Commission Meetings & Corresp. Nov 1986 MSA_S1832-27

AGENDA

CHESAPEAKE BAY CRITICAL AREA COMMISSION

Department of Agriculture
50 Harry S. Truman Parkway
Annapolis, Maryland

November 5, 1986 — 4:00 - 6:00 p.m.

Approval of the Minutes of October 8, 1986	Solomon Liss Chairman
Discussion of Transfer of Development Rights Paper	Lee Epstein
Discussion of Program Approval Process--staff/panel/local jurisdictions	Charles Davis
Status Report of State Regulations Committee	Kevin Sullivan
Old Business	Solomon Liss Chairman
New Business	Solomon Liss Chairman
Next Commission Meeting	Ann Sturgis Coates

CHESAPEAKE BAY CRITICAL AREA COMMISSION

Minutes of Meeting Held
October 8, 1986

The Chesapeake Bay Critical Area Commission met at the Wildfowl Trust of North America's Horsehead Sanctuary in Grasonville, Maryland. The meeting was called to order by Chairman Solomon Liss, with the following members in attendance:

Ronald Hickernell
Mary Roe Walkup
Wayne Cawley, jr.
Shepard Krech, Jr.
Ardath Cade
Ann Sturgis Coates
Harry Stine
William Eichbaum
William Bostian
James Gutman
John Griffin for Torrey Brown
Samuel Turner, Sr.
John Luthy, Jr.
Thomas Jarvis
Robert Price, Jr.

The Minutes of the September 3rd meeting were approved as written. Mr. Bostian suggested that the standard be changed to reflect that the Commission make a distinction between a Real Estate Agency's intentionally misleading advertisements regarding development in the Critical Area, and advertisements that are inadvertently misleading.

Chairman Liss introduced the Director of the Horsehead Sanctuary, Dr. Bill Sladen, who welcomed the Commission to the Sanctuary and said that he would discuss the tour and the sanctuary grounds at the end of the meeting.

Chairman Liss then introduced Deborah Hollman, Chief of the Urban Forestry Division of the Forest, Park and Wildlife Service in the Department of Natural Resources.

Ms. Hollman described the coordination of Urban Forestry with the Chesapeake Bay reforestation efforts. She said that Urban Forestry is a relatively new concept and only recently has the general public been made aware of it. She explained that 90% of the trees in Maryland's urban forests are alive and growing and that the goal of Urban Forestry is to manage that 90% and hopefully increase the number. One of the goals is to make the public more aware of the intent of the Urban Forestry Program. Ms. Hollman said that Urban Forestry has been brought to the forefront because of the decline of the Chesapeake Bay and that Urban Forestry uses BMP's with the help of organizations such as homeowners associations, who have direct interaction with the Bay. She said that her office is developing a Grant Program for community organizations in local areas affected by the Commission's criteria, to develop Buffer plans for the Critical Area, and that the grants are provided on the basis of a 50/50 match.

Mr. Gutman asked whether an application from a civic association requesting funds to be used for lobbying to have

local legislation enacted to curtail the destruction of trees, would be fundable.

Chairman Liss said that that kind of thing was a political question and that if neighborhoods are interested, they should finance the action themselves, and that the government incentive programs should not be involved.

Chairman Liss asked if the Urban Forestry Program provides assistance to developers who want to establish a Buffer system in the Critical Area?

Ms. Hollman answered yes, but that they were understaffed and could not provide assistance to the extent that it is needed. However, the Bay Foresters can offer opinions to developers with the help of the criteria.

Ms. Coates asked if the Uban Forestry Grants were applied only to Buffers in the Critical Area?

Ms. Hollman answered affirmatively.

Ms. Coates asked if there were enough trees available through the Urban Foretry Program for those people who want to purchase them?

Ms. Hollman answered that at this time, there is a low inventory and that only about 1,000 hardwood trees are available to the public for purchase.

Dr. Sladen asked if exotics are provided or only native trees?

Ms. Hollman answered that since wildlife habitat is to be considered, basically all of the trees from the State nursery are native species, but sometimes non-indigenous trees are used because of the inconvenience or incompatability of the native trees with the intended planting site. She added that her basic intention, however, was to use native species wherever possible.

Chairman Liss then asked Dr. Taylor to present the status on grant agreements with local jurisdictions.

Dr. Taylor said that half of the agreements have been signed. There are 7 jurisdictions where the status isn't known. All of the Upper Western Shore agreements have been signed with the exception of two. In the Lower Western Shore, all agreements have been signed, two are in process. In the Upper Eastern Shore, we do not know the status of five Chesapeake Bay Critical Area Commission

jurisdictions, but the rest are in process. Dr. Taylor then introduced the Commission staff's new planner for the Lower Eastern Shore, Mr. Edward Phillips. Dr. Taylor said that the Commission should be receiving all outstanding agreements by the end of October.

