slow market cycles. Other counties with successful TDR programs use several land preservation programs in combination with TDRs to provide options for landowners who want to preserve their lands. As a potential fund source, review the use of development impact fees to fund easement and open space purchases and seek legislative support for enacting such fees. As one developer stated:

“I would love to see TDRs work, but we would rather contribute money to a fund for the County to buy development rights to save farming. That's why we are hoping that the State Delegation will help us come up with a program, because the State Delegation controls that.”

³⁴ Article XI, Part V, Section 246, 8. k.

- If the market for TDRs does not develop when the real estate market rebounds with BRAC, consider lowering the base-level zoning densities for residential and commercial projects in the TR, SR and DR zoning districts, and then increase the bonus density for residential and commercial projects with TDRs to achieve market density. For example, Calvert County downzoned both rural and growth area zoning districts by 50% in 1999 and again by 50% in 2003, allowing a return to higher densities only with TDRs. As one developer in Cecil County said: *“Even though I hate to say it, the only way to make that work is to downzone the whole County, and start from scratch.”*
- Severely limit the approval of concept plans for new subdivisions in the SAR and NAR zones based on the pre-2007 zoning. Base approval of concept plans in these zones on the clear policies of the Comprehensive Plan encouraging farming and forestry uses in these zones, and the location of new residential growth to the I-95/Rt. 40 Growth Corridor. Establish a short performance period for any concept plans approved before 2007, so that subdivisions “grandfathered” during this period cannot be held over until the real estate market for low density subdivisions in rural zones improves.
- Work with local community groups in the designated TDR receiving zones to encourage acceptance of higher densities of development allowed with TDRs. Encourage context-sensitive Traditional Neighborhood Designs of new communities with environmental amenities to overcome local opposition to TDR densities. Develop or acquire model design guidelines for use in TDR receiver neighborhoods. Consider establishing minimum and maximum density limits in TDR receiving zones, to prevent underdevelopment of the growth corridor and maintain a demand for TDRs.
- Consider amending the TDR ordinance to permit TDR sales and recordation as “certificates of intermediate transfers” permitting speculative purchases of TDRs and protection of the sending parcels, prior to their approval and recordation in the receiving area plats. This would also encourage private “banking” of TDRs.
- Clarify that TDRs can be used “as-of-right” to increase allowable density to the maximum allowed with TDRs in the SR, DR and TR receiving zones, so that they will have a predictable use and value.

TABLE C.1 - CECIL COUNTY ZONING & TDR CODE - CHANGES 8-14-06

COMPARISON OF NEW & OLD ZONING AND TDR RULES	
Zoning Rules prior to 8/14/2006	Zoning Rules adopted 8/14/06, effective 1/1/2007
Northern Agricultural Residential (NAR)	
Density 1 du/5 acres major subdivision (30 ac.+ parcels) or 1 du/3 acres with 60% open space with 15% common open space for subdivisions with 10 or more lots	Density (50 acre minimum TDR sending lot) 1 du/10 acres major subdivision 60% open space is required with 15% common open space for subdivisions with 10 or more lots or payment in lieu. Recreational amenities provided by developer.
Southern Agricultural Residential (SAR)	
Density 1 du/8 acres major subdivision (50 ac.+ parcels) or 1 du/5 acres with 60% open space with 15% common open space for subdivisions with 10 or more lots	Density (50 acre minimum TDR sending lot) 1 du/20 acres major subdivision 60% open space is required with 15% common open space for subdivisions with 10 or more lots or payment in lieu. Recreational amenities provided by developer.
Suburban Residential District (SR)	
Density 2 du/acre with community facilities 4 du/acre with community facilities and PUD	Density with TDR 4 du/acre with community facilities minimum 10 acre parcel 30% common open space (15% if improved)
Development Residential District (DR)	
Density 4 du/acre with community facilities 6 du/acre with community facilities and PUD	Density with TDR 12 du/acre with community facilities minimum 10 acre parcel 30% common open space (15% if improved)
Town Residential District (TR)	
Density 4 du/acre with community facilities 6 du/acre with community facilities and PUD	Density with TDR 6 du/acre with community facilities minimum 10 acre parcel 30% common open space (15% if improved)

CECIL COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
1) TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.			
a) A balance of supply and demand for TDRs has been created in the design of the TDR program.	✓		Estimated 23,700 TDRs in sending & 55,000 rec. area
b) Receiver areas (RAs) are large enough to absorb authorized TDRs.	✓		31,420 acres & 8,723 lots
c) As-of-right base density in TDR receiving areas is zoned lower than the market demand for the type and density of housing that developers want to build.	✓		Mixed opinion from developers – short term : no, long term: yes
d) Developers in TDR receiver areas can achieve the desired market density only with TDRs.		X	PUD allows competitive density, but is seldom used
e) Density bonuses for using TDRs are sufficiently high to justify the increased cost of purchasing TDR	✓		100% bonus in SR, 300% bonus in DR, 50% in TR
f) Buying TDRs is more profitable to developers than building to base density or alternative ways to achieve higher density in receiver areas.		X	Short term market soft; in-town options preferred
g) Purchasing TDRs and the public approval process of using them in receiver sites is faster and more predictable than alternative ways to achieve the desired density.		X	Requires approval of TDR use on receiver site before transfer; i.e. unpredictable
h) Selling TDRs is reasonably competitive in value to landowners, considering the residual value of land restricted by TDR easements or covenants, with developing the sending site, selling an easement to other state or local PDR programs, or is the only alternative allowed.	✓		TDRs should have higher value with bonus density & no option to develop SAR site beyond 1:20; NAR 1:10
i) There is an active market for higher density housing types allowed with TDRs in receiver areas,	✓	X	Short term market soft; long term market strong w/BRAC
j) The county takes steps to maintain TDR values that are attractive to buyers and sellers by adding TDR receiver capacity, purchasing TDRs, adjusting the TDR allocation rate (amount of TDR/acre or du/TDR), or allowing TDRs for increases in non-residential floor area.		NA	No experience with market for TDRs yet. County needs to monitor and adjust program as needed
2) The County has strong Comprehensive Plan and Zoning policies supported by TDRs			
a) The TDR program is established as part of larger strategy to preserve land and redirect growth.	✓		Comp. Plan, LPPRP, & amendments support TDR
b) Goals are established in the Plan for the types, location and amount of land to preserve.	✓		SAR & NAR sending areas:139,000 ac 621 lots
c) TDR sending areas are designated to protect the most valuable rural land, unique natural and historic resources, or other resources in the Plan's protection goals.	✓		Rural SAR, NAR zones, Rural Legacy Areas, prime farms & forests
d) TDRs are received only where the county and municipalities want development to occur.	✓		TR, SR & DR zones in I-95 Rt.40 Growth Corridor
e) TDRs will not add new residences where they will contribute to the fragmentation of the best agricultural lands, conflict with existing farming operations or contribute to a sense of farming impermanence.	✓		Downzoning to 1:20, 1:10 density, w/ mandatory clustered on 40% lot protects rural lands
f) TDRs help mitigate the perceived effects of downzoning, help gain support from landowners, and help avoid litigation over rezoning.	✓		TDRs added to downzoning = 3 to 2 vote approval
g) Zoning limits or prohibits the use of development rights on the sending site, and reduces the as-of-right base density in receiver sites below the level of market demand.	✓		Downzoning limits density below market in SAR, NAR
h) Zoning provides for additional density needed to accomplish comprehensive plan goals in receiver areas only or primarily with TDR.	✓		TDR bonus density consistent with Comp Plan in receiving zones
i) The County adopts policy that future zoning density increases in receiving areas are allowed only with TDRs.		X	Increases allowed with PUD but seldom used; some rezoning O
j) County water and sewer plans anticipate and plan for development in receiving areas at the density needed to accommodate TDRs.	✓		Public water & sewer are planned but not TDR ready
k) Subdivision rules and procedures ensure that receiving area infrastructure is capable of absorbing development with TDR		X	No adequate public facilities ordinance

CECIL COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
3) Administration of TDRs is simple, efficient and predictable			County admin. structure & process not in place yet
a) Buyers of TDR can obtain all approvals for their use in receiver sites with certainty and predictability, and can use TDRs for additional density as-of-right in receiver projects.		X	Discretionary approvals unpredictable; clarification of as-of-right TDRs needed
b) Buyers & sellers of TDR are provided clear rules for use of TDRs in receiver areas and restrictions on using development rights on sending site.		X	Proposed ordinance is clear, but receiver site rules & standards needed
c) Buyers and sellers of TDR are informed about the current market values of TDRs.		NA	Market undeveloped; monitoring process needed
d) Receiver areas for TDR are designated and zoned for densities needed to absorb TDRs, without uncertain discretionary or conditional use review.	✓		SR & DR receiving zones established – clarification of as-of-right TDRs needed
e) TDRs are allowed on a gross land area basis; the number of TDRs authorized for sale is not reduced by environmental conditions for development on the sending parcel.	✓		Ordinance to allow TDRs for gross land area of qualified sending parcels
f) Arbitrary rules limiting the transfer or use of TDRs are avoided (e.g. distance between selling and receiver sites, use of TDRs in the same political districts, etc.).	✓		Rules are clear and simple, with no special limitations
g) Special rules for development in receiver areas do not discriminate against TDR projects.	✓		Community facilities needed for TDR projects
h) Land records, mapping and administration of TDRs are complete, maintained and publicly accessible.		X	Administration & recording process is incomplete
i) Restrictions on TDR sending sites are permanent, recorded in land records, used in the subdivision and zoning approval process, and sending sites are monitored for compliance.	✓	X	TDR sending site protected by conservation easement; monitoring process needed
j) Lengthy delays in recording and using TDRs are avoided.		X	TDRs not transferred until receiver project approved
k) Local government monitors and modifies TDR program as needed to improve effectiveness and efficiency, and adds receiving areas or increases their TDR capacity as needed to maintain demand.		NA	TDR oversight not yet established – periodic review process needed
4) The TDR program has broad public support.			
a) Rural landowners are motivated to protect land and farming as an industry, more than by profit from selling land for development; and they support TDRs, easement purchase programs and zoning to preserve agricultural uses;	✓	X	Mixed support from farm community; stronger in SAR than in NAR; good participation in MALPF, RLP
b) Real estate developers support TDRs to obtain increased density in receiving areas, and as a flexible and expedient alternative to purchasing additional land,		X	Developers support TDR concept, but question need for TDR in current market
c) Farming, community and environmental groups support TDRs as one means to protect more land,	✓	X	Mixed support for concept; but question TDR value/use
d) TDR receiving site communities accept or support the density, design quality and compatibility of development using TDRs.		NA	No TDRs until Jan. '07; high density often opposed
e) Elected government officials accept TDRs as method to protect land with private funds, protect equity of rural landowners, control the location and quality of growth and implement the comprehensive plan.	✓		Elected officials support TDRs; opposed downzoning in past; current TDR law enacted by a 3:2 vote.

3. DORCHESTER COUNTY TDR PROGRAM ASSESSMENT

The Feasibility of Successful TDR Programs for the Eastern Shore

Introduction

Dorchester County has not adopted a TDR Program. The county is in the process of updating its 1996 Comprehensive Plan, which will likely include a recommendation that “additional study be conducted to ascertain the feasibility of a TDR program in Dorchester County.” Consultants for the county have developed an excellent White Paper on *Transfer and/or Purchase of Development Rights* for the Comprehensive Plan³⁵ that reviews basic TDR concepts and features, problems associated with this land preservation technique, and other considerations. It suggests a hypothetical TDR/PDR Program scenario for consideration by a citizen Comprehensive Planning Advisory Committee and the Planning Commission.

This is an assessment of the feasibility of a TDR Program in Dorchester County, based on *Criteria for a Successful TDR Program* adopted by the Technical Advisory Committee for this study, the *Findings* of Phase I found in Chapter IV, and the collective experience of the committee members and principle investigators in the use of TDRs. Interviews were conducted with county planners, planning consultants and municipal officials in order to assess how the program relates to the *Criteria*. Parts of this assessment are drawn from White Paper #4, interviews with the planning consultants who prepared it and the Office of Planning and Zoning.

Summary

Dorchester County planners and their consultants have given a lot of thought to the use of TDRs for land preservation and directing growth, since the 1996 Comprehensive Plan update, which called for an evaluation of this tool. There appears to be good support from the county government for land preservation and a willingness to evaluate the future use of TDRs. However, there are a number of potential obstacles to the adoption or effective implementation of a successful program in the county. These are outlined below and explained in more detail under the Criteria.

- About half of the county is in farmland or natural resource land that is in the Critical Area, under tidal or non-tidal wetlands, under six feet elevation, with high-water tables that would not support housing densities high enough to serve as a TDR receiver area. These lands are not significantly threatened by demand for low density housing permitted by these conditions.
- Allowable zoning densities in designated county Development Districts are already as high or higher than these underlying soil conditions can support with septic systems, so there is no market for the use of TDRs to increase the density.
- All existing public water and sewage treatment systems are owned and controlled by municipalities, and they are eager to attract development at densities as high as the market wants to build, either within the towns or through annexations, without the use of TDRs.
- Most new higher density housing projects (3.5 du/acre or higher) are proposed in municipalities or adjacent to municipalities as called for in the Comprehensive Plan and the State’s smart growth guidelines, primarily to tap into existing sewage treatment facilities that operate below capacity.
- The small size of county government may not have the capacity to develop, implement and administer a complex TDR program, without additional staff, budget and/or outside professional help.

³⁵ *Implementation Strategies for Consideration, Transfer and/or Purchase of Development Rights*, Dorchester County Comprehensive Plan Update, White Paper #4, Redman/Johnston & Office of Planning and Zoning, page 19-29

- More than 30% of Dorchester's land area is already permanently preserved by large federal and state land holdings, easements and private conservation groups. Dorchester has more land and a higher proportion of its land in preservation, than any of the other Eastern Shore counties, and it may be able to complete its remaining 60,000 acre farmland preservation goal by 2020 with other programs that are easier to administer, without increasing development elsewhere to accommodate the receipt of TDRs.

However, if the county chooses to supplement their existing preservation tools with TDRs, it appears that one or more of the following steps may be needed.

- Adoption of the consultants *Conceptual TDR/PDR Program* outlined in White Paper # 4 for the Comprehensive Plan Advisory Committee, or at least the key ingredients of it.
- Downzone much of the Development District identified in Map 02 of the draft Comprehensive Plan update, to 1 du/20 acres or 1 du/25 acres, and allow landowners in this District to develop their land as a TDR receiver area at the prior density of 1 du/acre only with TDRs. Calvert County and the new Caroline County TDR programs could be used as examples of this approach for rural TDR transfers to low density residential areas on septic systems.
- Adopt the consultant's broader long-term vision for future development of this District, to include public water and sewer service, higher densities with TDRs, neighborhood design, mixed-uses in small compact areas, affordable housing, parks and open space, much of it paid for by developers of new communities in this area. This option would take much more citizen involvement and support, and could alter the agricultural and rural character of the county, but could also create the most demand for TDR, if this is a goal.
- Adopt a county policy, as suggested by White Paper #4, and as Calvert, Charles and Montgomery Counties have, that any increases in zoning allowed for new development in the county growth areas, require TDRs for the increase in density.

Applying the *Criteria for a Successful TDR Program*

The following is an assessment of whether Dorchester County's planning, zoning, economic and political context would be supportive of a TDR program, and under what conditions a TDR program might be feasible, related to the Criteria outlined in Chapter IV.

Criterion 1.

TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.

Supply and demand

Dorchester County is the largest county in Maryland's Eastern Shore, and lies near the center of the Delmarva Peninsula, between the Choptank and Nanticoke Rivers and the Chesapeake Bay. It has about 1,700 miles of shoreline.³⁶

While it is the largest county examined in this study, it has limited land resources available for development. Of the county's 440,230 total acres, about 83,238 acres are under water. Of the 357,000 acres of land, about 125,000 acres are non-tidal wetlands and 82,000 acres are tidal wetlands, which together cover 58% of the county. The Chesapeake Bay Critical Area which extends 1000 feet inland from mean high tide covers 178,176 acres or 48% of the total county land area. A majority of the lands in the county are below six feet elevation above sea level, and the water table is high throughout the county. These figures and the amount of land suitable for development

³⁶ Dorchester County Land Preservation, Parks and Recreation Plan (LPPRP), 2005

could be greatly affected by sea-level rise resulting from global warming. The groundwater protection plan requires four feet of separation between septic tile fields and the water table. Government regulations protecting the Critical Area, tidal and non-tidal wetlands, together with limits on septic systems in lowlands with a high water table, significantly limit development in the southern and western portions of the county.

About 98,224 acres of land or 30.8% of the county is permanently protected by federal and state fee ownership and easements, including the Blackwater National Wildlife Refuge and Fishing Bay Wildlife Management Area, and by private conservation organizations.³⁷ Most protected lands are in the southern half of the county and along Marshyhope Creek. The county has two Rural Legacy Areas, the Nanticoke River RLA from Fishing Bay to Brookview, and the Marshyhope Focus Area south of Federalsburg.

To establish a feasible TDR program, rules would need to be established for what land would qualify as sending areas, where the TDRs could be received, and what transfer ratios were allowed from the sending sites (acres/TDR) and in the receiver areas (dwellings/TDR). Dorchester County would need to determine whether there would be a large supply of TDRs from land zoned Resource Conservation (RC) (some of which has marginal development potential) plus Agricultural Conservation (AC); or a smaller supply if TDR sending sites were limited to the Priority Preservation Area (PPA) identified in the county's LPPRP, most of which is zoned AC. This PPA is generally located north of Little Choptank River, Blackwater National Wildlife Refuge and Fishing Bay WMA, and is south and east of the Development District. These lands are of higher value for agricultural production, but are also more easily developed. There are 351 farms in the county with 127,385 total farm acres. If all of these farms qualified for TDRs, subtracting 12,282 acres in MALPF, Rural Legacy and MET/ESLC easements, the remaining unprotected farms would cover 115,103 acres or 32% of the county's total land area.³⁸

Several trends would affect the future demand for TDRs in the county if a program was developed. The Maryland Department of Planning estimated in 2002 that the county's population growth rate between 2000 and 2005 would be 15% (3%/year). Between 2005 and 2010 the projected increase in population was 4,585 or 13% (2.6%/year) to a total of 39,860 people. In the five years after a comprehensive rezoning of the county in 1999, there were 238 new lots created, including 78 located in the Critical Area.³⁹ Between 2000 and 2004 there were 981 total acres of new subdivisions, including 716 acres or 73% in the AC and RC zoning districts. During this same period 9,816 acres of farmland and forests were preserved in these zoning districts by MALPF and Rural Legacy.⁴⁰ There were 242 new residential construction building permits issued in the county in 2004, representing a 26% increase over 2003, and by the end of October 2004 eight major subdivisions were pending outside of municipal boundaries to create 315 additional lots. However, recent plans for 1,080 acres of land annexed by Cambridge, extending the City's boundaries about 1 ½ mile south along Egypt Road north of the Blackwater, that would have added 2,671 housing units, a golf course, hotel, conference and retail center to the city in one development was denied by the State Critical Area Commission⁴¹ on October 4, 2006.

According to the Eastern Shore Land Conservancy:

³⁷ *Eastern Shore 2010: A Regional Vision, Tools Available for Attaining the Eastern Shore 2010 Land Protection Goal*, Eastern Shore Land Conservancy, January 2004,

³⁸ Op Cit, LPPRP Appendix C, from the 2003 Census of Agriculture for the year 2000

³⁹ Op Cit, LPPRP

⁴⁰ OP Cit, LPPRP, Table 4-2

⁴¹ *Planners considering growth allocation for Blackwater Resort*, Gail Dean, Star Democrat, October 21, 2005

“Dorchester County’s recent past has been one of little growth. From 1970 to 2000, the countywide population has increased by only about 1200 people. That trend has recently reversed with a tremendous influx of net in-migration resulting in over 7000 new dwelling units in the current development review pipeline county-wide.”⁴²

Much of the new construction in the county is happening in the City of Cambridge. While the City gained only 2,434 people between 1930 and 2000,⁴³ at the time of this assessment there were 27 projects under construction or in the review process for 6,692 new housing units in the municipality, including the Egypt Road project and several large condominium projects on the city’s waterfront.⁴⁴ Base level zoning densities in Cambridge range from 1 du per lot for single family detached units in Neighborhood Conservation and R-1 Residential districts to 10 du/acre for multi-family units in GC districts. But with Planned Unit Developments (PUD) 10% bonus densities are allowed for conventional subdivisions, plus an additional 10% for housing type diversity and 15% for affordable housing, allowing up to 13.5 du/acre. According to a county planner, Cambridge has some areas that allow 20 units per acre.

It is doubtful that Cambridge’s future growth would provide a demand for TDRs because the City is giving away the additional density to encourage development. As a county planner explained:

“We have plenty of sending areas, but I don’t think there are a whole lot of receiving areas. Even though Cambridge is growing at a faster rate than they have ever grown before, the developers are able to get the densities they want from the City Council, just by negotiation. They are getting those densities through exactions or negotiations. Since there isn’t any demand in the receiving areas for the additional density, there’s not much interest in TDRs.”

A planning consultant for the county reinforced this view:

“Cambridge is a place that has been down for so long that they see development as an opportunity. If a developer steps up and says, ‘I can’t do this TDR thing,’ the city is not going to make them do it. It just is not going to happen. They don’t want to kill the goose that is laying the golden egg. In their case, the golden egg is work for roofers, carpenters, pavers, sand and gravel guys, hardware stores, etc. That’s economic development to them.”

Criterion 2.

The County has strong Comprehensive Plan and Zoning policies supported by TDRs.

The 1996 Dorchester County Comprehensive Plan included a recommendation to consider a TDR program as a potential long-term strategy. The Plan is now in the process of being updated. A Comprehensive Plan Advisory Committee has been meeting with planning consultants and staff since May 2005. As indicated above, the updated Comprehensive Plan will likely include a recommendation that “*additional study be conducted to ascertain the feasibility of a TDR program in Dorchester County,*” based in part on White Paper #4, entitled *Implementation Strategies for Consideration, Transfer and/or Purchase of Development Rights*.

The 1996 Plan adopted a goal to protect 100,000 acres of farmland by 2020, and concentrate development in growth centers away from agricultural lands. These goals remain the focus of the current Comprehensive Plan update and the county’s preservation efforts. They need to protect an additional 60,000 acres of agricultural land by 2020, or about 4,000 acres per year to meet this goal. Under the Eastern Shore 2010 agreement sponsored by the Eastern Shore Land Conservancy and

⁴² Eastern Shore 2010: A Regional Vision, Attaining the Growth Center Goal: Current Data, November 2005

⁴³ Op Cit, LPPRP Appendix A, Maryland Department of Planning

⁴⁴ Residential Project List, updated 6-9-06, Cambridge Department of Planning and Zoning

adopted by the County Council, they would need to protect another 61,300 acres or 12,260 acres per year by the year 2010, to preserve 50% of the land outside of the county's growth area. The county now believes their original 100,000 goal is more realistic.

The county's 2005 LPPRP adopted by the County Council in January 2006 delineates Priority Preservation Areas encompassing most of the Agricultural District delineated in the 1996 Comprehensive Plan, including those areas with prime and productive agricultural soils. The PPA is generally described above under Criterion 1.

In 1994 and 1995 Dorchester County imposed a moratorium on subdivisions, and in 1999 downzoned the AC district to 3 dwellings per parcel created prior to March 1972, plus one dwelling for each 15 additional acres, or one dwelling for each 10 additional acres if clustered on 35% of the parcel. They also downzoned the RC district to 1 du/20 acres, consistent with the Critical Area Resource Conservation Area, which was downzoned in 1987 when the Critical Area law came into effect. At the time of the downzoning in 1999, TDRs were not considered in part because the planning staff believed that the issue of property rights had already been addressed in 1987.

"I think it allowed us to have a comfort level to go to the Council and say, 'Half the county has already been downzoned, so the issue of property rights has already been addressed head-on by the Critical Area Commission.' That was not as difficult as I had anticipated. I thought we were going to have a major fight. As more and more people move into the county, our perception of what good planning is has changed. The idea that 'I can do anything with my property' has become less and less of a concept in this county."

The average size of farms in the county is 357 acres.⁴⁵ Whether this agricultural zoning is sufficient to generate interest on the part of landowners to sell TDRs, rather than create lots on the farm property, is difficult to determine without knowing the average number of parcels in the average farm. The consultant's White Paper # 4 on TDRs states:

"Unless densities are more restrictive than they are currently in agricultural areas, they may fail to give rise to TDR sales."

"TDR will preserve lands only where prohibitions or restrictions on development are comprehensive and mandatory. Permitted density for development must be low enough to adequately provide for preservation of the resource (farm or forest land) to be protected. To avoid a patchwork quilt of developed and preserved land in sending areas, farmland might need to be downzoned to limit any development density to between one dwelling per 25 acres and one dwelling unit per 40 acres."⁴⁶

This guideline is consistent with Criterion 1, and reflects the experience of Montgomery County's agricultural zoning and successful TDR program (1 du/25 acres, with 48,584 acres in TDR) and those in the New Jersey Pinelands (1 du/40 acres, with 43,684 acres in TDR), described in Chapter VI of this report.

Draft map 02 of the 2005 Comprehensive Plan update shows a county Development District extending from Horn Point on the west, wrapping around the southern shore of the Choptank River to Cambridge, extending south to Snows Turn Park, east along Southside Drive, proceeding northeast on the north and west side of Route 16 to Secretary, East New Market and Hurlock, and then north on the west side of Routes 16 and 331 toward the southwest corner of Caroline County. This Development District encompasses about 10,000 acres of land, and is currently zoned Rural

⁴⁵ Op Cit, LPPRP, Appendix C

⁴⁶ Op Cit, White Paper #4, p.26

Residential (RR) for minimum lot sizes of 40,000 sq. ft. or 20,000 sq. ft. with clustering, although soil and water table characteristics often limit development to 2 acres or more per dwelling.

If Dorchester County was willing to downzone this Development District to a lower density, and allow landowners to use TDRs to reclaim former densities for market housing (as Calvert did successfully by county-wide downzoning of all zoning districts by 50% in 1999, and again in 2003), this district could likely serve as the primary receiving area and could create a market demand for TDRs. Neighboring Caroline County recently downzoned their R-Rural Zoning District, and established a TDR receiving area of about 6,000 acres north of Denton, with soils that are similar to those in Dorchester's Development District. With TDRs, Caroline's receiving area zoning will allow major subdivisions up to 50 units per parcel at a maximum density of 1 du/acre (an increase from 4 du/parcel plus 1:20 acres).

However, planners are not optimistic about this happening in the Development District:

"The feasibility of that happening in Dorchester, I would say, is about 10% or less."

"There is no political will to downzone to give rise to the use of TDRs. I don't think they would do that here. The question is, can we sewer that area, and then increase the density with TDRs. That would be a better shot."

As suggested in this statement, planners are considering a more ambitious strategy to manage and direct Dorchester County's future growth toward municipal growth areas and toward the Development District, and may be recommending it for consideration to the Comprehensive Plan Advisory Committee. As they described it:

"They have this huge growth area that's being picked apart at one acre density, or actually two acre density with the septic limitations, so what does that represent? By developing this big area at two acre density, they are just spreading out their problems. They are having road problems that they are going to have to fix everywhere. We have tried to say to them that you need to use this growth area more efficiently, so they don't just let it go. There is a way to achieve the objectives they want for economic development, affordable housing, resource protection, and all of these things. Even within the development district, there are sensitive areas, green infrastructure, and hydric soils that are being written off. With all of these issues, the key to getting what you want there is sewer, water, higher density and neighborhood design with mixed-uses in small compact areas with smart growth, where public sewer gives you the flexibility. The list of public objectives that could be added to that is affordable housing, parks and open space, recreation and TDRs. With developer's rights and responsibilities agreements, we can work out who pays for the roads, who pays for the sewers, and all this stuff, if the developer can go along with our public objectives. How can we structure a new town or new neighborhoods where everyone can achieve their goals? I think that's where we would like to see Dorchester go."

It remains to be seen whether the county planning staff and the Committee will be receptive to a major expansion of growth areas to allow water and sewer services in the Development District, to create a demand for TDRs or accomplish other goals. A county planner said:

"We're looking at whether or not our growth areas should change. Our growth areas are our municipalities and a few areas in the 10 year water and sewer service plan. We also have a rural growth area between Cambridge, Easton, New Market and Hurlock. This is along the Route 16 corridor. We have about 10,000 acres in that area that would be zoned for one house per acre. We have service areas around the towns, but we don't think at this point that we're actually going to be changing our growth boundaries. We don't think it's necessary to accommodate the additional growth. These areas were established in 1996

when our comprehensive plan was done, and we then changed the zoning for the areas in January of 1999.”

As indicated by Criterion 1, the key to a successful TDR program in Dorchester County would be to establish a strong demand for development at a density that is higher than existing base-level zoning, and to require TDRs to meet this demand. If the City of Cambridge and other municipalities with public water and sewer systems are unlikely to require TDRs to satisfy this demand, the Development District may be the only viable receiver area for a TDR program. With current septic system limitations, allowable densities and infrastructure, it is unlikely that any developers would be interested in buying TDRs from the AC or RC zones to use in the Development District. This is because 1) they cannot develop at densities higher than existing zoning permits without sewers, 2) there is a limited market for this type of housing, and 3) municipalities are eager to accommodate higher density development on existing public water and sewer systems without TDRs.

There are municipal water and sewer systems in Cambridge, East New Market, Hurlock, Secretary and Vienna. Cambridge’s sewage treatment plant has a design capacity of 8.1 million gallons per day (MGD). It had an average flow of 4.5 MGD in 2003, but after improvements separating storm drainage from sewage treatment, it dropped down to an average flow of 2.9 MGD in 2004, or less than 36% of capacity.⁴⁷ As a result, Cambridge can accommodate a significant amount of new development with the existing treatment plant, which is one of its attractions in a county where growth is limited by soils, wetlands and water table. Average sewer flows in the other municipalities are also under existing treatment capacity, but they do not have nearly the additional capacity as Cambridge. Dorchester County has a Sanitary District, but no sewage treatment facilities independent of the municipal systems. From time to time they have purchased sewage treatment capacity from the municipal systems in order to extend sewers to communities with failing septic systems.

Criterion 3.

Administration of TDRs is simple, efficient and predictable.

In the absence of an existing TDR Program or a specific proposal for one, it is not possible to apply Criterion 3 to assess whether the county’s administration of a program would be simple, efficient and predictable, or whether they could commit the staff and budget to effectively implement a program.

The burden of administering a TDR program is of concern to the planning staff:

“I don't know what will work in Dorchester County, or what the mechanics of a TDR program are. I don't know if landowners know about it, and I don't know whether it is strictly a free market program, or what the county's involvement will need to be. We have a very small staff. I wonder how time-consuming a TDR program can be.”

“From a personal perspective, I have been a skeptic of TDRs. I really need to have someone convince me that it can work in Dorchester County. The reason that I believe it hasn't been pushed here is that we haven't developed anything that appears to work. We have plenty of sending areas, but I don't think there are a whole lot of receiving areas.”

As part of the White Paper #4 for the Comprehensive Plan update, the authors outlined a “*Hypothetical TDR/PDR Program*” that would link the purchase of TDRs to Critical Area growth allocation and/or annexation. The concept is illustrated by a hypothetical scenario where the county would adopt the following policy for annexation and growth allocation:

⁴⁷ Maryland Department of the Environment, Sewage Treatment Plant Flow Table, Dorchester County, 2002-2004

- *“Annexations will only be endorsed by the county in designated growth areas,*
- *Growth allocation will only be permitted in designated growth areas,*
- *Proposed development in [growth areas] must achieve a gross residential density of 3.5 dwelling units per acre (i.e. total site area x 3.5), and*
- *Each dwelling unit permitted must result from the purchase of TDR.”⁴⁸*

With the enactment of H.B.1141 by the Maryland General Assembly in 2006,⁴⁹ the county’s legal authority for implementing this scenario for annexations would need to be reviewed in the context this new law.

When Critical Area regulations were enacted in 1989, Dorchester was granted about 2,900 acres of growth allocation, which was to be used to allow for construction in lower density approved areas. To date, the county has about 1,180 acres of Critical Areas growth allocation remaining in its pool. It recently approved 313-acres of growth allocation for the Egypt Road project near the Blackwater, which was denied by the State Critical Area Commission⁵⁰ in October 2006.

Under an alternative scenario in the White Paper, the county would permit developers to pay a residential unit fee in lieu of purchasing TDRs from private landowners, a portion of which would be used by the county to purchase development rights from landowners in designated agricultural preservation areas. They also propose that agricultural areas be further downzoned to 1 du/25 acres, allowing TDRs to be sold at the rate of TDR/10 acres, the current density allowed for cluster development in the AC zone.

This hypothetical scenario provides greater detail for the design and administration of a TDR program, but the key ingredients of the scenario and its central concept would appear to meet many of the Criteria for a Successful TDR Program developed for this study.

Criterion 4.

The TDR Program has broad public support.

Landowner and public support for a TDR program has never been tested in Dorchester County, because a specific TDR ordinance has never been introduced for consideration by the Planning Commission or County Council. However, rural landowners have participated in State and federal programs to permanently preserve their land through MALPF, the Rural Legacy Program, and some have donated conservation easements to MET and the Eastern Shore Land Conservancy.

Other indicators of the County Council’s support for land preservation and the general concept of TDRs can be found in:

- Language in the 1996 Comprehensive Plan to evaluate TDR programs,
- Adoption of a goal in the 1996 Comprehensive Plan to preserve 100,000 acres of productive farmland by 2020,
- Adoption of the Eastern Shore Land Conservancy’s Eastern Shore 2010 agreement to preserve 50% of the remaining farmland outside of locally designated growth areas by 2010, and
- Adoption of the 2005 Land Preservation, Parks and Recreation Plan (LPPRP), which included a strategy to “*Develop a Transfer of Development Rights and Purchase of Development Rights Program if feasible.*” The LPPRP also reaffirmed the 1996 goal to preserve 100,000 acres of farmland by 2020, and delineated Priority Preservation Areas/Preservation Focus Areas.

⁴⁸ Op Cit, White Paper #4, Conceptual TDR/PDR Program, pages 27-29

⁴⁹ House Bill 1141, *Land Use–Local Government Planning*, 2006, Chapter 381, Article 23A – Corporations – Municipal; Article 66B – Land Use

⁵⁰ *Planners considering growth allocation for Blackwater Resort*, Gail Dean, Star Democrat, October 21, 2005

The county's support for a TDR program and the key ingredients to make one work will be tested when the recommendations of the White Paper # 4 are presented to the Comprehensive Plan Advisory Committee, the Planning Commission and the County Council, if they get that far. As described above, these recommendations include a broader strategy for establishing receiver areas in annexation or growth allocation areas or in the Development District.

DORCHESTER COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
1) TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.			
a) A balance of supply and demand for TDRs has been created in the design of the TDR program.		X	Sending and receiving areas are not identified
b) Receiver areas (RAs) are large enough to absorb authorized TDRs.		X	Municipalities may not want TDRs; the development district is limited w/o sewers
c) As-of-right base density in TDR receiving areas is zoned lower than the market demand for the type and density of housing that developers want to build.		X	Existing zoning in development district = market without sewers
d) Developers in TDR receiver areas can achieve the desired market density only with TDRs.		X	Towns welcome new development w/o TDRs
e) Density bonuses for using TDRs are sufficiently high to justify the increased cost of purchasing TDR		X	No bonuses for TDRs established
f) Buying TDRs is more profitable to developers than building to base density or alternative ways to achieve higher density in receiver areas.		X	Developers able to get higher density w/o TDRs
g) Purchasing TDRs and the public approval process of using them in receiver sites is faster and more predictable than alternative ways to achieve the desired density.		n.a.	TDR process not designed or adopted
h) Selling TDRs is reasonably competitive in value to landowners, considering the residual value of land restricted by TDR easements or covenants, with developing the sending site, selling an easement to other state or local PDR programs, or is the only alternative allowed.		X	Several alternative land preservation programs are available to landowners that would sell TDRs
i) There is an active market for higher density housing types allowed with TDRs in receiver areas,	✓		Cambridge and towns have active market for density
j) The county takes steps to maintain TDR values that are attractive to buyers and sellers by adding TDR receiver capacity, purchasing TDRs, adjusting the TDR allocation rate (amount of TDR/acre or du/TDR), or allowing TDRs for increases in non-residential floor area.		n.a.	TDR program not yet designed or adopted
2) The County has strong Comprehensive Plan and Zoning policies supported by TDRs			1996 Comp. Plan under revision
a) The TDR program is established as part of larger strategy to preserve land and redirect growth.	✓		Comp. plan calls for evaluation of TDRs
b) Goals are established in the Plan for the types, location and amount of land to preserve.	✓		Comp. Plan & LPPRP have goals/ priorities
c) TDR sending areas are designated to protect the most valuable rural land, unique natural and historic resources, or other resources in the Plan's protection goals.	✓		LPPRP establishes Priority Preservation Area
d) TDRs are received only where the county and municipalities want development to occur.	✓		Planners support sending TDRs only to growth area
e) TDRs will not add new residences where they will contribute to the fragmentation of the best agricultural lands, conflict with existing farming operations or contribute to a sense of farming impermanence.		n.a.	TDR receiving areas not yet identified or planned
f) TDRs help mitigate the perceived effects of downzoning, help gain support from landowners, and help avoid litigation over rezoning.		X	Agricultural zoning is established, downzoning is not anticipated
g) Zoning limits or prohibits the use of development rights on the sending site, and reduces the as-of-right base density in receiver sites below the level of market demand.		n.a.	TDR sending areas or eligibility not identified. Downzoning is unlikely
h) Zoning provides for additional density needed to accomplish comprehensive plan goals in receiver areas only or primarily with TDR.		n.a.	If development district is sewerred, increase in density could be with TDRs
i) The County adopts policy that future zoning density increases in receiving areas are allowed only with TDRs.		n.a.	Planners are considering annexation policy re: TDRs
j) County water and sewer plans anticipate and plan for development in receiving areas at the density needed to accommodate TDRs.	✓		High municipal W&S capacity, no sewers in Co.
k) Subdivision rules and procedures ensure that receiving area infrastructure is capable of absorbing development with TDR		X	Septic rules limit density in dev. district due to soils

DORCHESTER COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
3) Administration of TDRs is simple, efficient and predictable			Administration is not yet designed or proposed
a) Buyers of TDR can obtain all approvals for their use in receiver sites with certainty and predictability, and can use TDRs for additional density as-of-right in receiver projects.	✓	n.a.	TDR program not yet designed or adopted
b) Buyers & sellers of TDR are provided clear rules for use of TDRs in receiver areas and restrictions on using development rights on sending site.	✓	n.a.	TDR program not yet designed or adopted
c) Buyers and sellers of TDR are informed about the current market values of TDRs.	✓	n.a.	TDR program not yet designed or adopted
d) Receiver areas for TDR are designated and zoned for densities needed to absorb TDRs, without uncertain discretionary or conditional use review.	✓	n.a.	TDR program not yet designed or adopted
e) TDRs are allowed on a gross land area basis; the number of TDRs authorized for sale is not reduced by environmental conditions for development on the sending parcel.		n.a.	TDR program not yet designed or adopted
f) Arbitrary rules limiting the transfer or use of TDRs are avoided (e.g. distance between selling and receiver sites, use of TDRs in the same political districts, etc.).	✓	n.a.	TDR program not yet designed or adopted
g) Special rules for development in receiver areas do not discriminate against TDR projects.	✓	n.a.	TDR program not yet designed or adopted
h) Land records, mapping and administration of TDRs are complete, maintained and publicly accessible.		n.a.	TDR program not yet designed or adopted
i) Restrictions on TDR sending sites are permanent, recorded in land records, used in the subdivision and zoning approval process, and sending sites are monitored for compliance.		n.a.	TDR program not yet designed or adopted
j) Lengthy delays in recording and using TDRs are avoided.		n.a.	TDR program not yet designed or adopted
k) Local government monitors and modifies TDR program as needed to improve effectiveness and efficiency, and adds receiving areas or increases their TDR capacity as needed to maintain demand.	✓	n.a.	TDR program not yet designed or adopted
4) The TDR program has broad public support.			
a) Rural landowners are motivated to protect land and farming as an industry, more than by profit from selling land for development; and they support TDRs, easement purchase programs and zoning to preserve agricultural uses;	✓		Landowners participate in other state land preserve programs; soils & zoning limit development of farms
b) Real estate developers support TDRs to obtain increased density in receiving areas, and as a flexible and expedient alternative to purchasing additional land,		X	Developers can obtain desired density on water & sewer w/o TDRs
c) Farming, community and environmental groups support TDRs as one means to protect more land,		n.a.	TDRs have never been proposed or considered
d) TDR receiving site communities accept or support the density, design quality and compatibility of development using TDRs.		X	Towns support density w/o TDRs, Development District support untested
e) Elected government officials accept TDRs as method to protect land with private funds, protect equity of rural landowners, control the location and quality of growth and implement the comprehensive plan.	✓		TDR study supported in latest Comprehensive Plan and LPPRP

4. KENT COUNTY TDR PROGRAM ASSESSMENT

The Feasibility of Successful TDR Programs for the Eastern Shore

Introduction

In July 2000, as directed by the 1996 Comprehensive Plan,⁵¹ a Land Use Ordinance Workgroup in Kent County proposed a TDR program as part of a draft Land Use Ordinance. The TDR proposal was only part of a larger package of changes endorsed by the Kent County Planning Commission, which added four new zoning districts and removed others, established maps for buffers, flood plains and airport safety and made other changes to refine the county's rules governing land use and preservation. After a public hearing by the County Commissioners on September 4, 2001,⁵² in which several citizens opposed the TDR program and no one spoke in favor of it, the Commissioners removed the TDR provisions from the Land Use Ordinance before approving most other parts of it. Recently, the 2006 draft update of the County Comprehensive Plan included a goal to "*Promote voluntary programs to permanently preserve agricultural lands,*" including a strategy to "*Investigate a Transfer of Development Rights (TDR) Program.*"⁵³

This report is an assessment of the feasibility of a TDR Program in Kent County, based on *Criteria for a Successful TDR Program* adopted by the Technical Advisory Committee for this study, the *Findings* of Phase I found in Chapter IV, and the collective experience of the advisory committee members and principle investigators in the use of TDRs. Parts of this assessment will review elements of the 2001 TDR Program proposal, but since it is unlikely that this same proposal will be reintroduced, it is not fully evaluated. Interviews were conducted with county planners, municipal officials, and representatives of the farming and development communities, in order to assess how the existing context of planning, zoning, real estate and public attitudes in the county relate to these *Criteria*.

Summary

Kent County planners have had five years to consider the feasibility of a TDR program after the public reaction and Commissioner's response to the first proposal in 2001. Even though the new draft of the 2006 Comprehensive Plan calls for another investigation of TDRs, the planners anticipate that this will be a more focused or targeted look at whether TDRs might play a limited role to help implement Greenbelts around participating municipalities and unincorporated villages, as identified in master plans. They do not expect that a county-wide TDR ordinance will be reintroduced that resembles the 2001 proposal. There are a number of good reasons for a more focused approach to TDRs, including the following:

- Kent County has the lowest population, the highest percentage of its land in farms and the largest average size farms of any county in the State. Its average annual growth rate is 0.8%, and the county government and most of its citizens want it to remain that way.
- The county's farming community is supportive of current zoning restrictions for agricultural and critical area lands, which generally limit housing densities to 1 du/30 acres and 1 du/20 acres respectively. This zoning may be sufficient when used in conjunction with existing easement purchase programs to accomplish the preservation goals of a TDR program, without the need to find receiving areas to accommodate development with TDRs.

⁵¹ Kent County Comprehensive Plan, 1996, <http://www.kentcounty.com/gov/planzone/compplan.htm#COU>

⁵² Kent County, Maryland Commissioners, Code Home Rule Bill No. 10-2001 Hearings, September 4, 2001, 7:00 p.m.

⁵³ Comprehensive Plan, Draft, Kent County, Maryland, March 2006, Chapter C. Countryside

- Many landowners and other citizens in Kent County are very skeptical of or opposed to TDRs because of how this technique has been used or misused in other Eastern shore counties.
- Existing municipalities and unincorporated towns and villages have very limited capacity to absorb higher densities that might result from TDR transfers, if bonus densities were added to existing as-of-right zoning. Most development proposals do not seek higher densities than allowed by existing zoning, except for annexations.
- Chestertown has the highest amount of new development proposed or under construction, but it has severe traffic problems related to a single two-lane drawbridge over the Chester River. There are growing concerns about traffic congestion and the limited capacity of Route 213, the *Chesapeake Country National Scenic Byway* and the road that uses this bridge.
- TDRs were initially proposed in 2001 as a way of eliminating the *enclave* option for clustering development at 1 du/10 acres in the Agricultural Zoning District (AZD). Since then, the County has adopted stringent design standards that affect the cost-effectiveness of the *enclave* option, and the Planning Commission now has to find that any proposed *enclave* will not have a negative impact on agriculture, so this option is not being used.

While there is limited potential or public support for a county-wide TDR program, a limited and targeted program might be feasible to provide additional incentives to landowners with property in greenbelts around towns and villages to protect their property by selling TDRs to receiving areas in these towns and villages. The following policies might facilitate a more focused TDR program:

- Authorize a limited county TDR program that would be targeted to protect specific agricultural and natural resources in greenbelts around towns and villages, or land in designated Rural Legacy Areas, where the TDR sending areas are in close proximity to the limited receiving areas identified through the community master plan process.
- Establish interjurisdictional agreements between municipalities and the county, as suggested in the 2006 draft update to the Comprehensive Plan,⁵⁴ to utilize TDRs for a portion of any density increase in zoning resulting from future municipal annexations (as determined through consultations required by H.B. 1141,⁵⁵) or for in-fill developments within municipalities. Alternatively, establish a program for payments-in-lieu of TDRs for developers to contribute land preservation funds for acquiring easements in greenbelts.
- Adopt a county policy that requires any that increases in zoning of land for new developments in the county would require a portion of the increase to be with TDRs, or would require payments-in-lieu of TDRs for preserving greenbelts around unincorporated towns and villages.

Applying the *Criteria for a Successful TDR Program*

The following is an assessment of whether Kent County's planning, zoning, economic and political context would support another TDR program proposal, related to the Criteria outlined in Chapter IV.

Criterion 1.

TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.

Supply and demand

⁵⁴ "Through interjurisdictional agreements, the incorporated towns could also be designated as 'receiving' zones."

⁵⁵ HB 1141, Chapter 381 Local Government-Generally, Land Use – Local Government Planning, Enrolled 2006

Kent County's population is the lowest of any county in the State, with 19,197 people in 2000. This was an 8% increase over 1990, or an average of 0.8% per year, significantly lower than other neighboring Eastern Shore counties. Population growth is expected to increase at a slow pace through 2010. Projections by the Maryland Department of Planning are 20,500 by 2010, and 21,250 by 2015, an increase of only 2,053 people in 15 years or an average of 136 per year.⁵⁶ The county is losing young people and gaining older people, in part because it is an attractive place for people to retire. However, Kent County is sandwiched between Cecil and Queen Anne's, two of the three fastest growing counties on the Eastern Shore (2.05% and 1.95%/year), and is about six miles from the town of Middletown, Delaware, which grew by 23.7% or 1,458 people between 2000 and July 2004, more than Kent's entire population is expected to grow in ten years. In 1997, the American Farmland Trust (AFT) included Kent County as part of the Mid-Atlantic Coastal Plain which they claimed was the ninth most threatened agricultural region in the United States.⁵⁷

Kent County has the highest percentage of total land area in farms of any county in the State, at 66% of its 179,480 acres. 57% of the county is defined as prime farmland, compared with 23% of the State as a whole. It has some of the best farmland in the United States,⁵⁸ and the largest average farm size (374 acres/farm) in the State.⁵⁹ The 2002 Census of Agriculture identifies 117,372 acres of land in farms, most of which is in the Agricultural zoning district (AZD) that generally limits development to 1 du/30 acres.⁶⁰ All of Kent County is mapped as *High Quality Farmland and Low Development*,⁶¹ on the AFT 2002 map *Farming the Edge, Sprawling Development Threatens America's Best Farmland*.

For the Eastern Shore 2010 report in 2003,⁶² Kent County reported that it had 156,100 acres of land outside of locally designated growth areas, and had protected 33,098 acres or 21.2% of this land, or 18.4% of the total county.

The 2001 TDR proposal would have created a sending area composed of all lands located within the AZD and RCD zoning districts meeting certain criteria, including 40 acres minimum parcels with 50% suitable cropland or forestland and prime soils, with a soil and water conservation or forest management plan. It would have allowed one TDR for each 10 acres of qualifying lands in the AZD zone and one TDR for 20 acres in the RCD. No detailed estimates are available of the total theoretical number of TDRs that would have been authorized. Landowners wishing to sell TDRs would have to apply to the county to create a TDR area and to determine the number of TDRs available.

In their efforts to evaluate the supply and demand relationship, the planning staff had problems:

"When it came down to trying to draw the map, we had a very hard time, because we had many more sending areas than we had receiving areas, and we finally came up with some balance. But it included zoning some areas in the Rural Character [previously zoned agriculture] for development, and no one really wanted to do that."

⁵⁶ Ibid, Draft 2006 Comprehensive Plan, III Background

⁵⁷ *Farming on the Edge*, A.Sorensen, R. Greene, K. Russ, AFT, Center for Agriculture in the Environment, Northern Illinois University, DeKalb, Ill. March, 1997.

⁵⁸ Op Cit, Draft 2006 Comprehensive Plan

⁵⁹ 2002 Census of Agriculture, National Agricultural Statistics Service USDA, Census, State-County Data, Table 1.

⁶⁰ AZD zoned land allows 1 du/30 acres, or 1 du/10 acres as an "enclave" on 10% of lot, following strict design standards.

⁶¹ *Farming on the Edge, Sprawling Development Threatens America's Best Farmland*, American Farmland Trust, 2002.

⁶² *Eastern Shore 2010: A Regional Vision, Tools Available for Attaining the Eastern Shore 2010 Land Protection Goal*, Eastern Shore Land Conservancy, June 2003-January 2004,

Receiving areas under the 2001 TDR proposal were in the Critical Area Residential (CAR), Rural Character (RC), Rural Residential (RR) Village (V), Intense Village (IV), Intense Village Critical Area (IV CA) and Resource Conservation District (RCD) within housing with resort or conference center uses. Density bonuses with TDRs ranged from 85.5% to 500% depending on the zone.

In 2000, Kent County had 9,410 total housing units, about 78% of which were single family detached units. Between 1996 and 2003, 221 new lots were created, 55% of which were in the countryside. However, in 2002 and 2003 when 44% of these lots were created, most were located in areas zoned for development.⁶³

County planners and officials would like to see Kent County's growth rate remain at less than 1% per year, but the number of new housing developments that are under construction or proposed may increase that rate. For example, Chestertown is a municipality of about 4,000 people with about 2,500 existing dwelling units. Several new subdivisions are under construction, including the 44 townhouse units known as *Chester River Landing* on Quaker Neck Road at the edge of town, and *Coventry I, II, and III* near Route 514, which together with other projects would increase the town by about 500 units in less than five years. A Traditional Neighborhood Design (TND) project is in the early planning stages adjacent to the historic district, and will eventually yield 300 or 400 dwellings. A recent proposal by the Yorktowne Group would annex 600 acres outside of Chestertown on Routes 291 and 213. Tentatively called *Morgan Creek*, this proposal could include from 700 to 2,000 housing units, plus a mix of commercial uses, depending on whether Chestertown would be willing to grant the zoning for the project.

Outside of Chestertown, other recent or pending housing projects in the county include a Canterra proposal outside of Betterton, annexation proposals in Millington by developers from Delaware, and three residential subdivision proposals by Center'D, one for a 19 lot Montabello Hills major subdivision, a second for 50 units of duplexes and single-family units in Rock Hall, and an infill development with five units in Fairlee. Some of these proposals are at the pre-concept stage and could be reduced in size or may not happen. In Kennedyville, 20 lots have been approved and 60 more are under review within the unincorporated village. This developer held a community Charette involving citizens in the planning process and paid to increase the capacity of sewer treatment and water facilities, but did not achieve the full density permitted by the existing zoning.

Whether this trend of increased development activity could create a demand for TDRs, if a new proposal were adopted, would depend primarily on whether these and future projects were constructed at the density already allowed by existing zoning, and whether the county or the municipalities where they are proposed would require TDRs as a condition of any increases in density, either through Planned Unit Development (PUD), developers rights and responsibilities agreements, annexation agreements or other vehicles. This would likely be influenced by whether citizens and neighborhood groups in the vicinity of these new developments would support the higher densities proposed, as discussed under Criterion 4 below.

Criterion 2.

The County has strong Comprehensive Plan and Zoning policies supported by TDRs.

As indicated in the introduction, Kent County proposed a TDR ordinance in 2001 at the direction of the 1996 Comprehensive Plan. The Countryside section of the 1996 Plan stated:

⁶³ Op Cit, Draft 2006 Comprehensive Plan

“Kent County recognizes that a successful farmland preservation program requires a comprehensive approach that integrates a variety of techniques, promotes the purchase of farms by farmers and minimizes the potential conflicts between farmers and their non-farm neighbors. The following goals and strategies represent a broad based program for the support and preservation of agriculture in Kent County. It is a program that was not easily developed, but is the key to the success of many of the goals of this plan.”

The 1996 Plan included the following strategy to “Identify Land for Agricultural Use:”

“The County Commissioners will direct the County Agricultural Advisory Commission to identify and recommend farmland that should be for agricultural use. In order to avoid potential conflicts between farms and their non-farm neighbors, the agricultural areas will consist of a contiguous area predominantly devoted to agriculture or forestry, principally composed of Class I, II, and III Soils, and will be large enough to support a variety of agricultural activities. The sum of these areas consists of enough land to help maintain a market for the necessary agricultural support services in the county. The agricultural areas will contain some sensitive areas not well suited for agriculture to provide large contiguous areas. Once identified the purchase of easements and efforts of local land conservancies will be targeted to these areas. These areas will also be used to define the Agricultural Zoning District.”

Another Plan strategy was to “Establish a Transfer of Development Rights (TDR) Program:”

“The Agricultural Zoning District will be designated as a "sending" zone for development rights. The TDR program would allow a higher density to be transferred than the allowable density if the farm was developed itself. This should make the sale of development rights more economically attractive for the farmer than to develop the agricultural land itself.

The Rural Character Zone and planned growth areas around towns and villages would be designated as "receiving" zones, allowing densities to increase if TDRs are purchased. The densities of the designated growth areas would be low, with TDR as the only means to permit higher densities, thereby encouraging the use of TDRs. The TDR Program will set out the maximum permitted densities for these areas.”

The Implementation Measures section of the 1996 Plan listed the following:

“Develop a Transfer of Development Rights Program: The Planning Commission, with the recommendations of the Agriculture Advisory Committee, will devise a TDR program for adoption by the County Commissioners. This program must be adopted prior to, or concurrent with, comprehensive rezoning.”

As indicated above, this measure resulted in the proposed 2001 TDR provisions in the Land Use ordinance, which were removed by the County Commissioners after a September 2001 public hearing described under Criterion 4.

The 2006 draft update of the County Comprehensive Plan⁶⁴ includes a strategy to “Investigate a Transfer of Development Rights (TDR) Program.” The language of this 2006 TDR strategy is the same as in the 1996 Comprehensive Plan, except that it includes a new sentence:

“Through interjurisdictional agreements, the incorporated towns could also be designated as “receiving” zones.”

⁶⁴ Op Cit, Draft 2006 Comprehensive Plan

The 2006 draft Plan also has a strategy to “*Identify Land for Agricultural Use*,” as the 1996 Plan did, but it reports the following progress in the implementation of this strategy:

“The Agricultural Advisory Commission has identified and mapped farmland that should be for agricultural use. The agricultural areas consist of a contiguous area predominantly devoted to agriculture or forestry, principally composed of Class I, II, and III Soils, and is large enough to support a variety of agricultural activities. The sum of these areas consists of enough land to help maintain a market for the necessary agricultural support services in the county. The agricultural areas will contain some sensitive areas not well suited for agriculture to provide large contiguous areas. The purchase of easements and efforts of local land conservancies will be targeted to these areas. This map will be periodically reviewed.”

Under the Goal to *Maintain Agricultural Lands and Forests*, other strategies include: *Retain the Agricultural Zoning District*, *Retain the Resource Conservation District*, and *Reduce the Number of Undeveloped Lots in the Countryside*. One standard to retain the AZD is:

“Large contiguous areas of prime agricultural land are critical to an expanding and prosperous agricultural industry. The preservation of these large contiguous areas reduces the potential for conflicts between farmers and their non-farm neighbors, allows the diversification of agricultural operations and reduces the need for regulations governing nuisances sometimes associated with agribusiness. It is therefore essential to reduce the amount of land consumed by development and to promote the Agricultural Zoning District as the priority area for the targeting of easement programs.”

In summary, Kent County has strong policies and strategies to support a TDR program in both the 1996 Comprehensive Plan and in the draft 2006 Comprehensive Plan update, consistent with Criterion 2.

Kent County also has among the strongest zoning for preserving agriculture and natural resources in the State, which would support a TDR program. Since adopted in 1989, the AZD zone has limited the density of residential development to 1 dwelling per 30 acres. While it also allows an *enclave development* (cluster) at a density of 1 dwelling per 10 acres, strict design standards were adopted after the 1996 Comprehensive Plan that has limited the use of this option. Under these standards landowners must minimize the use of tillable soils for development, and impacts to neighboring agricultural operations and hunting, and show that the agricultural land remaining after subdivision is suitable for a commercially viable agricultural enterprise. They must locate the enclave on 10% or less of the property with maximum size lots of $\frac{3}{4}$ of an acre. Enclave subdivisions must have no less than three and no more than 10 dwelling units, and only one enclave per parcel is permitted. These and other more specific design standards have severely limited the use of the enclave option since they were adopted. Approval of enclaves in the AZD zone is a discretionary decision by the Planning Commission, which has strong representation from the farm community and generally does not favor subdivisions in agricultural areas.

Those interviewed explained that the enclave option was supposed to be removed from the Land Use Ordinance for the AZD zone in 2001 and replaced with the TDR provisions, but when the TDR provisions were removed after the public hearing, the enclave option was restored. By establishing detailed and stringent design standards limiting the use of the enclave option, this rationale may no longer be applicable to a new TDR proposal if one returns. The planning staff explained:

“We had an agricultural enclave option in our prior ordinance, the enclave option was to go away, and the TDR option was to replace it. We had to put it back in when the TDRs came out.”

“There are additional design standards that make it difficult to do. The Planning Commission has to find that it won’t have a negative impact on agriculture. It’s there, but it’s not being used.”

A member of the Planning Commission also explained:

“For those on the Commission that love land preservation, why champion a new program if we don’t see the development coming that could support it? If a few of these enclave proposals popped up in the AZD zone, people would get a little more afraid what was going to happen. We haven’t seen many of them, so it has not been an issue.”

There was concern at the time of the 2001 TDR proposal that completely removing the *enclave* option could have an adverse effect on the appraised values of MALPF easements in the AZD zone. When asked, “If an appraiser does an appraisal for a MALPF easement in the AZD zone, would that option be reflected in the value of the easement?” A farmer responded:

“Yes, it was in mine. I recently had an appraisal, and that’s exactly what they looked at.”

“At the time they were trying to do away with the enclave option, there was a concern about its affect on appraisals. We didn’t have the high numbers that we see now, and if the appraisers saw the zoning as only one house per 30 acres, it would be a problem getting the appraised values. The market has changed now, but that was a concern then.”

Land in the RCD zoning district, which was eligible as a sending zone in the 2001 TDR proposal, is also well protected by existing zoning and State Critical Area regulations. The zone corresponds to the State designated Chesapeake Bay Critical Area, and the Resource Conservation Areas identified by the county and approved by the State Critical Area Commission. Residential densities are limited in the district to 1 du per 20 acres, with minimum lot size of $\frac{3}{4}$ acre if on septic, and $\frac{1}{2}$ acre if on a community system, with a 100 foot minimum buffer from the waterfront, as required by state law. TDR transfers were to be allowed in the RCD primarily to allow expansion of the size of existing dwellings in the buffer.

With existing zoning in place that generally preserves all of the proposed TDR sending areas, at least as long as this zoning is maintained, Criteria 2 appears to be met if a new TDR program were to be proposed. But this zoning may also be sufficient without a TDR program, in conjunction with other available land preservation programs to make the protection permanent. The local zoning should preserve the land resources that the Agricultural Advisory Commission has identified and mapped as farmland that should be for agricultural use, as well as the lands in the designated RCD zone in the Critical Area.

Water, sewer and other infrastructure

County and municipal water and sewer facilities could be a limiting factor for the implementation of a TDR program, if density bonuses were needed above the as-of-right base level zoning in the most likely receiving areas.

A developer explained the effects of water and sewer service on density and the market:

“It is a lot simpler for the developer to go on public water and sewer systems; it is much more marketable to the end consumer. Given the option, we would definitely prefer to do infill development, with enclave development as a secondary choice.”

The Maryland Department of the Environment tables for Kent County for 2002-2004 show that the sewage treatment plants in Chestertown, Kennedyville and Worton/Butlertown are within 25% to 33% of their design and permitted flow capacity, however, this table is now two years old. Except for Chestertown and Rock Hall, Kent County sewage treatment plants tend to be designed for capacities that are lower than the larger plants in neighboring Cecil and Queen Anne's counties.⁶⁵

Increased densities with TDRs may also be limited by the capacity of other infrastructure in the county, including roads and bridges. Chestertown has had the highest rate of growth and new development in the county, and the new annexation of 600 acres proposed by Yorktowne developers has the potential for nearly doubling the number of housing units in the town. As the Mayor described, the primary issue is the limited capacity of a single two-lane drawbridge over the Chester River carrying all of the north-south traffic through town.

"We have a unique problem in Chestertown that all of the best TDRs in the world are not going to solve. We have a traffic problem. That traffic problem is monumental. I'm all in favor of putting growth around the towns and villages. It's the only way to do it. That being said, we have a traffic problem, with one way in and one way out. The congestion on this street is stunning. It can be backed up as far as the eye can see. In town, we have enough water and sewer service for infill development. That's all we have. We know we have enough water and sewer for infill development, but the problem that is going to drive everything else is traffic."

"[The lack of a] bypass has us stuck. Kent County says yes, Queen Anne's County says no, and the State Highway Administration says, 'Until you can agree we can't do anything'."

As a Chestertown Council member simply put it during their meeting on the annexation proposal by Yorktowne: *"If you solve our bypass problem, we'll consider it, but we don't know how a developer could possibly do that."*

Criterion 3.

Administration of TDRs is simple, efficient and predictable.

The 2001 TDR proposal was well designed for efficient and predictable administration, because of the county's extensive review of literature on TDRs and TDR programs in other Maryland counties and in other states. It incorporated many of the features of successful TDR programs in Montgomery and Calvert County.

However, in the absence of an existing TDR program and considering comments from the planning staff that a new TDR proposal would not be similar to the one proposed in 2001, it is not possible to apply Criterion 3 to fully assess whether Kent County's administration of a new program would be simple, efficient and predictable. With a small planning staff it is difficult to assess whether the county could commit the staff and budget to effectively implement a new county-wide program.

Furthermore, with the enactment of H.B.1141 by the Maryland General Assembly in 2006,⁶⁶ the county's legal authority to implement the new language in the draft 2006 Comprehensive Plan⁶⁷ would need to be reviewed if they wanted to seek interjurisdictional agreements to designate TDR receiving areas in municipalities, especially if they were to go into areas proposed for annexation.

⁶⁵ Maryland Department of the Environment, Sewage Treatment Plant Flow Tables, 2002-2004 average

⁶⁶ Op Cit, House Bill 1141

⁶⁷ *"Through interjurisdictional agreements, the incorporated towns could also be designated as "receiving" zones."*

Criterion 4.

The TDR Program has broad public support.

There is very strong support for controlling growth and preserving agricultural land and natural resource in Kent County, and for maintaining and promoting the agricultural, hunting and tourism industries that depend on these land resources. This support may not extend to broad public support for a TDR program, however, if the result of TDR transfers is perceived to require more or higher density development.

There appears to be a significant difference in the attitudes of the farming community and landowners in Kent County toward land preservation and zoning than in its neighboring counties. Compared to other Eastern Shore counties, this attitude may be most similar to the farming culture in Caroline County, where young farmers initiated and the local Farm Bureau supported rezoning agricultural lands and the redesign of the existing TDR program to prevent sprawl cluster developments in the agricultural zone. As a farmer who works in several Eastern shore counties described it:

“Within one week I went to the Cecil County hearing on the TDR program, where they tabled the vote. Two days later I went to the Queen Anne’s County Commissioners meeting on the Henry Sears proposal, and we had our own Planning Commission meeting [here in Kent County] within a few days of these two. It seemed like I was in three different parts of the world. In our meeting, we had 12 applications to sell land preservation easements, and a one-lot subdivision proposal. In Cecil County they were still going at 11 o’clock at night and yelling at each other.”

But regarding TDRs, he also said:

“I haven’t seen where it’s been a very effective tool in the counties that I’m involved with. In Queen Anne’s, I have seen the down side of their program, so here I didn’t really support the TDR proposal because of what happened there.”

“Most of these small villages don’t want to grow. We’re now doing a three-village master plan for Worton, Kennedyville and Fairlee, and the feeling there is universal. They are scared of what will happen with another 200 homes.”

A public hearing was held by the County Commissioners September 4, 2001⁶⁸ on the 2001 TDR Proposal. The following are samples of comments from those that testified against the proposal. No one spoke in favor of it:

“Do not adopt the proposed Land Use Ordinance including the TDR Program since there is not a successful history in other communities and a clear definition of the process [is] not apparent.”

“The TDR program [is] replete with problems. [I am] concerned that the TDR program would become a statute and not readily revocable should the program not be viable. The program was counter productive for the County. The purpose of the Zoning Plan [is] to meet the health safety and welfare of the county, therefore, allowing increased density, through the TDR program, does not meet those standards.”

⁶⁸ Kent County Commissioners, Public Hearing on Home Rule Code Bill No. 10-2001, September 4, 2001

“Expressed concern as a local builder, of the high purchase price of building lots in Kent County. There are few affordable building lots in Kent County ... feels the TDR program would exacerbate the problem and not provide any benefits.”

“TDR programs do not work. Specifically noted page 407 which infers purchasing and selling TDRs, which he feels the county should not be involved with this type of commerce.”

Summarizing the overall public reaction to the TDR proposal in 2001, a member of the planning staff said:

“Probably several things defeated the program, including the TDR related issues in Queen Anne’s County. Several people said the program was not working. We said that our program is nothing like Queen Anne’s program, but it didn’t matter.”

KENT COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
1) TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.			
a) A balance of supply and demand for TDRs has been created in the design of the TDR program.		X	Excess of supply & public resistance to RA demand
b) Receiver areas (RAs) are large enough to absorb authorized TDRs.		X	No interest in use of TDR in Receiver Areas
c) As-of-right base density in TDR receiving areas is zoned lower than the market demand for the type and density of housing that developers want to build.		X	Receiver areas zoned for market without TDRs
d) Developers in TDR receiver areas can achieve the desired market density only with TDRs.		X	Builders offer other benefits for density
e) Density bonuses for using TDRs are sufficiently high to justify the increased cost of purchasing TDR		X	No current proposal for TDR bonus density
f) Buying TDRs is more profitable to developers than building to base density or alternative ways to achieve higher density in receiver areas.		X	Developers able to get desired density w/o TDRs
g) Purchasing TDRs and the public approval process of using them in receiver sites is faster and more predictable than alternative ways to achieve the desired density.		n.a.	No current proposal for TDR
h) Selling TDRs is reasonably competitive in value to landowners, considering the residual value of land restricted by TDR easements or covenants, with developing the sending site, selling an easement to other state or local PDR programs, or is the only alternative allowed.		X	Landowners participate actively in land pres. programs, didn't support TDR proposal in 2001
i) There is an active market for higher density housing types allowed with TDRs in receiver areas,		X	Limited market for higher density housing
j) The county takes steps to maintain TDR values that are attractive to buyers and sellers by adding TDR receiver capacity, purchasing TDRs, adjusting the TDR allocation rate (amount of TDR/acre or du/TDR), or allowing TDRs for increases in non-residential floor area.		n.a.	TDR program was rejected in 2001; new program not designed
2) The County has strong Comprehensive Plan and Zoning policies supported by TDRs			1996 Comp. Plan & 2006 Draft call for TDR study
a) The TDR program is established as part of larger strategy to preserve land and redirect growth.	✓		Draft Comp. plan calls for evaluation of TDRs
b) Goals are established in the Plan for the types, location and amount of land to preserve.	✓		1996 Comp. Plan & 2006 draft have goals/priorities
c) TDR sending areas are designated to protect the most valuable rural land, unique natural and historic resources, or other resources in the Plan's protection goals.	✓		Ag. Advisory Committee identified & mapped farmland to preserve
d) TDRs are received only where the county and municipalities want development to occur.	✓		2001 proposed receiver areas rejected by County
e) TDRs will not add new residences where they will contribute to the fragmentation of the best agricultural lands, conflict with existing farming operations or contribute to a sense of farming impermanence.		n.a.	Prior 2001 TDR receiving areas were in growth areas. No new proposal.
f) TDRs help mitigate the perceived effects of downzoning, help gain support from landowners, and help avoid litigation over rezoning.		X	Agricultural zoning is established, downzoning is not anticipated w/ TDR
g) Zoning limits or prohibits the use of development rights on the sending site, and reduces the as-of-right base density in receiver sites below the level of market demand.		n.a.	Ag. zoning limits rural development; Comp Plan to limit base density w/o TDRs
h) Zoning provides for additional density needed to accomplish comprehensive plan goals in receiver areas only or primarily with TDR.		n.a.	Additional density not wanted to achieve Comp Plan goals, even w/TDR
i) The County adopts policy that future zoning density increases in receiving areas are allowed only with TDRs.		n.a.	Planners are considering more limited TDR use
j) County water and sewer plans anticipate and plan for development in receiving areas at the density needed to accommodate TDRs.	✓		Municipal W&S capacity varies, none for TDRs
k) Subdivision rules and procedures ensure that receiving area infrastructure is capable of absorbing development with TDR		X	Bridge & road capacity limits density in towns

KENT COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
3) Administration of TDRs is simple, efficient and predictable	✓		2001 TDR program was well designed for Admin.
a) Buyers of TDR can obtain all approvals for their use in receiver sites with certainty and predictability, and can use TDRs for additional density as-of-right in receiver projects.		n.a.	New TDR program not yet designed or adopted
b) Buyers & sellers of TDR are provided clear rules for use of TDRs in receiver areas and restrictions on using development rights on sending site.		n.a.	New TDR program not yet designed or adopted
c) Buyers and sellers of TDR are informed about the current market values of TDRs.		n.a.	New TDR program not yet designed or adopted
d) Receiver areas for TDR are designated and zoned for densities needed to absorb TDRs, without uncertain discretionary or conditional use review.		n.a.	New TDR program not yet designed or adopted
e) TDRs are allowed on a gross land area basis; the number of TDRs authorized for sale is not reduced by environmental conditions for development on the sending parcel.		n.a.	New TDR program not yet designed or adopted
f) Arbitrary rules limiting the transfer or use of TDRs are avoided (e.g. distance between selling and receiver sites, use of TDRs in the same political districts, etc.).		n.a.	New TDR program not yet designed or adopted
g) Special rules for development in receiver areas do not discriminate against TDR projects.		n.a.	New TDR program not yet designed or adopted
h) Land records, mapping and administration of TDRs are complete, maintained and publicly accessible.		n.a.	New TDR program not yet designed or adopted
i) Restrictions on TDR sending sites are permanent, recorded in land records, used in the subdivision and zoning approval process, and sending sites are monitored for compliance.		n.a.	New TDR program not yet designed or adopted
j) Lengthy delays in recording and using TDRs are avoided.		n.a.	New TDR program not yet designed or adopted
k) Local government monitors and modifies TDR program as needed to improve effectiveness and efficiency, and adds receiving areas or increases their TDR capacity as needed to maintain demand.		n.a.	New TDR program not yet designed or adopted
4) The TDR program has broad public support.			
a) Rural landowners are motivated to protect land and farming as an industry, more than by profit from selling land for development; and they support TDRs, easement purchase programs and zoning to preserve agricultural uses;	✓		Rural landowners support ag zoning & land preservation programs, but generally not TDRs
b) Real estate developers support TDRs to obtain increased density in receiving areas, and as a flexible and expedient alternative to purchasing additional land,	✓		Developers support TDR concept, but build within allowed density.
c) Farming, community and environmental groups support TDRs as one means to protect more land,		X	2001 TDR proposal universally opposed
d) TDR receiving site communities accept or support the density, design quality and compatibility of development using TDRs.		X	Towns & villages oppose additional density of TDR
e) Elected government officials accept TDRs as method to protect land with private funds, protect equity of rural landowners, control the location and quality of growth and implement the comprehensive plan.		X	County Commissioners rejected 2001 TDR proposal

5. QUEEN ANNE'S COUNTY TDR PROGRAM ASSESSMENT

The Feasibility of Successful TDR Programs for the Eastern Shore

Introduction

In Phase I of this study, Queen Anne's TDR program was one of six in Maryland reviewed to determine the attributes or key ingredients of the program, and to identify why it was either succeeding or not succeeding. This review resulted in the preparation of a *TDR Program Profile* for the county, found in Chapter VI of this report, which supplements this assessment. Interviews were conducted with the Planning Director and her staff. The TDR ordinance and records of TDR transactions were examined, and the comprehensive plan, zoning ordinance and related documents were reviewed. Prior to the interviews, the Planning Director had provided a PowerPoint presentation to the County Commissioners about the history and evolution of *Queen Anne's County Land Preservation*, which was helpful in understanding the context for and evolution of TDR and other land preservation programs in the county.

This more detailed assessment of Queen Anne's TDR program is based on *Criteria for a Successful TDR Program* adopted by the Technical Advisory Committee for this study, the *Findings* of Phase I found in Chapter IV, and the collective experience of the committee members and principle investigators in the use of TDRs. Additional interviews were conducted with developers, farmers, citizen and environmental activists, and attorneys and engineers involved in capital facilities and development in the county, in order to assess how the program relates to the *Criteria*.