Mr. Eichbaum asked if the Scopes of Work we have received have been adequate? Dr. Taylor answered that the content of most of them have been good, but some jurisdictions have needed to have their Scopes clarified.

Chairman Liss said that there has been a delay in some agreements because the jurisdictions wanted a guarantee from the Commission that FY 88 funds would be made available if the jurisdictions did not finish their Programs by FY87. He said that the Commission could not guarantee this as the decision is up to the Legislature. If the Legislature does not appropriate funds and if the county does not have the funds, the Program will be completed by the Commission.

Mr. Griffin asked if there was a problem with the time factor involving the jurisdictions who have yet to complete their programs? Chairman Liss said that if the Commission is convinced that the jurisdictions are acting in good faith, the Commission will grant them an extention.

Mr. Epstein pointed out that the Commission should think of a cut-off date whereby the Commission will do the jurisdiction's Program, if the jurisdiction has not indicated that it is going forward or that it is seeking grant monies to do the local program themselves.

Chairman Liss suggested that the cut-off date should be 14 days after the November Commission meeting. If the jurisdictions have not completed their Grant applications by then, the Commission will notify them that the local program will be completed for them.

Ms. Coates suggested that the Commission be certain to allow the jurisdictions enough time to complete their own Programs.

Mr. Eichbaum asked if any jurisdiction has yet asked the Commission to do their Programs for them? Chairman Liss said that none have so far.

Mr. Hickernell was then asked to report the status of the Economic Baseline Study Award. He said that the Panel met one last time. There were three "finalists". The Panel decided to recommend Rutgers University's Center for Urban Policy

Research, as they were the only respondents who were acceptable. Mr. Hickernell said that the entire process was well organized and that Mr. Pollock was to be commended.

Ms. Cade said that she was pleased with the Panel's decision and that Rutgers has a good reputation with the work they have done in Maryland with the Legislature and State government.

Mr. Gutman asked what the delivery date of the study was? Mr. Pollock answered approximately 14 months from the date of signing a contract.

Chairman Liss asked that a vote be taken to approve the recommendation of the Panel. The motion was seconded and approved unanimously. He suggested that the Commission publicize information letting the public know that we are concerned about the effect that the criteria will have and are undertaking a detailed study to determine impacts.

Mr. Epstein was introduced to report on the study that had been developed by the Attorney General's Office for the Commission regarding TDRs. He said that the study was performed by an intern this summer, and that it is a draft that will be distributed to the Commission for their review, that could be made available to the public as a Commission "white paper" after Commission approval next month.

Ardath Cade was then asked to report on the status of the State Regulations Subcommittee. She said that the Subcommittee was making good progress, and noted that an effort was being made to contact and involve other State agencies.

Regarding Old Business, Dr. Krech asked the status of the University of Maryland Law School proposal. Chairman Liss reported that the Commission staff is still waiting to hear from them.

Ms. Cade suggested that a portrait be made of the Commission at the next meeting.

Dr. Taylor said that the arrangements would be made.

The meeting ended with a presentation and tour of the Sanctuary by Dr. Sladen.

DRAFT

Transferable Development Rights: An Analysis of Programs and Case Law

September, 1986

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NOTE:

This research paper was prepared by Charles Bacharach, a summer legal intern in the Office of the Attorney General, Department of Natural Resources. Any opinions expressed herein are solely those of the author.

> pro quo is what should control. If the developer takes advantage of the increased density transferred and builds accordingly, does this not mean the preservation of the open space is forever? We certainly hope so and are suspicious of any motives for keeping a hold on it. [emphasis in original][85]

The court further held that the program was not mandatory because the plaintiff could forgo the transfer process and build single family homes.[86]

This case is important for several reasons. First, and most significantly, it is important because the court upheld the application of the TDR concept as a valid, legal, land-use management technique. Second, the court displayed unusual flexibility in upholding a very innovative TDR scheme. The transfer process was not mandatory in the sense that the landowner either participated or was left with nothing. However, it fits somewhere in between what have been defined as mandatory and voluntary schemes in that the landowner must transfer full title of the land to use the TDRs. This seems closer to the mandatory scheme than the voluntary, where typically the landowner is left with some residual use of the land. It is certainly open to question whether other state courts would uphold this law.