Summary

The Queen Anne's County TDR program protected 2,180 acres of land with TDR deed restrictions prior to the 1994 amendments, primarily by transferring development rights to clustered developments in agriculturally zoned areas (311.36 acres/year ave.). Since the 1994 amendments, 464 acres of land has been preserved with TDR transfers (66.28 acres/year ave.). All of the transfers after 1994 except one were from rural properties to other properties in the Critical Area. Outside of the Critical Area the goal of the 1994 changes to the program was to redirect TDRs to designated growth areas. This has clearly not been achieved, for a number of reasons explained below.

The Queen Anne's County Chesapeake Bay Critical Area Act⁶⁹ serves as a supplemental or "overlay" ordinance to the zoning regulations of the county's Land Use and Development Code.⁷⁰ Uses and densities in each of the Critical Area development areas⁷¹ are those permitted in the applicable underlying base zoning district, and densities in each are allowed to be increased by TDRs from the RCA. But TDRs from the Agriculture (AG) and Countryside (CS) zones outside of the Critical Area have not traded since 1994, because there is no demand for TDRs for use in designated growth areas. This is attributable to the following factors:

- The base level as-of-right zoning density in designated receiver areas is 3.5 du/acre or higher, and the market demand for residential use is for a density less than this.
- The bonus density offered for residential and commercial development with TDRs is too low to be attractive to developers.
- The per unit cost of public water and sewer service for new development in growth areas is higher than the cost of well and septic service in agricultural areas.

⁶⁹ Chapter 14.1 Queen Anne's County Code

⁷⁰ Chapter 18, Land Use and Development

⁷¹ Intensely Developed Areas IDA, Limited Development Areas LDA, Resource Conservation Areas RCA

- The existing capacity of the public sewage system may limit large new residential projects with TDRs; opposition groups often use the process for expanding such facilities to block new development, and significant increases must be granted by the County Commissioners.
- Developers are able to avoid requirements for including moderately priced dwelling units in their projects by developing outside of growth areas, while building more housing units.
- Landowners and developers are able to continue rural-to-rural transfers of development rights outside of growth areas through the Non-Contiguous Development (NCD) provisions of the zoning ordinance.
- Height limits for structures and other environmental restrictions may limit the density of development in growth areas below base level zoning or TDR bonus levels.
- Organized citizen and community opposition to higher density development has led County Commissioners and developers to reduce the scale and density of proposed developments below that allowed by base level zoning, and to remove some undeveloped farmland from designated growth areas, further reducing the need for TDRs.

As a result of these and other factors, the Queen Anne's County TDR program does not meet several *Criteria for a Successful TDR Program* used for this evaluation, as discussed below and illustrated in the attached chart, page 87.

Applying the *Criteria for a Successful TDR Program*

The following is an assessment of how the Queen Anne's County TDR ordinance and its planning, zoning, economic and political context relate to the Criteria outlined in Chapter IV.

Criterion 1.

TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.

Supply and demand

When the TDR ordinance was adopted in 1987 with revisions of the Comprehensive Plan and zoning ordinance, they were provided as one additional tool among others to mitigate the potential effects of downzoning agricultural and critical area lands. There were no overall estimates of the total projected supply of TDRs or the demand for them in receiver areas, which at that time included other rural areas of the county.

Since the 1994 amendments, the county's TDR zoning policies direct the use of TDRs to zoning districts in the six designated growth areas. The designated growth areas are very small, with 6,400 acres of total land available for development, or about 3% of the land area in the county (238,337 ac.) and 3.8% of the total amount of land in farms (167,957 acres – 70.5% of county). Total build out capacity at base zoning density in these growth areas was estimated in 2002 at a maximum of 20,000 new dwellings, or 15,000 du based on 75%, and 10,000 du at 50% of probable density, over a 6 to 20 year planning period. Since 2002, in response to citizen pressure the Commissioners removed large farms from community plans for development in Stevensville and Queenstown, reducing potential total build-out capacity. Theoretically, if a 25% TDR bonus density were added to these 2002 build-out projections in the growth areas, a maximum of 5,000 additional dwellings would be possible or 3,750 du at a probable density of 75% or 2,500 du at 50%.

Approximately 209,000 acres or 88 % of Queen Anne's County is zoned Agricultural (AG) or Countryside (CS), allowing one TDR/8 acres in AG and one TDR/5 acres in CS zones outside of the Critical Area RCA. In September 2005, the county reported 49,743 acres of county land protected with some form of easement (29,517 ac.) or deed restriction (20,226 ac), including 2,644 acres of TDR sending properties.

The county has a broad multi-program strategy to protect farmland and open space, including MALPF, MET and Rural Legacy easements, state and county owned parkland and natural areas, private conservation lands, and deed restricted open space resulting from cluster developments, non-contiguous developments, and TDRs sending areas. TDRs play minor role in this strategy, with the fewest acres protected other than private conservation lands.

Since the current market for new residential development in the growth areas is for single family detached units at a density of about 2.5 du/acre on public water and sewer, it is lower than the base zoning density, so there is no incentive to use TDRs. Development right transfers are now happening through the Non Contiguous Development (NCD) program,⁷² which allows transfers to rural areas on well and septic systems. Since 1994 this program has preserved 5,032 acres through 17 projects (630[±] development rights) because landowners get higher per acre values for the development rights than they can through non Critical Area TDR sales or easement sales to MALPF, and it is a quicker and more flexible option. In this way the NCD program provides a demand for development rights from non-Critical Area lands zoned AG and CS, for use outside of growth areas and competes with the TDR program.

Queen Anne's 25% bonus density for using TDRs to increase housing density in growth areas is the lowest of any of the TDR programs in Maryland. Others typically offer an increase over the base zoning density with TDRs somewhere between 100% and a high of 700% in Montgomery and 1,900% in Calvert, the two most successful TDR programs in the state.⁷³ Queen Anne's commercial density bonus of 200 ft² per TDR with a maximum of 25% per project, and a 500 ft² per TDR increase in impermeable surface or 25% per project, are also too low to provide an incentive to buy TDRs, as discussed below.

TDR values

In an active market, TDR values are a function of supply and demand, but they also must be competitive with other options available to the buyer and seller. The zoning rules governing TDRs in Queen Anne's County are different for transfers within the designated Critical Area where most land is designated Resource Conservation Area (RCA) with a density of 1 du/20 acres. TDRs can be transferred from one property in the Critical Area RCA to other properties in the Critical Area in the IDA, LDA or RCA areas. For example, the maximum density in CS zoned land in the RCA would be 1 du/20 acres without TDRs, but could be increased to 1 du/5 acres with TDRs from other RCA property.⁷⁴ This has provided an incentive to transfer development rights within the Critical Area where TDRs continue to be traded at high value. While there is not any increase in the overall density of Critical Area RCA as a whole with TDRs, the receiving parcel can increase the density on site to whatever the base zoning allows, assuming the 1:20 density is maintained overall. TDRs were offered to the Critical Area landowners initially to help mitigate the perceived loss of land value by the State's mandated 1:20 acre density in the RCA zones. However, early studies projected that both vacant and residential parcels of Critical Area land in the county would increase in value after the enactment of the Critical Areas law in 1984.⁷⁵ Recent sales of waterfront lots worth \$1 million or more were reported, with TDR sales at a quarter of this value.

⁷² Additional description of the NCD program is in the TDR Program Profile for Queen Anne's, Chapter VI, and Article XIX, §18:1-97-99 of the County Zoning Code.

⁷³ See *Maryland TDR Programs – Comparative Features*, Table I.

⁷⁴ Article XX, §18:1-106 C. (4) (a), and §18:1-15 D. (1) (f), Countryside (CS) District.

⁷⁵ *The Impact of Regional Land Use Controls on Local Real Estate Markets: The Chesapeake Bay and The New Jersey Pinelands*, W. Patrick Beaton, Center for Urban Policy Research, Rutgers University, New Brunswick, NJ, July 1988

These Critical Area TDRs have been traded in the past for about \$35,000 each, or \$1,750/acre, to more valuable locations within the Critical Area. With a diminishing supply of these TDRs and rapidly appreciating values of waterfront property, Critical Area development rights are now worth much more. Those interviewed reported recent Critical Area TDR sales at \$250,000 and \$265,000 per TDR (\$12,500- \$13,250/acre) for creation of more valuable waterfront lots worth a reported \$450,000 to \$1,000,000.

Because of many factors, non-Critical Area TDRs are now worth next to nothing, because there is very little or no market for their use in growth area zoning districts. One of the county planners thought that this is primarily because developers want to build single family housing on public water and sewer at a density of about 2.5 dwellings per acre, which is lower than the base level zoning density in these areas, rather than at 4.3 du/acre or higher densities allowed with TDRs.

“The market demand is less than 3.5 units per acre. So in order to keep qualified as a PFA, the 3.5:1 requirement for PFAs by the state is higher than the market. What we’ve seen is single family product, which is about 2.5 acre densities if you’re on public water and sewer, so the permitted density is 3.5:1 or higher in the growth area”

“Politically and publicly the 2.5 units/acre was unacceptable to the public. So while we’re struggling to get 2.5 units/acre, the citizens are concerned about that being too high a density.”

Others interviewed suggest the lack of interest in TDRs in growth areas is due to several factors other than the market. Some claim there would be a market for higher densities in growth areas, as evidenced by completed higher density developments in Kent Narrows and higher density proposals at Kent Island and Grasonville.

The additional cost of providing for public infrastructure improvements also discourages developers from using TDRs for higher density within growth areas, or from developing projects at the base-level density allowed in some growth areas, as described under criterion 2 below.

In addition to a bonus residential density, the county TDR program gives other incentives for the use of TDRs in growth areas, including an additional 200 ft² of commercial space for each TDR and an increase in impervious surface, for a 25% total increase in commercial space. As one developer explained:

“If you assume that commercial land is worth about \$300,000 an acre, and commercial zoning already permits 0.4 FAR (floor area ratio), you have 17,124 ft.² of the building space as-of-right. The effective cost of land per square ft of building space is \$17.22. Therefore, one TDR for commercial purposes is worth \$3,433. By the time you get done, that increase is probably worth less than the cost in consultants, engineering, and processing time to create the TDRs.”⁷⁶ He also explained, “If you don’t use TDRs for increasing the size of a commercial building you can increase impervious surfaces on a site by 500 ft² (about two parking spaces) per TDR. You are allowed a total impervious surface of 0.8, but can use TDRs to increase that by 25%. It is unlikely that the county would allow 100% impervious surfaces on any site, because of environmental features. At its maximum value, adding two parking spaces would only be useful for professional or medical offices, so there is little interest in the additional parking to justify the purchase of TDRs.”

⁷⁶ At a transfer rate outside of the CA of 1 TDR/8 acres (\$420/acre), this amount would also be too low for landowners to be interested in selling TDRs, especially when there are other options available to them.

Criterion 2.

The County has strong Comprehensive Plan and Zoning policies that support use of TDRs.

The county's TDR program was adopted in 1987 as part of comprehensive plan and zoning amendments which downzoned rural zoning districts, as one means to mitigate the perceived loss of value or landowner "equity" in the land subject to the downzoning. Prior to the 1994 amendments to the program, it partially fulfilled this objective when TDRs had value for the sellers and could be transferred to other parts of the AG and CS zones.

The 1994 amendments were designed to direct new growth with TDRs only to zoning districts in designated growth areas, thus preventing further fragmentation of the agricultural lands outside of the Critical Area with TDRs, consistent with the amendments to the Comprehensive Plan.

The TDR ordinance establishes minimum standards for the quality of land to be preserved with TDRs. The Transferor parcel in the AG and CS zones outside of the Critical Area must be at least 24 acres or one half of the size of the lot of record, and meet soils criteria similar to those for eligibility for the MALPF program. Transferor parcels in the Critical Area RCA must be at least 20 acres.

For the *Eastern Shore 2010* inter-county agreement, sponsored by the Eastern Shore Land Conservancy, Queen Anne's County established a goal of preserving 111,637 acres of land or 46.8% of its total land area by 2010. As of September 2005, it had preserved 62,953 acres of land or 26.4% of the county, including easement and deed restricted open space, state and local parks, and private conservation lands.

The Comprehensive Plan adopted in 2002 describes the TDR program, and concludes: "*Of all the preservation/conservation options, this program has been the least effective and plagued with legal appeals by property owners near the receiving parcels.*"

Land Use Policy 5A of the Plan is to "*Enhance the amount of the county's lands outside the Growth Areas that are preserved for agricultural production,*" and adopts the following implementation strategies related to TDRs:

- "1. During the ordinance update, reevaluate the TDR program and consider fine-tuning implementation techniques that will enhance the program, and*
- 2. During the ordinance update and review of the TDR provisions, consider changing the density on transferring properties from one unit per four acres to one unit per eight acres."*

The zoning ordinance revision of 2004 changed the TDR/land ratio from 1:4 acres to 1:8 acres in the AG zone, and established minimum size and soils criteria for sending parcels.⁷⁷ Other refinements were made in the ordinance to reflect changes in zoning categories and standards.

Two of the designated growth areas, Queenstown and Centerville, are incorporated towns with their own planning, zoning and regulatory authority over land use in most of their community plan boundary, and their cooperation is needed for their community plans to be implemented, especially for infrastructure support for higher density development with TDR. There were reports of significant tension between county and municipal leaders in these jurisdictions, especially over the issue of public water and sewer service and the scale of development.

Instead of zoning policies which support TDRs, some of those interviewed claimed that the NCD program competes with or inhibits the TDR program's objective to send rural development rights to designated growth areas. With all the other constraints on the use of TDRs in growth areas

⁷⁷ 24 acres or ½ of the size of the lot of record, whichever is less, §18:1-101, A (4).

discussed here, it is not certain that the development rights that are now being used in NCD cluster developments outside of growth areas would be used in growth areas if the NCD option were not available. With 5,032 acres of farmland under deed restrictions from NCD transfers since 1994, which is nearly double the 2,644 acres restricted by the TDR program since 1987, the planning staff and others balanced this accomplishment with the loss of some farmland elsewhere in the AG and CS zones where the NCD developments are occurring, and the threat of road-side small cluster development that would likely occur without NCDs.

A full evaluation of the NCD program is beyond the scope of this assessment, since it is focused only on TDR programs and not other density transfer programs available in other counties. Interview discussions about the NCD program were limited in this assessment to its relationship to the TDR program. Some of those interviewed questioned whether the NCD program is compatible with, detracts from or competes with the county's TDR program.

Water and sewer costs and affordable housing

Improvements to the county's water and sewer infrastructure in growth areas outside of municipal boundaries are done by the County Sanitary District, an enterprise funded from existing users, except for some State funded wastewater plant expansions, such as the one under construction on Kent Island to increase the waste water treatment capacity by one million gallons per day (MGD). In the county, developers are required to provide the majority of the necessary water and sewer infrastructure to serve new growth. The typical cost is about \$4,000 for water, \$6,000 for sewer, and a capital connection charge of \$4,900, for a total cost of nearly \$15,000 per unit of new residential construction in a growth area, compared to the typical cost of about \$10,000 per unit for well and septic service for new homes in agricultural zones.⁷⁸ Development impact fees for public schools and fire protection total \$5,744 per unit for single family detached and \$3,397 per unit for other residential housing in new developments.⁷⁹

In rural areas developers are able to build more houses under the threshold of the county Inclusionary Housing ordinance⁸⁰ and avoid requirements to build 10% moderately priced units in their projects, or payments in lieu of construction. For example, a landowner can develop a 59 lot subdivision in a rural area and stay under the moderate priced housing requirement, and end up with more units than another developer who builds in a growth area, where the threshold for including moderate priced dwelling units is 20 lots.

Developers suggested that the biggest problem with transferring TDRs to growth areas was the limited sewage treatment capacity in these areas. One said:

“Centerville doesn’t have any sewer capacity; Church Hill has a very small area with a tiny sewer capacity, and Queenstown has a letter from MDE saying they shall not connect even one additional house to the town sewage treatment plant. The sewer capacity issue is probably the main limiting factor anywhere you go on the Eastern shore.”

Examples were offered by several of those interviewed to illustrate that it is not precisely a sewage capacity problem, but that citizen opposition to higher density in growth areas often targets the public decision process required to expand sewage capacity to block expansions needed for new development:

⁷⁸ Queen Anne's County Sanitary District official

⁷⁹ §18:3-16 A. Development Impact Fees.

⁸⁰ Article XXI Inclusionary Housing, §18:1-108, Moderately priced dwelling units, County zoning code

“Developers of two proposed projects close to the Bay Bridge were unsuccessful in their efforts to get amended into the comprehensive plan. When they redid the comprehensive plan, some areas that were previously scheduled for water and sewer were no longer planned for this.”

“The recently proposed annexation at Queenstown would have required a state-of-the-art sewage treatment plant, costing \$6.5 million. The small population of Queenstown could not even afford a million-dollar upgrade to the existing system. The Elm Street Development Corporation decided to withdraw their plans for Queenstown (about 1400 homes on half-acre lots), even though they never got to a point where there was a vote on the proposal, after spending a lot of money for consultants, planners, lawyers and others for 3 ½ years. Queenstown may have foreclosed their opportunity for expansion of the town in this area.”

“If you came to Queen Anne’s County and said that you wanted to be on public sewer, and asked were can I go? Centerville has limited capacity, so I wouldn’t go there; Sudlersville has an old system activated sludge plant that can’t meet the new biological limits; I won’t go there. Church Hill does not know what their capacity is; Chestertown has some capacity, I may try to go there, but their annexation policy is limiting. So if I can’t go to any of these places, maybe I’ll go out on the farm to develop.”

The Maryland Department of the Environment’s *Sewage Treatment Plant Flow Table* of March 2004, which monitors the capacity and use of county and municipal sewage treatment plants, shows that the Queenstown plant is the only one in the county where flows exceeded design and permitted capacity, but this table is now two years old.

Sewage Treatment Plant Flow Table - MDE

Plant	Daily Flow in Millions of Gallons (MGD)			
	Design Capacity	Permitted Flow	2004 Ave. Flow	Ave. Flow 2002-2004
Centerville	0.500	0.500	0.311	0.322
Church Hill	0.080	0.080	0.068	0.059
Queen Anne's Co. Sanitary District	2.000	2.000	1.510	1.541
Sudlersville	0.090	0.083	0.034	0.042
Queenstown	0.085	0.085	0.091	0.091

According to the county’s 2006 Comprehensive Water and Sewerage Plan, *“Water availability has never been the limiting factor for development in Queen Anne’s County, sewer has always been the limiting issue.”*⁸¹ However, the Maryland Department of the Environment (MDE) has prohibited any future groundwater appropriation permits into the Aquia aquifer on Kent Island, due to salt-water intrusion. New appropriations from the Aquia between the Wye River (west of Queenstown) and Kent Narrows are limited to less than 1,000 gallons per day per development. As a result, the county has begun a well replacement program into the lower Patapsco aquifer, which requires wells typically at 1,500 to 1,700 feet deep, compared to 150 to 200 feet for the Aquia.

The county is concerned with the lack of municipal water available to serve the growth areas within municipalities. About half of the properties in these areas have access to a water main. New development must connect to the water service when it is available. Due to limited funding, any extensions of water service in the past were to serve a development project, but a system of

⁸¹ *Queen Anne’s County, 2006 Comprehensive Water and Sewerage Plan*, Queen Anne’s County Sanitary District, Alan Quimby, P.E., Feb. 28, 2006

mandatory connections is now being considered. Since the Plan reports that many of the systems supplying water to growth areas may not have sufficient capacity to meet the demand resulting from a mandatory system,⁸² the availability of water service could be a limiting factor in the use of TDRs in growth areas if other factors limiting TDR demand could be overcome.

Criterion 3.

Administration of TDRs is simple, efficient and predictable.

The Transfer of Development Rights section of the zoning ordinance (Article XX, §18:1 et seq.) provides more detailed rules than most county TDR ordinances provide in terms of limitations, bonus ratios, and rules for use of TDRs in various zoning districts. The steps in the transfer process are integrated into the Subdivision code and outlined in the Queen Anne's TDR Program Profile, in Chapter VI. In general, developers have found the administration of the TDR program to be comparatively simple in the county, but outside of the Critical Area they are only allowed to be used in growth areas, where developers don't want to use them. As one said, *"The administration of TDRs is a relatively simple process here, but the problem is where to use them. Who cares how efficient the system is if there is nowhere to use them?"*

Since the 1994 changes to the TDR program limited the use of TDRs to designated growth areas, developers have lost interest in the use of TDRs. Large development proposals have been opposed by organized citizen groups and reduced in scale and density by the County Commissioners, including the *Four Seasons* and *Gibson's Grant* projects on Kent Island. Since development projects have not been approved at the base-level zoning density, it is unlikely that potential buyers of TDRs would consider the purchase of TDRs to build 25% above the base density a good investment.

The deed restrictions recorded in the land records on TDR sending parcels do not list the price paid for the TDRs. While some of those interviewed were willing to share anecdotes of prices paid for some TDRs they were directly involved in, this information is not collected or shared with other potential buyers or sellers of TDRs, so little information about the TDR market is available publicly.

Landowners are eligible to sell TDRs based on the gross land area of the sending parcel, and do not have to demonstrate that the number of development rights they could sell for use in receiver areas, could be built on the sending parcel. This "gross area" approach was criticized by some, because it could lead to more housing units being built in the county than if land with environmental constraints, such as wetlands or wildlife habitat, were deducted from the land area eligible to sell TDRs. In other counties, this "gross area" calculation has made administration of a TDR program more predictable, and has encouraged landowners to sell TDRs rather than develop the sending properties.

Additional restrictions on where TDRs can be received based on political or community considerations further restricts the future potential demand for TDRs, such as those added to the TDR ordinance that TDRs used on receiving parcels in the CMPD and TC zoning districts and in the Stevensville Growth Area must be derived from transferor parcels within the 4th Election District (Kent Island).

The County Planning Department maintains a detailed TDR Table with the file number, name and location of the sending and receiving parcels, acres of TDR open space, and further comments. The county also produces detailed maps of the locations of TDR sending properties protected by open space deed restrictions.

⁸² Ibid, page 7-8

The *original instrument of transfer* of TDRs is required by the county zoning code (§18:1-104) to contain covenants that the development rights being permanently transferred represent all development rights with respect to the transferor parcel under the existing or any future zoning or similar ordinance regulating the use of land; that the transferor parcel may not be subdivided or reconfigured; that the parcel is restricted to a list of open space, agricultural and recreation uses in the code (§18:1-12); and that all provisions of the instrument shall run with and bind the transferor parcel and may be enforced by the County Commissioners. After it is properly executed, the *original instrument of transfer* is delivered by the Planning Director to the recorder of deeds for recording.

Several of those interviewed questioned the permanence and long-term effectiveness of restrictive covenants enforced at the sole discretion of the County Commissioners, compared with a perpetual conservation easement form of protection such as those recorded for MALPF, MET, the Rural Legacy Program, federal farm and forest preservation grant programs, or by other county TDR programs. For example, under Article XXVII of zoning code, *Guarantees and Covenants* (§18:1-205 E (7)) the ordinance states:

“Any open space restrictions established by the instrument shall be null and void and of no force and effect following: (a) Annexation of the open space by a municipal corporation, (b) Final approval by the municipal corporation of a subdivision or site plan that would permit uses other than those uses authorized in the instrument, and (c) The execution of a release in recordable form by the County Commissioners releasing the land from the force and effect of the instrument. The execution of such release shall be in the sole and exclusive discretion of the County Commissioners”

It was reported that one such case of a planned release from the force and effect of a deed restricted property in Sudlersville was challenged in court. In effect, with this provision the *original instrument of transfer* covenants on the 2,644 acres of TDR “protected” property, or the 12,194 acres of other deed restricted property with similar covenants in the county, could be released in the future by three of the five member County Commission. There is no language in the code or the covenants that calls for permanent or perpetual preservation of these lands, or that would guide or limit this important decision of the County Commissioners.

Criterion 4.

The TDR program has broad public support.

Most of those interviewed agreed that one of the primary factors limiting housing density and TDR demand is organized citizen opposition to the rate, scale and density of growth almost everywhere in the county, but especially in and around designated growth areas. Some indicated that this slow-growth movement was supported by a majority of the political leaders at the time. In this context, it is unlikely that changes in the TDR program that would increase the rate, scale or density in growth areas would be considered. Only changes that would lower the base-level density in TDR receiving areas, or shift development from rural areas to growth areas by changes in the NCD program, existing cluster-development rules, or the inclusionary housing thresholds, would likely be acceptable to those opposing development in the growth areas.

Organized citizen opposition to large development projects such as the Elm Street Development Corporation proposal at Queenstown, and the Four Seasons and Gibson’s Grant projects on Kent Island, indicate that TDRs will not be supported if they are seen as an instrument for much higher density residential development, more rapid growth, or the loss of the scale, historic character and patterns of the existing small towns, or the county’s environmental resources. Citizen activists interviewed in this assessment preferred the TDR program to the NCD program or cluster

development in rural areas, because the 1994 changes were intended to redirect these development rights to growth areas. However, they realized that has not happened, and rural to rural transfers of development rights continue at an accelerated pace through these other options.

The farm community has had very little interest in the TDR program after the 1994 changes, other than those farmers that might be able to sell TDRs in the Critical Area. There is no market for TDRs currently because there are no buyers and they have little or no value. With some exceptions, they generally support maintaining other options to sell or transfer development rights through the NCD program, or for clustering development on their own properties. When TDRs could be sold for use in areas that had a market for them, prior to 1994, farmers preferred selling TDRs than other options that took more time and were less predictable, if the values were competitive at the time. With the unpredictable funding in recession periods and the two year processing period, TDRs were preferred over selling easements to MALPF. Since cluster development and the NCD option requires that the project using the TDRs be fully approved before the development rights could be sold, with no intermediate sale instrument, landowners often preferred to sell TDRs.

For reasons explained by developers under criterion 1) above, the real estate and development community, i.e. those that provide the funds to make any TDR program operate, also have very little interest in the county's TDR program the way it is now structured. They would welcome higher bonus densities for commercial space with TDRs. Before the 1994 change they welcomed the flexibility of being able to buy or sell *instruments of intermediate transfer* of TDRs when they could be used in rural receiving areas, because they could buy and bank TDRs for future use, without having their projects approved for the use of the TDRs at the same time, the way the NCD program works. Some supported the concept of a county policy requiring that all rezoning of land for increased development density require TDRs for all or part of the increase.

Opportunities to improve the use of TDRs in Queen Anne's County

As a land management or land preservation tool, TDRs are among the most difficult to design, implement and administer, especially in rural communities where the scale and character of existing towns and residential settlements are of lower density, there is a limited real estate market for higher density, or citizens oppose major changes in the rate or density of development. This is likely to be one of the reasons why a national survey of TDR programs in 2000⁸³ revealed that 44% of the TDR programs enacted for farmland preservation in the U.S. had failed to preserve any land, and only 30% had preserved more than 100 acres.

This assessment is based on the assumption that Queen Anne's County will want to utilize the most appropriate and effective tools to implement its Comprehensive Plan and guide future growth and preservation of the county. Fundamental changes in zoning, community plans, or the scale, location and character of future development in the county are not expected just to make the TDR program work more effectively. In its present form and under its many constraints discussed above, the county TDR program will have very limited future use for either protecting land or guiding development to designated growth areas. However, there are a few changes that might be considered within this context to make TDRs more attractive for use in future development, including:

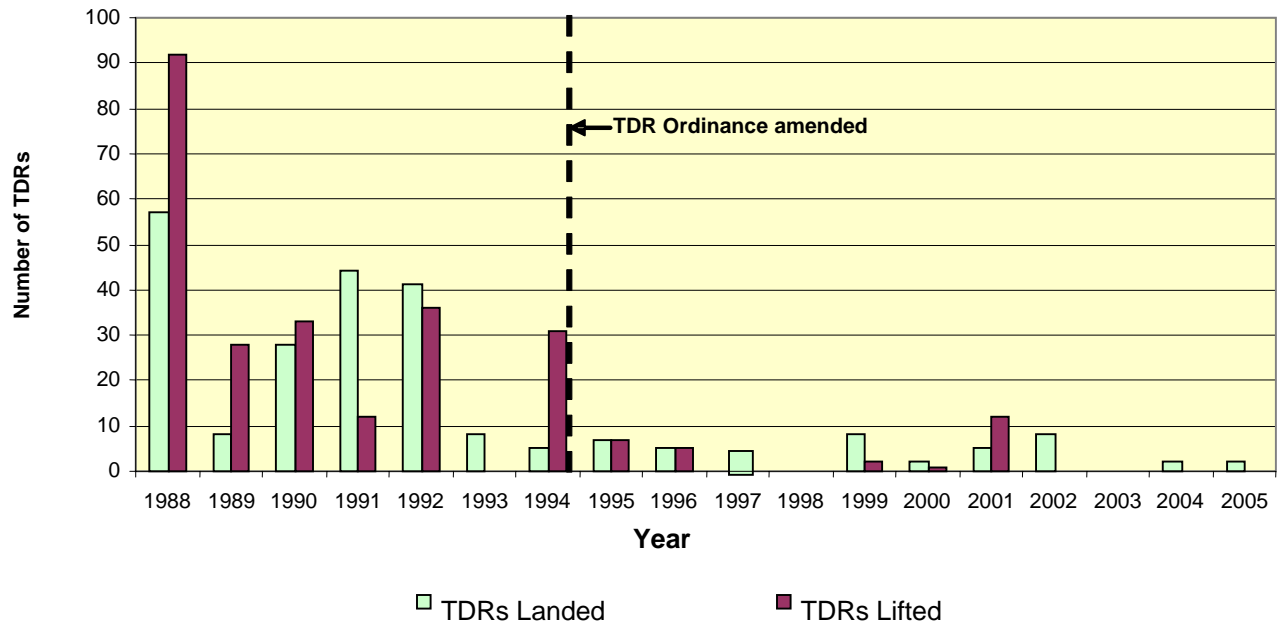
- Adopting a policy that all increases in residential or commercial density (i.e. upzoning) in the future should be permitted only with the purchase of TDRs, including lands annexed by municipalities resulting in an upzoning. Calvert, Charles and Montgomery Counties have adopted such a policy and it has been a key to maintaining demand for TDRs.

⁸³ *Fact Sheet: Transfer of Development Rights*, American Farmland Trust – Farmland Information Center, Jan. 2001

- Developing interjurisdictional agreements with municipalities that would provide incentives for incorporated towns to use TDRs from the county. One idea suggested by a representative of the farming community in the interviews would involve county purchase of TDRs (with funds from the proposed Purchase of Development Rights Program), the donation of these TDRs to municipalities willing to downzone undeveloped or redevelopment areas in towns, allowing the municipalities to then sell the development rights to developers and reestablish pre-downzoned or higher densities with TDRs. This would provide a source of funds to municipalities to provide infrastructure and services for the new in-town development, at a scale and density that would be compatible with the existing town pattern.
- Increasing bonus densities for commercial space from 200 ft² per TDR to an amount high enough to generate a demand for TDRs in growth areas. (St. Mary's County requires TDRs for expansion of commercial building space in receiving areas, and allows 2,000 ft² per TDR).
- Lowering the base-level zoning densities for residential projects in growth areas, and then increasing the current 25% bonus density for residential projects with TDRs to achieve market density. More successful TDR programs offer 100% or more bonus density with TDRs. This approach would be consistent with the Maryland *Smart Growth and Neighborhood Conservation - "Smart Growth" Areas* legislation providing incentives and guidelines for establishing Priority Funding Areas (PFAs). Calvert County downzoned both rural and growth area zoning districts by 50% in 1999 and again by 50% in 2003, allowing increases in densities only with TDRs.
- Lowering thresholds for moderately priced housing requirements for low-density rural subdivision projects, to be consistent with the thresholds for development in growth areas. Rural subdivisions typically create more demand for schools and roads than more dense urban developments, and cost more in public services than they pay for in taxes. If developers were not able to avoid providing moderately priced housing and paying less for water and sewer systems by developing in agricultural areas, there might be more demand for development with TDRs in growth areas.
- Allowing increases in the height of residential structures where TDRs are used to increase residential densities. Maximum allowable zoning densities of residential development projects have been restricted by the height limits in certain community plans; and
- Evaluating the cumulative effects of the NCD program related to the purposes of Part 6 of the Zoning and Subdivision Code, Development Alternatives and Bonuses,⁸⁴ and the impact of this program on the objectives and effectiveness of the TDR program.

⁸⁴ Part 6, §18:1-96, Purposes. "A. *Encourage and to provide flexibility in the protection of farmland and open space in conjunction with increasing development intensities within designated growth areas where public services and facilities can be more efficiently provided*, B. *Encourage the creation of larger contiguous areas of protected lands and to provide flexibility in the protection of open space and farmland in resource conservation areas of the Chesapeake Bay Critical Area*; and C. *Encourage infill development with existing urbanized and growth areas?*" (This purpose applies to the NCD, TDR, Scenic Corridor Development, and Inclusionary Housing Articles.)

TDRs Lifted and Landed by Year - Queen Anne's County



QUEEN ANNE'S COUNTY TDR PROGRAM EVALUATION
Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
1) TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.		X	Market & sewers limit TDRs in Growth Areas
a) A balance of supply and demand for TDRs has been created in the design of the TDR program.		X	3 to 5 TDRs for each TDR capacity in growth areas
b) Receiver areas (RAs) are large enough to absorb authorized TDRs.		X	Receiver areas small
c) As-of-right base density in TDR receiving areas is zoned lower than the market demand for the type and density of housing that developers want to build.		X	Base growth area zoning higher than market & sewage capacity
d) Developers in TDR receiver areas can achieve the desired market density only with TDRs.		X	Demand for density lower than base zoning
e) Density bonuses for using TDRs are sufficiently high to justify the increased cost of purchasing TDR		X	25% density bonus lowest in State
f) Buying TDRs is more profitable to developers than building to base density or alternative ways to achieve higher density in receiver areas.		X	Alternatives are more profitable than TDRs
g) Purchasing TDRs and the public approval process of using them in receiver sites is faster and more predictable than alternative ways to achieve the desired density.		X	Citizen resistance to development; use of NCDs is faster
h) Selling TDRs is reasonably competitive in value to landowners, considering the residual value of land restricted by TDR easements or covenants, with developing the sending site, selling an easement to other state or local PDR programs, or is the only alternative allowed.		X	NCD and MALPF development rights have higher value than TDRs
i) There is an active market for higher density housing types allowed with TDRs in receiver areas,		X	Sewer capacity limits higher density
j) The county takes steps to maintain TDR values that are attractive to buyers and sellers by adding TDR receiver capacity, purchasing TDRs, adjusting the TDR allocation rate (amount of TDR/acre or du/TDR), or allowing TDRs for increases in non-residential floor area.		X	No county initiatives to improve TDR program since 1994, ex. 2002 change from 1:4 to 1:8
2) The County has strong Comprehensive Plan and Zoning policies supported by TDRs			Mixed Performance due to f) through k)
a) The TDR program is established as part of larger strategy to preserve land and redirect growth.	✓		TDRs adopted as part of 1987 Plan & rezoning
b) Goals are established in the Plan for the types, location and amount of land to preserve.	✓		General goals in Comp. Plan & LPPRP
c) TDR sending areas are designated to protect the most valuable rural land, unique natural and historic resources, or other resources in the Plan's protection goals.	✓		TDR sites must qualify for prime ag. soils and size
d) TDRs are received only where the county and municipalities want development to occur.	✓		TDRs allowed only in growth area, ex. in CA
e) TDRs will not add new residences where they will contribute to the fragmentation of the best agricultural lands, conflict with existing farming operations or contribute to a sense of farming impermanence.	✓		Cluster zoning and NCD developments allowed, but not TDRs, except in Critical Area
f) TDRs help mitigate the perceived effects of downzoning, help gain support from landowners, and help avoid litigation over rezoning.		X	Original program = yes Program after 1994 changes = no
g) Zoning limits or prohibits the use of development rights on the sending site, and reduces the as-of-right base density in receiver sites below the level of market demand.		X	NCD/cluster allowed on sending site; market lower than base 3.5:1 du
h) Zoning provides for additional density needed to accomplish comprehensive plan goals in receiver areas only or primarily with TDR.		X	Limited TDR market in growth areas due to sewer capacity and NCD
i) The County adopts policy that future zoning density increases in receiving areas are allowed only with TDRs.		X	Annexations and new developments allowed by rezoning w/o TDRs
j) County water and sewer plans anticipate and plan for development in receiving areas at the density needed to accommodate TDRs.		X	Public water & sewer paid by new develop.
k) Subdivision rules and procedures ensure that receiving area infrastructure is capable of absorbing development with TDR		X	Infrastructure limits growth area density

QUEEN ANNE'S COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
3) Administration of TDRs is simple, efficient and predictable			Administration is mixed; few TDR transfers
a) Buyers of TDR can obtain all approvals for their use in receiver sites with certainty and predictability, and can use TDRs for additional density as-of-right in receiver projects.		X	Response to Citizen opposition to growth is unpredictable
b) Buyers & sellers of TDR are provided clear rules for use of TDRs in receiver areas and restrictions on using development rights on sending site.	✓		Zoning TDR rules are clear and detailed
c) Buyers and sellers of TDR are informed about the current market values of TDRs.		X	No recordation or sharing of TDR values
d) Receiver areas for TDR are designated and zoned for densities needed to absorb TDRs, without uncertain discretionary or conditional use review.		X	Growth area projects often opposed and reduced in size.
e) TDRs are allowed on a gross land area basis; the number of TDRs authorized for sale is not reduced by environmental conditions for development on the sending parcel.	✓		TDRs based on gross land area; Increases incentive to sell
f) Arbitrary rules limiting the transfer or use of TDRs are avoided (e.g. distance between selling and receiver sites, use of TDRs in the same political districts, etc.).		X	Kent Island TDRs sent only to Kent Island growth areas
g) Special rules for development in receiver areas do not discriminate against TDR projects.		X	Sewer cost & housing rules favor rural projects
h) Land records, mapping and administration of TDRs are complete, maintained and publicly accessible.	✓		Good mapping and TDR records
i) Restrictions on TDR sending sites are permanent, recorded in land records, used in the subdivision and zoning approval process, and sending sites are monitored for compliance.		X	Restrictive covenants are recorded, but are not permanent
j) Lengthy delays in recording and using TDRs are avoided.	✓		Intermediate TDR transfers allowed
k) Local government monitors and modifies TDR program as needed to improve effectiveness and efficiency, and adds receiving areas or increases their TDR capacity as needed to maintain demand.		X	No major changes to program since 1994 ex. 1:4 to 1:8 ac/TDR in '02
4) The TDR program has broad public support.		X	Lack of developer or landowner interest
a) Rural landowners are motivated to protect land and farming as an industry, more than by profit from selling land for development; and they support TDRs, easement purchase programs and zoning to preserve agricultural uses;		X	Impermanence syndrome prevails; landowner emphasis is on right to develop
b) Real estate developers support TDRs to obtain increased density in receiving areas, and as a flexible and expedient alternative to purchasing additional land,		X	Little developer interest in TDRs due to sewage cost or capacity in growth area
c) Farming, community and environmental groups support TDRs as one means to protect more land,	✓		Little current interest in TDR sales outside of CA
d) TDR receiving site communities accept or support the density, design quality and compatibility of development using TDRs.		X	Frequent opposition to growth area projects
e) Elected government officials accept TDRs as method to protect land with private funds, protect equity of rural landowners, control the location and quality of growth and implement the comprehensive plan.	✓		No initiatives to eliminate TDRs, but little interest in improvements

6. TALBOT COUNTY TDR PROGRAM ASSESSMENT

The Feasibility of Successful TDR Programs for the Eastern Shore

Introduction

Talbot County adopted a TDR Program for the Chesapeake Bay Critical Area Resource Conservation Area (RCA) in August 1989, as part of a comprehensive rezoning following the adoption of the State Critical Area program. These TDR rules applied to the Rural Conservation (RC) District which corresponded to the RCA. In 1991 the county adopted another set of TDR rules for agricultural lands in the Rural Agricultural Conservation (RAC) zoning district. Recently, to help implement the county's updated 2005 Comprehensive Plan⁸⁵ the county proposed changes in its zoning regulations and agricultural preservation programs, including changes to the TDR program. These changes are planned in two phases. In the first phase, the county planning staff is developing a proposal for a local purchase of development rights (PDR) program, and several proposed revisions to the zoning regulations, which were reviewed by the Planning Commission, considered by the County Council on September 19, 2006,⁸⁶ and rejected by the Council on September 26th. The proposed zoning changes would have eliminated the RAC zoning district and established four new non-Critical Area zoning districts, including the Agricultural Conservation (AC) district, Countryside Preservation (CP) district, Western Rural Conservation (WRC) district, and the Town Conservation (TC) district, as described in more detail below. Relatively minor changes were proposed in the design and function of the TDR provisions in this first phase, although the county planners intend to review the TDR program in more detail in the second phase. They are currently exploring the development of interjurisdictional agreements with municipalities to address the use of TDRs, as called for in the Comprehensive Plan, in the event the proposed changes are resubmitted in 2007.

Talbot's TDR program was one of six in Maryland reviewed in Chapter VI of this report, to determine the attributes or key ingredients of the program and identify why it was either succeeding or not succeeding. This review resulted in the preparation of a *TDR Program Profile* for the county, based on the zoning before the recent changes were proposed, so it describes the county's experience with its TDR program prior to the proposed changes. It should be viewed together with this assessment for a complete picture of Talbot's TDR program as it has evolved. This part of the report is an assessment the potential for success of the proposed new TDR Program, based on the changes to the zoning regulations presented to the Planning Commission May 8, 2006, including the rules for the four new zoning districts, with the understanding that adjustments in the proposal may be made in 2007 and resubmitted to the Council for further consideration. The key features of the proposed changes to the Talbot TDR program are summarized in Table 1. The characteristics of Talbot's existing TDR program are summarized in Chapter VI, 6, page 136.

This assessment utilizes the *Criteria for a Successful TDR Program* adopted by the Technical Advisory Committee for this study, the *Findings* of Phase I found in Chapter IV, and the collective experience of the committee members and principle investigators in the use of TDRs. Interviews were conducted with developers experienced in the use of TDRs and county and municipal officials and planners, in order to assess how the TDR program relates to the *Criteria*. The Principal Investigators also participated the University of Maryland, Environmental Finance Center's financing workshop in Talbot County on June 22, 2005.⁸⁷

⁸⁵ Talbot County Comprehensive Plan, February 15, 2005

⁸⁶ Draft Talbot County Code Revisions, Proposed Revisions to Zoning Regulations, Chapter 190 Zoning, 5/8/06

⁸⁷ *Financing Land Preservation in Talbot County, Maryland, Final Program Report*, Environmental Finance Center, University of Maryland, November 9, 2005, <http://www.efc.umd.edu/pdf/TalbotReport.pdf>

Summary

Talbot County's two TDR programs, one in the RC district and the other in the RAC, protected 770 acres of land with three TDR transactions since 1989, or less than 50 acres per year on average. The TDR Profile identified a number of features of the TDR program that limit its performance, including:

- TDR transfers are limited to the same zoning and election districts.
- Soil characteristics limit the allowable density with TDRs on receiver parcels without public water and sewer or shared septic systems.
- Requirements for concurrent approval of a joint subdivision plan could inhibit TDR sales.
- TDR sending sites are not permanently protected by Reservation of Development Rights Agreements.
- Rural-to-rural transfers could fragment the agricultural land base.
- The market for higher residential densities than developers can achieve with cluster development without TDRs is limited.

The draft revisions to the zoning ordinance proposed May 8, 2006⁸⁸ do not correct the first five of these deficiencies in the existing TDR program, but they could significantly limit the overall density of cluster developments in the rural areas without the use of TDRs. The proposed draft would make the following key changes that could affect the use of TDRs in the county, as described in more detail in Table 1.

- The proposed ordinance would require mandatory clustering in the new zoning districts. Large lot developments currently allowed by RAC zoning at 1 du/20 acres plus 3 du per parcel scattered over the entire property, would have to be clustered on 25% to 50% of the property, depending on the parcel size, and the minimum open space required in a cluster development would increase to 70% for parcels over 60 acres and to 75% for parcels 100 acres or larger.
- Higher densities above the base zoning of 1 du/20 acres plus 3 per parcel now allowed by clustering dwellings in the RAC would be allowed only with TDRs from other parcels. With TDR transfers, densities in cluster developments could increase to 1 du/10 acres plus 3 in the CP zone, 1 du/5 acres plus 3 per parcel in the AC zone, and 1 du/10 acres in the WRC, plus 2 for parcels less than 40 acres, and one for parcels between 40 and 100 acres.
- The amount of land on the sending parcel restricted by TDR transfers would be increased from 1 TDR per 10 acres in the RAC zone, to 1 TDR per 20 acres in the WRC zone and for transfers within the CP zone. Transfers from the CP zone to the AC zone or within the AC zone would continue to be restricted at the rate of 1 TDR per 10 acres.
- A maximum limit of 60 lots per parcel in all new zoning districts is proposed.

The proposed revisions to zoning regulations were rejected by the Talbot County Council September 26, 2006. However, based on the limited changes proposed to the TDR program and the county's experience with the current TDR program, we have 1) obtained the views of planners, developers and other county and municipal officials through interviews, and 2) utilized the *Criteria for a Successful TDR Program* outlined in Chapter IV to prepare the following summary assessment of the county's proposed May 8th revision of its TDR program. The following is a summary of our findings.

- New zoning districts with mandatory clustering would limit the number of new dwellings allowed in rural areas without TDRs, saving more land, but they would not be likely to significantly increase the demand for TDRs outside of municipal growth areas, primarily because of the septic limits of Talbot County soils; the cost, uncertainty and feasibility of shared septic systems; and the 60 lot maximum size of new subdivisions with TDRs in the AC zoning district.

⁸⁸ Op Cit

- In the AC and CP zoning districts, continuing the up-front allowance of three development rights per parcel, which cannot be transferred as TDRs to more appropriate receiver sites, could continue the pattern of small cluster subdivisions and sprawl in the proposed greenbelts of towns and in the agricultural areas of the county, and limit the market demand for TDRs.
- The Comprehensive Plan's policy that "*The county and towns should explore implementation of an inter-jurisdictional transfer of development rights program to encourage development in the Towns and designated growth areas,*" does not appear to hold much promise for TDR transfers from the county to towns in the short term, with the possible exception of future growth in Easton. Other municipalities either do not want to grow, with or without TDRs, or are annexing large new tracts of land on their own and increasing the allowable density for housing without the use TDRs.
- The proposed limit on the maximum number of lots per subdivision would restrict the use of shared septic systems for subdivisions using TDRs to parcels 285 acres or larger in the AC zoning district, because shared septic systems are not economically feasible for subdivisions of less than 60 lots. There are only 21 parcels of land in the AC zoning district that could accommodate 60 units with TDRs.
- While the ordinance would provide a new definition of "Reserved Land"⁸⁹ suggesting that these lands are "permanently protected open space," the Reservation of Development Rights (RDR) agreements as defined under the code, do not provide permanent protection for TDR sending sites. They would continue to allow the owners of land with these RDR agreements on TDR sending sites to buy back TDRs for use on the sending sites, petition the Council to remove the restrictions if the land is rezoned, or to use the properties for public purposes. Open space remainder lands in a cluster subdivision could enjoy more permanent protection than TDR sending sites, which weakens the permanent concept of TDRs. Impermanent RDR agreements do not prevent these lands from being assessed by the IRS at unrestricted fair market value for estate tax purposes.⁹⁰

Applying the *Criteria for a Successful TDR Program*

Criterion 1

TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.

Supply and demand

Talbot County is the smallest of the counties in the Eastern Shore in this study with 172,227 acres of land, of which 105,729 acres or (61.4%) is in farmland. The 2002 Census of Agriculture listed 288 farms in the county with an average size of 367 acres.⁹¹ Talbot's population grew by 3,263 people or about 1% per year between 1990 and 2000, slower than the prior decade (1.78%). While the Maryland Department of Planning's population projections assume an increase in population of 2,938 between 2000 and 2010, several development projects recently approved or proposed, discussed below, would appear to push these numbers higher, if they are all approved and constructed.

In 1989 the county downzoned about 57,500 acres of land in the Chesapeake Bay Critical area from 2 and 5 acre lots in the RCA to one dwelling per 20 acres, to comply with the State Critical Area law. In 1991 the county adopted a new Resource Agricultural Conservation (RAC) zoning district to replace the A-2 zoning which permitted 2 acre lots, and downzoned the RAC to 1 dwelling per 20 acres, plus 3

⁸⁹ Op Cit, §190-14, Terms Defined, p.1, Draft Talbot County Code Revisions

⁹⁰ Section 2703, IRS Code, cited by Steve Small, Esq. Land Trust List Service, March 15, 2006

⁹¹ The Census lists farms by total land area, including multiple parcels or multiple farms being tilled by the same farmer.

dwelling per parcel. These two changes in the RC and RAC zoned lands significantly reduced the allowable density of 87% of the county's total land area.

In 2004 Talbot County reported that 28,007 acres of land in the county was protected,⁹² including 560 acres with TDR transfers, 8,100 acres of easements acquired by MALPF, 551 acres by Rural Legacy, and 10,754 acres in private easements acquired by the ESLC and MET. An additional 210 acres was protected on the Councell farms with a TDR transfer to Wye Mills since this report. The total of 28,217 acres of protected land represents 19.1% of the land outside of locally designated growth areas in the county, and 16.4% of the county's total land area.

A recent presentation made to the Talbot County Planning Commission⁹³ provided a number of indicators of the current real estate market for residential development outside of incorporated towns compared to prior years. Between 1981 and 1991, before the county downzoned the Critical Area and RAC lands, about 4,700 acres of farmland was converted to residential use, or an average of 427 acres per year. Since the downzoning, in the 13 years between 1992 and 2005, about 3,990 acres of farmland was converted or about 285 acres per year. However, the number of new residential building permits issued outside of towns was roughly the same between these two periods, with 2,076 between 1980 and 1991, and 2,198 between 1992 and 2005. The county forecasts another 3,140 permits are likely between 2006 and 2025, about the same annual amount as the past 14 years. There are currently 1,275 platted and undeveloped residential parcels in the unincorporated parts of the county outside of towns. There were 261 perc tests conducted outside of towns in 2005 and 292 by July 2006.

Most large new residential developments are being proposed adjacent to municipalities, where they have been or will be annexed into town and have access to public water and sewer facilities. The scale of these projects indicates that the market for new housing in Talbot, as in other Eastern Shore counties, is on an upward trend. In 2003 Trappe, a small village south of Easton of 450 houses, annexed 857 acres of their planned growth area for *Trappe East*, now called *Lakeside*, a large mixed-use Planned Unit Development (PUD) to include 2,260 dwelling units, which will be built at a rate of about 250 houses per year. Trappe has state approvals for upgrading their sewage treatment facilities, and it approved the Trappe East Developers Rights and Responsibilities (DRR) agreement in February 2006. Another 172 acres of land in the Trappe growth area known as the *Lyons Farm* was annexed in 2004. These growth area properties have been upzoned through the PUD process with DRR agreements, without the use of TDRs.

In St. Michaels, a large Traditional Neighborhood Design (TND) development with 312 new dwellings by the Midland Corporation was approved by the town at a density below that permitted by the existing zoning, but construction has been held up by citizen challenges in court for about seven years. Elm Street Development has proposed a new project with 16 lots recently annexed to St. Michaels, which is planning to apply "gateway zoning."

In Easton, the Yorktowne Development Company is applying for sewer service designation for two large properties annexed by Easton.

One of the largest influences in the future growth of Talbot County could be a major new plan for a site near the county border with Queen Anne's County at Routes 50 and 404. Queen Anne's County is developing a plan for a business and employment center with institutional, office and mixed residential uses at this intersection east of Chesapeake Community College. Easton Memorial Hospital is considering relocation to the Talbot side of this planning area.

⁹² *Eastern Shore 2010: A Regional Vision, Tools Available for Attaining the Eastern Shore 2010 Land Protection Goal*, Eastern Shore Land Conservancy, January 2004

⁹³ Talbot County Planning Commission, PowerPoint presentation, 2006

The *Preserve at Wye Mills* is the only subdivision project in Talbot County to use TDRs outside of the Critical Area. Located at Wye Mills, near the northern border of the county adjacent to Route 50, it is a development of 67 houses on 0.8 to 1.25 acre lots, clustered on 118 acres of a 394 acre farm. It utilizes a shared septic system with spray irrigation. The market for these clustered houses was summarized as follows by its developers:

“For the first half of the homes that have been sold already, we have had three types of buyer markets: those moving north that need to get closer to their work, some people moving out of Queen Anne’s County who wanted to get Talbot County’s taxes or a more rural feeling, and we’ve had western shore residents moving over and commuting back. We’ve had a significant number of Talbot County residents sign up.”

In a broader description of the overall housing market in Talbot County, they noted:

“The tighter and more closed the central Maryland counties became, the greater the need was to move elsewhere. Not by developers, but by people. We thought most of our buyers would come from the western shore. The houses that we’re building over there, if we were lucky enough to find the land to build them in Anne Arundel County, the price of the land would be so high that the price of the house would be \$250,000 higher there than here. So if you’re a family of four living in Annapolis, and you want to move out of your townhouse into a three or four bedroom house, you’re close to \$800,000 to \$1 million for what you were getting four years ago for \$500,000-\$600,000. Why is this? There is nowhere to build in Anne Arundel County. It is all a function of supply and demand.”

“The market for what we are doing is different than what is going on in Easton, and very different than what is going on in Trappe. My sense is that we have a primary demand for housing for people that are working on the western side of the bridge. We would expect that Trappe is going to attract far more empty-nesters and second home people. We’re not gearing to that market at all. As far as Easton goes, it probably gets both markets. There is plenty of market for housing, and there will continue to be with regard to the primary housing market, unless and until the communities on the western shore meet the mandate of the smart growth legislation of the past 10 years. They are not meeting that mandate; they are not providing home sites. They are pushing growth elsewhere.”

Larger cluster developments of 60 units on shared septic systems like the Wye Mills project are only possible on 21 parcels larger than 285 acres in the AC zoning district, and there are problems associated with this model described under Criterion 2 below, so the market for TDRs for these may be limited. The most likely market for TDRs under the proposed ordinance, as indicated in Table 1, are smaller cluster developments in the AC, CP or WRC districts where the densities can be increased by 40% in the AC for parcels of 40 acres, to over 110% for parcels over 300 acres, on lots that are 2 acres or more on individual septic systems.

Some of the recent changes proposed in the Talbot County Zoning ordinance and TDR program could result in some increase in demand for TDRs in the rural areas, but the overall supply of TDRs from the CP and WRC zoning districts will be reduced. While the proposed code would continue to limit rural to rural transfers of development rights within the same zoning and election districts, except for the CP district, the maximum density per parcel with TDRs in the CP and WRC districts would be reduced, lowering theoretical demand for TDRs for development in these districts.

The WRC zone covers 18,642 acres inland of the 1000 foot Critical Area lying west of Easton, Trappe and Route 50. By reducing the overall density of future development that can take place on these lands, and by preventing the transfers of TDRs from the AC and CP zones into the WRC,

these changes could increase the market for TDR transfers from other parcels within the WRC. However, at the same time it would discourage the use of TDRs within the WRC, because the maximum cluster density with TDRs would be lowered to 1 du/10 acres, from 1 du/5 acres, and they would have to buy TDRs from other WRC property to accomplish this. The amount of land protected by the sale of one TDR would also double in the WRC from 1 TDR/10 acres under RAC to 1 TDR/20 acres, so there would be fewer TDRs to sell. By preventing the transfer of TDRs outside of the WRC, the market for TDR sales from WRC property could be more limited.

The AC zoning district is the largest district and includes about 60,157 acres of agricultural lands generally east of Route 50, between Easton and Trappe and the Choptank River and Caroline County. The maximum densities allowed in the AC district remain the same as the RAC zone for parcels less than about 300 acres using TDRs, but the proposed ordinance would set a 60 lot maximum on any receiving parcel in all three new zoning districts. This maximum should not affect TDR use in the CP or the WRC districts, because there are no unprotected farms there over 600 acres, where the 60 lot maximum could be reached at a density of 1du/10 acres with TDRs. However, it could affect the AC district because it lowers the maximum total number of units that could otherwise be built with TDRs on farms 285 acres and larger. There are 21 unimproved parcels 280 acres and larger in the AC zone where TDRs could be used to construct more than 60 units, soils or shared septic facilities permitting. As one developer described it:

“In the AC zoning district, I don't see TDRs happening under the current scheme. Until you get to a very large farm, you can't get to the 60 unit limit for the use of shared septic systems. Unless it's, say 300 acres or more, it is going to start and stop with 60 units. It will only be a very small sliver of properties that can use TDRs, when you take soil conditions into account.”

“This new ordinance is not going to drive more open space, it is going to be driving smaller developments popping up in the rural areas, at 10 lots here and 20 lots there, instead of developments with 60 units here and 70 units there. Does that make sense?”

It is uncertain whether the residential development market would respond to these changes by increasing the use of TDRs for cluster development projects in the rural areas of the county zoned AC, CP or WRC. With the modest changes in bonus densities for using TDRs between the prior RAC zoning district and the new districts where TDRs can be transferred, indicated in Table T.1, it appears unlikely that a strong demand for TDRs would develop in the CP or WRC districts as a result of the changes; but there could be some incentive to transfer TDRs from the CP and AC districts to properties in the AC district, since any increase in base density would have to use TDRs. However, if there is an increase in cluster developments in the AC district with TDRs, there should be a concern about the impact this could have on fragmentation of the remaining farmland in the district.

Criterion 2

The County has strong Comprehensive Plan and Zoning policies supported by TDRs.

The Introduction to the 2005 Comprehensive Plan contains the following statements as part of “A Vision of Talbot County in 2024:”

“Transfer of development rights from one land parcel to another that is better suited for development is a common practice and has proved to be an effective growth and resource management tool.”

Two chapters of the Comprehensive Plan also provide policies that support land preservation with the use of TDRs. The Land Use Plan⁹⁴ envisions:

⁹⁴ Ibid, Chapter 3

“Planned urban growth areas consistent with the principles of Smart Growth, with Countryside Preservation Areas surrounding towns and villages. Agricultural land is protected to preserve our farms;” with a goal to:

“Promote and maintain a well-planned pattern of compatible and efficient utilization of land and water resources which concentrates development only in areas where environmental impacts will be minimized.”

Other statements in the Land Use Plan specifically support TDRs:

“The county and towns should explore implementation of an inter-jurisdictional transfer of development rights program to encourage development in the Towns and designated growth areas, and encourage implementation of the Countryside Preservation Area.”

“Designate the Countryside Preservation Area as a TDR sending areas, giving priority to Towns and Designated Growth Areas as receiving areas.”

“The county will continue to promote and encourage the Transfer of Development Rights as a means of preserving prime farmland and encouraging appropriate residential development patterns in rural areas.”

“One technique that the county and towns should mutually explore is the concept of an interjurisdictional transferable development rights program as one means of implementing the county’s objectives for Countryside Preservation Areas. Development rights originating in the Countryside Preservation Areas could be transferred to designated receiving areas within the adjacent incorporated town. The financial feasibility of transfers should also be assessed to determine program potential.”

The Rural and Agricultural Conservation Chapter⁹⁵ also includes a policy that:

“Rural landowners should be provided the opportunity to transfer development rights from a property in order to maintain development equity and conserve agricultural lands and open space. The county should re-examine opportunities for use of development rights transfer and identify market opportunities or incentives to broaden use;” and an implementation policy to:

“Re-examine opportunities for property owners to transfer development rights. The county should continue its TDR Program and encourage its broader use. TDR purchasers within Rural and Agricultural Conservation Areas should continue to be allowed to use these additional development rights, but only in conjunction with the development of a cluster subdivision as earlier described.”

Proposed changes to the TDR provisions of the draft zoning ordinance are described in the Summary and under Criterion 1 above, and illustrated by example in Table T.1.

A common element of the new Comprehensive Plans for both the county and the municipalities is the establishment of greenbelts around the towns, designed to provide a protected land buffer and future growth boundary for town development. These greenbelts are proposed for rezoning as CP zoning districts in the May 8th draft.

Under the *Requirements for Cluster Subdivision with Transferable Development Rights*⁹⁶ section of the proposed ordinance, sending parcels in the CP District may transfer development rights to other parcels in the CP District, to subdivisions in the AC District, or to “incorporated towns if allowed by town regulations.” This is the only zoning district from where TDRs would be authorized to be

⁹⁵ Ibid, Chapter 6

⁹⁶ Ibid, §190-56.1 (E)(4), page 11

sent to incorporated towns where water and sewer services can support higher densities. The receiving densities for such transfers would be determined by the town zoning regulations.

The CP zoning district generally corresponds to the greenbelts identified in the Comprehensive Plan, and include 10,410 acres of land in a ring from about ½ mile to 1 mile around Easton and Trappe, with smaller patches of CP zoning adjacent to Oxford and St. Michaels. The county would actively encourage landowners in the CP districts to preserve these greenbelts through existing or new PDR easement sales, or through TDR transfers within the CP or to the AC zoning district or incorporated towns.

This concept is provided for in the TDR provisions of the proposed zoning ordinance for the CP district, which is described as follows:

*“The district shall be characterized by rural agricultural and low-density residential uses. The CP District is established to protect the rural character of land bordering and surrounding the growth areas of incorporated towns as shown on the county’s Comprehensive Plan. Farmland, forests, and open spaces are to be protected to prevent sprawl and to provide a physical and visual boundary to the growth areas. The county will target land within this district for protection through county programs for creation of agricultural and conservation easements. Agricultural activities shall be preserved, encouraged and protected.”*⁹⁷

The proposed new Town Conservation (TC) zoning district would be established as a future growth area for towns, between the greenbelts or CP zones, and the existing boundaries of the municipalities. As the draft proposal describes:

*“This district shall be characterized by agricultural and low-density residential uses. The TC District is established to protect the rural character of land around the incorporated towns and within the “Designated Growth Areas” of the Comprehensive Plan. The TC District is intended to prevent sprawl development, to preserve the character and identity of the towns, and to prevent intensive development that would hinder the orderly growth of these areas in the future as land is annexed by the towns. ...The base density in the TC District is one dwelling per 20 acres, plus three dwelling units.”*⁹⁸

While the land remains unincorporated under the county’s jurisdiction, the TC zoned lands would not be eligible as sending or receiver sites for TDRs. However, the long term intent of the TC zone may include a possible future use for TDRs, as described by one official:

“The new TC zone is meant to be a future growth area, where some time way down the line, past the year 2016, it will become a growth area. For the time being, it will be downzoned to one unit per 20 acres. We don’t want it to be subdivided and developed on septic systems until it’s needed for growth. The key is to talk the towns into making the base density in the TC zones when in its annexed really low, and if a developer wants to get a higher density, anything approaching the 3.5 units per acre, they will have to pony up and buy development rights from the greenbelt.”

Sewer and septic limits

Under the proposed Talbot County TDR program, unless TDRs are transferred from the CP zoning district to a town parcel, as encouraged by the Comprehensive Plan and permitted in the draft ordinance, all TDRs would be expected to be used to develop formerly rural lands on well and septic systems in the AC, CP or WRC districts, or on shared septic systems in the AC district. The minimum size lot for

⁹⁷ Op Cit, §190-15 (2)(a), page 3

⁹⁸ Op Cit, §190.15 (A) (7), page 4

cluster development in the AC district would be 0.25 acre. The minimum lot size would be one acre in the CP and WRC districts, but the average density is likely to be from 2 to 2.75 acres per dwelling because of septic limitations.⁹⁹ As indicated in the TDR Profile, subdivision projects on Talbot County soils typically require public water and sewer service or shared septic systems to accommodate higher densities. The minimum lot size for a septic system in the county is typically two acres or more based on Health Department standards. To get Health Department approval for a septic system there has to be four feet of clearance between the bottom of the septic field trench and the seasonal high water table. These standards are likely to limit the total number of TDRs on receiver sites without shared septic facilities, and thus their demand in the AC zone. Table T.1 illustrates that the maximum amount of development with TDRs could be 20% to 84% of the maximum allowed for TDRs subdivisions in the AC zoning district if they are on well and septic systems. Only parcels 285 acres or larger in this district are able to accommodate 60 units with TDRs and, according to developers, this is the minimum number of units needed for a shared septic system to be economically viable. The shared septic system at Wye Mills cost more than \$20,000 per dwelling unit plus about \$4500 per unit for the grinder pump on the spray lot, compared to typical costs of about \$10,000 per unit for traditional septic system installations. Therefore, the 60 unit maximum is also the minimum size for a subdivision with a shared septic system.

While shared septic systems are considered to be better for the environment and for smart growth, because they allow development on smaller lots that do not consume so much land per dwelling, and they do not introduce nitrogen into the groundwater supply, they also have many drawbacks besides increased cost that are likely to inhibit their wide use in Talbot County for higher density cluster developments with TDRs, including:

- Several additional unpredictable approval steps at the local and state level, including a required amendment of the county Master Water and Sewer Plan by the County Council, that can turn a one year approval process into a three year process, and
- Uncertain and conflicting requirements for a spray field for treated septic effluent, which in Talbot County must be located within the development envelope of a cluster development, supplanting houses that could otherwise be built within the envelope (Talbot is the only county in Maryland where a shared septic spray field cannot be located in the open space remainder of a cluster subdivision).

As one developer described the experience:

“Once you had all of that [the ground water and perc tests] we had to go to the county and get a conversion of the Master Water and Sewer Plan to allow a joint facility. So you might be faced with spending \$100,000 dollars, only to get to the county and have them say “We don’t want any shared facilities there; we’re not sure they work.”

No public sewer systems are planned for the AC, CP or WRC zoning districts unless parts of these areas are annexed in the future and rezoned by municipalities that control most public water and sewer facilities, or unless the county owns and manages a municipal facility, and agrees to extend such service to unincorporated towns with failing septic systems, as they did when they extended sewer lines to Unionville and Tunis Mills on the Miles River Peninsula from the St. Michaels sewage treatment plant on the south side of the Miles River. The county owns the St. Michaels and Tilghman treatment plants. In the past, the County Council declined an opportunity to extend sewer service to Claiborne, Neavitt, Wittman and Bozman, to get failing village septic systems connected to an upgraded St. Michaels sewage treatment facility, under the assumption that by creating a larger plant, it would allow new

⁹⁹ Op Cit, Article X, §190-56.1 Standards for Rural Districts, Requirements for Standard Cluster Subdivision, Table, D (1) & (3), Draft Talbot County Code Revisions

development and not just solve existing problems. One planner involved in administering the county TDR program, indicated:

“There was no incentive to transfer TDRs, because you couldn't get the high density because of the septic system limits. I think that was part of the Achilles' heel of the program. You could never achieve the density, unless you did a shared facility. Wye Mills was the first shared facility in Talbot County.”

Criterion 3

Administration of TDRs is simple, efficient and predictable.

With only three major transfers of TDRs, two in the Critical Area and one more recently in the RAC zone to a receiver site at the Village of Wye Mills, there has not been much administration required of the County Planning and Zoning Office. However, there are parts of Talbot's TDR program that probably have been more complex to administer than Maryland's more successful TDR programs, and may have inhibited other landowners and developers from participating in this land management alternative.

First, as indicated in the *TDR Profile*, the county requires approval of a *joint subdivision* for recording both the approval of the subdivision using the TDRs on the receiving parcel, and the separation of the TDRs from the sending parcel and the recordation of the RDR agreements on this parcel. This prevents the sellers from knowing whether their TDR transfers will be approved for as long as it takes to review, process and approve the new subdivision, a process that can take from one to five years. Owners of TDRs on the sending sites often have options for selling development rights other than in the limited TDR market in Talbot County. These include selling easements to the State's MALPF and Rural Legacy programs, and USDA's Farm and Ranchland Protection Program (FRPP), Forest Legacy or Conservation Reserve Enhanced Program (CREP). The county is currently considering starting a new Purchase of Development Rights (PDR) Program, funded locally. Many landowners in the county have also been motivated by strong environmental ethics to donate permanent conservation easements on their properties to MET or the ESLC, or because of significant income, property and estate tax benefits of such charitable donations.¹⁰⁰ About 20,000 acres of land in the county have been permanently preserved with these programs. Compared with the long Talbot County TDR process, these other land conservation programs can offer competitive prices, and a more predictable and expedient process, even if the changes to the zoning ordinance result in some increase in the demand for TDRs. If a stronger TDR market develops, the county could help facilitate this market by allowing TDRs to be sold and transferred by “certificates of intermediate transfer” allowed by many other TDR programs in Maryland, which allows the owner of land with TDRs to sell the TDRs to a developer willing to assume the risk that these TDRs will be transferable to a receiving subdivision.

Another administrative burden to buyers of TDRs (and to sellers, because of the Joint Subdivision process) is the approval of shared septic systems for projects with 60 dwelling units, as described in Criteria 2 above, based on the experience of the *Preserve at Wye Mills*, where the standards for the system and size of the spray field to handle the projected sewage flow from the dwellings were conflicting and unpredictable. Talbot County required that the 23.6 acre spray field be incorporated into the 118 acre development envelope of the property, reducing the number of TDRs that could be used by 15, and the amount of land preserved on the sending site by 150 acres. The developers of this project claim that other counties allow the spray field for shared septic systems to be located

¹⁰⁰ Talbot County property owners have donated easements on more land than any other County in the State, except Baltimore County, mostly to MET and ESLC.

within the agricultural open space remainder of a cluster subdivision, since the spray field is used for agriculture.

As discussed in the summary, the RDR agreements recorded on land from which TDRs are transferred do not provide for “permanently protected open space,” as suggested by the new definition of “Reserved Land.” If the TDR sending sites are not perceived by the public as permanently protecting the property, support for the overall TDR program can be eroded, since the primary benefit of a TDR program to most people, is the preservation of open space and farmland. As one planner illustrated:

“Suppose you are a neighbor who just moved from Washington to a community in a farm area, and went to a public hearing on a cluster development and saw that the RDR land is right across from your property. You would think that you are always going to have this nice pleasant open space across from you. All of a sudden, if it moves and that area gets developed, people would be freaked out. So I think the strengthening of this RDR provision is a good decision to make these reserved land areas permanent.”

Since the development potential of a substantial amount Talbot County is limited by Health Department limits on septic systems, typically to over 2 acres per lot, utilizing TDRs in a rural to rural transfer program can be highly unpredictable, and the final number of TDRs that can be used to increase density of the receiver site is not known until this department approves percs for the dwelling units allowed under the zoning ordinance. The number of percs for dwellings that could exceed the as-of-right density of 1:20 plus 3 lots in the AC or CP zone using TDRs is a case-by-case, site-by-site determination.

Even though many of the problems of the Talbot County TDR program have been known for many years, the proposed amendment to the county zoning ordinance is the first real effort to modify the program and the underlying zoning to make it more effective. As one planner described:

“Until recently, since they changed the zoning density to one unit per 20 acres, the market for new development was not very high. It has only been in recent years, all of a sudden, that there is a flood of new development. So there wasn’t a real panic about the need for a TDR program. Things appeared to be working, farmland was getting preserved, Rural Legacy came on board and we did a very good job with that, and things kind of settled down. There didn’t appear to be any need to change things. I think as planners, we failed to recognize the need to update the TDR program.”

Criterion 4

The TDR Program has broad public support.

The Talbot County TDR program has been supported by several Comprehensive Plans and County Councils since established in 1989 in the RC District, and 1991 when expanded to the RAC district. According to the planners, there has not been any attempt to remove this provision from the zoning ordinance, in spite of its limited use in three projects. As one farmland owner said:

“I think TDRs in Talbot County are sort of like affordable housing. Everybody likes it and wants it, but it’s a question of how you define and accomplish it.”

Farmers appear to have mixed views about TDRs and the zoning rules that make TDRs work. As one explained:

“It’s mostly younger farmers who are in the leadership positions now, and they’re just as interested in doing land deals as they are in continuing to farm. They say they want to continue

farming, but the difference between the Farm Bureau's positions here compared to their positions in Caroline County is huge.”¹⁰¹

Most of the opposition from the Talbot County Farm Bureau to the proposed zoning changes relates to proposals for removing or reducing the number of up-front development rights allowed for each parcel, before the 1du/20 acre density is calculated in the new zoning districts. Farmers were also concerned about the loss of allowed density they have with cluster bonus density, without the use of TDRs. Under the proposed changes, they would have to buy TDRs from other landowners to achieve the same density they had with the cluster-only option.

Developers in Talbot County generally support the concept of TDRs, but there are only a few that have participated in TDR transactions, and they are highly skeptical that the proposed amendments will lead to an increase in the use of TDRs.

“I think the new proposal is going to further hinder the use of TDRs. It will not increase TDR use. I further think that the Council has the ultimate veto power on any projects like these because they have the authority to amend the Master Water and Sewer Plan. That is discretionary.”

“With this set of regulations we are more likely to get TDRs for less desirable development, i.e. two acre lots, than for shared sanitary facility projects which are in my view more desirable, because they take dramatically less land for roads and development.”

A planning official seemed to echo this skepticism:

“The developers are going to continue shopping around the Eastern Shore to these little incorporated towns, to try to find three commissioners that are going to buy into their development plans. That's where the war is. Once you start seeing Ryan, Poulte and Lennar signs advertising houses for sale, the game is over.”

Transfers of Development rights from the county to incorporated towns has been the subject of much discussion in Talbot County, as evidenced in the language of the Comprehensive Plan quoted under Criterion 2 above. There is considerable support in the county for establishing inter-jurisdictional agreements between the county and municipalities for transfers of TDRs from the county to the towns, especially from the new greenbelts or CP zoning districts. As one planning official said:

“Everyone in the county that I heard during the course of the Comprehensive Plan process said there has to be better cooperation between the county and the towns, especially Easton. There is a possibility in St. Michaels, and in Oxford there is no problem, because they want to remain as they were in the 1700's”

“I don't see that moving TDRs around the unincorporated parts of the county as being a big deal. The process is cumbersome, people in the county don't want it, and it's a problem for the developers for providing on-site wastewater treatment. So why do that, when it's a lot easier to go shopping in the towns?”

“The developers are much more interested in getting a piece of the growth area to play with. It's easier to talk somebody in these little towns, whether it is Denton, Centerville or wherever, into letting them do their development there.”