In Dupont Circle Citizens Ass'n. v. District of Columbia Zoning Com'n.[87] the court upheld the appropriateness of using TDRs to implement a Planned Unit Development (PUD) program. In a broad-based challenge to a proposed PUD, a citizens group charged that the District's zoning regulations did not provide for TDRs. The court disagreed and held that "[t]he very nature of

TRANSFERABLE DEVELOPMENT RIGHTS

I - Introduction

Transferable Development Rights (TDR) is a rapidly evolving technique of land and resource management. While the legal and social roots of TDR have been traced back through the centuries [1] the actual implementation of current TDR programs is quite a recent phenomena. Central to all TDR programs is the idea that the right to develop property may be severed from all other rights of land ownership. Accordingly, the development rights of one parcel of land, the "sending" parcel, may be severed and transferred to another, the "receiving" parcel. The end result is to allow some desired feature of the sending parcel to be preserved, while allowing more development on the receiving parcel than would have otherwise been possible under zoning laws as currently applied.

Traditionally, local governments have looked towards two general categories of land-use management tools in an attempt to control development. Zoning and other regulations which restrict or manipulate land-use density allowances represent the first category. Regulations such as these often prove to be ineffective at achieving the goals for which they were designed. If they are too harsh and deprive a landowner of a "reasonable return" on his investment in the land, the regulations may be declared unconstitutional.[2] If they are too lax, or variances are easily obtained, the regulations will not achieve the desired results. Various types of compensation schemes comprise the second category of traditional land-use management tools. These schemes may range from government purchases of conservation easements to a full acquisition of the land and all associated rights

by condemnation or other methods.[3] While compensation may be possible for the acquisition of a limited number of properties, it soon becomes a prohibitively expensive method of land conservation or special resource preservation. This is especially true where, as is often the case, the land which needs protection is located in rapidly developing areas which have high property values.

TDR programs represent a new alternative to local governments seeking to impose land-use restrictions. Potentially more effective than zoning, and more cost efficient than compensation, each TDR program is designed to serve the highly individual needs of a particular locality. TDR programs have been designed for such varied purposes as the preservation of historic buildings, agricultural land and ecologically sensitive areas. Because they primarily involve the sale of development rights and not government purchases, TDR programs are economically efficient. Often the cost to local government can be limited to the administrative and planning expenses necessary to implement the program. These expenses, on the other hand, should not be underestimated.

Every TDR program functions by a different set of mechanisms. Some of these mechanisms are common to all TDR schemes but there are two general features of every program which give it a distinctive quality: first, the way in which the development rights are measured, and second, the method which is used to effectuate the transfer of these rights. This report is a review of various TDR programs and proposals, and the relevant case law. The concluding section contains suggestions about how this information may be useful for implementing the Chesapeake Bay Critical Areas program.

II - Programs and Proposals

Several programs and proposals which utilize the TDR concept will be examined in this section. Subsections A-D will survey four major TDR schemes which are broadly representative of the variety of TDR programs now in use. Subsection E presents a brief analysis of several TDR programs which have built on the foundations of the four major schemes and have been adopted to fit needs of the particular jurisdictions they serve. This section is not meant to be an exhaustive study of all TDR programs and proposals. It is merely intended to provide a broad overview of how TDR programs operate and the reasons behind their success or failure.

A - The New York Plan-Preservation of Historic Urban Landmarks

Program Goals: Underlying all TDR programs is the goal of preserving some imperiled resource faced with threat of imminent development. For many years now, city planners have recognized the need to protect buildings of historic and cultural importance. In his essay assessing the New York City TDR program, David Allen Richards described the need for preservation and the major impediment to that goal:

> Landmarks were endangered both by the zoning ordinance's encouragement of new office buildings and by urban economics. Older buildings not only enhanced the city's character through their historic associations and architectural distinction, they also provided wells of light and air amid

> the skyscrapers. Yet their economic return could never approach that of the office towers which might replace them, so the urge to demolish was overwhelming.[4]

The New York plan was the first TDR program in the country to be practically utilized. For the most part, though, the early years of the program have been assessed as a failure.[5] Undoubtedly there will be vast differences between this urban plan and plans which are eventually used in Maryland's Critical Areas program. There are, however, lessons of great value to be learned from the short comings of this early TDR attempt.

The Program

Early Legislation - The New York TDR program grew out of that city's 1961 incentive zoning law which introduced the floor area ratio (FAR) technique.[6] The FAR is the ratio between the floor space permitted in a building under zoning laws and the area of the lot on which the building stands. By controlling the permitted floor space, zoning officials can regulate the physical volume of the building.[7] Thus, an owner of 10,000 square feet of land in an area with a designated FAR of 6 could construct a building with no more than 60,000 square feet of floor space. The 1961 resolution had two major loopholes in the FAR limitation, and these helped to undermine its effectiveness. First, a developer could gain a twenty percent increase in floor area by surrounding his building with an open plaza or by adding other amenities. Second, the resolution defined "zoning lot" for

FAR purposes to include any contiguous parcel owned by the developer within the same block as the construction site.[8] This allowed developers to increase the size of their buildings without a variance.