Prior to the Council's action to reject the amendments, there were promising discussions taking place between the Planning Commissions and staffs for the county and the Town of Easton about an

¹⁰¹ A group of 12 young farmers led the recent effort in Caroline County to downzone the agricultural zoning districts, and limit TDR receiver areas to a designated receiver zone north of Denton.

interjurisdictional agreement for the transfer of development rights between the CP zone and land in the Town of Easton, as recommended in the Comprehensive Plan. The benefit to Easton to have an interjurisdictional TDR agreement with the county would be that it would facilitate transfers from the CP zoning district to protect the greenbelt around Easton, under zoning of the receiver site that would be under the town's control.

But further interjurisdictional agreements with other municipalities may be more difficult. When asked if any other incorporated towns besides Easton were interested in a TDR agreement, one planner said:

"No, not in the foreseeable future. If it doesn't happen with Easton it's not going to happen, at least that's my personal opinion."

In part, because of the lack of cooperation between some towns and the county, some planners and developers are beginning to think about establishing new growth areas where TDRs and public services can be planned from the beginning. A county planner said:

"In another part of the comprehensive planning strategies is to do village master plans. One of the thoughts is that when we get into those, we are looking at how we can create those villages as receiving areas for TDRs. These would be unincorporated villages. We envision starting with Skipton then go on to Cordova; those are two areas where we anticipate additional development."

Another town planner reinforced this idea:

"So what is going to happen? Trappe is done, St. Michaels and Oxford are done, Easton is still sprawling out, but eventually it will be done. To keep this county preserved, knowing that development pressure is always going to be here, people need to think about a new town. We need to think about creating a new town around an existing village such as Cordova, Skipton or Longwood, those are some possibilities. They don't now have water and sewer, they're just little villages. That way you can have another location to focus growth as an island, with a new town. It affords the possibility to set up procedures and processes to absorb TDRs from day one."

Along the same theme, a developer said:

"It is interesting to me that the new zoning ordinance splits the county down the middle, between west and east of Route 50. I think they also should've taken in a north and south factor, and looked at the advantages of accommodating some growth north of Easton, where all of the congestion is. I wonder sometimes if it is better to keep expanding Easton, which has so many issues already, or whether it is better to find a couple of other growth centers."

Public support for TDR programs will be crucial to whether the Council reconsiders the May 8th proposal again, or a variation of it, in 2007. Apparently there was insufficient public support for the changes at the September 19 hearing before the County Council. As one planner summarized,

"There have to be certain things in place for a TDR program to work, one of which has to be the market, another has to be willing sellers, and another has to be a government process to make it all work. If any one of those factors is missing you will have a failed TDR program. It's all three that have to work."

These comments generally follow the *Criteria for a Successful TDR Program* that this study is using to evaluate the TDR programs for the Eastern Shore.

TABLE T.1 - TALBOT COUNTY ZONING & TDR CODE - CHANGES PROPOSED 5-8-06

CURRENT ZONING CODE - SUBDIVISION STANDARDS				PROPOSED SUBDIVISION STANDARDS			
RAC - Rural Agricultural Conservation District				AC, CP & WRC - Zoning Districts			
Minimum lot size (acres)	1	0.25	0.25	Minimum lot size (acres) 0.25 in AC, 1.0 in CP & WRC w/TDR			
Minimum Open Space	Rural	Cluster	Cluster/TDR	Min. Open Space		Cluster	Cluster /TDR
6-20ac	N.A.	25%	25%	6-20ac		N.A.	25%
20-30 ac	N.A.	50%	50%	20-30 ac		N.A.	50%
30-40 ac	N.A.	60%	60%	30-40 ac		N.A.	60%
40-70 ac	N.A.	65%	65%	40-60 ac		N.A.	65%
70-160 ac	N.A.	70%	70%	60-100 ac		N.A.	70%
160 + ac	N.A.	75%	75%	100 + ac		N.A.	75%

COMPARISON OF CURRENT & PROPOSED ZONING AND TDR RULES

Standard Cluster under RAC vs Current Zoning				Examples: Standard Cluster under RAC vs Current with/TDRS			
Maximum Density/ Parcel	Rural	Cluster	Cluster/TDR	Parcel size in acres	Rural	Cluster	Cluster /TDR
Current Zoning Code RAC				Current Zoning RAC	Maximum Dwellings per Parcel		
Parcels over 6 acres	3 du plus	3 du plus	3 du plus	40	3	7	11
1 TDR / 10 acres	1 du/20 ac	1 du/10 ac	1 du/5 ac.	80	7	11	19
				100	8	13	23
				200	13	23	43
				300	18	33	63
				400	23	43	83
				500	28	53	103
Proposed Zoning Code		Cluster	Cluster/TDR	Proposed Zoning		Cluster	Cluster /TDR
AC DISTRICT		3 du plus	3 du plus	AC DISTRICT	Maximum Dwellings per Parcel		
1 TDR / 10 acres		1 du/20 ac	1 du/5 ac.	40		5	11
				80		7	19
				100		8	23
Max number of lots			60	200		13	43
Minimum lot size (acres)		1	0.25	300		18	60
				400		23	60
				500		28	60
CP DISTRICT		3 du plus	3 du plus	CP DISTRICT	Maximum Dwellings per Parcel		
1 TDR / 20 acres to CP parcel		1 du/20 ac	1 du/10 ac	40		5	7
1 TDR/10 acres to AC parcel				80		7	11
				100		8	13
Max number of lots			60	200		13	23
Minimum lot size (acres)		1	1	300		18	33
				400		23	43
				500		28	53
WRC DISTRICT 1TDR/20 ac.		1 du/20 ac	1 du/10 ac	WRC DISTRICT	Maximum Dwellings per Parcel		
Less than 40 acres		plus 2 du	plus 2 du	40		3	5
40 to 100 acres		plus 1 du	plus 1 du	80		5	9
100 acres or more		0 up front	0 up front	100		5	10
				200		10	20
Max number of lots			60	300		15	30
Minimum lot size (acres)		1	1	400		20	40
				500		25	50

N/A = Not available or not applicable

Bold numbers = Max allowable lots per parcel [§190-56.1(E)(2)]

TALBOT COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
1) TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals.			Based on draft Zoning & TDR law of 5/8/06
a) A balance of supply and demand for TDRs has been created in the design of the TDR program.		X	Demand limited by soils for septic and 60 lot max.
b) Receiver areas (RAs) are large enough to absorb authorized TDRs.		X	Receiver and sending areas are the same
c) As-of-right base density in TDR receiving areas is zoned lower than the market demand for the type and density of housing that developers want to build.	✓		Base zoning lower than demand, but demand not as high as allowed w/TDR
d) Developers in TDR receiver areas can achieve the desired market density only with TDRs.		X	Developers seek PUD & town annexations, or cluster at lower density
e) Density bonuses for using TDRs are sufficiently high to justify the increased cost of purchasing TDR		X	Market value of TDRs not established and uncertain
f) Buying TDRs is more profitable to developers than building to base density or alternative ways to achieve higher density in receiver areas.		X	Developers prefer cluster or in-town development
g) Purchasing TDRs and the public approval process of using them in receiver sites is faster and more predictable than alternative ways to achieve the desired density.		X	Joint subdivision and shared septic approvals unpredictable and slow
h) Selling TDRs is reasonably competitive in value to landowners, considering the residual value of land restricted by TDR easements or covenants, with developing the sending site, selling an easement to other state or local PDR programs, or is the only alternative allowed.		X	20,000+ acres protected with MALPF, RLP, MET & ESLC, compared to 770 acres with TDRs
i) There is an active market for higher density housing types allowed with TDRs in receiver areas,		X	Market for housing strong, but limited by septic/soils; in-town market is stronger
j) The county takes steps to maintain TDR values that are attractive to buyers and sellers by adding TDR receiver capacity, purchasing TDRs, adjusting the TDR allocation rate (amount of TDR/acre or du/TDR), or allowing TDRs for increases in non-residential floor area.		X	Changes to TDR program likely to reduce TDR demand & supply. Focus is on PDR alternatives.
2) The County has strong Comprehensive Plan and Zoning policies supported by TDRs			
a) The TDR program is established as part of larger strategy to preserve land and redirect growth.	✓		TDRs supported in Plan and LPPRP strategy
b) Goals are established in the Plan for the types, location and amount of land to preserve.	✓		WCR, AC, & CP greenbelts targeted
c) TDR sending areas are designated to protect the most valuable rural land, unique natural and historic resources, or other resources in the Plan's protection goals.	✓		WCR, AC, & CP greenbelts targeted, WRC protection strengthened
d) TDRs are received only where the county and municipalities want development to occur.		X	Continues rural-to-rural TDR transfers
e) TDRs will not add new residences where they will contribute to the fragmentation of the best agricultural lands, conflict with existing farming operations or contribute to a sense of farming impermanence.		X	TDRs can be received in all rural zoning areas and in Greenbelts. Likely to continue fragmentation
f) TDRs help mitigate the perceived effects of downzoning, help gain support from landowners, and help avoid litigation over rezoning.	✓		Landowners see TDRs as preserving equity after downzoning
g) Zoning limits or prohibits the use of development rights on the sending site, and reduces the as-of-right base density in receiver sites below the level of market demand.		X	TDR sending and receiving sites are in the same zoning districts
h) Zoning provides for additional density needed to accomplish comprehensive plan goals in receiver areas only or primarily with TDR.		X	Plan goals achieved more through PDRs & zoning than through TDRs
i) The County adopts policy that future zoning density increases in receiving areas are allowed only with TDRs.		X	Density increases gained by annexation & upzoning
j) County water and sewer plans anticipate and plan for development in receiving areas at the density needed to accommodate TDRs.		X	Septic or shared facilities only in rec.area, ex. failed septic
k) Subdivision rules and procedures ensure that receiving area infrastructure is capable of absorbing development with TDR		X	County septic rules limit TDR w/septic or shared facil

TALBOT COUNTY TDR PROGRAM EVALUATION

Summary of Program by Criteria established in ESLC TDR Study

CRITERIA FOR A SUCCESSFUL TDR PROGRAM	Yes	No	Comment
3) Administration of TDRs is simple, efficient and predictable			
a) Buyers of TDR can obtain all approvals for their use in receiver sites with certainty and predictability, and can use TDRs for additional density as-of-right in receiver projects.		X	TDR use requires OK of joint subdivision, Health, Planning, MDE & Council
b) Buyers & sellers of TDR are provided clear rules for use of TDRs in receiver areas and restrictions on using development rights on sending site.		X	Cluster remainder and shared septic rules are conflicting and ambiguous
c) Buyers and sellers of TDR are informed about the current market values of TDRs.		X	Few TDRs transferred – no market to track
d) Receiver areas for TDR are designated and zoned for densities needed to absorb TDRs, without uncertain discretionary or conditional use review.		X	Receiver areas can absorb higher density but public reviews uncertain
e) TDRs are allowed on a gross land area basis; the number of TDRs authorized for sale is not reduced by environmental conditions for development on the sending parcel.	✓		TDRs calculated on gross land area
f) Arbitrary rules limiting the transfer or use of TDRs are avoided (e.g. distance between selling and receiver sites, use of TDRs in the same political districts, etc.).		X	TDR transfers only within same zoning & election dist. ex. CP; 60 lot limit
g) Special rules for development in receiver areas do not discriminate against TDR projects.		X	Special rules for shared septic systems w/TDR
h) Land records, mapping and administration of TDRs are complete, maintained and publicly accessible.	✓		TDRs tracked with joint subdivision plan, RDRA
i) Restrictions on TDR sending sites are permanent, recorded in land records, used in the subdivision and zoning approval process, and sending sites are monitored for compliance.		X	RDR agreements are impermanent; monitoring is unknown
j) Lengthy delays in recording and using TDRs are avoided.		X	3-4 yr. Joint subdivision delays; 3 yr shared septic facility approval process
k) Local government monitors and modifies TDR program as needed to improve effectiveness and efficiency, and adds receiving areas or increases their TDR capacity as needed to maintain demand.		X	No changes since 1991; modest proposed improvements in 2006
4) The TDR program has broad public support.			
a) Rural landowners are motivated to protect land and farming as an industry, more than by profit from selling land for development; and they support TDRs, easement purchase programs and zoning to preserve agricultural uses;		X	Owners motivated to protect land go to State PDRs or MET; others oppose any equity loss
b) Real estate developers support TDRs to obtain increased density in receiving areas, and as a flexible and expedient alternative to purchasing additional land,		X	Only 3 TDR projects built; developers foresee little future use of new TDRs
c) Farming, community and environmental groups support TDRs as one means to protect more land,	✓		Farmers & Enviros support TDRs but are skeptical of changes
d) TDR receiving site communities accept or support the density, design quality and compatibility of development using TDRs.		X	Opposition to only TDR project outside of Critical Area; higher densities opposed.
e) Elected government officials accept TDRs as method to protect land with private funds, protect equity of rural landowners, control the location and quality of growth and implement the comprehensive plan.		X	County Council rejected TDR and rezoning proposal on 9-26-06

Note:

* This evaluation is for the proposed county TDR program in draft zoning ordinance of 5-8-06; rejected by the County Council September 26, 2006

VII. TDR PROFILES

(Phase I Findings)

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The Calvert County TDR Program was enacted in 1978, the first in Maryland. It has since protected more land (11,652 acres¹⁰²) with TDRs than any other county in the state except Montgomery, and is one of the more accomplished TDR programs in the nation. It was established as a result of a study committee established in 1976 by the County Commissioners and former Senator Bernie Fowler to look into alternative land preservation tools for the county. The committee was chaired by Greg Bowen, who was working for the Tri-County Council and was President of the Young Farmers at the time. He now serves as Calvert County Planning Director.

The committee evaluated several land preservation tools, including clustering, scenic easements, agricultural zoning, purchase of development rights and TDRs. A member of the community, Randi Vogt, now with the Planning Staff, suggested the new technique of TDRs to the committee. New York City had used TDRs as a density exchange for historic preservation and various universities had started theoretical studies on TDR, including the University of Maryland, which in 1974 had completed a white paper¹⁰³ on the use of TDRs. The committee was formed largely of farmers and an extension agent. They held a number of meetings with landowners and interest groups and discussed options for farmland preservation. At the end of a large meeting with the County Commissioners and about 65 people, mostly farmers, the Commissioners said: “let’s take it to a vote; let’s see what people want.” About 80% of the people said they wanted the county to look into TDRs. The Commissioners asked their Maryland Delegation for authorizing legislation, which was enacted in 1977, and the Commissioners drafted the laws and adopted them in 1978. The county established its first Agricultural Preservation Districts (APD) in 1979.

It was set up initially as a voluntary program on both the sending side and the receiver sides. To qualify to sell TDRs landowners would enter into an APD, a voluntary land conservation agreement not to develop their land for five years, patterned after a similar prerequisite of the Maryland Agricultural Land Preservation Foundation’s easement purchase program. However, if they chose not to sell TDRs, they could develop the sending property at the full density allowed at that time, one dwelling per five acres. In the receiving areas, it was set up to move development to the less desirable lands for farming, where a lot of development was occurring. It wasn’t a growth control technique and didn’t try to direct growth to town centers or growth areas.

The County Commissioners enacted two major reductions in the underlying zoning throughout the county, one in 1999 when there was a 50% downzoning and another in 2003 that enacted another 50% downzoning. These had a major effect on the performance of the TDR program, by reducing the as-of-right density in the rural areas of the county from 1 du/5 acres prior to 1999 to 1 du/10 acres, and to 1 du/20 acres after 2003. They allowed these landowners to return to 1 du/5 acres with TDRs between 1999 and 2003 and to 1 du/10 acres with TDR after 2003, but they had to buy TDRs from other landowners to accomplish this. These changes made development of land in TDR sending areas less profitable and increased demand for TDRs in receiving areas, by increasing the bonus density allowable by purchasing TDRs. For example, lands in Rural Community Districts, which are now the primary receiving areas for TDR, are allowed 1 du/20 acres without TDRs, but if located within one mile of a Town Center, they may build cluster residential developments at 1 du/acre with TDRs, a 1900% density bonus. Because the county has a policy of not allowing density increases between the six year comprehensive plan and rezoning cycle, purchasing TDRs is the only way developers can obtain higher density than the base-level zoning permits. These changes have

¹⁰² Not counting 5,006 acres protected by County purchases of TDRs through the PAR and LAR program, 8/16/2005

¹⁰³ Phillips Foster, Frank Schnidman, Mark Bailey, *Transferable Development Rights: Are they a step in the direction of better land use management?* University of Maryland Cooperative Extension Service, Bulletin 251, 1974.

helped to increase the purchase price of TDRs from an average of about \$2,400 per TDR prior to 1999 to about \$7,500 in 2005. Since a developer needs five TDRs for each additional dwelling in a receiver area, TDRs now cost about \$37,500 per dwelling unit. This would cost \$712,500 to increase the density on a 20 acre parcel in a Rural Community District, from 1 to 20 dwellings.

TDR transfer process

Transferring development rights includes the following steps under the Calvert Program:

- 1) A property owner puts his/her land in an APD.
- 2) The district is established by the county.
- 3) Landowners can apply immediately, or any time after the district is established, to get their TDRs certified, based on acreage.
- 4) The TDRs are certified by the Board of County Commissioners.
- 5) Once they're certified, developers in a receiving zone apply for subdivisions and indicate that they are going to use TDR lots.
- 6) The developer gets preliminary approval based on the use of TDRs.
- 7) Before they can use TDRs on a property, they have to do a title search of the farm on which the TDRs are coming from, to certify the ownership of the TDRs.
- 8) They do a covenant [easement] document that permanently restricts the sending property for farming and forestry uses.
- 9) They do a transfer document that transfers some or all of the TDR from the sending farm to the receiving property.
- 10) The covenant [easement] document is recorded, immediately followed by the transfer document;

For example, if a developer needs 50 additional development rights for 10 additional houses (5:1 ratio), the transfer number is recorded on the Plat, saying that the developer has purchased 50 development rights from farmer X to create 10 additional lots on this property, which are being applied to this record plat.

Performance factors

A robust market for real estate development in Calvert County has been one of the most significant factors contributing to the success of the TDR program. Between 1970 and 2000 the number of households increased by more than 19,900, from 5,540 to 25,447. During most of that 30 year period Calvert was the fastest growing county in the State.¹⁰⁴ Slightly less than 30% of the new subdivisions built over the 1980–2001 period used TDRs. By 2002, 2,130 new housing units had been built with TDRs.¹⁰⁵

The County Planning Director indicated that the most essential factor influencing their success is that TDRs have to make economic sense to the developer. He has seen many programs where TDR sales do not occur because of this factor. The TDR bonus density compared to the base level density is really important here.

The county has to have very strong zoning, and the government can't give density away through rezoning. Since the Calvert County Commissioners adopted the TDR program in 1978, they have only reduced zoning densities, while allowing increases only with TDRs. If they were giving the density away, they wouldn't have preserved any land with TDR.

The county set up specific receiver areas with a boundary, but they didn't make them too small. They knew they had to go to where the markets were dictating. They tried to set them up so that,

¹⁰⁴ *Calvert County Comprehensive Plan*, Chapter 1, Land: Land Use and Growth Management, 2004

¹⁰⁵ *Zoning, TDRs, and the Density of Development*, Virginia McConnell, Margaret Walls, and Elizabeth Copitz, Resources for the Future, Discussion Paper 05-32, July 2005.

theoretically, the receiving areas have a density that is 2 or 3 times that needed with the number of TDRs available in the areas they wanted to preserve. Downzoning the receiver areas by 50% in 1999 and again in 2003, at the same time the rural sending areas were downzoned, increased the demand for TDRs and their value.

In addition, Calvert County began buying TDRs in 1993 and extinguishing the development rights through their Purchase and Retirement Program (PAR) and their Leverage and Retire Program (LAR). These public TDR purchases have preserved 5,006 acres of land or 30% of total land preserved with TDRs. They have helped stabilize and increase the price paid for TDRs by the private market.¹⁰⁶ The county requires that the sale of a single TDR through these programs be accompanied by an easement restricting the entire land area of the sending farm, allowing the county to strategically target their TDR purchases to maximize use of public funds to preserve the best farms.

To get a TDR program established in the beginning, enthusiastic farm community support was needed. The Calvert County program grew out of the work of a study committee made up largely of farmers. Leaders in the farm community have benefited from the program and continue to support it.

“I really encourage you to give some anecdotal stories about how TDRs are valued by landowners in Calvert County. I know that two-thirds of the boards of directors of the Calvert Farm Bureau have their farms in land preservation. They’ve seen it work for them.”¹⁰⁷

Limitations

Calvert County’s TDR program allows TDRs to be transferred from one rural area to another, and does not require that densities achieved in the receiver areas reach the State standards for Priority Funding Areas (PFAs - 3.5 dus/acre). At the inception of the program Designated Agricultural Areas and Designated Farm Communities were set up as TDR sending areas, including about 20,000 acres of land in the farm belt along the Patuxent River. The Farm Community District (FCD) and Resource Preservation District (RPD) now include 57,000 acres. They are the areas with prime farmland soils established by the Agricultural Preservation Advisory Board (APAB) in 1978. Those could not be TDR receiver zones in the beginning. TDRs could only be transferred to designated Transfer Zones (TZs) established as floating zones and approved by the County Commissioners on a case-by-case basis after public hearings.

In 1999, with the downzoning of the rural areas from 1 du/5 acres to 1 du/10 acres, the TDR ordinance was amended to eliminate the TZ requirement and allow the sending area properties to buy-back TDRs to achieve the previous 1 du/5 acre density, even if the receiving area was in the eligible sending areas. This practice was continued after the 2003 downzoning of rural areas from 1 du/10 acres to 1 du/20 acres. However, the county doesn’t call those transfers. It’s just a way for landowners to buy-back the rights to go to the 1du/10 acre density they had before the 2003 downzoning. They claim that fewer than 100 TDRs have gone back into the FCD and RPD sending areas, because TDR use is more profitable in the preferred receiver areas than in the sending areas. Most of the TDR developments are now going where the county wants them to go.

The FCD and RPD zones include large nearly contiguous farms and forest lands along the Patuxent River and other resource-rich areas such as the Parker’s Creek watershed east of Prince Frederick. These are the primary TDR sending areas. While Rural Community Districts (RCDs) serve as both TDR sending and receiving areas, and some parts of this 50,000 acre zone mostly north of Prince

¹⁰⁶ *How Well Can Markets for Development Rights Work? Evaluating a Farmland Preservation Program*; Virginia McConnell, Elizabeth Kopits, and Margaret Walls; Discussion Paper 03-08, Resources for the Future, March 2003.

¹⁰⁷ Greg Bowen, November 3, 2005 interview

Frederick appear to remain in agricultural or forestry use, the county's 2005 Land Preservation and Natural Resource Conservation Map shows an extensive pattern of residential subdivisions, many of which preceded the adoption of the TDR Program in 1978. The remaining farmland in the area is highly fragmented and often surrounded by subdivisions. The 57,000 acres of land in the FCD and RPD primary sending area represents about 43% of the total county land area, more than half of which is protected by the county's land preservation programs or public ownership.

The highest densities achievable in the RCD receiving area, where most development is occurring, is 1 du/acre with TDRs and clustering on 20% of the total development land area, if the development is within one mile of a Town Center. Beyond one mile, the maximum density is one unit per four acres. Much of this low to medium density residential development is on well and septic systems, rather than on public water and sewer service. There has been very limited use of TDRs in Town Centers or higher-density R-1 or R-2 residential zones, primarily because here is a limited market for higher density residential developments. Transferring development to where there is water and sewer is not something the county could achieve, so 90% of development with TDRs was not on community sewers. Only 4% or 5% of the whole county was being served by water and sewer at the time the program was established. The county is now working towards more public utilities for these residential areas. In 2005, at least a third of the new dwellings are on community sewers. The county is now directing new development using TDRs toward Town Centers and residential areas on public utilities.

Calvert's TDR program has been criticized for transferring density from the rural areas along the Patuxent River west of Route 4, to other semi-rural areas in the northeast quadrant of the county north of Prince Frederick, i.e. rural-to-rural transfers. However, as the planning director described:

"TDRS are a tool which can be used to preserve what a community wants to preserve. Our success should be measured based on how much we preserved of what we had and what we do with it. Calvert is the smallest County in the state, with perhaps the least prime farmland, due to highly erodible soils and rolling terrain. For 300 + years, tobacco was king. Every farmer raised it. We lacked the big towns, so there was little market for milk, vegetables, etc. Our average farm size was 90 acres. Farmers could raise a family on 90 acres, because it only took 10-20 acres of tobacco to make a living. In our best years, we raised \$20,000,000 in gross farm product sales. When our program began, it was simply rural to rural transfers, because we had very little land with access to community sewers. Much of the land east of MD 4 (and north of Prince Frederick) developed in the 1970s and 1980s. It was also the roughest land. Our Program has evolved and in 2005 only one percent of our lots were recorded in our Farm and Forest District (57,000 acres), which is our designated "Priority Preservation Area" in the Comprehensive Plan. We downzoned the Farm and Forest District twice and we greatly strengthened the need for TDRs in the receiving areas. Most growth is now going in and around our town centers."

CALVERT TDR PROFILE			
Established	1978		
Major changes	1999, 2003		
General features			
Mandatory or voluntary	Voluntary		
Type of protection of TDR sending site	Easement		
Sale of 1st TDR requires easement on whole farm			
Sending areas			
TDRs authorized per acre	1:1		
Ag. Preservation Districts with 50+ acres in:	Base Density		
Forest Conservation Districts	0.05		
Rural Preservation Districts	0.05		
Rural Community Districts	0.05		
Rural Residential Districts	0.05		
RUR Districts	0.05		
Eligible Receiving areas			
TDRS needed per du	5:1	TDR	TDR
	Base Density	Max Density	Density Bonus
Forest Conservation & Rural Preservation Districts	0.05	0.1	100%
Rural Community Districts	0.05	0.25	400%
Rural Community w/in 1mi Town Center	0.05	1	1900%
R-1 Residential	0.25	4	1500%
R-2 Residential	0.25	4	1500%
Town Centers	1	14	1300%
Performance			
Total County land area in acres	130,820		
TDRs transferred	15,602		
Acres of Land protected with TDRs ¹⁰⁸	11,652		
% of County Land Area protected with TDRs	8.9%		
Acres of Land protected with all Programs	32,983		
% of County Land Area protected with all Programs	25.2%		
Density = number of dwelling units per acre		Example: 0.05 du/acre = 1 du/20 acres	

¹⁰⁸ See footnote #1, page 1

The Charles County TDR program was adopted as part of the zoning ordinance in 1992, following the 1990 Comprehensive Plan revisions. It was designed to serve as a primary tool to help the county implement its goal of preserving 64,000 acres of productive farmland in the county, and to shift development from Agricultural and Rural Conservation Districts (AC and RC) to the Development District in the north of the county around Waldorf and St. Charles. It offered landowners an additional option to preserve farm and forest lands. To be eligible to sell TDRs, landowners must be in an AC or RC and be enrolled in an Agricultural Preservation District (APD) under the Maryland Agricultural Land Preservation Program, which requires a covenant preventing development on the property for 5 years. It also ensures that only farm and forest lands with the best soils and exceeding 50 acres in size can qualify.

A 1991 consultant's study recommended limiting the amount of land that could be eligible to sell TDRs by tying the program to the same APD requirements as the MALPF program, limiting the overall supply of TDRs. There are currently 11,446 acres in eligible APDs in the county, with a potential for 3,815 TDRs. A total of 978 TDRs have now been certified by the county, including those that have been retired and transferred. Each qualifying parcel of land is eligible to transfer one TDR per 3 acres, reflecting the allowable zoning density in the sending areas. In many cases this allows the transfer of more dwelling rights than would be permitted on the sending parcel, because of environmental restrictions related to forest management, storm water control, steep slopes or wetlands. In the western portion of the county, these restrictions typically limit residential densities to one dwelling per 4 or 5 acres or more.

TDR transfer process

Transferring development rights includes the following steps under the Charles County program:¹⁰⁹

- 1) A property owner puts his/her land in an APD, restricting development for 5 years.
- 2) The district is approved by the county and the MALPF board.
- 3) The property owner applies to have TDRs certified by the county, with documentation of clear title and a plat map.
- 4) The county issues a certificate stating the number of development rights available to the sending parcel, based on one development credit per acre enrolled in the APD, with 3 credits for each TDR.
- 5) Once certified, the property owner can sell or convey TDRs by signing an *instrument of original transfer*, which includes covenants documenting that the development rights have been transferred from the transferor to the transferee, and a restrictive covenant on the entire sending parcel restricting the land for agricultural use. These covenants are recorded with the County Clerk.
- 6) If the TDRs are transferred to another party prior to being applied to a development site, they are considered *intermediate transfers*, as defined in the TDR ordinance.
- 7) A developer of land in the Development District applies for a subdivision and submits an affidavit of intent to transfer development rights in conjunction with the development application, with site plan and other documentation required for the subdivision.
- 8) The county can grant preliminary approval of the subdivision and the increased density with TDR based on this affidavit.

¹⁰⁹ Rick Pruetz, *Beyond Takings and Givings: Saving Natural Areas, Farmland and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*; Arje Press, 2003, page 384, and interview with Charles Rice, November 7, 2005.

- 9) Final approval of the project is granted based on a demonstration that the developer owns the necessary TDR, that a deed of transfer has been recorded permanently preserving the land in the sending site, and that the TDRs have not previously been used.
- 10) Upon approval of the development project, the TDR *instrument of original transfer* or *instrument of intermediate transfer* is conveyed to the Charles County Commissioners and retired.

Performance factors

Since 1992, 156 TDRs have been retired and another 520 have been transferred, averaging about 52 TDRs protecting 156 acres per year. It has served as an additional tool to implement the 1990 and subsequent Comprehensive Plans for the county by helping to direct growth from rural areas of the county to the Development District. These transfers have protected 2,028 acres of land with restrictive covenants (deed restrictions) on eight farms. An additional 302 TDRs have been certified by the county as eligible to sell, which would protect another 906 acres if sold and retired.

In the early years, until about 2000, the market for TDRs was very slow. Various reports on TDR programs in Maryland show no TDR sales by 1995,¹¹⁰ 306 acres preserved with TDRs by 1998,¹¹¹ and 1,183 acres protected by 2001.¹¹² As of March 2005, the TDR program had protected less than 1% of the county's 294,407 acre land area, and 5.4% of all protected land in the county.

The program does not allow rural-to-rural transfers of development rights, except when a landowner seeks to buy-back TDRs that have been sold to use on the original sending site. While no buy-back TDR transfers have occurred yet, some are now in progress, but few of these rural-to-rural transactions are anticipated, since the county requires a restrictive covenant on the entire sending farm when only one TDR is retired. The only way to reinstate development rights to a sending parcel is to protect 3 acres elsewhere for each TDR bought-back.

The TDR program has contributed 2,028 acres to the county's 64,000 acre agricultural land preservation goal, and provided another option for landowners who want to continue farming or forestry operations in one of the faster growing counties close to the Washington metropolitan area. When this goal was adopted in 1992 it represented all of the remaining productive farmland in the county. There was 52,056 acres of land in farm and forest use remaining in the county in 2002, according to the USDA Census of Agriculture.

In 1999, the County Commissioners amended the TDR ordinance to require the use of TDRs for any rezoning of land in the county for a higher density, which should increase the use of TDRs for land protection if the real estate market in the future supports densities higher than the base levels allowed in the Development District. If this policy is sustained when public services are expanded to the RC(D) zone in the Bryan's Road area, and if this area is rezoned upward from 1 du/10 acres to accommodate future growth, the demand for TDRs should improve.

Limitations

Two major factors have limited the performance of the Charles County TDR program: 1) the ability of landowners in the AC and RC sending zones to sell 3 to 5 acre rural building lots as-of-right for about \$185,000 compared to average offers of about \$8,500 per TDR on 3 acres in May 2005,¹¹³ and 2) existing base-level residential densities in the Development District, from 1 to 1.75 du/acre for low density residential, to 15 du/acre for high density residential transit oriented developments, has

¹¹⁰ Managing Maryland's Growth, Models and Guidelines: *Transferable Development Rights*, Flexible and Innovative Zoning Series, No. 9. Maryland Office of Planning, January 2005.

¹¹¹ *Counties with TDR Programs*, Maryland Office of Planning, February 5, 1998.

¹¹² Fact Sheet: *Transfer of Development Rights*, American Farmland Trust, Farmland Information Center, 1/2001.

¹¹³ *Charles County Transferable Development Rights Program Assessment*, ACDS, LLC, Environmental Resources Management, October 2005, page 1.

been at or higher than the market developers wanted to build for. Both of these factors are a product of permissive local zoning in both the TDR sending area and the receiving areas. Most TDRs have been transferred to the RL low density residential zone, which can be increased from 1 to 3 du/acre, or to the RM zone, which can be increased from 3 to 4 du/acre or to 6 du/acre with Planned Unit Development, or to higher densities in mixed-use or transit oriented developments. According to the county's consultant evaluating their TDR program:

*"The demand is currently driven by the residential real estate market that places nearly equal value on one-third and half acre building lots in the Development District as it does one-acre lots. Developers' ability to use TDRs to facilitate this density enhancement is bounded by the economics of development and market demand. Simply, the developer cannot pay more for the TDR than he or she will receive in marginal profit from higher density development."*¹¹⁴

Unlike more successful TDR programs in Montgomery and Calvert Counties, Charles County did not downzone its agricultural and rural areas in conjunction with or after the establishment of a TDR program. In 2000 the County Commissioners created a 14 member Rural Commission, to evaluate the effectiveness of the permitted density of one unit per three acres for conventional subdivisions in the AC and RC zones, and to provide recommendations to increase the utilizations of the TDR program. In its 2002 Report, the Commission found that the TDR program has had limited impact, in part due to its voluntary nature and lack of supportive rural zoning. They indicated that a build-out at 1 du/3 acres would result in a landscape that would be unacceptable due to the high consumption of land per dwelling unit and the resulting development patterns.¹¹⁵ In October 2003, The Planning Commission recommended the rezoning of the rural area of the county to an optimum density of 1 du/20 acres, with 1 du/10 acres as the minimal acceptable density. They said that *"Anything less than one dwelling per ten acres would not be acceptable and would fail to preserve agricultural land and the rural character of the areas outside the Development District, currently zoned AC and RC."* After contentious public hearings on the Planning Commission's recommendations in 2004, the County Commissioners decided to retain the 1 du/3 acre zoning in most of the Agricultural and Rural zones, except for a small area at the south-western end of the Development District west of Bryan's Road. This area was downzoned RC(D) (for *deferred*) to 1 du/10 acres. The Commissioners wanted to discourage development in this area until public utilities and services could be provided to support development at a later date. The Planning staff anticipates that this area could be upzoned in the future with TDRs to increase the density above the 1:10 ratio. This could give a significant boost to the demand for TDRs that remain unsold at the time.

Under the current rules for the program, by allowing only landowners enrolled in approved APDs to sell TDRs, the supply of TDRs is limited by the amount of unsold TDRs certified or eligible from existing APDs. This is currently estimated at 3,815 potential TDRs from 11,446 acres in existing APDs, less 676 retired and transferred TDRs, or 3,139 TDRs. If all of these eligible landowners sold TDRs, instead of selling easements to the MALPF or Rural Legacy Program, donating easements to the Maryland Environmental Trust, or selling their land for development, the program would theoretically be limited to protecting another 9,417 acres. At the historical average for the TDR program, 156 acres preserved annually, it would take more than 60 years to utilize all of the potentially available TDRs from existing AC and RC areas eligible to enroll in APDs. The county's TDR consultant has suggested that limiting the program to those enrolled in APDs may limit the potential of the program, and the county's LPPRP recommends expanding TDR participation to a broader group of landowners (see discussion below).

¹¹⁴ Ibid, page 12

¹¹⁵ Letter to Commissioners of Charles County from Jo Ann Ptack, Chairman of the Charles County Planning Commission, October 27, 2003.