Transfers of development rights were allowed under the 1961 resolution but only between a landmark and a contiguous parcel under the same ownership. This limitation proved to be totally impractical. A 1968 amendment eased the restriction by redefining "contiguous" to include parcels across the street or intersection and allowing transfers between separately owned properties. A landmark owner, then, could transfer his authorized but unused floor area, measured in terms of FAR to contiguous parcels. The amendment, however, limited transfers to a twenty percent increase above the authorized floor area of the transferee site.

The Transfer Process - The method of transferring development rights is extremely complicated, involving manifold layers of bureaucracy, each with its own requirements, and that factor proved to be a major drawback in the success of the program.[9] To begin with, a building must first be designated as a landmark by the New York Landmark Commission. Because of the development problems that may ensue, owners of prospective landmark property often wage long battles with the Commission over designation. Consequently, the effort to preserve the landmark is sometimes lost before any application of the TDR program is ever made. Once the designation is made, all plans

for development which will utilize the landmark's TDRs have to be submitted to the Commission for approval. The go-ahead will be given only if the designs are deemed to be compatible with the landmark. Both parties wishing to arrange the transfer must then apply to the New York Planning Commission for preliminary approval of the transfer. The application must include proposals for the development of the receiving lot, and the maintenance of the landmark, as well as the Landmark Commission's report outlining the effects of the development on the landmark. The Planning Commission must approve all these plans and decide whether the development will adversely affect the occupants of other buildings in the vicinity. Further, the Planning Commission may conditionally approve the transfer based on the willingness of the purchaser of the development rights to provide an amenity, like an open plaza, on the site to be developed. Plans for the amenity, of course, must also be approved by the Planning Commission. Finally, if the Planning Commission gives it approval, the Board of Estimates reviews the plans and has the final authority to grant or deny the proposed transfer. If the Board grants the transfer then the development potential for the landmark would be permanently reduced by the amount of the development rights, in terms of FAR, that were sold.

This bulky transfer system proved to be largely unworkable for a number of reasons. The success of any TDR program depends not on creating the transferable rights but on creating a market for those rights. The New York plan defeated all incentive for participating in the program. First, the contiguous parcel

restriction was a severe limitation on the ability of developers to participate in the program. Only parcels contiguous to the landmark which were available for development could be used as transferee sites. If contiguous sites were not available or were unsuitable for development then there was no market for the TDRs. Moreover, the close proximity of transferee sites to the landmark could sometimes be the source of more problems. A great concentration of development within a block of the landmark might strain public services, cause traffic congestion, increase pollution in the area, and even overwhelm the landmark which the transfer was designed to protect.

Second, the loopholes in the original 1961 resolution allowed contiguous lots to be calculated into the FAR and gave a twenty percent FAR increase for open space amenities. With these opportunities, and the possibility of obtaining a variance, the TDR program was easily overlooked by developers. Finally, the complexity of the program itself discouraged rather than encouraged transfers. The government was involved in every step of the tranfer process and the requirements of the Planning and Landmark Commissions were often based on vague aesthetic guidelines which additionally complicated matters.

Because of the problems associated with the TDR system the Planning Commission was forced to amend the zoning resolution on a nearly case by case basis. For example, in 1969 the Penn Central Railroad submitted plans to construct a 55-story office tower over its Grand Central station. The Landmark Commission blocked the project and amended the zoning resolution to make it

easier for Penn Central to use its development rights elsewhere. As amended the resolution allowed transfer of development rights to extend beyond merely contiguous lots. The amendment provided for transfer to any lot which could be connected to the landmark by a chain of lots under single ownership and it eliminated the twenty percent ceiling on development increases through rights transfers.[10] These changes would have allowed Penn Central to develop their many properties in the nearby area.[11] Eventually the station was saved by the Supreme Court's decision upholding New York's landmark preservation law, not by the TDR program. The Court, did however, mention that one reason for upholding the law was that Penn Central had the opportunity to make development rights transfers. The availability of TDR's, the court held, lessened the economic impact of the landmark preservation law. [12]

While the numerous subsequent changes in the New York zoning law are, by and large, of no interest to our immediate purpose, at least one other amendment deserves attention. That amendment was the creation of a Special Parks District for the preservation of open space.[13] Like the 1969 amendment, the Special Parks legislation was enacted to resolve a specific problem not treated by the original zoning law. The controversy surrounded the proposed development of Tudor Parks, two privately owned parks which provided a bastion of light and air in an area dominated by apartment towers.[14] Development in the designated open areas of the Special Parks District (which spanned the entire width of Manhattan from 33rd to 60th Street) was restricted to

recreational facilities only, and the parks had to be open to the public between 6 A.M. and 10 P.M. every day. To compensate the landowners for the loss in development value, they were allowed to transfer their development rights to designated areas in the central business district. There were, however, no specific sites or buyers where these rights could be marketed, nor was there any specific value attached to the rights. Further, even if a buyer was found the transfer was subject to the usual process of municipal approval.

The owner of Tudor Parks brought suit against the city claiming that the legislation constituted an unconstitutional taking of his property without just compensation.[15] The Court of Appeals of New York held that the zoning change was not a taking because there was no actual physical invasion or appropriation of the property.[16] Nevertheless, the law was held to be unconstitutional as a deprivation of property without due process of law because it unreasonably restricted the park owner's use of his property while granting him only an extremely uncertain compensation through the TDR scheme. The court did, however, recognize the validity of the concept of transferable development rights. Albeit lengthy, Chief Judge Breitel's incisive analysis of this matter is particularly instructive:

> It is recognized that the "value" of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put. Thus, the development rights are an essential component of the value of the underlying property because they

constitute some of the economic uses to which the property may be put. As such, they are a potentially valuable and even a transferable commodity and may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property. [Citations omitted]

Of course, the development rights of the parks were not nullified by the city's action. In an attempt to preserve the rights they were severed from the real property and made transferable to another section of mid-Manhattan in the city, but not to any particular parcel or place. There was thus created flowing development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase, or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by reattachment to tangible real property. Put another way, it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action. The acceptance of this contingency-ridden arrangement, however, was mandatory under the amendment.

The problem with this arrangement, as Mr. Justice Waltermade so wisely observed at Special Term is that it fails to assure preservation

> of the very real economic value of the development rights as they existed when still attached to the underlying property (77 Misc.2d 199, 201, 352 N.Y.S. 2d 762, 764). By compelling the owner to enter an unpredicable real estate market to find a suitable receiving lot for the rights, or a purchaser who would then share the same interest in using additional development rights, the amendment renders uncertain and thus severely impairs the value of the development rights before they were severed (see Note, the Unconstitutionality of Transferable Development Rights, 84 Yale L.J. 1101, 1110-1111). Hence, when viewed in relation to both the value of the private parks after the amendment, and the value of the development rights detached from the private parks, the amendment destroyed the economic value of the property. It thus constituted a deprivation of property without due process of law.[17]

Conclusions

Since the time of the Fred French/Penn Central cases the New York TDR laws have been altered several times to address specific situations. These subsequent TDR schemes have met with some success[18], and several other cities have adopted TDR programs based on the New York Model.[19] While the preservation of urban landmarks is a vastly different enterprise than protecting critical environmental areas, there is much to be learned from the experience of the urban programs. By far the most important lesson is that any TDR program must create a market for the transferred rights. As the Fred French case showed, to simply allow transfers is insufficient. There must be a real market for the development rights or another way of compensating landowners for their losses when a real and very substantial loss is proved.

This is especially true where the TDR program was mandatory; that is, where the land owner must either participate in the TDR program or not utilize any of the property's development potential. Without a viable marketing plan a TDR program cannot succeed.

Another major problem with the New York program was the complex transfer process. Numerous government agencies were involved, each with its own priorities. The maze of plans and permits which had to be negotiated could only disuade developers from participating. In the end, the system was so complicated it precluded any general application and had to be continuously amended. Moreover, lax zoning regulations and the voluntary nature of the program (only the Special Parks law was mandatory) allowed developers to choose other more enticing alternatives. The conclusion one must draw from all of this is that a successful TDR program must be a combination of simplicity and appeal. If developers are not given the proper incentive, or can find less complicated ways of achieving their goals, they will not utilize TDR programs.

B - The Rutgers Proposal for the Preservation of Open Space

Program Goals: This proposal was the result of cooperative effort between Rutgers University faculty and the New Jersey Department of Community Affairs. The faculty group, headed by Prof. B. Budd Chavooshian, sought to develop a TDR program which would act as a "land use control device to preserve farmlands and

other critical land resources."[20] Their proposal would allow owners of land in designated preservation areas to sell their development rights to the owners of developable land. The group hoped that this would help slow the rampant development of New Jersey's open spaces. While the proposed legislation which resulted from this project was never enacted, it is useful as a model of a simple and practical basis for a TDR program.