However, it appears that the Charles County TDR program is not limited by a short supply of eligible TDRs, but by a limited demand for TDRs in the Development District, and by unbalanced competition for landowner's development rights for small subdivisions that are allowed by right within the AC and RC areas of the county, with zoning that permits one dwelling per three acres. The Consultant also finds that "*developers are using TDRs to gain relatively small, by right density increases,*" and their desire to utilize higher densities is limited by the market's desire for single family homes on one-third acre lots.¹¹⁶

To overcome some of these limitations, the Draft Charles County Land Preservation, Parks and Recreation Plan (LPPRP) of July 2005, to be considered by the Commissioners in December 2005, recommends certain revisions to the TDR program, including:

- Making the TDR program mandatory for certain types of development,
- Downzoning or otherwise restricting growth in rural areas,
- Increasing density enhancements in targeted growth areas,
- Banking TDRs with a land trust,
- Expanding TDR participation to a broader group of landowners (beyond those enrolled in APDs)
- Limiting intrazone sending of TDRs (e.g. the buy-back option), and
- Reducing the development timeline using TDRs (e.g. increasing the speed of lot allocation process under the Adequate Public Facilities Ordinance)

¹¹⁶ Op cit, ACDS, p. 18

CHARLES TDR PROFILE				
Established			1992	
Major changes			1999	
General features				
Mandatory or voluntary			Voluntary	
Type of protection of TDR sending site			Covenant	
Sale of 1st TDR requires easement				
Sending areas				
TDRs authorized per acre		0.33		
		Base		
Ag. Preservation Districts (MALPF) with 50+ ac. in:		Density		
Agricultural Conservation Zoning Districts (AC)		0.33		
Rural Conservation Zoning Districts (RC)		0.33		
Eligible Receiving areas				
TDRS needed per du		1	TDR	TDR
		Base	Max	Density
Development Districts in:		Density	Density	Bonus
RL	Low Density Residential	1	3	200%
RL-TOD	Low Density Transit Oriented Development	1.75	3.5	100%
RM	Medium Density Residential	3	4	33%
RM-PDR	Medium Density Planned Residential Dev.	3	6	100%
RM-TOD	Medium Density Transit Oriented Dev	4	8	100%
RM-MX & PMH	Medium Density Mixed Planned Mfg. Home	3	10	233%
RH	High Density Residential	5	6	20%
RH-PRD	High Density Planned Residential Dev.	5	12	140%
RH-TOD	High Density Transit Oriented Development	15	27.5	83%
RH-MX	High Density Mixed Use	5	19	280%
RH-MX & PMH	High Density Mixed Use Planned Mfg. Home	5	10	100%
RH-MX & TOD	High Density Mixed Use & Transit Oriented	15	27.5	83%
Performance				
Total County land area in acres			294,407	
TDRs transferred				676
Acres of Land protected with TDRs			2,028	
% of County Land Area protected with TDRs				0.7%
Acres of Land protected with all Programs			37,551	
% of County Land Area protected with all Programs				12.8%

Density = number of dwelling units per acre

Example: 0.33 du/acre = 1 du/3 acre

The Montgomery County TDR Program was enacted in 1980, the second in the State after Calvert County's. By the end of June 2005 it had protected 48,584 acres at a density of 1 dwelling to 25 acres in the county's Agricultural Preserve, a 91,591 acre Rural Density Transfer (RDT) zone. Montgomery has protected more land with TDRs than all other TDR programs in Maryland combined and more than any other TDR program in the nation. Using only acres of land protected as a measure, Montgomery's TDR program is by far the most successful. It is typically profiled as a model TDR program in national studies of this land preservation technique, and various aspects of it have been copied by local jurisdictions in several other states.

Montgomery County was an early leader among local jurisdictions in growth management. A General Plan was adopted for the National Capital region as early as 1957. In the mid-1960's they developed the concept of *wedges and corridors*, to plan for wedges of open space, low density residential, rural villages and preservation, separated by corridors of development, or *corridor cities*. This concept was the basis of its pioneering 1964 General Plan for the Washington Region,¹¹⁷ followed in 1974 by a downzoning from 1 and 2 du/acres to 1 du/5 acres in the rural wedges to discourage the conversion of farmland. This did not slow the conversion of land. The county lost 26,848 acres or 18% percent of its farmland between 1971 and 1979.

In October 1980 the Maryland-National Capital Park and Planning Commission (MNCPPC) adopted a *Functional Master Plan for the Preservation of Agriculture and Rural Open Space for Montgomery County*. The Plan recognized the importance of the 'Impermanence Syndrome,' a feeling by farmers that farming is doomed in their area, resulting from development pressures, loss of support industries, land speculation, suburban neighbor nuisance complaints and other factors. Among other things the plan recommended the preservation of critical masses of farmland and rural open space; identification of an Agricultural Reserve and a Rural Open Space Area; application of incentives and regulations to preserve farmland and rural open space to encourage agricultural uses of the land; and application of specific innovative preservation techniques such as a Rural Density Transfer Zone (RDT), a Rural Cluster Zone, and a County Development Rights Fund. The County Planning Board had previously established a pilot RDT Zone within the Olney Master Plan, prepared text amendments for the RDT to implement this Master Plan, and enacted a one year interim ordinance limiting development in selected areas of the Rural Zone to 1:25 density, while the Functional Master Plan was being prepared. As a test case the first receiving area for TDRs was designated in the Olney Master Plan, which limited the transfer of TDRs only from the Olney RDT zone.

To implement the Functional Master Plan, the county amended the zoning code and sectional maps to downzone the entire 91,591 acre RDT from 1:5 to 1:25 density, and allowed 5 TDRs to be sold and transferred to designated receiver zones, based on the previous density, but allowed only one development right per 25 acres to be used on the sending parcel (i.e. the 5th TDR).

While some members of the MNCPPC board recommended a downzoning of the RDT to 1:50 density in the Plan, based in part on Baltimore County's prior downzoning action, the Commission realized after an extensive outreach program that politically they were not going to be able to get a zoning density lower than 1 du/25 acres. Since about 60% to 70% of the agricultural study area lands had severe limitations for septic systems,¹¹⁸ some also believed that the population holding capacity

¹¹⁷ *On Wedges & Corridors: A General Plan for the Maryland-Washington Regional District in Montgomery and Prince George's Counties* (1964, updated 1969). http://www.mc-mncppc.org/community/general_plans/wedges_corridors/wedges_corridors64.shtml

¹¹⁸ *Functional Master Plan for the Preservation of Agriculture and Rural Open Space in Montgomery County*, October 1980, Septic System Suitability, page 18

of the RDT zone would be further limited by the County Department of Environmental Protection's regulations governing deep-trench septic systems.¹¹⁹

TDR transfer process

Transferring development rights includes the following steps under the Montgomery County Program:

- 1) A property owner consults with the Department of Economic Development staff, who provide a list of interested buyers and an explanation of the program.
- 2) The property owner in the RDT zone obtains a title report on the property to determine clear title, and to document that they have not sold their TDRs, and there are no prior easements restricting TDR sales.
- 3) The property owner obtains an official 1:200 ft. zoning map from MNCPPC locating the property in the RDT zone.
- 4) The County Attorney provides the property owner with a standard TDR easement form to complete and return with specific information about the property boundaries, ownership, etc.
- 5) The County Attorney creates the TDR, assigns a specific serial number to the easement for each TDR, and maintains a file of each TDR assigned.
- 6) The property owner signs the easement and has it notarized.
- 7) The County Executive signs the easement and has it notarized, allowing it to be recorded.
- 8) The property owner has the option of keeping the easement, entering into a contract of sale (option agreement) with a developer to sell the easement before it is recorded, or recording the easement. (in some cases a developer will negotiate with a property owner to sell TDRs, put a deposit down, and incur all costs of title search, attorneys, and document preparation for the purchase and recording of the easement, until he/she obtains approvals for the use of the TDR in a receiving area project).
- 9) The property owner records the easement in the county land records, at which point the TDRs are "lifted" from the sending property. They are no longer associated with the real property in the RDT zone, and become negotiable, like a stock or bond. The TDR easement for the first sale of TDR from the sending property covers the entire sending parcel, not just a portion of the property that corresponds to the 5 acres for each TDR sold. A separate overlay easement is placed on the entire sending property for each subsequent sale of remaining TDRs, further reducing the available TDRs on the sending site.
- 10) The property owner could then keep the easement after it is recorded to see what price the market is willing to pay, or if a contract of sale has already been signed, receive payment and execute a deed of transfer of the TDR, which is also recorded in the deed of the sending property. This phase consummates the transfer of the TDR to the buyer.
- 11) The developer submits copies of the TDR easement and deed of transfer to the MNCPPC and County Attorney upon approval of the development project using TDRs, in order to obtain the higher bonus density in the receiver area.
- 12) The serial numbers for the TDRs used in the receiver area project are recorded on the subdivision plat of the approved development project.

Performance factors

Balancing supply and demand

Montgomery County has sought to carefully balance the estimated amount of TDRs that would be transferred out of the RDT zone, with the amount of receiving capacity for TDRs in designated area

¹¹⁹ *Ibid*, page 17: "This policy results in a population holding capacity that is less* than the zoned population holding capacity. This "perk" policy is one of the most significant in limiting population density within the Study Areas."
(*Roughly half of the population holding capacity based on zoning)

master plans. In 1987, the Maryland Court of Appeals overturned the county practice of increasing density for TDRs only through the master planning process,¹²⁰ leading to adoption of a comprehensive rezoning ordinance that year establishing TDR receiving areas in each of the master plans. After the initial Olney master plan, TDR receiving areas were established in eight master plans in the 1980's and another six were created in the 1990s. Receiving areas are now located in 16 master plans with a cumulative total of 99 TDR receiving area parcels. While the use of receiving areas and the price received for TDRs sagged during slow economic times, in the very active real estate market or recent years in the Baltimore-Washington Metropolitan area, these receiving areas provided the engine of demand that has made the TDR program work well in the early years of the 21st Century.

The theoretical maximum number of TDRs authorized in the RDT zone was originally 18,318, but after subtracting publicly owned land, land protected with other easement programs, existing residences, and parcels less than 10 acres, an estimated total of 12,297 TDRs was available from the RDT zone. The total receiving capacity in nine approved master plans was estimated in 1992 at 11,650 TDR, nearly a 1 to 1 balance. However, it became clear that three major factors would influence this supply and demand balance. First, since the average price of TDRs that could only be transferred off of the sending parcels was significantly lower (\$8,250 in 1992) than the value of the 5th TDR that could be used within the RDT zone (\$150,000 to \$200,000) few landowners were expected to sell their 5th TDRs (estimated at 2,481 in 1997 and 1,851 in 2005). Second, environmental restrictions, building moratoria, site limitations or market considerations have resulted in a '*diminished capacity*' of TDRs in the sixteen designated master plan receiver areas. Of the total estimated capacity in these plans (15,336 TDRs in 2005), 8,077 have been approved for use and 5,233 (34.1%) will not be used due to diminished capacity. A third factor contributing to diminished capacity is a county rule requiring developers to use at least 2/3 of the increased density allowed with TDR in receiver sites. Environmental and other site limitations have often prevented developers from using 2/3rds of the TDR capacity, resulting in development at the base-level density without any TDR. A Task Force studying the TDR program in 2002,¹²¹ and the MNCPPC have recommended eliminating this rule.

The county has periodically expanded both the number of TDR receiver areas and the TDR absorption capacity of these master plans. Between 1992 and 2005 the county expanded the total TDR capacity in receiver areas by 7,528 TDR, more than offsetting the loss of 5,233 TDRs through diminished capacity.

To balance the remaining supply of about 2,122 TDRs to be sent (not counting the 1/5th TDRs or those already approved for use), there is a remaining capacity of about 2,046 TDR in designated receiver areas. Because of diminished capacity, only 800 to 1,300 TDRs of these are likely to be used in the existing receiver zones, leaving a shortage of new receiving capacity ranging from 900 to 1,300 TDRs.

Other factors

Several other key factors appear to be responsible for Montgomery County's success in protecting more land with TDRs than any other local jurisdiction in the U.S.

In 1980 and since, forward thinking elected officials in the county have had the public interest at heart and were willing to make unpopular decisions that impacted a large number of people. While the 1980 downzoning to 1:25 density in the RDT zone was unpopular among landowners, the county

¹²⁰ *West Montgomery County Citizens Association, et.al. v Maryland-National Capital Park and Planning Commission, et.al.*, No. 124, September Term, 1985, April 1, 1987.

¹²¹ *TDR Program Task Force Report*, Judy Daniel, July 19, 2002 memorandum to Montgomery County Planning Board.

had a long record of support for agriculture and they utilized the TDR program to help mitigate negative impacts of this downzoning on land values. The downzoning slowed the pace of development down so greatly that it gave the county time to develop other tools, including the county PDR program (AER), utilization of State easement programs (MALPF, MET, Rural Legacy and CREP) and agricultural economic development assistance for farmers. It played a very big role in the success of the program, because the landowners were given an opportunity to market development rights they couldn't use on site.

Montgomery's TDR program was not voluntary like others in Maryland, where the same number of development rights could be built on the farm property as could be sold and transferred to areas more suitable for development. Only one of the 5 authorized TDR per 25 acres could be used on site. Staff claims that most or all of the farmland in the RDT zone would have been developed by the year 2000 at the rate that land was being converted in the 1970s if it would have been a voluntary program. One of the strengths of the program is that once a single TDR is sold, the entire property is protected with an easement. They believe that the few landowners that have not sold their off-site TDRs are betting on a change in zoning in the future, but since so many farms in the RDT have been permanently protected by TDR easements or other state and local easement programs (about 65,000 acres), there will be little political or legal support for a future change in zoning.

Having sufficient staff support to manage the TDR program has also been one key to its success. Professional staff in the MNCPPC ensures that master plans for the receiver areas build in sufficient capacity for higher density using TDRs, and prepare 5 year status reports on the progress of the program, including the supply and demand for TDRs. The MNCPPC recently authorized their staff to create a computerized tracking system for the TDR program, which will provide ongoing data, making status reports available whenever needed. Staff in the Department of Economic Development's Agricultural Services Division provides a connection to the agricultural community; they often act as their advocates with other county agencies. They explain the TDR program to the landowners; and keep track of current prices and buyers of TDRs, while administering other farmland preservation programs that provide an important menu of alternatives to land conversion.

Limitations

The 2002 TDR Task Force highlighted several problems with the existing program, including 1) too few receiving areas related to the decreased use and diminished capacity of receiving areas, and loss of receiving areas from annexations, rezonings and master plan revisions, resulting in an imbalance of realistic sending to receiving area TDRs; and 2) a resulting decline in TDR values after 1997. In the last few years, largely due to the real estate boom and addition of the 2,000 acre Clarksburg Master Plan in 1994, with a capacity of 2,153 TDRs in an area previously zoned agriculture or low-density residential, the values for TDR have increased to an all time high, from an average of \$8,000 in 2002 to \$42,000 in 2005.

There are several proposals being studied by the county to address the current imbalance between the remaining supply of 2,122 off-site TDRs and the lower demand for these. The Task Force and the MNCPPC have recommended that the master plan evaluation process include the creation or expansion of TDR receiving zones whenever any additional density is contemplated outside of the RDT zone; a policy to allow TDRs in floating zones and mixed-use and transit zones; and a policy to allow residential TDR conversions to non-residential commercial or office uses.¹²²

In June 2005, the county listed 48,584 acres of land as *preserved* by the TDR program. However, the largest threat to the full success of the program in protecting the future of farming in the Agricultural

¹²² *Agricultural Initiatives*, Judy Daniel memorandum to Montgomery County Planning Board via John Carter, 11/10/2005

Reserve is the looming possibility that 1,850 additional residences will be constructed at a density of 1:25 in the RDT zone, with the 5th TDRs that have been withheld from the TDR market. At an estimated value of between \$175,000 and \$500,000 in 2005, depending on the county's rules for septic systems for these units, it is unlikely that these 5th TDRs will be sold for use outside of the RDT. There may also be additional residential units built on TDR sending sites in the RDT zone for family members of landowners who owned farms when the downzoning occurred in 1980, and for tenant homes for agricultural workers approved by the county, both of which are permitted by the terms of the TDR easements and the RDT zoning. Each landowner affected by the downzoning was allowed to reserve one right to develop a house for family members who agree to live on the property, at the previous 1:5 acre density, but they have to utilize one TDR for each family residence. Since these on-site rights would be much more valuable than off-site TDR sales, many landowners with local children are expected to convey these rights to their family. New tenant houses do not have to use a TDR if it is shown they are needed for managing the farm, unless there is a plan to eventually convert it to a primary residence.

Other studies have been initiated to address the problem of increasing residential and non-residential development activity in the Agricultural Reserve posed by build-out of the 5th TDRs and large institutional uses permitted in the RDT zone, such as churches. The County Council recently imposed a moratorium on the extension of public sewer services to institutional uses allowed in the RDT zone, and initiated a study of alternative locations for these uses outside of the RDT. They are considering a recommendation from the MNCPPC to limit the use of "sand-mound" septic systems (authorized as an alternative to deep-trench systems in 1994) to existing residences with failing septic systems, or on a case-by-case basis for others in the RDT, but to deny their use *"to create residential subdivisions that would otherwise not be allowed and that eliminate all realistic potential for farming and agricultural uses."* This has become very controversial, because it could affect the build-out of the 5th TDRs, or family member and tenant houses in those areas of the RDT identified in the 1980 Functional Master Plan as having severe limitations for septic systems.

The Department of Economic Development has also developed a proposal¹²³ that would actually have the effect of enhancing the original goal of the 1980 downzoning and TDR program, by reducing the likely build-out density below the current 1:25 acre ratio. This proposal would establish a Building Lot Termination (BLT) Program to publicly fund the purchase of a substantial portion of the 5th TDRs that remain on TDR sending parcels. Initially, the county would negotiate with the landowners that hold these rights, purchase the TDRs with public funds, convert the residential TDRs to non-residential use based on a formula the Council would approve, then resell them to developers for use in newly established Research and Development (R&D) zones, where there is an unmet demand for additional floor area for research and office development. After an initial period when the county would play a brokerage or facilitation role, they would expect that a direct developer-to-TDR owner market would develop for the transfer of these more expensive 5th TDRs.

The county has not established procedures to monitor and enforce TDR easements. The only control over development on the easement restricted sending property is through the subdivision application process, where applicants are required to sign an affidavit that they own a certain amount of TDRs. MNCPPC does not require a title report on properties during the subdivision process, although some county staff have recommended that such reports be required.

¹²³ *Enhanced Farmland Preservation Initiatives, Fall 2005*, Montgomery County Department of Economic Development, Agricultural Services Division.

MONTGOMERY TDR PROFILE			
Established			1980
Major changes			
General features			
Mandatory or voluntary			Mandatory
Type of protection of TDR sending site			Easement
Sending areas			
TDRs authorized per acre		0.20	
County Agricultural Preserve		Base Density	
Rural Density Transfer (RDT) Zone		0.04	
Eligible Receiving areas			
TDRS needed per du		1	TDR
			TDR
Master Planning Areas:		Base Density	Density
RE-2/TDR	Residential TDR	0.5	Max Density
RE-2C/TDR	Residential TDR	0.5	Bonus
RE-1/TDR	Residential TDR	1.1	
R-200/TDR	Residential TDR	2.18	
R-150/TDR	Residential TDR	2.18	
R-90/TDR	Residential TDR	6	
R-60/TDR	Residential TDR	28	
R30/TDR	Residential TDR	28	
R20/TDR	Residential TDR	40	
R10/TDR	Residential TDR	50	
		100	
Performance			
Total County land area in acres		316,800	
TDRs transferred			8,077
Acres of Land protected with TDRs		48,584	
% of County Land Area protected with TDRs			15.3%
Acres of Land protected with all Programs		158,250	
% of County Land Area protected with all Programs			50.0%
Density = number of dwelling units per acre		Example: 0.04 du/acre = 1 du/25 acres	

The Queen Anne's County TDR program was adopted in 1987 as part of comprehensive plan and zoning amendments which downzoned rural zoning districts to help preserve nearly 90% of the county's land area from development. TDRs were offered to landowners as an option to help mitigate potential loss of value from a reduction of development rights from the previous 1 du/acre to 1 du/20 acres in the Agriculture (AG) and 1 du/20 acres in the Countryside (CS) zone for large lots and allowing for clustering of new development on 15% of a development site to achieve 1 du/8 acres in the AG zone, and 1 du/5 acres in the CS zone outside of the Critical Area. This downzoning preceded the 1989 downzoning of Resource Conservation Areas (RCA) of the Critical Area required by State law to be a maximum of 1 du/20 acres. Other Eastern Shore counties were also rezoning rural areas adjacent to the Critical Area at about the same time to protect farmland and maintain consistency.

When first authorized, TDRs were allowed to be transferred within the AG and CS zones (i.e. rural-to-rural transfers). Comprehensive Plan amendments in 1993 and zoning amendments in 1994 limited TDR transfers to zoning districts largely within designated growth areas, with a significant effect on the use of TDRs. Between 1987 and 1994, 2,180 acres were protected with TDRs from 39 sending parcels. Since the 1994 amendments, 464 acres have been protected with TDRs from 8 sending parcels, representing an 85.1% decline in the annual rate of acres protected with TDRs (311.4 acres/yr to 46.4 acres/yr). Most of the TDR transfers prior to 1994 were rural-to-rural transfers within AG and CS zones.

Currently, users of TDRs in growth areas may increase the density of residential development by 25% on receiver sites and reduce the minimum required open space by 25%. In certain zoning districts, use of TDRs allows an increase by 25% in floor area for non-residential development, and increase in the amount of impervious surfaces by 25%. TDRs transferred to certain zoning districts on Kent Island must come from other properties in Kent Island's election district. Most designated growth areas are zoned to a minimum density of 3.5 du/acre to correspond to State guidelines for Priority Funding Areas (PFAs). This tends to be higher than the current market for single-family residential development, which is about 2.5 du/acre on water and sewer service.

Eligible transferor properties in the Chesapeake Bay Critical Area must be at least 20 acres in size, and a development right may not be used to increase density for receiving parcels in the Critical Area RCA beyond the density allowed in the parcel's base zoning district. Other qualified TDR transferor parcels must be at least 24 acres or half of the size of the lot of record, whichever is less, and must meet minimum prime soil standards based on the MALPF program. The original instrument of transfer of TDRs from a sending site must represent all TDRs from the transferor parcel under the existing or any future zoning, and once TDRs have been transferred, the parcel may not be subdivided or reconfigured.

In the AG zone 8 acres must be permanently deed restricted as open space for each TDR transferred. In the CS zone 5 acres must be so restricted for each TDR transferred, and in CS zones within the Critical Area, 20 acres must be preserved for each TDR transferred. These deed restrictions are in the form of a restrictive covenant of the same form used by the county to deed restrict other remainder open space lands through the cluster zoning ordinance, and through a parallel Non-Contiguous Development (NCD) program, discussed below. In September 2005 the county listed 17,582 acres of open space land protected with deed restrictions, in addition to those from TDR sending parcels. Deed restricted open space is limited to agriculture, forestry and some recreational uses.

TDR transfer process

Transferring development rights includes the following steps under Queen Anne's TDR Program:

- 1) A landowner qualified to sell TDR or his/her representative (transferor) consults with the Planning Director to determine the eligibility of the transferor site, number of TDRs available, and requirements for an application for an “original instrument of transfer” for the sending parcel,
- 2) The transferor prepares an application for an original instrument of transfer, naming the transferor and transferee, a metes and bounds description of the parcel and covenants prescribed by the code,
- 3) After executing the original instrument of transfer, the transferor delivers it to the Planning Director,
- 4) The Planning Director certifies the original instrument of transfer, delivers it to the recorder of deeds, and then notifies the transferor and transferee,
- 5) After recordation, a development right may be transferred to an intermediate transferee prior to the time when its use for a specific receiving parcel has been finally approved,
- 6) The owner of a proposed receiving parcel (e.g. transferee) files with the Planning Director an application to use TDRs with respect to the development of the proposed receiving parcel,
- 7) The Planning Director reviews the instruments of transfer or agreement, determines their sufficiency to fulfill the requirements of the code, the number of TDRs available for use and the number of TDRs allowed to be used on the receiving parcel, and reports in writing to the applicant,
- 8) The owner of the receiving parcel prepares and submits a subdivision site plan for the development and use of the TDRs to Planning Director, and provides written notice to adjacent property owners,
- 9) Major subdivisions for new development that require Planning Commission approval require a preapplication meeting with the Planning Department, followed by a site visit, a sketch plan, and submission of a plat that is circulated to reviewing agencies,
- 10) The Planning Director prepares and submits a report to the Planning Commission with the Department’s recommendations; and the Planning Commission reviews and approves, disapproves or approves the preliminary site plan with conditions,
- 11) A final subdivision plat is submitted to the Planning Director, transmitted to the reviewing agencies, revised as necessary to address comments, and filed with the Planning Director for further review,
- 12) The Planning Commission considers the final subdivision plat at a regular public meeting, and may approve or disapprove the plat, or approve it with conditions,
- 13) Final approval may not be given involving TDRs until all instruments of transfer have been approved by the Commission’s attorney and recorded in the land records,
- 14) The final plat of the receiving subdivision is recorded with the Recorder of Deeds for the county.

Performance factors

The Queen Anne’s County TDR program has protected 2,644 acres of agricultural lands with the transfer of 252 TDRs from 47 sending parcels. This represents 4.2% of all protected lands and 1.1% of the total land area in the county. It has protected more land with TDRs on the Eastern Shore than any other Eastern Shore TDR program, but much less land than programs in the Washington-Baltimore metropolitan area, which operate in a more active real estate market, with higher density receiver zones.

Until the Zoning Ordinance was changed in 1994 requiring that TDRs be transferred only to zoning districts in designated growth areas, it provided landowners with a viable option to developing all or parts of their farms at a 1:20 density, or 1:8 with clustering in the AG district; or to selling conservation easements to the MALPF program. All TDR transfers since 1994 have been to areas served by water and sewer, and have avoided further fragmentation of contiguous agricultural lands

other than those located in designated growth areas, and support the Comprehensive Plan and principles of Smart Growth.

However, since 1994 another option has become more useful to landowners who want to sell development rights. As another way of helping landowners maintain their land values, the 1987 Zoning Ordinance that authorized TDRs also authorized the Non-Contiguous Development (NCD) option. This option allows a landowner or group of landowners whose lots are zoned AG or non-critical area CS, but not contiguous, to file a development plan in the same manner as the owner of a single lot. It allows clustering of development rights of multiple lots on one parcel, with a reservation of a minimum of 50% of the development parcel in open space, and preservation of 100% of the sending parcel in open space. The NCD development parcel can be within the same AG or CS zoning district, rather than in districts in designated growth areas as required for TDR transfers. Qualified NCD sending parcels must be at least 40 acres or half of the size of the lot of record, whichever is less, and must meet minimum prime soil standards based on the MALPF program. Once the NCD rights have been transferred, the parcel may not be subdivided or reconfigured. The developed parcel also has specific requirements as to setbacks from roads and property lines as well as screening requirements between the adjacent farm operations and public roads. This program and some of the NCD projects have become controversial with other landowners, environmental groups and the State, due to the effects of rural-to-rural transfers of density, fragmentation of the agricultural land base and potential conflicts of farming operations with new housing developments. It has also become the preferred method for landowners to sell development rights in the county, preserving 5,032 acres through 17 projects from 1995 to date, because they get higher per acre values for the development rights than they can through TDR sales or easement sales to MALPF, and it is quicker and more flexible. Landowners can enter a part of their farms in the NCD program one year, and other parts in later years, unlike TDRs and MALPF. Since the current market for new residential development in the TDR receiver areas is for single family detached units at a density of from 1 du/acre to 2.5 du/acre on public water and sewer, the market for TDRs has shifted to the NCD program, which can accommodate lower densities in rural areas on well and septic systems.

Limitations

The two primary limits to Queen Anne's TDR program performance have been, 1) a lack of housing market for densities at or above 3.5 dwellings per acre in designated growth areas, and 2) citizen opposition to the pace and density of new residential development, in and outside of growth areas. As a result, county planners admit that TDRs have been a very minor part of their land preservation strategy.

A common observation among planners is that most people dislike two aspects of population growth: a) suburban sprawl, and b) high density. TDR programs seek to inhibit suburban sprawl, but often fail because of opposition to high density. Other land preservation techniques focus only on inhibiting sprawl, protecting land without affecting density elsewhere. But as a land preservation mechanism, TDR programs uniquely depend on private-sector funds to purchase development rights; without a market for densities higher than the base-level zoning, this private money is simply not available.

When the State of Maryland established the concept of Smart Growth and Priority Funding Areas (PFAs) in the late 1990's, and began limiting the State's budget support for capital facilities and infrastructure payments to PFAs, Queen Anne's County established zoning densities for residential use in their designated growth areas at a level that would meet the 3.5 du/acre state guidelines, and agreed that these areas would receive planned water and sewer services. Designated growth areas and PFAs make up about 6% of the county's total land area, roughly 14,000 acres.

The current political climate in the county does not suggest that demand for TDRs is likely to increase. County planning staff provided several recent examples to illustrate the problem. When Smart Growth came along, the county did community plans for Stevensville, Chester, Kent Narrows, Grasonville and jointly adopted community plans with the incorporated towns of Queenstown and Centerville. Densities for most of these areas were set at a minimum of 3.5 du/acre, except in Chester where the base density was set at 6 du/acre. In order to keep qualified as a PFA the density was set higher than the market wanted. Single developers were ready to implement major projects in most of these areas as soon as the zoning was completed, but the projects proposed were at a density of 2 or 3 du/acre, so they didn't need any TDRs. While the county was struggling to get 2.5 du/acre, citizens were concerned that this was too high a density, and asking the county to reduce it. At *Four Seasons* on Kent Island, 1,350 homes were proposed on 550 acres at about 2.5 du/acre, so it didn't come close to the Smart Growth density. The developers originally proposed a higher density, but the County Commissioners reduced it under citizen pressure through restrictions on water and sewer service. A project called *Gibson's Grant* on Kent Island, which started out close to the permitted density at 750 units was reduced to 285 units after political challenges, but even this wasn't acceptable to the community, and they ended up with 250 units and 55 acres of preserved open space.

The planning staff does not believe, under the current political climate, that there is a political will to support higher densities to support development in growth areas with TDRs. They said, "*We're in a slowing things down mode,*" where elected officials are trying to reduce densities in the larger projects. The Commissioners have initiated a new community plan for the Stevensville-Chester growth area, and appointed a Citizen Advisory Committee that recently recommended removing several large farms in the area from the growth boundary. This will reduce the land area available for future growth, and reflects the current political and citizen sentiment, that "*We don't want a lot of growth or a lot of high density.*"

Even if there was a higher level of demand for more density in designated growth areas, the bonus incentives provided in the Queen Anne's TDR program would probably not be sufficient to attract much interest on the part of developers. For example in a Town Center single family development, by increasing the allowable density by 25% from 3.2 du/acre to 4 du/acre, the additional profit to the developer might not offset the additional cost for purchasing the TDR. The more successful TDR programs in Montgomery and Calvert County provide bonus densities ranging from a low of 100% to a high of 1,900%. The Queen Anne's County TDR program also allows a 25% bonus density for non-residential space, and a 25% increase in the allowable impervious surface, but for each TDR that restricts 8 acres of farmland, a developer would typically get 200 sq. ft. more space, and 500 sq.ft. more impervious surface. The planners don't see developers using this.

In 2004 the County Commissioners appointed a Preservation Task Force to review the county's land preservation programs, focusing on protecting working farms and scenic vistas, with emphasis on preserving properties adjacent to the Chesapeake Country Scenic Byway and the county's scenic corridors. The Task Force recommendations included a Purchase of Development Rights (PDR) Program, an Agricultural Economic Development Program, Agricultural Tax Credits, a Fee-in-Lieu Program, Revised Screening Requirements for the NCD program, Scenic Vista buffer incentives, an increase in the recordation tax, and allowing community septic systems in rural subdivisions. While TDRs and the limitations of the existing program were a part of these discussions, no recommendations for programmatic changes were proposed.

QUEEN ANNE'S TDR PROFILE			
Established	1987		
Major changes	1994, 2004		
General features			
Mandatory or voluntary	Voluntary		
Type of protection of TDR sending site	Covenant		
Sending areas			
TDRs authorized per acre & base density	TDRs/acre	Base density	
Agricultural (AG) with cluster	0.125	0.125	
Countryside (CS) in non-Critical Area w/cluster	0.2	0.2	
Countryside (CS) in Critical Area (RCA)	0.05	0.05	
Eligible Receiving areas			
TDRS needed per du in Growth Areas	1	TDR	TDR
	Base Density	Max Density	Density Bonus
	Single/Multi	Single/Multi	
Growth Areas -AG & Neighborhood Conservation (NCD)			
Countryside (CS) outside Critical Area (CA)	0.2	0.25	25%
Countryside in Critical Area	0.05	0.05	0%
Estate (E)	0.5	0.63	25%
Suburban Estate(SE)	1.25/1.5	1.56/1.87	25%
Suburban Resid.(SR)	2/3.4	2.5/4.25	25%
Suburban Comm.(SC)	3.2/8.5	4/10.62	25%
Village Ctr. (VC) w/sewer	3.2/4.5	4/5.62	25%
Village Ctr. (VC) no/sewer	1.25/1.5	1.56/1.95	25%
Village Ctr. (VC) Apartment	NA/10	NA/12.5	25%
Town Center (TC)	3.2/4.5	4/5.62	25%
Town Center (TC) Apartment	NA/10	NA/12.5	25%
Stevensville & Grasonville (SMPD & GPRN)	3.5	4.37	25%
Performance			
Total County land area in acres	238,337		
TDRs transferred	252		
Acres of Land protected with TDRs	2,644		
% of County Land Area protected with TDRs	1.1%		
Acres of Land protected with all Programs	62,953		
% of County Land Area protected with all Programs	26.4%		

Density = number of dwelling units per acre

Example: 0.125 du/acre = 1 du/8 acres

* 2,000 additional sq. ft. of floor area allowed per TDR to increase commercial Floor Area Ratio in these zones

The St. Mary's County TDR Program was enacted in 1990, after the 1988 Comprehensive Plan recommended a downzoning from 1 dwelling per acre to 1 dwelling per 20 acres. While the County Commissioners would not impose a rural residential density lower than 1 du/3, they adopted the TDR program in the 1990 revisions of the zoning ordinance. At that time TDRs were not allowed to be transferred to other sites in the agricultural or rural preservation zones.

In 1995 the county set a goal of permanently preserving 60,000 acres of farmland, about 26% of the county's total land area. In 1997 there was a total of 67,703 acres of agriculture land in the county.¹²⁴ This continues to be a very ambitious goal, since by 2005 the county had preserved a total of 13,667 acres of farmland, including 1,800 acres with TDR transfers. The county supports this goal primarily by participating in federal and state land preservation programs, which have protected most of this land with easement purchases.

For the 1999 Comprehensive Plan a citizens group recommended a sliding scale of density, with 1 du/10 acres or 1du/5 acres, depending on various performance standards, which was also rejected by the Commissioners in favor of maintaining the 1 du/3 acres zoning in rural areas. Following a TDR workshop in 1999 where Calvert County described its TDR Program, the zoning was changed in 2002 to reduce density in the RPD zone to 1 du/5 acres, but landowners were allowed to purchase 2 TDRs per dwelling from other sites to transfer density within the RPD, allowing a return to the 1 du/3 acre density. This preserves 6 acres for each additional dwelling and subdivisions of 6 or more lots would have to cluster the dwellings on 50% of the receiving site. In September 2006, the Commissioners amended the zoning in TDR receiver areas to increase maximum density in two residential and one mixed-use zone, increasing the bonus density if TDRs are used.

The Rural Preservation District (RPD) zone includes about 178,000 acres of farmland and forests outside of growth areas and covers 77% of the county's land area. It was established "to foster agricultural, forestry, mineral resource extraction, and aquaculture uses and protect the land base necessary to support these activities."¹²⁵ The St. Mary's program now allows TDRs from qualifying lands in the RPD for increased residential density in eight residential and mixed use zoning districts and the RPD, and for increased non-residential density of approved uses in 11 residential or mixed use zones and the RPD.

TDR transfer process

Transferring development rights includes the following steps under the St. Mary's County TDR Program:

- 1) A landowner contacts the county's Land Use and Growth Management Department to obtain information on the program,
- 2) The landowner or his/her representative drafts an 'instrument of original transfer' with the names of the transferor and the transferee; a metes and bounds description or plat of the sending parcel; covenants limiting subdivision and use of the land for agriculture or residential use permitted with remaining TDRs, in perpetuity and enforceable by the county; and other information required by the ordinance,
- 3) The landowner applies for a certificate of original transfer from the Planning Director, with a certificate of title signed by an attorney, and five copies of a plat of the proposed sending parcel identifying the parcel from which development rights are being removed,

¹²⁴ *St. Mary's County 2005 Land Preservation, Parks and Recreation Plan (LPPRP)*, Adopted Dec. 2005, Table II-1

¹²⁵ *Ibid*, page IV-5

- 4) The transferor and transferee have sole responsibility for supplying all information required for the certification, including information on the environmental characteristics of the sending parcel, such as steep slopes 15% or greater, highly erodible soils, wetlands and hydric soils, or land in floodplains,
- 5) On the basis of this information and covenants, the Planning Director affixes a certificate of findings to the instrument of original transfer, containing the number of development rights authorized to be transferred from the sending parcel,
- 6) After it is executed, the instrument of original transfer is delivered with supporting documents to the Planning Director, who delivers it to the Clerk of the Circuit Court for recording, then notifies the original transferor in writing of such recording. At this point the TDRs have been “lifted” from the sending parcel and it is restricted by the covenants limiting the use of the property,
- 7) At any time after the “lifting” of the TDR from the property, the owner of the instrument of original transfer can sell or convey the TDRs to another party in the form of an “instrument of intermediate transfer,” which must be recorded in the land records of the county, with documentation similar to but not the same as the instrument of original transfer,
- 8) The initial request to use TDRs on a property in the receiving area is submitted by a developer in the form of a concept or preliminary subdivision plan, a site plan, or other form authorized by the zoning ordinance, along with an affidavit of intent to transfer development rights to the property, application fees, and copies of a recorded instrument of original transfer for the TDRs, or a signed agreement between the applicant and the transferor who owns the TDRs, containing the plat of the sending parcel and other information required by the ordinance,
- 9) The county may grant preliminary subdivision or site plan approval for the proposed development conditioned upon proof of ownership of the TDRs and deed restrictions on the sending parcel, as required for final subdivision or site plan approval,
- 10) A developer submits a final subdivision or site plan for approval using TDRs, providing proof of ownership of all TDRs that will be used in the project, a deed of transfer for each TDR that has been recorded and restricts the use of the sending parcel, and a title search demonstrating that the TDRs have not been previously used, and
- 11) Final transfer of the of TDR to a receiving parcel is completed when, a) the instrument of original transfer, the instrument of transfer to the owner of the receiving parcel, and the instruments of transfer between any intervening transferees have been recorded in the land records of the county, b) the development right has been transferred by a final instrument of transfer to the Board of County Commissioners, and c) the approved final subdivision plat or approved final site plan for the receiving parcel has been recorded in accordance with the zoning ordinance, and At this point the TDR is considered to have “landed.”

Performance factors

In the 15 years since the program was enacted, 1,800 acres of farmland and forests have been preserved with TDRs on about 7 or 8 large properties, or an average of about 120 acres per year. In January 1995, the Maryland Office of Planning reported that St. Mary’s County had protected less than 50 acres with TDRs. A February 1998 report from this office said that the program had been used once.¹²⁶ In February 2003, Pruetz¹²⁷ reported that the county was reviewing a concept plan that would use TDRs to preserve 190 acres on the sending farm. The county’s LPPRP lists 6 properties and 1,313 acres preserved with TDRs.

¹²⁶ *Counties with TDR Programs*, Maryland Office of Planning, 2/5/98

¹²⁷ Rick Pruetz, *Beyond Takings and Givings, Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, Arje Press, February 2003,

With base level densities in the receiving areas ranging from 1 du/acre in residential low density zones, to 20 du/acre in the high density zone, the as-of-right density is as high as or higher than the market for single family residential development in the development zones. The county Land Use and Growth Management Department estimates that there is more potential for using TDRs in the RPD zone than in the growth areas, because there is always a strong market for low density single family detached housing in the RPD.

The 2002 zoning amendments authorized a “payment-in-lieu” option for developers to contribute a fee payment of 125% of the current price of MALPF easement purchases (about \$12,000 per TDR). This allows developers to quickly acquire increased density allowed with TDRs in lieu of buying TDRs directly from landowners. It would allow the county to purchase preservation easements with these funds from willing landowners. These development rights would be extinguished, reducing the supply of TDRs. County purchases could help set the market value of TDRs.

The County Commissioner’s recent action to increase the maximum density with TDRs in Development Districts should increase demand for TDRs, if there is a market for this higher density. The County now provides one the highest bonuses for using TDRs, along with Montgomery and Calvert Counties.

Current negotiations for “big-box” retail projects in the county, and prior measures taken by the county to limit the maximum size of such structures, may lead to an increase in the use of TDRs to take advantage of the 2,000 sq.ft. per TDR bonus floor area authorized in the 2002 zoning amendments.

Limitations

County planners are well aware of key limitations of St. Mary’s TDR program, as stated in their draft *LPPRP*:

“In spite of the stated intention of the rural preservation district (RPD) to protect the land base for the natural resource-based industries in the county, a look at the actual numbers and location of residential lots in the last 14 years suggests that zoned density and transfer of development rights (TDRS) have done little to direct growth away from areas intended for preservation.

“Contributing to St. Mary’s County’s problem is the ability for development rights to be transferred within the RPD. In other words, the preservation district can also be used as a receiving area for development rights sent from other parts of the same district. This greatly undercuts the potential of TDRs to completely remove density from an area to avoid incompatible land uses and to protect public investments in the land base for agriculture.”

“...the differential between the densities allowed by the base zoning compared to with TDRs is too small, and to allow for transfers within the sending area is essentially counterproductive.”¹²⁸

In October 2004 the Maryland Department of Planning listed St. Mary’s County, among the 23 counties, as having the 4th most fragmented pattern of land in agricultural zoning districts, the second highest percentage of development in parcels less than 20 acres in agriculturally zoned land, and the 4th lowest percentage of protected land in agriculturally zoned districts.¹²⁹ The *LPPRP* appears to acknowledge that the TDR program contributes to this fragmented pattern of agriculturally zoned land.

¹²⁸ Op cit, *Combined Performance of Preservation Tools*, page IV-19

¹²⁹ *Maximizing Return on Public Investment in Maryland’s Rural Land Preservation Programs*, Maryland Department of Planning, MCAE, October 2004.

When the TDR program was established, the county did not estimate the total supply of TDRs that were created or the total demand for them in eligible receiver sites to determine if a healthy private market in TDRs would develop. This would have been complicated by the uncertainty over how many TDRs landowners would be authorized to sell. Unless TDRs are coming off of recorded lots, they are calculated on the basis of “usable acreage” not the gross acres of the sending parcel. Landowners cannot use land with steep slopes 15% or greater, highly erodible soils, wetlands and hydric soils, or land in floodplains to calculate the number of eligible TDR. Therefore, there is some uncertainty in the TDR transfer process over the number of TDRs available to each landowner. The County is pursuing suggested modifications to the program that will help eliminate this uncertainty by calculating TDRs on a gross land area basis.

Since some landowners who choose to develop their lands can manage to avoid these environmentally sensitive lands by clustering new residences on other flat lands that will “perc,” they can often qualify for more development rights on site, than they can sell off site as TDRs. Since these on-site development rights are worth many times the current value of off-site TDRs (\$10,000/TDR or about \$3,300/acre), and since developers consider 1:3 acre densities as more desirable than 1:5 acres, several projects have come forward with TDRs to give a density boost to projects in the RPD.

On the receiving side, the county adopted a Planned Unit Development ordinance in 1974, which allowed a density of 5 dwellings per acre based on certain design features, which was the highest density the market demanded at the time. In the first decade of the TDR program, whenever developers wanted higher density in the receiver sites, they would typically use the PUD alternative. If they could already achieve their desired density with PUD, there wasn’t any need for TDRs. The 2002 amendments to the zoning ordinance offered a new mechanism where the PUD would no longer be needed. A concept of mixed-use zones was enacted for Downtown, Corridor, Town Center, Residential, and Village Center areas. The base density of the Residential Low Density (RL) zone was reduced from 2 du/acre to 1 du/acre, creating some demand for TDRs to obtain higher density. However, the RPD zone was not downzoned, so the TDR density in the RPD receiving areas remained higher than the market for single family developments, “*hence no market for buying TDRs, no sale of TDRs and no land protected with TDRs.*”¹³⁰

In addition to PUD, the 2002 Zoning Code provides a menu of methods for achieving increases in the base residential density in TDRs receiving areas, which could compete with the market for TDRs, including affordable housing, energy efficiency, roof pitch, on-site forest retention, bioretention stormwater management, landscape areas, or “green building” design. Ten other design or environmental methods are permitted for increasing Floor Area Ratios for commercial developments in receiver areas, in addition to the 2,000 sq.ft per TDR. In some receiver zones in growth areas, the utilities are not adequate to handle the increased density allowed with TDRs. School overcrowding, transportation bottlenecks, or lack of public water and sewer service may inhibit the use of TDR density in some areas where there is a market for it.

Several proposals are under consideration by the county to enhance the operation of the TDR program so it can play a larger roll in meeting the county’s farmland preservation goals. A community based initiative has suggested eliminating options to receive higher density in receiving areas that compete with TDRs, to allow TDRs from sending sites on a gross acreage rather than net acreage basis; and establishing a policy that the award of higher density through rezoning or other means is allowed only with TDRs. The LPPRP has suggested a strategy to establish a low-density voluntary overlay or floating zone where land in the zone could not be developed at higher than one dwelling per 20 acres density or be a TDR receiving zone; to eliminate the ability to transfer density

¹³⁰ Comment by Denis Canavan, October 17, 2005 interview

to the RPD, and to create incentives for transfer of TDRs with large differential densities (e.g. 1:15 to build, 1:3 to send); and eliminate the ability to transfer TDRs to Rural Legacy Areas.

SAINT MARY'S TDR PROFILE ¹³¹			
Established	1990		
Major changes	1999, 2002, 2006		
General features			
Mandatory or voluntary			
Type of protection of TDR sending site	Easement		
Sending areas			
TDRs authorized per acre	0.33 or 1 per parcel < 3 acres		
Rural Preservation Districts (RPDs)	Base Density 0.2		
Eligible Receiving areas			
TDRS needed per bonus du in the Rural Preservation District	2		
TDRS needed per bonus du in the Development Districts	1	TDR	TDR
	Base Density	Max Density	Density Bonus
Rural Preservation Districts (RPDs)*	0.2	0.33	65%
Development Districts in:			
Residential Low Density (RL, RMX, VMX, TMX)*	1	5	400%
Residential High Density (RH)	10	20	100%
Corridor Mixed Use (CMX)*	1	15	1400%
Downtown Core Mixed Use (DMX)*	20	20	0%
Residential Neighborhood Conservation (RNC)**	1	2	100%
Performance			
Total County land area in acres	230,984		
TDRs transferred	600		
Acres of Land protected with TDRs	1,800		
% of County Land Area protected with TDRs	0.8%		
Acres of Land protected with all Programs	20,810		
% of County Land Area protected with all Programs	9.0%		
Density = number of dwelling units per acre		Example: 0.33 du/acre = 1 du/3 acres	
* 2,000 additional square feet of floor area allowed per TDR to increase commercial Floor Area Ratio in these zones, except DMX			
** In designated growth areas only			

¹³¹ Densities and bonus ratios based on September 2006 rezoning of Development Districts

Talbot County has two TDR programs, one adopted in August 1989 to help implement downzoning in the Resource Conservation Areas (RCA) of the Chesapeake Bay Critical Area, and another adopted in July 1991 to help preserve agricultural lands downzoned from 1 du/2 acres to 1 du/20 acres plus 3 dwellings per parcel. Both programs were viewed as a way to soften the impact of downzoning on property values, to help get landowner support for rezoning or avoid litigation. To date the programs has protected 770 acres in three sending parcels, including two in the Critical Area.

The 1991 downzoning was recommended by planners to maintain consistency in the zoning code with the RCA density of the Critical Area, and in response to concerns over the explosion of growth happening on Kent Island in neighboring Queen Anne's County, followed by an increase in new subdivisions in Talbot at the time.

In the Rural Conservation (RC) District zoning now allows one dwelling per 20 acres (from 1 du/20 ac). As an incentive for landowners to install expensive shoreline erosion measures, TDRs are allowed to be transferred to specified areas. Receiving areas must have a shoreline erosion rate of at least two feet per year, to increase development within such shoreline areas to a density of 1 du/5 acres. With each TDR transfer in the RC District, 20 acres of land from the sending site must be protected by a "reservation of development rights agreement" granted to the county.

In the Rural Agricultural Conservation (RAC) District, located mostly on the east side of the county, the zoning allows three dwellings per parcel for any parcel of 6 acres in size, plus one dwelling per 20 acres, or three dwellings per parcel plus 1 du/10 acres with clustering. With TDRs and clustering, 3 dwellings per parcel plus 1 du/5 acres are allowed. To use TDRs dwellings must be clustered on the receiving site. The amount of open space protected through clustering is based on a sliding scale in the zoning ordinance, ranging from 25% of the parcel if below 20 acres, to 75% if 160 acres or more. Clustering of dwellings and use of TDR on parcels smaller than 6 acres is not permitted. With each TDR transfer in the RAC District, 10 acres of land from the sending site must be protected by a "reservation of development rights agreement."

Reservation of development rights agreements run with and bind the land to restrict future development of any residential, commercial or industrial buildings/structures and uses of the sending parcels, but do not have the status of a perpetual conservation easement protecting the property. A landowner has the option to transfer development rights back onto the sending property at a later date, or to petition the County Commissioners for the release of the reservation in the event the zoning for the property is changed. The agreements also do not restrict future use of the restricted sending property for public purposes. The same agreement is used to protect subdivided open space throughout the county, required every time a cluster development is approved.

Both TDR programs limit transfers to other lands within the same RC and RAC zoning district and to the same election district. A concern at the time the programs were enacted was that, if successful, most TDRs would be transferred from the eastern to the western part of the county, or from lower cost farmland to higher cost land along the Chesapeake Bay and its tributaries, which is more sensitive environmentally.

Transfers require approval of a Joint Subdivision for both the sending parcel and the receiving parcel at the same time, although these parcels do not have to be in the same ownership. This was done to enable the county to track where the TDRs were coming from, and where they are used in a new subdivision. The transfers are not effective until the Joint Subdivision is approved and recorded with the land records of both the sending and receiving parcels.

Talbot County has five municipalities with their own land use and zoning powers, where the current TDR programs do not apply, including Easton, Oxford, Queen Anne, St. Michaels and Trappe. Although there is some cooperation between the county and the municipalities in comprehensive planning and zoning for growth, schools and public infrastructure; the latest Comprehensive Plan recommends that interjurisdictional agreements be implemented to allow TDR transfers from the county to the towns. Some of these towns are in the midst of major expansions and annexations. Approved plans by single developers will increase the number of dwellings in Trappe by over 500% and in St. Michaels by 42%, but these increases in size or density were approved without the use of TDRs.

TDR transfer process

Transferring development rights includes the following steps under the Talbot County TDR Program:

- 1) A landowner who has land qualified to sell TDRs and a developer in the same election district in the RAC zoning district prepare a Joint Subdivision plan and application for the sending parcel and the receiving parcel;
- 2) The landowner and developer submit an application for a Joint Subdivision to the County Planning Officer;
- 3) The Joint Subdivision plan for the sending and receiving parcel is reviewed by the Talbot County Planning Office for conformance with the comprehensive plan, zoning and subdivision ordinances, and other environmental regulations. The Planning Officer prepares recommendations to the Planning Commission and schedules a review of the Joint Subdivision by the Planning Commission;
- 4) The Planning Commission holds hearings on the Joint Subdivision application, reviews the Joint Subdivision application at a public meeting and approves the transfer of the TDR from the sending site and the use of the TDR on the receiving parcel, along with the approval of the subdivision for new development, subject to the terms and conditions of the subdivision approval. Conditions for approval of a Joint Subdivision include preservation of the natural characteristics of the sending parcel by protecting it from future development, and protection of the shoreline of the receiving parcel when TDRs are transferred within the RC District;
- 5) Upon approval of the Joint Subdivision, it is recorded among the land records of the sending parcel along with a reservation of development rights agreement on 10 acres for every TDR transferred from the RAC District or 20 acres for every TDR transferred from the RC District, and with the land records of the new subdivision parcel using the TDRs;
- 6) A landowner who transfers TDR has the option to transfer development rights back onto the sending property at a later date, but must buy them from another landowner with property in the same election and zoning district, and protect 10 acres for every TDR transferred to the original sending site, through another Joint Subdivision plan and reservation of development rights agreement on the new sending site. A landowner who sells TDR also has the right to petition the County Council for release of the reservation of development rights in the event the zoning of the property is changed.

Performance factors

By the end of 1998 the county had preserved two properties with TDR transfers in the RC District; one moved 24 TDRs from the Miller Farm to Chance Hope preserving 480 acres, and another called Linwood moved 4 TDRs and preserved 80 acres, both resulting in shoreline protection in the Critical Area. A more recent TDR project transferred 21 TDRs within the RAC District to a subdivision near Wye Mills, preserving 210 acres on the sending parcel. Additional lands were protected on the receiving parcels, but these were counted as deed restricted open space attributable to the clustering requirement, rather than TDR protected lands.

As a mitigation measure to maintain land value related to downzoning, the TDR program served to bolster landowner support for the rezoning. About 50% of the farm community went along with the rezoning in 1991, and the other 50% was worried about the potential devaluation of their farms. The Planning Director at the time predicted that property values would actually increase in the three years following the rezoning, and they did. Other concessions allowing 3 dwellings per parcel in addition to the 1 du/20 acres, additional lots for family members, and permitting sellers of TDR to buy them back or to petition the Council to release the reservation of development rights restrictions on the sending site if the property was ever rezoned, also provided assurances to landowners.

TDRs have not played a significant role in the county's overall land preservation strategy. With about 3,300¹³² acres of deed restricted open space, 8,100 acres protected by MALPF easements, 551 acres protected by Rural Legacy easements, and 10,754 acres protected by the Eastern Shore Land Conservancy or the Maryland Environmental Trust; TDRs have protected only 2.7% of all protected lands in the county or 0.4% of the county's land.

Limitations

A number of key features of the Talbot TDR program appear to have limited the program's land preservation achievements, including limits on the geographic areas where TDRs can be transferred allowing rural-to-rural transfers that help fragment the agricultural land base; requiring concurrent approval of a Joint Subdivision plan before TDRs can be sold; soil characteristics of the county that limit the full density of TDRs on receiver parcels without public water and sewer services; the limited market for residential densities higher than what developers can build in the RC and RAC zones with cluster development without TDRs; and the willingness of landowners with eroding shorelines in the RC District to install shore erosion measures without the incentive of higher density permitted with TDRs.

Subdivision projects require water and sewer services to accommodate higher densities permitted with TDRs. A hypothetical example provided by the planning staff illustrates the problem. If a developer wants to do a subdivision on a 200 acre farm in the RAC zone, it would qualify for 13 dwellings as-of-right (3 +1/20 ac). By clustering on 25% of the parcel, 23 dwelling would be permitted on 50 acres, or 2.17 du/acre. With TDRs the development could yield 43 dwellings on 1.16 acre lots, but this would exceed the septic system capacity of Talbot County soils, and the Health Department would require water and sewer facilities. The minimum lot size for a septic system in the county is typically 2 acres. Developers prefer to develop larger lot subdivisions that have a good market in the county, than incur the expense and time delays to install water and sewer in order to obtain higher densities with TDRs.

There have been few TDR transactions in the county, and the zoning has not changed substantially since TDRs were authorized; so the code provisions allowing sellers of TDRs to buy them back for use on the sending site, or to petition the Council to remove restrictions on the sending sites, have not been tested. However, these provisions and the ability for the government to use the restricted TDR sending properties for public use, raise questions about the permanency of land protected with TDRs if a more active real estate market develops.

The Joint Subdivision approval requirement prevents landowners from selling TDRs until the long process of obtaining approvals for the subdivision using the TDRs on the receiving site. As a mechanism for keeping track of the number and location of TDRs sold and the source and number of TDRs used in new subdivisions, the Joint Subdivision requirement may have inhibited more predictable and expedient TDR sales and thus protection of more land. One case of the Dolvin Farm

¹³² *Eastern Shore 2010: A Regional Vision, Tools Available for Attaining the Eastern Shore 2010 Land Protection Goal*, Eastern Shore Land Conservancy, January 2004, page 43

took the State four years to approve, and the buyers and sellers of TDRs were held up that long. Other counties with more successful TDR programs allow TDRs to be severed from the land and sold prior to their approval and use on a receiving parcel, and require that a conservation easement be placed on the entire sending parcel lowering the amount of development potential by the number of TDRs sold. These programs utilize other means to account for and record TDR transactions. Some jurisdictions in other states have helped facilitate quick and predictable TDR transfers by establishing a TDR bank. Landowners also have other options to sell or donate conservation easements to state programs or land trusts, which take less time and are more predictable than waiting four years to have a Joint Subdivision agreement approved for TDRs.

Recent revisions of the Comprehensive Plans for the county and some of the municipalities recognize the potential for transferring TDRs from the county to growing municipalities, and recommend that interjurisdictional agreements should be explored to facilitate such transfers. However, elected officials and many citizens appear to be resisting the transfer of higher densities from the county to the towns. For example, Trappe has annexed their growth area, has State approvals for their sewage treatment facilities, and plans to approve 250 houses per year of a 2,300 dwelling Planned Unit Development, upzoning the land without the use of TDRs. A greenbelt or Countryside Protection Area shown in their Comprehensive Plan is already protected land. In St. Michaels, a large neo-traditional development of 312 new dwellings was approved at a density below that permitted by the existing zoning, so the use of TDRs was not considered.

County Planners have explored the concept of sending TDRs into designated growth areas around certain towns prior to annexation, but the towns do not want these areas to be developed at all, because they are their future annexation areas, and they want to add them in the future as unencumbered as possible. The county can't provide the increased density to these areas with TDRs unless there is water and sewer, and the towns don't want to annex areas with low densities of 2 to 5 acre lots with curvilinear streets. These type of developments typically cost local jurisdictions more to service them than they pay in taxes, and they are incompatible with the existing street pattern and design of the historic towns. For these and other reasons, planners do not see interjurisdictional agreements as a very promising means to increase demand for TDRs.

The Talbot Count Planning Office is currently planning to hire consultants to do a thorough evaluation of the county's TDR program and to make recommendations for ways that it might be improved. These and other limitations are likely to be considered at that time.

TALBOT TDR PROFILE			
Established	1989		
Major changes	1991		
General features			
Mandatory or voluntary	Voluntary		
Type of protection of TDR sending site	Covenant		
Sending areas			
TDRs authorized per acre from RC	0.05		
TDRs authorized per acre from RAC	0.1	Cluster	
	Base Density*	Base Density*	
Rural Conservation District (RC) outside of 500' from eroding shoreline	0.05	n/a	
Rural Agricultural Conservation (RAC) zone	0.05	0.1	
Eligible Receiving areas			
TDRS needed per du	1	TDR	TDR
Master Planning Areas:	Base Density*	Max Density^	Density Bonus
Rural Conservation Districts w/in 500' of shoreline with erosion rate of 2+ ft/yr	0.05	0.2	300%
Rural Agricultural Conservation (RAC) zone	0.05	0.2	300%
Performance			
Total County land area in acres		172,227	
TDRs transferred			49
Acres of Land protected with TDRs		770	
% of County Land Area protected with TDRs			0.4%
Acres of Land protected with all Programs		28,217	
% of County Land Area protected with all Programs			16.4%

Density = number of dwelling units per acre

Example: 0.05 du/acre = 1 du/20 acres

* Base and TDR Max densities allow 3 du/parcel as of right in addition to density shown above

^ Bonus density with clustering without TDR in RAC is 3 du/parcel plus 1 du/10 acres or 0.1

Located in the Snoqualmie Valley, between the Northern Cascade Mountains, Wenatchee National Forest and Puget Sound, with snow-capped Mt. Rainier to the South, King County is a highly urbanized county of 1.8 million people around Seattle. It has computer and aerospace headquarter companies (e.g. Microsoft and Boeing), high-rise buildings, interstate highways and residential sprawl, surrounded by spectacular natural resources.

The first King County Washington TDR Program was adopted in 1993 to help implement the Washington Growth Management Act of 1990, which led King County to adopt an Urban Growth Management Boundary, or Urban Growth Area (UGA).¹³³ This program was limited to sending and receiving sites within King County, to protect a broad range of resources including open space, wildlife habitat, woodlands, shoreline access, community separators, regional trail linkages, historic landmarks, agricultural land and parks sites. Receiver areas were urban unincorporated areas in six zoning districts. Only one TDR transfer protecting a small 1.25 acre property occurred under the original program.

In 1998, the county adopted a three-year pilot TDR project modeled after TDR programs in the Pinelands of New Jersey; Boulder County Colorado and Montgomery County Maryland, allowing transfers from rural parts of the county to incorporated cities. There are 39 cities in King County housing 1.4 million of the county's total population of 1.8 million. The program has provided incentives to the cities to accept TDRs with county funds for public amenities for transit enhancements, pocket parks and pedestrian or transit friendly street improvements in the receiving neighborhoods. The first interjurisdictional transfer in 1999 protected the 313 acre McCormack Forest with the transfer of 62 rural residential credits, allowing 500,000 sq.ft. of additional floor area in a Microsoft office complex in the City of Issaquah, about 15 miles east of Seattle on Lake Sammamish. In 2000, the county adopted a Transfer of Development Credits (TDC) Bank and established procedures to handle these transactions, and in 2001 made the pilot program a permanent part of the King County Code¹³⁴.

In 1999 and 2000 the City of Seattle and King County approved the Denny Triangle TDR Interlocal Agreement, allowing qualified landowners in the Cedar, Tolt, Green and Snoqualmie River Basins to sell TDRs to property owners in the Denny Triangle neighborhood of Seattle. This provided \$100,000 in county funds for amenities and a pledge of \$400,000 more for capital improvements when TDRs are transferred. Under the agreement, new buildings can build an additional 2,000 sq.ft. of residential space for each TDR transferred, and can add 30% to their maximize height. The county funds will be matched by developer contributions based on the additional square footage from TDRs.

The current TDR program is voluntary. Sending sites must be certified by the county as meeting certain criteria, and provide a public benefit to protect agricultural or forest lands, Rural Forest Focus Areas, regional trails and open space areas, habitat for threatened and endangered fish and wildlife species, or designated urban separators zoned R-1. Density may be transferred to unincorporated urban areas zoned R-4 (4 du/acre) or greater, incorporated cities with an approved interlocal agreement, and some rural areas.

TDR transfer process

¹³³ Rick Pruetz, *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, Arje Press, February, 2003.

¹³⁴ Chapter 21A.37, King County Code, <http://dnr.metrokc.gov/wlr/tdr/code.htm>.

Transferring development rights where both the proposed sending and receiving sites are within the unincorporated lands of King County use the following process¹³⁵:

- 1) A sending site owner submits an application for sending site certification, including legal description, title report, description of qualifying resources, and a forest stewardship plan where applicable.
- 2) An interagency review committee reviews and approves the sending site application, and issues a TDR certificate letter of intent, agreeing to issue a TDR certificate in exchange for the proposed sending site conservation easement.
- 3) The sending site owner may then market the TDR sending site development rights to potential purchasers.
- 4) The TDR letter of intent may be transferred to the new owner if requested in writing;
- 5) In applying for receiving site approval, the applicant shall provide the Department of Natural Resources a TDR certificate letter of intent in the name of the applicant, or another person with a signed option to purchase the TDRs, and a TDR certificate issued in the name of the applicant or another person with a copy of a signed option to purchase the certificate;
- 6) Before all permit and plat approvals, the applicant delivers the TDR certificate for the number of TDRs being used and the TDR extinguishment document to the county,
- 7) When the receiving site development proposal requires a public hearing, it also serves as a hearing on the TDR proposal. The reviewing authority makes a consolidated decision on the proposed development and use of TDRs, and uses the same appeals procedure as for the development proposal;
- 8) TDRs from a sending site are considered transferred to a receiving site when a final decision is made on the TDR receiving area development proposal, the sending site is permanently protected by a conservation easement, notice has been provided to the County Assessor's office, and a TDR extinguishment document has been provided to the county.

TDRs proposed for transfer to an incorporated municipality receiving site are reviewed and transferred using the municipality's application review process.

Performance factors

King County has a long history of funding land preservation¹³⁶. In 1979, \$50 million in bonds were authorized to buy development rights from 12,000 acres of land. Open Space bonds for \$117 million were passed in 1989 and \$60,000 in 1993. In 2004, the county purchased development rights from about 90,000 acres of forested lands with \$21.5 million from the Transfer of Development Credits (TDC) Bank. If counted as TDR transfers, this would make King County's TDR program the most accomplished in the nation, with nearly twice the 48,584 acres of land protected by TDRs in Montgomery County, Maryland, the most accomplished program prior this purchase. However, in Maryland, TDR or development right purchases with public funds are typically counted under the Purchase of Development Rights (PDR) fund source, because many of the public purchases of TDRs are intended to be extinguished rather than transferred to receiver sites.

King County and its municipalities have 24,910 acres of land in parks and public open space (1.8% of county), but 877,500 acres or 65% of the county is forested lands, including large amounts of public forest lands in the Northern Cascade Mountains northeast of Seattle, and national forests to the east. Only about 5% of the county is in farmland, or 66,652 acres, averaging about 27 acres per farm.¹³⁷

¹³⁵ Ibid, Ch. 21A.37.080, <http://dnr.metrokc.gov/wlr/tdr/pdf/21A-37.pdf>

¹³⁶ Pruetz, Op. Cit, page 186.

¹³⁷ King County Benchmarks: Land Use, 2005, http://www.metrokc.gov/budget/benchmrk/bench05/landuse/LandUse2005-final_all.pdf#page=11

Inter-local TDR agreements

Many of the TDR transfers in the county to date have been from rural and forested parts of the county to receiver sites in incorporated municipalities, such as to Microsoft's office complex in the City of Issaquah and planned transfers to Seattle's Denny Triangle. The policy basis for interlocal transfers originates from the Washington Growth Management Act of 1990, and King County's adoption of an Urban Growth Management Boundary. The Growth Management Act set up a progressive and forward thinking land use pattern, with a boundary for urban areas similar to those established in Oregon in the early 1970's with Senate Bill 100. Washington State was also an early pioneer in coastal management, with the State's Shoreline Management Act of 1971,¹³⁸ which was a model for and the first program approved under the federal Coastal Zone Management Act of 1972.

King County cities and the unincorporated county areas within the UGA adjacent to cities are likely to be the receiver areas of choice in the future. This is because nearly 22% of the county is in the UGA, there are strong land use controls and large amounts of public lands outside of the UGA, and the market for higher density development with TDRs is largely within the cities and future annexation areas. Several cities have areas of urban density outside of their city limits within the UGA, with a base and maximum zoning density established by the county, targeted in the Growth Management Act over the long term for annexation. According to one official, *"The problem from the county's perspective is that we can't get them to annex those areas quick enough. That's because they are not big money makers from a tax standpoint."*¹³⁹

Seattle and other cities have been receptive to accepting density transfers from rural parts of the county with TDRs, because there is a public recognition that there is a broader regional interest that serves everyone. They believe that development should occur inside of cities where the infrastructure exists, and that farms and forests are permanently protected with TDRs. The incentive payments built into the interlocal agreements, from county funds to pay for amenities and capital infrastructure in the receiver areas, help offset local concerns about the impacts of higher densities, but the receiver areas are typically within existing high-density communities.

Seattle has also seen the benefit of TDRs used for preserving historic landmarks and arts institutions, retaining low income housing and encouraging infill development in historic districts that is compatible with the district character. Seattle adopted a downtown plan in 1985, the same year San Francisco adopted its *Downtown Plan* incorporating TDRs as a way to save historic buildings and conservation districts. Seattle's plan focused on optimizing the economic vitality of the downtown while maintaining the existing cultural and social resources.¹⁴⁰ By 2001, the Seattle TDR program had helped preserve and restore two landmark performing arts theaters, and 541 affordable housing units. In addition, 300,000 square feet of TDRs from a major performing arts facility had been sold to finance bonds used to build the city's symphony hall.¹⁴¹ For the first 12 years, the City of Seattle was the sole purchaser of TDRs, until 1997 when the development community began private purchases, resulting in the preservation of a landmark YMCA building.

Whether the King County-Seattle experience with interjurisdictional agreements for TDRs could be transferable to the more rural environment of the Eastern Shore, will probably depend on a number of factors, including 1) the extent of regional cooperation between counties and municipalities for implementing comprehensive plans or shared land preservation goals, 2) the strength of the market for higher density development within municipalities, 3) the willingness of city officials to maintain

¹³⁸ Chapter 90.58 RCW, <http://www.mrsc.org/Subjects/Environment/shorelin.aspx>

¹³⁹ Interview with Mark Sollitto, King Co. Department of Natural Resources

¹⁴⁰ Transfer of Development Rights (TDR) Case Study, Seattle WA, <http://www.horsleywitten.com/smart-growth/pages/CS-tdr-seattle.html>

¹⁴¹ Pruetz, Op. Cit, page 235.

a base level of density lower than this market while allowing higher densities only with TDRs, and 4) the willingness of county governments to provide financial and other incentives to municipalities willing to accept TDRs, to help pay for capital infrastructure and amenity enhancements within town boundaries to offset the impacts of higher density development.

KING COUNTY WASHINGTON TDR PROFILE			
Established	1993		
Major changes	1998, 2001		
General features			
Mandatory or voluntary	Voluntary		
Type of protection of TDR sending site	Easement		
Sending areas		Base Density	
TDRs authorized per acre		(TDR/acre)	
Urban Separator R-1		4	
RA outside of Rural Forest Focus Area			
RA in Rural Forest Focus Area		0.20	
A-10 & A-35 in Agricultural Production District		0.20	
F in Forest Production District		0.0125 (or 1 per lot between 15 & 80 acres)	
Eligible Receiving areas			
TDRS needed per du		1	TDR
Incorporated Cities as provided in Plan			
Unincorporated Urban Areas zoned:		Base Density	Max Density
RA-2.5	Residential	0.2	0.4
RA-5	Residential	0.2	0.4
R-4	Residential	4	6
R-6	Residential	6	9
R-8	Residential	8	12
R-12	Residential	12	18
R-18	Residential	18	27
R-24	Residential	24	36
R-48	Residential	48	72
NB	Residential	8	12
CB		18	24
RB		36	48
O		36	48
Performance			
Total County land area in acres		1,344,000	
TDRs transferred		97	
Acres of Land protected with TDRs#		713	
% of County Land Area protected with TDRs		0.05%	
Acres of Land protected with all Programs		N/A	
% of County Land Area protected with all Programs		N/A	

Density = number of dwelling units per acre

Example: 0.2 du/acre = 1 du/5 acres

Does not include County purchases of TDRs from about 90,285 acres of forested lands held by the TDC Bank

The State of New Jersey was an early pioneer in the use of TDRs to protect agricultural and natural resource lands starting in 1979 with the enactment of the *Pinelands Protection Act*.¹⁴² This encompassed about a million acres of environmentally sensitive lands spread over all or parts of 56 municipalities in seven counties in southeast New Jersey. In 1989, with the successful use of TDRs to protect the Pinelands in Burlington and other counties, the State Legislature authorized the *Burlington County Transfer of Development Rights Demonstration Act* as a pilot TDR program, to demonstrate the feasibility of TDRs as a land use planning tool at the county-wide level. This allowed any town or city in the county to adopt a TDR program with county approval. Citing the TDR concept modeled after the 10 year pilot program in Burlington County and the Pinelands Commission's experience transferring Pinelands Development Credits into growth areas since 1981, the New Jersey Legislature enacted and Governor James McGreevey signed the *State Transfer of Development Rights Act* in 2004.¹⁴³

The *Pinelands Protection Act* and the *Burlington County TDR Demonstration Act* authorize and encourage inter-municipal TDR transfers. While the *State Transfer of Development Rights Act* allows for interjurisdictional TDR transfers, the State staff does not see many local governments stepping up to enter into these agreements, because of a lack of tangible benefits associated with increasing density by receiving TDRs from another municipality. All of New Jersey falls within incorporated municipal boundaries. According to one staff, "*Every square inch of New Jersey is incorporated; counties cannot participate in a TDR program per se; they can only facilitate or encourage them by municipalities.*"¹⁴⁴ Unlike Maryland, New Jersey counties do not have much authority over land use controls, except stormwater drainage systems or county roads. There are no unincorporated areas outside of municipal boundaries. There are 21 counties and 566 municipalities in New Jersey, with 12 different forms of municipal government with local land use authority. Under the State TDR Act, a city, borough, town, township or village is defined as a municipality eligible to develop a TDR program. Interjurisdictional transfers of TDRs have been most active in the Pinelands. The Pinelands Commission acts as a regional government which exercises land use controls over a 1.1 million acre *Pinelands National Preserve* designated by Congress in 1978.¹⁴⁵ The Commission is made up of 7 members appointed by the Pinelands counties, 7 members appointed by the Governor, and one member designated by the U.S. Secretary of the Interior.

The Pinelands Commission

The Congressional designation of the *Pinelands National Reserve* authorized the creation of a regional planning agency and charged it to adopt a plan for the reserve within 18 months. The Pinelands Commission adopted a Comprehensive Management Plan in 1980 dividing the planning area into a Preservation Area of 295,000 acres including the largest tracts of relatively unbroken forest and economically vital berry industry wetlands, and the surrounding Protection Area lands that had experienced some development. These areas were further divided into 9 management areas, including 3 that qualified as sending areas for TDR, including the Preservation Area District, the Agricultural Production Areas, and Special Agricultural Production Areas. The Comprehensive Management Plan¹⁴⁶ was approved by the Secretary of the U.S. Department of Interior and reviewed by Congress in 1981. After municipal plans were prepared in conformance with the Comprehensive

¹⁴² New Jersey Code Title 13, 13:18A-1, *Pinelands Protection Act*, Conservation and Development – Parks and Reservations. <http://www.state.nj.us/pinelands/images/pdf%20files/pinelandsprotectionact1.pdf>

¹⁴³ Op. Cit. Chapter 2, P.L. 2004, Chapter 2, *State Transfer of Development Rights Act*,

¹⁴⁴ Interview with Courtenay Mercer, New Jersey Department of Community Affairs, October 14, 2005

¹⁴⁵ Puetz, Op. Cit. page 215.

¹⁴⁶ A Summary of the New Jersey Pinelands Comprehensive Management Plan, Pinelands Preservation Alliance, <http://www.pinelandsalliance.org/pages/cmp.html>.

Management Plan, residential development was not allowed as-of-right in these areas, except through a conditional use approved by the local jurisdiction.

Under the Pinelands program, four TDRs equal one Pinelands Development Credit (PDC), which allows four additional dwellings in a receiver area. The amount of land preserved per TDR varies by the location of the sending property and the type of land. In the Preservation Area District, 49 acres of wetlands and 9.8 acres of other lands are preserved for each TDR sold. In Agricultural Production and Special Agricultural Production Areas, 49 acres of wetlands and 4.9 acres of farmed or other land are preserved per TDR.¹⁴⁷ As of October 2005, there were 33 municipalities with TDR sending areas, and 43,684 acres of land had been preserved with TDRs in 24 of these.¹⁴⁸ There were 22 municipalities certified to receive TDRs, and one was waiting for their master plan to be certified by the Pinelands Commission. In July 2005, TDRs were selling in the range of \$28,846 to \$39,000 each.