The Program: As outlined by Chavooshian and his colleagues the Rutgers proposal involved six basic steps:

1) Each local government will prepare a land-use plan that will identify undeveloped land and designate those areas which are to remain undeveloped. The land-use plan will also identify those areas to be developed and show how the developable land is to be utilized. This land-use plan should represent a viable and rational plan for the development of the municipality. (Because New Jersey utilizes a township government system the Rutgers plan refers to municipalities. It is, however, meant to be a plan for open space preservation which can be implemented by any form of government).

2) The Planning authority for each local government must then calculate the development potential for the preserved areas under the current zoning plan. For this purpose it is assumed that each potential dwelling unit is represented by one development right. The total number of development rights in each preservation area, then, should equal the number of dwelling

units eliminated by the land use plan.

3) The development rights are distributed in the form of certificates of development rights. Each owner of land in the preservation area will receive development rights on the basis of the assessed value of his undeveloped land in relation to the assessed value of all the undeveloped land in the municipality. Landowners will receive one development rights certificate for each development right alotted to them.

4) The local government must rezone the areas designated as developable to provide an incentive to builders. That is, planners must designate districts where higher density development will be allowed if it is accompanied by a transfer of development rights from the preservation areas. The allowed increase in density will depend upon the number of TDRs created.

Owners of preserved land may sell their TDRs to anyone including developers -- speculators, real estate brokers, or private individuals -- or they may even utilize the development rights themselves. Once the rights are transferred for development elsewhere, the owner has given up the right to develop that land in the future.

5) Since developers may build within the constraints of the zoning regulations even without transfers of development rights, it is possible that there could be a surplus of TDRs. In this event the local government must rezone the developable areas. New districts which can receive transfers of develoment rights must be designated. Such rezoning will continue to provide the incentive needed to encourage transfers of development rights.

Thus, an available market for the rights will be created until all outstanding rights are transferred.

6) Development rights are to be taxed as a component of developable real property. At the beginning of each program, the local government would assess the value of each development right by using the following procedure: First calculate the aggregate value of all undeveloped land that is zoned for restricted residential use. Second, calculate the aggregate value of all undeveloped land as if it were developed to the extent allowed by all issued development rights. Finally, the value of each developed right would then be determined by calculating the difference between the built and unbuilt values of all lands in the municipality and dividing the difference by the total number of development rights issued by the municipality. The open market value of the development rights would then be used to calculate the assessed value of development rights in the future. Additionally, land in the preservation areas shall be assessed at its value for agricultural or open space use.

Conclusions: The Rutgers proposal is notable for several reasons. Minimal government involvement in the transfer process is one significant characteristic. The local government decides how many development rights to create and how they are to be distributed. With the exception of designating the district to which the rights can be transferred though, the government does not participate in the actual transfer process. Development rights certificates are bought and sold on the open market. As

one member of the Rutgers group, Jerome Rose, noted, "[t]he same economic forces that determine the value of land would also determine the value of the separated component of the value of land, namely, the right to develop."[22]

The method of rights distribution is another area where the Rutgers proposal is especially innovative. Rather than establishing a flat distribution rate of so-many development rights per acre, the number of development rights is scaled to the value of the land as developable property. Thus, the more valuable the land is to begin with, the more TDRs will be allotted to the owner. This scheme assures landowners of a fair rate of compensation for their losses due to the preservation restrictions.

The Rutgers proposal also utilizes a strong incentive system which should create a market for the development rights. The primary incentive is the opportunity for builders to develop land to a higher density than would be otherwise be allowed in the designated receiving districts. The second major incentive to market the development rights is that they will be taxed as real property. By selling development rights certificates landowners in the preservation area reduce the value of their land. Accordingly, they will only be taxed on the reduced value of their land for agricultural purposes. Likewise, purchasers of development rights certificates will be prompted to sell or utilize their rights so as to reduce their own tax burden.

Finally, the proposed legislation only deals with the

conversion of farmland and open space development into residential land uses. Commercial and industrial development is purposefully excluded from the proposal. The authors believed that including these kinds of development would only increase the complexity of the transfers and the administrative duties that would be necessary. Jerome Rose emphasizes that there was "no logical reason" for the exclusion, but there were "sufficient practical and political reasons why the proposal should be kept as simple and understandable as possible."[23]

The proposed legislation had a number of other characteristics which distinguished it from some earlier TDR schemes. Power to create the land-use system and administer it was given to the local governments rather than the state. This arrangement was deemed to be more politically feasible and placed control over the program in the hands of the officials most directly responsbile to the affected people. The State's greatest role in the program was to protect the program's integrity. Lax enforcement of the land-use plan could frustrate the goals of the entire program. To prevent this from occurring the legislation required that the appropriate State planning agency approve any variance or zoning amendment to change land-use in the preservation areas. [24] Moreover, a change would be granted only where it was "reasonably necessary to protect public health or safety and no practical alternative to the proposed development is available."[25] Thus, a close observance of the land-use plan was assured.

Like most TDR programs, the success or failure of the Rutgers proposal would rest upon the reasonable and prudent use of sound planning principles. Each local government must develop an efficient long term master plan for land-use in its jurisdiction. These local master plans are the cornerstones of the entire proposal. It is of vital importance that each local plan strike a balance between developed and undeveloped land. This is necessary for three reasons: first, so that a market demand for development at higher densities is created; second, so that the areas which are preserved meet the agricultural and open space needs of the community; third, and perhaps most importantly, so that the high density growth areas will be developed as healthy and desirable residential environments. Only by meeting these requirements can this, or any, TDR program succeed.

C - The Pinelands Development Credit Program

Program Goals: The Pine Barrens of southern New Jersey constitute a largely undeveloped area of important natural resources. Nearly one million acres in size, the Barrens, or Pinelands as it is commonly known, is the site of a variety of agricultural enterprises, unique environmental habits, and lies over one of the largest unpolluted freshwater aquifers in the country. The Pinelands, which are wedged into the fast growing Boston-Washington corridor, has long faced a serious threat from possible over-development. The recent revitalization of nearby

Atlantic City heightened concerns and prompted legislators to take action.

In 1978, as part of the National Parks and Recreation Act (NPRA), Congress created the Pinelands Natural Reserve.[26] The NPRA declared that it was in the national interest to protect and preserve the Pinelands. Accordingly the act set guidelines for the State of New Jersey and its local governments to follow in developing a program aimed at achieving those goals.

Pursuant to the federal directive, New Jersey has enacted the Pinelands Protection Act.[27] Under that act a planning entity, the Pinelands Commission, was created and given primary planning authority over development in the Pinelands area.[28] The Commission was charged with preparing and adopting a comprehensive management plan (CMP) for the region.[29] Upon completion of the CMP the fifty-two municipalities within the Pinelands region were required to conform their local master land-use plans to the CMP. As part of the overall plan for managing the future development of the Pinelands, the Commission created an innovative TDR program. Although it has not yet been fully implemented, the Pinelands TDR program is well worth examining.

Land Use Policy: As part of its Comprehensive Management Plan (CMP) the Pinelands Commission created the Pinelands Development Credit (PDC) program.[30] The PDC program was designed to augment the overall CMP by encouraging growth near existing development,

and by discouraging growth in the ecologically sensitive areas of the Pinelands. Under the Pinelands Commission's CMP, land in the Pinelands is divided into eight categories: the Preservation Area District, Forest Areas, Agricultural Production Areas, Special Agricultural Production Areas, Rural Development Areas, Regional Growth Areas, Pinelands Towns and Villages, and Military and Federal Installation Areas. The Pinelands Commission's CMP dictates how much development may occur in each of the designated areas. The limits range from commercial, industrial, and relatively concentrated residential development in the Pinelands Towns and Villages and Regional Growth areas, to very restricted residential development in the Preservation Area District. Under the CMP landowners in the Preservation Area District or the Agricultural Production Areas would have two choices if they want to develop their land: they can either develop it as permitted by the CMP, or; they can sell their PDC's for use in the areas scheduled for development.

The Transfer Process: All landowners in the Preservation Area District or one of the Agricultural Production Areas may qualify for the PDC program. (The same applies to landowners in the Special Agricultural Production Areas, which are merely agricultural areas within the Preservation Area District.) The CMP provides a simple formula for allocating the development credit[31]:

Preservation Area District

Upland - 1.0 credit for each 39 acres.

Wetland - 0.2 credits for each 39 acres.

Agricultural Production Areas

Upland - 2.0 credits for each 39 acres.

Wetland - 0.2 credits for each 39 acres.

Wetlands that are actively farmed - 2.0 credits for each 359 acres.

All PDCs may be sold on the open market. Each credit sold entitles the buyer to construct four homes in addition to the zoned maximum in a regional growth area. Thus, even landowners with small holdings in the Preservation Area District or the Agricultural Production Areas may benefit from the PDC program. (The program, in fact, allows persons with holdings as small as 0.1 of an acre to obtain 1/4 of a PDC.) Once a landowner sells the PDCs allocated to him by the Pinelands Commission a restriction prohibiting future development is placed on the deed to his property. The PDC buyer must in turn present a copy of the deed restriction, and The Pinelands Commission's certification of the transfer, to the municipality in which he plans to build.