With 43,684 acres preserved with TDRs, the New Jersey Pinelands program is the second most successful in the nation after Montgomery County, Maryland's, unless the 90,000 acre public purchase of TDRs by the King County Washington program is counted. Key to its success is the requirement in the *Pinelands Protection Act* that all municipalities in the Pinelands area are required to allow for the use of TDRs for new development in their land use regulations. The Pinelands Preservation Alliance summarized how TDRs are planned for in municipal receiver areas.

*"To distribute the bonus housing units evenly and maintain consistent housing types in various neighborhoods, municipalities designate zoning districts in which residential development will be permitted at densities ranging from less than 0.5 dwelling units per acre to 12 or more dwelling units per acre with credits. Using credits, development can take place at the high end of the density ranges. This could theoretically increase the number of units built in the growth areas by about 50 percent, or roughly 46,000 units. However, the number of credits that will be available for sale will generate only about 24,400 units, according to Commission estimates. The gap between supply and demand is expected to create a stronger market for the credits."*¹⁴⁹

Another key to their success is that landowners in the designated Protection Area do not have the right to develop new housing as-of-right, with one exception. Members of families that have lived in the Pinelands for at least 20 years, or persons who earn their living from Pinelands resources, are allowed to build houses for their own use on land they owned as of February 1979, when interim development controls were imposed by a Governor's Executive Order. New residences are allowed only through a conditional use approval process guided by municipal plans approved by the Pinelands Commission that are consistent with the Comprehensive Management Plan. Since municipalities must plan for receiving TDRs from any part of the Pinelands, inter-municipal transfers are guided by the Pinelands Commission. There are not any inter-local agreements because the Commission set up the local programs. Any municipality can get TDRs from any other municipality in the overall sending area.

Burlington County Pilot TDR Program

In 1989 there was great interest in expanding the Pinelands TDR experience statewide, but the New Jersey legislators did not believe TDRs would be appropriate for the entire state, so they enacted the *Burlington County TDR Demonstration Act*. There are two municipal TDR programs in the county, one in Chesterfield Township and another in Lumberton Township. Just outside of the Pinelands boundary in the county, ten miles southeast of the State's capital city of Trenton, Chesterfield

¹⁴⁷ *Worksheet for PDC Estimates*, New Jersey Pinelands Commission.

¹⁴⁸ The Pinelands Development Credit Program, Municipal Acres Permanently Preserved, October 7, 2005.

¹⁴⁹ Pinelands Preservation Alliance, Op. Cit, page 6.

Township had adopted a TDR program as early as 1975 and had protected 3,150 acres of farmland with conservation easements by 1992.¹⁵⁰ With a revision of Chesterfield's Master Plan in 2003, and the adoption of the 560 acre Old York Village Plan, a neo-traditional or *new urbanist* development has now protected about 1,800 acres of farmland, and the build-out will preserve about 5,000 acres. Since it was adopted in the late 1990's no subdivision has been proposed outside of the receiving areas in Chesterfield. As a voluntary TDR program, landowners could have developed at the base zoning outside of the developed area, but the landowners can get a much higher return by selling TDRs for development in the core area of the receiver site. About 80% of the dwellings in Old York Village have site plan approval and a major developer has purchased the last large piece of land for the remaining 20%, and he is moving forward with development and seeking TDRs for the project.¹⁵¹ In 2004, Chesterfield held an auction for TDRs and they went for about \$50,000 each, or about \$10,000 per acre. This compares to \$3,300 to \$5,300 per acre values in the area for easement applications to the New Jersey farmland protection program at that time.

In Lumberton Township, 23 miles south of Trenton and 20 miles east of Philadelphia, TDRs have been used to create a more typical residential subdivision. The state staff promoting TDR programs does not use Lumberton's program as a showcase, because it does not incorporate a desirable higher density town center concept as Chesterfield does. Since the program was established in 1995, Lumberton has designated 2,868 acres for TDR sending areas. By April 2004 it had preserved 850 acres with TDRs.¹⁵²

Neither Chesterfield nor Lumberton needed an interjurisdictional agreement for inter-municipal TDR transfers, because the transfers were from within their townships.

State Transfer of Development Rights Program

The *State Transfer of Development Rights Act* enacted in 2004 may be the most comprehensive state law authorizing and guiding the development of local TDR programs in the nation. While it allows municipalities the flexibility to adopt a TDR program that meets their specific growth and preservation needs, subject to county approval, it also provides specific requirements for the development and adoption of TDR programs that builds upon New Jersey's successful TDR experience and some less successful attempts. It requires municipalities to conduct the kinds of planning and evaluations that will likely prevent development of TDR programs that have achieved limited success in New Jersey and many other states, including Maryland.

The legislation was crafted by a broad-based coalition of state agencies, local governments, agricultural groups, environmentalists, planners and legislators. The New Jersey Office of Smart Growth in the Department of Community Affairs spearheads the State's TDR initiatives, because the required plan endorsement petition must be submitted to that office. The Office of Smart Growth selected several TDR Demonstration Projects since the passage of the law, and provides technical and financial assistance to municipalities setting up new programs. The State TDR Act also provided for matching planning assistance grants up to \$40,000 to municipalities for preparing the documents required by the legislation through the State TDR Bank, which is housed in the Department of Agriculture. Implementing a TDR program under the Act requires a major planning

¹⁵⁰ Rick Pruetz, *Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges*, Arje Press, February, 2003
<http://www.beyondtakingsandgivings.com/chester.htm>.

¹⁵¹ Courtenay Mercer, Op. Cit.

¹⁵² Pruetz, TDR Case Studies Update, Lumberton Township, Burlington County, New Jersey,
<http://www.beyondtakingsandgivings.com/lumber.htm>, and Courtenay Mercer, Op. Cit.

initiative on the part of the municipality, including adoption of the following planning and implementation documents.¹⁵³

- A Development Transfer Plan Element of the municipal Master Plan, including:
 - An estimate of anticipated population and economic growth for the next 10 years,
 - Identification and description of all prospective sending and receiving zones,
 - Analysis of how population growth is to be accommodated in municipalities and receiving zones,
 - An estimate of existing and proposed infrastructure of the receiving zone,
 - A procedure and method to transfer development rights from sending to receiver zones, and
 - Explicit planning objectives and design standards to govern the review of applications for development in the receiving zone.
- A Utility Service Plan, addressing necessary utility services within receiving zones, so that development using TDR is not unreasonably delayed because infrastructure is not available.
- A Transfer Ordinance implementing the TDR program, which codifies the location of the sending and receiving zones, credit allocation scheme and administrative transfer procedures.
- A Capital Improvement Plan, including the location and cost of all infrastructure for the receiving zone and a method of cost sharing if any portion of the costs are to be assessed against developers.
- A Real Estate Market Analysis, which examines the relationship between the development rights generated in the sending area and the capacity of the receiving zone to accommodate the necessary development, in order to validate the transfer system proposed in the TDR element prior to adoption of the implementing ordinance.
- Plan Endorsement. Initial Plan Endorsement from the State Planning Commission following state guidelines, or an amended current endorsed plan to include the TDR program, after a pre-petition meeting with the Office of Smart Growth.
- Periodic Review of the program by the County Planning Board where the municipality is located, and where farmland is involved, by the County Agricultural Development Board.

After the first three years following adoption of the TDR ordinance, the municipal planning board and government body must prepare an assessment of the TDR program and submit it to the County Planning Board, the Office of Smart Growth, and the County Agriculture Development Board when farmland is involved. Their review will involve an assessment of the transfer of credits, current economic situation, capital improvement plan and the goals of the TDR plan. The absence of plan endorsement or the failure to have transferred a sufficient degree of development potential within five years constitutes a rebuttable presumption that the development transfer ordinance is no longer reasonable.¹⁵⁴

While this may appear to be an onerous set of requirements for the adoption of a local TDR program, this examination of Maryland TDR programs suggests that those that have not been successful in protecting much land would likely have been more successful if they had followed the New Jersey State TDR planning requirements, or they might never have been established at all.

This observation raises the question of whether the State of Maryland should adopt similar requirements and standards for establishing county and municipal TDR programs, that together with technical assistance from the Maryland Department of Planning, could help ensure that new TDR programs will be successful. While local TDR programs should be optional and tailored to the unique real estate market, land use regulations and politics of each county, the lack of a model or

¹⁵³ *Transfer of Development Rights (TDR): How does TDR Work?* Department of Community Affairs, Office of Smart Growth, <http://www.nj.gov/dca/osg/resources/tdr/index.shtml>.

¹⁵⁴ Section 20, *Pinelands Protection Act*, Op.Cit

guidelines for TDR programs in Maryland has inhibited the success of this mechanism in most of the counties that have adopted it.

The New Jersey TDR law has a few key requirements that should be considered by Maryland in establishing more specific guidelines or requirements for county TDR programs. These include Sections:

- 9.e. In receiving zones, *“no density increases may be achieved in a receiving zone without the use of appropriate instruments of transfers.”*
- 11.c. *“The restrictions (of the sending parcel easement) shall be expressly enforceable by the municipality and the county in which the property is located, any interested party, and the State of New Jersey.”*
- 20. *“The failure to maintain plan endorsement status or the failure to have transferred a sufficient degree of development potential within five years constitutes a rebuttable presumption that the development transfer ordinance is no longer reasonable.”*

At a minimum, New Jersey’s *State Transfer of Development Rights Act* is a *must-read* for any county anticipating the adoption of a new TDR program, as a checklist for the kind of planning and analysis that should be done.

VII. CONCLUSIONS AND RECOMMENDATIONS

1. Counties considering the adoption of a new TDR program or enhancement of an existing program should try to meet the Criteria for a Successful TDR Program.

The study team for this project and the Technical Advisory Committee distilled the information gathered from the review of six Maryland TDR programs and two programs in other states, into a set of Criteria for Successful TDR Programs used in the assessment of the six counties in the Eastern Shore assessment area. In conducting the TDR assessments the Criteria were validated or minor modifications were made for this report. These criteria are found in Chapter IV, Section 2 of this report, under four categories including:

- TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals,
- The county has strong Comprehensive Plan and Zoning policies that support use of TDRs,
- Administration of TDRs is simple, efficient and predictable, and
- The TDR program has broad public support.

These criteria tend to explain why some Maryland TDR programs are working to protect large amounts of rural lands and guiding growth to existing or developing areas. They also help explain why other programs in the state are only protecting a small amount of land, and are performing less successfully than other land preservation options available to the counties. It is recommended that any county that embarks on a process of drafting a new TDR program or improvements to an existing program, review these criteria at the outset.

2. State actions could help facilitate successful TDR Programs.

With Maryland's dominant success in preserving land with TDRs compared to other states, there should be an opportunity for the State of Maryland to provide more guidance or standards that will help local governments evaluate, design and adopt TDR legislation. The lessons from successful programs in Calvert and Montgomery County and unsuccessful experiences in the other counties demonstrate the need for this guidance.

Maryland's State enabling legislation is very short:

"Article 66.B, § 11.01. Establishment of programs for transfer of development rights.

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

- (1) Encourage the preservation of natural resources; and*
- (2) Facilitate orderly growth and the development in the State."*¹⁵⁵

In 1995, a Maryland Office of Planning report ¹⁵⁶ reviewed TDR programs in Maryland and other states, and provided guidelines for how to prepare a local TDR ordinance. The renamed Maryland Department of Planning now provides technical assistance to counties as they study TDR programs, but they do not have the authority to review and approve local TDR programs as they are developed, or to do the type of research needed to ensure that a local program will work.

¹⁵⁵ Maryland State Code, 1986, ch. 605; 2000, ch. 426, § 2.

¹⁵⁶ *Managing Maryland's Growth, Models and Guidelines, Transferable Development Rights*, Maryland Office of Planning, January 1995.

Compare the Maryland situation with the experience of the State of New Jersey. After the highly successful TDR Program in The Pinelands of New Jersey had preserved 43,684 acres with TDRs, and other earlier local TDR programs had limited success, the New Jersey Legislature enacted and Governor James McGreevey signed the *State Transfer of Development Rights Act* in 2004.¹⁵⁷ This statute is 38 pages long compared to Maryland's 37 word enabling statute. All land in New Jersey is under the planning and zoning jurisdiction of incorporated municipalities. Implementing a TDR program under the Act requires a major planning initiative on the part of a municipality, including adoption of the following planning and implementation documents.

- A Development Transfer Plan Element of the municipal Master Plan, including:
 - An estimate of anticipated population and economic growth for the next 10 years,
 - Identification and description of all prospective sending and receiving zones,
 - Analysis of how population growth is to be accommodated in the municipality and receiving zones,
 - An estimate of existing and proposed infrastructure of the receiving zone,
 - A procedure and method to transfer development rights from sending to receiver zones, and
 - Explicit planning objectives and design standards to govern the review of applications for development in the receiving zone.
- A Utility Service Plan, addressing necessary utility services within receiving zones, so that development using TDR is not unreasonably delayed because infrastructure is not available.
- A Transfer Ordinance implementing the TDR program, which codifies the location of the sending and receiving zones, a credit allocation scheme and administrative transfer procedures.

The New Jersey Department of Community Affairs Office of Smart Growth also has a direct role in reviewing and approving new TDR programs in the State.¹⁵⁸ If counties in Maryland were required to carry out similar planning and implementation activities before adopting a TDR program, and there was more direct State oversight in their creation, it is likely that TDR programs in Maryland that have had very limited success would not have been adopted, or would be protecting more land.

From time to time State and local officials, developers and interest groups have considered whether interjurisdictional TDR programs allowing counties to send TDRs to municipalities where development is needed and can be accommodated by public facilities. Interjurisdictional agreements have been successfully adopted for TDR transfers between King County and Seattle Washington, and Boulder County and the City of Boulder Colorado. Interjurisdictional agreements are being discussed or pursued in several Eastern Shore counties related to the future transfer of TDRs, including Cecil, Caroline, Kent and Talbot. In 2006 the General Assembly enacted House Bill 1141 establishing more specific procedures and authorities between Maryland counties and municipalities for the process of municipal annexations. The potential use of TDRs was not mentioned in this legislation.

If more specific State requirements or guidelines for establishing TDR programs were adopted in Maryland, as described above in New Jersey, and more counties choose to enact this land management tool, it would be appropriate for the State to establish a framework and guidelines for coordination and cooperation in the annexation process established by H.B. 1141, where TDRs would be part of the discussions. Wherever counties have adopted a TDR program, transfers of development rights should be on the agenda in the county-municipal negotiations over increases in density that often accompanies municipal annexations.

¹⁵⁷ Chapter 2, P.L. 2004, Chapter 2, *New Jersey State Transfer of Development Rights Act*,

¹⁵⁸ *Transfer of Development Rights (TDR): How does TDR Work?* Department of Community Affairs, Office of Smart Growth, <http://www.nj.gov/dca/osg/resources/tdr/index.shtml>.

3. Counties with TDR programs should require TDRs for any upzoning to increase density for new development projects, and work with municipalities to incorporate TDRs into new annexations and infill redevelopment.

Most parties interviewed in all six counties during this study agreed that local governments should have a policy not to increase zoning density for new development in counties with TDR programs, without requiring that all or a major part of this increase in density be accomplished with TDRs. This kind of policy has helped create a demand for TDRs in both Montgomery and Calvert County, and has been adopted by Charles County. Counties should also require the use of residential TDRs for zoning increases in the size or floor area of commercial and industrial uses to generate TDR demand.

As a former chairman of the Montgomery County Planning Board and former developer once said:

“You have to downzone to make a TDR program work. There's no market if the land is actually zoned to the density you're willing to allow. It's time we stopped giving away zoning for free and started making developers pay for favorable zoning.”¹⁵⁹

4. Counties should protect TDR sending sites with permanent conservation easements, rather than deed restrictions that are less than permanent.

With the exception of the new TDR program in Cecil County, all existing TDR programs in the Eastern Shore assessment area require that land from which TDRs are sold be protected by deed restrictions, restrictive covenants or, in Talbot “*Reservation of Development Rights (RDR) Agreements*.” For example, in Queen Anne’s County deed restrictions are null and void following annexation of open space if the municipality approves a subdivision with uses not authorized in the deed restriction, and it is released by the County Commissioners.¹⁶⁰ In Talbot, owners of TDR sending sites with RDR agreements can buy back TDRs for use on the sending sites, petition the Council to remove the restrictions if the land is rezoned, or to use the properties for public purposes. In Caroline County the new TDR ordinance allows landowners that sell or transfer their development rights to purchase and reestablish these rights on the sending parcel, in the event that their property becomes a part of a receiving area. Cecil’s new program requires permanent TDR easements to protect TDR sending parcels, similar to the easements required in Montgomery County. Restrictive covenants as a land preservation instrument provide limited protection. Such restrictions can be extinguished by property foreclosures or other events. Impermanent deed restrictions do not prevent these lands from being assessed by the IRS at unrestricted fair market value for estate tax purposes, even though they may be prevented from being developed by local law.¹⁶¹ If a landowner that has sold TDRs is able to restore development rights to a sending parcel, or if a local government removes such restrictions from TDR sending sites, such actions will likely undermine public confidence in the TDR program and other deed restrictions on protected lands.

5. TDR programs need to serve the broader land management goals and objectives of Local Comprehensive Plans. The primary purpose of TDR programs is to preserve valuable farmland, natural areas and open space. New growth or development should not be planned merely to create more demand for TDRs.

In several of the interviews for this study, the lack of performance of TDR programs was attributed to a lack of demand for TDRs. Some suggested that increasing development through the establishment of new towns or growth centers with higher densities and their own sewage treatment facilities would create the market demand for TDRs and make existing or new TDR programs work.

¹⁵⁹ William Hussmann, Former Chairman of the Montgomery County Maryland Planning Board, to visiting group of Michigan legislators, quoted in the Michigan Farm Bureau’s web site after the visit

¹⁶⁰ Article XXVII, Queen Anne’s County zoning code, *Guarantees and Covenants* (§18:1-205 E (7))

¹⁶¹ Section 2703, IRS Code, cited by Steve Small, Esq. Land Trust List Service, March 15, 2006

The Eastern Shore of Maryland is a special place, with one of the largest concentrations of productive agriculture and forests, hunting and fishing resources, and unique cultural resources anywhere on the East Coast. These resources are dependant on a sustainable base of undeveloped land. The special historic character of waterfront towns and villages, scenic roads, Rural Legacy and Heritage Areas and wildlife preserves, is essential to the growing tourism industry of the Eastern Shore. A significant change in the character of the Eastern Shore should not be the price of having successful TDR programs.

Some counties may choose not to adopt a TDR program, if the impact of new development using TDRs in receiver areas is too great, or if such development is not supported by local communities and their elected leaders. They may decide that other tools for land preservation, including PDRs and protective zoning, can preserve as much or more land without the problems or citizen opposition often associated with using TDRs for development.

6. Counties should seek to preserve farmland, natural resources and open space by limiting development through zoning, to help ensure a successful TDR program while redirecting development pressure away from rural areas.

Success with TDRs is more likely in counties that have zoned rural lands to protect agricultural and natural resource lands, limiting allowable residential densities to 1 dwelling per 20 acres or more, as in Baltimore, Calvert, Caroline, Kent and Montgomery Counties in Maryland or in the New Jersey Pinelands. However, the quantity of land preserved is not the only measure of success under the Criteria used in this study. For example, Calvert County had preserved 10,656 acres with private TDR transfers by 2003, when they downzoned rural lands to 1 du/20 acres, but many of these transfers were to rural communities outside of designated growth or Priority Funding Areas on well and septic systems, so there was loss of farmland in some rural areas in order to protect farmland in other areas. After the downzoning, only one percent of lots were recorded in the Farm and Forest District in 2005. Most growth in Calvert is now going in and around town centers.

Montgomery County lost 26,848 acres or 18% percent of its farmland between 1971 and 1979. County officials predicted that most or all of the farmland in the Rural Density Transfer zone would have been developed by the year 2000 at the rate that land was being converted in the 1970s, if the downzoning in 1980 from 1 du/5 acres to 1 du/25 acres had not occurred allowing TDRs at the previous rate of 1 TDR per 5 acres. Montgomery County has now permanently protected more than 50% of the County's total land area through TDR and other land conservation programs.

7. Counties with TDR programs should establish procedures to monitor, review and periodically adjust the design of the program and the zoning for sending and receiver areas, in order to maintain TDR demand and ensure that the goals of the program are being met.

Few if any TDR programs are perfectly designed or 100% complete when they are adopted. Successful programs do not remain static after they are adopted. Local governments should not refrain from adopting a program if it can be improved over time and adjusted to maintain a balance of supply and demand, based on actual experience during implementation. TDRs values will fluctuate with this demand and with the overall real estate market. As one farmer in Cecil County expressed it:

“My theory is that you are not going to start off with a perfect program right off the bat. You have to pass something and then start tweaking it from there, because if you try to pass a perfect program right off the bat, you'll be there 10 years from now and still not have a program.”

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IV. APPENDICES

TABLES - COMPARATIVE FEATURES OF MARYLAND TDR PROGRAMS AND COUNTY FARMS

The following charts provide a comparative summary of the Maryland TDR Programs evaluated in this Study, and the characteristics of farms in each of the counties reviewed. While the Comparative Features generally remain the same for these programs until the zoning ordinances that authorize the programs are amended, the numbers in the chart showing the Performance of Maryland TDR Programs is dynamic. These charts track the amount of land preserved by the programs relative to the overall land preservation goals set by the counties, and the size of the county at the time of the interviews. The chart showing the TDR Ratios and Values is also highly dynamic, changing with every TDR transaction. Much of the information in Table I can be obtained over the internet by accessing the zoning ordinances with the TDR regulations. The information for Tables II and III were derived from interviews with planners responsible for the TDR programs, from developers who have used TDRs, or from county technical reports and plans.

Table I – Comparative Features of Maryland TDR Programs pages 157 and 158

Describes the year that each TDR program was established and modified, the eligible zones, base density and TDR rate in sending areas; and the eligible zones, base density and TDR density in receiver zones.

Table II – Performance of Maryland TDR Programs page 159

Describes the size of each TDR County, the total County land preservation performance indicators, and the performance of each county TDR program based on TDR performance indicators.

Table III – TDR Ratios and Values page 160

For each TDR County, lists the TDR transfer ratios for both sending and receiving areas, provides estimates of TDR values in typical and special areas, and the estimate of TDR costs per dwelling unit for which TDRs are used, based on information provided by those interviewed at the time of the meetings.

Table IV - Characteristics of Maryland Farms, USDA 2002 Census of Agriculture page 161

Describes the characteristics of farms in Maryland and eleven counties, including the TDR counties and those in the Eastern Shore assessment area, including number and average size of farms per county, percent of county land in farms, and the market value of agricultural products. A reviewer of a draft of this report suggested that *“Most truly commercial farming counties have at least 100,000 acres of farmland, as well as \$50 million a year in gross farm product sales.”* The reader can compare these counties with this standard or “rule of thumb.”

COMPARATIVE FEATURES of MARYLAND TDR PROGRAMS

TDR Program Features										
County Year adopted or amended	Sending areas			Receiving areas						Other TDR standards
	Eligible areas/zones	Base density du/acre	TDR rate TDRs/acre	Eligible areas/zones	Base single fam. density du/acre	Base multi. fam. density du/acre	TDR single fam. density max du/ac	TDR res. density bonus	TDR multi. fam. density max du/ac	
Calvert 1978 1999 2003	APDs w/50+ac* Forest Cons.Dist.(FCD) Rural Pres.Dist.(RPD) Rural Community District (RCD) RUR Rural District	1:20 1:20 1:20 1:20 1:20	1:1 1:1 1:1 1:1 1:1	FCD, RPD Rural Community Dist (RCD) Rural Comm.w/in 1mi TC R-1 R-2 Town Centers	0.05 0.05 0.05 0.25 0.25 1		(TDRs/du=5) 0.1 0.25 1 4 4 14	100.0% 400.0% 1900.0% 1500.0% 1500.0% 1300.0%		- Sale of 1 TDR requires easement on whole farm permitting 1 residence - Increases in density are not permitted except through comprehensive rezoning or use of TDR
Caroline 1989 2006	Rural District ®	4 lots/parcel @ 1:1	1:15	Receiver areas or municipalities w/IGA Rural R minor subdivision Rural R major subdivision	4 lots/parcel @ 1:1 4 lots + 1:15		(TDRs/du=1) 1:1 4 lots + 1:1	0.0% 200% to 600% +		- 4 lots per parcel after November 30, 1972 - 50 unit cap on major subdivision with TDR
Cecil 2006 (effective 1/1/07)	Properties 50+ ac. w/50% prime soils Northern Agricultural Residential (NAR) District Southern Agricultural Residential (SAR) District	1:10 1:20	1:5 1:3	(with community facilities) Suburban Residential (SR) Dist. Development Residential (DR) Dist. Town Residential (TR) Dist. (with community facilities & PUD) Suburban Residential (SR) Dist. Development Residential (DR) Dist. Town Residential (TR) Dist.	2 4 4 4 6 6		(TDRs/du=1) 4 12 6 4 12 6	100.0% 200.0% 50.0% 0.0% 100.0% 0.0%		-TDR receiving areas require community facilities, water & sewer service within 10 years, or approved shared facility. -Cluster with 60% open space required in NAR & SAR zoning districts
Charles 1992 1999	APDs (MALPF) in: Agricultural Conservation (AC) & Rural Conservation (RC) Zones	1:3 1:3	1:3 (-existing du)	Development Districts RL RL-TOD RM RM-PDR RM-TOD RM-MX & PMH RH RH-PRD RH-TOD RH-MX RH-MX & PMH RH-MX & TOD	1 1.75 3 3 4 3 5 5 5 5 5 5		(TDRs/du=1) 3 3.5 4 6 8 10 6 12 10 10	200.0% 100.0% 33.3% 100.0% 100.0% 233.3% 20.0% 140.0% 83.3% 280.0% 100.0% 83.3%		- TDR only used with cluster or planned development standards - Any increase in res. density granted by Co. must be with TDRs - Sale of 1 TDR requires easement on whole farm - Landowners can transfer TDRs back to sending property at a later date
Queen Anne's 1987 1994 2004	Agricultural (AG) & Countryside (CS) w/ prime soils 20+ac in Crit.Area 24+ac or 50% of lot elsewhere CS non Crit.Area CS Crit.Area RCA	1:20 1:8 with clustering 1:5 1:20	1:8 1:5 1:20	Growth Areas ex:Ag &NCD Countryside (CS) outside CA Countryside in CA Estate (E) Suburban Estate(SE) Suburban Resid.(SR) Suburban Comm.(SC) Village Ctr. (VC) w/sewer Village Ctr. (VC) no/sewer Village Ctr. (VC) Apartment Town Center (TC) Town Center (TC) Apartment Stevensville & Grasonville SMPD & GPRN®	0.2 0.05 0.5 1.25 2 3.2 3.2 1.25 10 3.2 3.5		(TDRs/du=1) 0.25 0.625 1.5625 2.5 4 4 1.56 10 4 4.375	25.0% 25.0% 25.0% 25.0% 25.0% 25.0% 25.0% 25.0% 25.0% 25.0%	(TDRs/du=1) 2 4 11 6 2 13 6 13	- Bonus floor area and increased impervious surface allowed with TDR in CS 150% bonus for clustering in AG zone (1:20 ac. to 1:8 ac.) 300% bonus for cluster in CS zone (1:20 ac. to 1:5 ac.) +25% bonus of non-residential FAR with TDR

Table I

NOTES - see page 158

COMPARATIVE FEATURES of MARYLAND TDR PROGRAMS

	TDR Program Features									
	Sending areas			Receiving areas						
County Year adopted or amended	Eligible areas/zones	Base density du/acre	TDR rate TDRs/acre	Eligible areas/zones	Base single fam.density du/acre	Base multi. fam. density du/acre	TDR single fam.density max du/ac	TDR res. density bonus	TDR multi. fam density max du/ac	Other TDR standards
Montgomery 1980	Rural Density Transfer (RDT) Zone	1:25	1:5	Residential (RE-2/TDR) Residential (RE-2C/TDR) Residential (RE-1/TDR) Residential (R-200/TDR) Residential (R-150/TDR) Residential (R-90/TDR) Residential (R-60/TDR) Residential (R30/TDR) Residential (R20/TDR) Residential (R10/TDR)	0.5 0.5 1.1 2.18 2.18 4.84 7.26	14.5 21.8 43.5	(TDRs/du=1) 4 2 2 11 6 28 28	700.0% 300.0% 81.8% 404.6% 175.2% 478.5% 285.7% 175.9% 129.4% 129.9%	40 50 100	Children of RDT landowners in 1980 have right to build one residence per child per five acres, using 1 TDR. - Sale of 1 TDR requires easement on whole farm permitting 1 du/25 ac unless 5th TDR is sold
St. Mary's 1990 1999 2002 2006	Rural Preservation Districts (RPD)	1:5	1:3 or 1 per lot <3 ac	Rural Preservation District (RPD) Res. Low Density (RL,RMX,VMX,TMX) Residential High Density (RH) Corridor Mixed Use (CMX) Downtown Core Mixed Use (DMX) Res.Neighborhood Conservation (RNC)	0.2 1 10 1 20 1		(TDRs/du=2) 0.33 (TDRs/du=1) 5 20 15 20 2	65.0% 400.0% 100.0% 1400.0% 0.0% 100.0%		Additional 2,000 sq.ft. non-residential floor area per TDR allowed except in RH & CM zones * Sensitive land areas subtracted from acreage before density calculation
Talbot # 1989 1991	Rural Conservation (RC) District beyond 500' of eroding shoreline Rural Agricultural Conservation District (RAC)	1:20 3 lots/parcel + 1:20	1:20 1:10	Rural Conservation (RC) District with erosion rate of 2+ ft/yr Rural Agricultural Conservation District (RAC) in same election district	0.05 3 lots/parcel +0.05		(TDRs/du=1) 0.2 3 lots/parcel +0.2	300.0% 300.0%		# Based on new zoning ordinance proposed 5/8/06 Transfers in same election district only Landowners can transfer TDRs back to sending property at a later date
Wicomico 2002 2004	Co. Agricultural Land Preservation Dist. MD Agricultural Land Preservation Dist.	1:15 (conv) 1:3 (cluster) 1:20 (conv) 1:20 (cluster)	1:3 1:3	Agricultural-Rural District (A-1) Village Conservation (V-C) Residential (R-8) Cluster Residential (R-8) PUD Residential (R-15) PUD Residential (R-20) PUD	0.33 0.2 5.445 7.2 4.36 4.36		(TDRs/du=1) 0.495 0.33 6.05 7.42 7.26 6.22	50.0% 65.0% 11.1% 3.1% 66.5% 42.7%		Program amended to allow rural to rural transfers

NOTES:

* 10+acres if adjacent to existing APD, APDs must meet soil productivity requirements (Calvert)
© = QA TDRs to PRN Districts and Town Centers must come from 4th Election District

NCD = Neighborhood Conservation District (Queen Annes)
APD = Agricultural Preservation District (Calvert & Charles)

TDR Features

Table I

PERFORMANCE OF MARYLAND TDR PROGRAMS

County	Total County Land Preservation Performance Indicators					TDR Program Performance Indicators						
	Ag Pres Goal	Total Land Preserved^	Total Ag Land Preserved	% of County Preserved	% of Ag goal met	Sending areas protected w/ TDR					Receiving area TDRs	
						Total area Sending	Easement restricted	Deed restricted	Total Land protected	Properties protected	Total area Receiving	Total TDRS used
(total land acres)	acres	acres		%	%	acres	acres	acres	acres	number	acres	number
Calvert 130,820	40,000	32,983	23,473	25.2%	58.7%	107,000	11,652		11,652		124,100	15,602
Caroline 204,744	100,000	43,169	35,380	21.1%	35.4%			345	345		6,000	17
Cecil 222,990	55,000	34,062	18,333	15.3%	33.3%	139,000					31,420	
Charles 294,407	64,000	37,551	17,150	12.8%	58.7%			2,028	2,028	8		676
Queen Anne's* 238,337	111,637	62,953	55,587	23.3%	56.4%	159,208 @		2,644	2,644	47		252
Montgomery# 316,800	70,000	158,250	64,998	50.0%	92.9%	65,409 ⌘	48,584		48,584	710~	9,701	8,077
St. Mary's 230,984	60,000	20,810	13,667	9.0%	22.8%		1,800		1,800	8		600±
Talbot 172,227	73,843	28,217	23,490	16.4%	31.8%			770	770	3		49
Wicomico 241,388	n/a	34,525	7,730	14.3%	n/a							0
TOTAL/Ave	574,480	452,520	259,808	23.4%	45.2%		62,036	5,807	67,823			

^ = All forms of protection, not limited to TDRs (source: MDP, Mar. 21, 2005, except where noted * & #, in Comp. Plan or LPRP)

* = Total land preserved in QA Co. includes public lands, easements and 17,582 ac.deed restricted property.

@ = QA total land outside of growth areas, minus 64,065 ac. Protected lands (Rossing 2005 Land preservation PPT)

= Montgomery has 70,000 acre Ag. Preservation goal, within a 93,000 acre Agricultural Reserve (RDT zone). Total land preserved = 158,250 acres incl. parks & public lands.

15,336 Total TDR Capacity in Receiver areas; 8,077 TDRS approved; 2,045 TDR remaining capacity

~ = Montgomery Case Count from 1984-2005 from County Attorney files, Appendix 2, Mathew Greene memo of 8/30/2005.

TDR Performance

Table II

COMPARATIVE FEATURES of MARYLAND TDR PROGRAMS

Table III - TDR RATIOS AND VALUES

		TDR Transfer Ratios			TDR Values				
		Sending transfer rate		Receiving	Price \$ per TDR - Typical		Price \$ per TDR Special*		TDR Price
County		Acres / TDR	Acres / TDR	TDR needed / DU	per TDR	per Acre	per TDR	per Acre	per DU
(Zones >)		(Ag & CS)	(Special Area)						
Calvert		1:1		5:1	\$7,500	\$7,500			\$37,500
Caroline		15:1		1:1	\$13,000 to \$15,000	\$867 to \$1,000			\$13,000-\$15,000
Cecil	NAR SAR	10:01 20:01		1:1 1:1	N.A.	N.A.	N.A.	N.A.	N.A.
Charles		3:1		1:1	\$8,500	\$2,833			\$8,500
Queen Anne's		8:1	20:1	1:1	\$3,500	\$438	\$35,000 to \$265,000	\$1,750 \$13,250	\$3,500 \$250K+ in CA
Montgomery		5:1	5:1	1:1	\$42,000	\$8,400	\$200,000 \$500,000	\$40,000 \$100,000	\$42,000
St. Mary's		3:1 (or 1/lot <3 ac)		2:1 in RPD 1:1 other	\$10,000	\$3,333			\$20,000 RPD \$10,000 other
Talbot	RAC RC	10:1 20:1	20:1	1:1	\$14,000	\$1,400			\$14,000
Wicomico		3:1		1:1	N.A.	N.A.	N.A.	N.A.	N.A.

Notes: TDR values and transfer rates at time of County TDR Profile Interviews, based on views of those interviewed

* Special Areas & Values are for Chesapeake Bay Critical Area, 5th on-site TDR allowed in Montgomery Co.,
or Major subdivision in Caroline Co.

N.A. = Not available, No TDR transfers

Table III

Characteristics of Maryland Farms

USDA 2002 Census of Agriculture - Selected Study Counties

	Farms and Land in Farms					Market Value of Ag.Products		
	Number of Farms	Land in Farms (ac)	Average size (ac)	County Land Area	% of Land in Farms	Total \$ Annual Sales	Average per Farm	Average per Acre
Maryland	12,198	2,077,630	170	6,294,540	33.0%	\$1,293,303,000	\$106,026	\$205
Calvert	321	30,032	94	137,711	21.8%	\$3,244,000	\$10,106	\$24
Caroline	506	114,843	227	204,890	56.1%	\$104,358,000	\$206,241	\$509
Cecil	468	77,089	165	222,806	34.6%	\$68,612,000	\$146,607	\$308
Charles	418	52,056	125	295,041	17.6%	\$6,384,000	\$15,273	\$22
Dorchester	351	125,385	357	356,826	35.1%	\$83,866,000	\$238,934	\$235
Kent	318	117,372	369	178,838	65.6%	\$66,836,000	\$210,176	\$374
Montgomery	577	75,077	130	317,130	23.7%	\$41,634,000	\$72,156	\$131
Queen Anne's	443	155,566	351	238,211	65.3%	\$66,024,000	\$149,038	\$277
St. Mary's	577	68,153	118	231,201	29.5%	\$12,196,000	\$21,137	\$53
Talbot	288	105,729	367	172,248	61.4%	\$33,451,000	\$116,149	\$194
Wicomico	512	88,470	173	241,389	36.7%	\$174,594,000	\$341,004	\$723

* Professor Tom Daniels, Ph.D., University of Pennsylvania, commented that:

"Most truly commercial farming counties have at least 100,000 acres of farmland, as well as \$50 million a year in gross farm product sales."

[December 2006 Review of *The Feasibility of Successful TDR Programs for Maryland's Eastern Shore*]

* Professor Lori Lynch, Ph.D., University of Maryland, wrote: *"While the number of farmland and harvested cropland acres affects the rate of farmland loss, there is not a statistically determinable "threshold" that has maintained over the last 50 years. We hypothesize that some of the earlier loss of farmland (1949-1978) resulted from a shift to forest or recreational use."*

[Critical Mass of Agricultural Land Report, MCAE Pub 2003-01, January 2003, Janet Carpenter and Lori Lynch, University of Maryland, College Park]

Table IV

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