The PDC Bank: In order to spur more sales in the PDC market New Jersey enacted the Pinelands Develoment Credit Bank Act.[32] [hereinafter referred to as Bank Act] The Bank Act appropriated

five million dollars from the State General Fund to be used by the Bank for buying and selling PDCs. Under the terms of the Bank Act, credits maybe purchased by the Bank to further the objectives of the PDC Program or "when necessary to alleviate hardship"[33] Each credit must be purchased for at least $10,000.00 and at no time may the purchase price exceed 80% of the PDCs market value as determined by the Bank's board of directors.[34]

Another function of the PDC Bank is to guarantee loans secured by landowners using their PDCs as collatoral. In this manner landowners may use and enjoy their PDCs without selling them, thereby making the PDCs more a flexible type of compensation. The bank is also the designated registry of all PDC transactions.[35] Pinelands development credit certificates are to be issued to all PDC owners by the bank. Subsequently the bank is to record the names and addresses of all PDC buyers and sellers as well as information on where the receiving and sending parcels are located. Additionally the bank is to perform a yearly enumeration of all PDC related transfers.

Conclusions: - On paper the Pinelands Development Credit program works fine, but in reality it has experienced many practical difficulties. The greatest problem facing the PDC program is the lack of communication and cooperation between the Pinelands Commission and the fifty-two municipalities located within the Pinelands Reserve. Moreover, the municipalities don't always cooperate with each other. One county planner I spoke with

remarked that it was like trying to negotiate with "fifty-two little kingdoms all of which are looking after their own interests." By the end of 1985, ten municipalities had still not brought their land-use master plans into conformance with the Pinelands Commission's CMP.[36] Until the Commission and these municipalities work out their differences, which mainly concern future density allowances, the PDC program will not be able to operate efficiently.

Thus far the PDC market has been very slow. There are several reasons for this situation. First, as mentioned above, a number of municipalities have not yet conformed to the Pinelands Commission's requirements under the CMP. Second, there were a great number of construction projects underway or planned before the PDC program was instituted. Many developers did not want to complicate their plans by participating in the PDC program. Only recently, as new development projects have been initiated, has the market for PDCs ripened. Third, some of the municipalities designated as receiving areas do not want higher density development in their jurisdictions. Partially as a result of that situation, many of the receiving area sites selected by the municipalities and approved by the Pinelands Commission were unattractive to developers. Often they were far from growth areas and lacked desired public services.[37] Finally, there is no effective regionwide agency to facilitate PDC transfers. The Pinelands Development Credit Bank may eventually fill that void, however, the Governor has not yet appointed the board members, so the bank is not functional.

The size of the Pinelands region, and the number of local governments involved, pose difficult problems for the PDC program. The cohesiveness which a properly functioning development credit agency could provide is essential to its success. At least one county has taken the initiative by creating a county-wide PDC bank. The Freeholder's Board of Burlington County created a Development Credit Exchange. While the Exchange was actually created several years before the Pinelands Development Credit Bank Act was passed, it operates on the same basic premise. As of July, 1986, the Exchange (which is financed by County Funds) had bought ninety PDCs and sold ten. A planner with the Burlington Exchange explained that County programs are necessary because the Pinelands Commission has no mechanism for effectively promoting PDCs on the local level.

Aside from the absence of an effective coordinating agency, the Burlington Exchange planner added that a major problem with the PDC program is the failure of municipalities to effectively down-zone the receiving areas in their jurisdictions. At first glance this criticism seems to be somewhat of a paradox. One end result of a TDR program is to increase density levels in receiving areas. As such, there is a natural inclination to believe that the allowable base density levels in the receiving areas must be increased. This is not necessarily the case. TDR programs allow developers to buy development credits so that they can build in excess of established base density levels in receiving areas. If developers can already build at sufficiently high density levels, any increased density allowances may not be

financially worthwhile to them. There is a need to set a base density for development in receiving areas low enough so that the TDR bonus is appealing to developers. The New Jersey experience thus far suggests that while some small developers may take advantage of the PDC program, the larger developers and land speculators do not have much incentive to participate.

In the end, what is missing in the PDC program is exactly what the Rutgers group stressed - good planning, especially in the receiving areas. Overall, the program suffers from a lack of cooperation between the various affected governments, both state and local. Many of the uncooperative municipalties want to save the Pinelands, but not at the cost of higher development densities in their own jurisdictions. The problem arises in part from New Jersey's system of township government where the municipalties play a stronger role in governing than do the counties in which they exist. More than that, though, the PDC program is at the disadvantage of being just a small part of the total Pinelands preservation project. Only recently, with the enactment of the not yet fully functional Pinelands Development Credit Bank Act, did the PDC program attain the stature it deserves. With the passage of the Bank Act the State has shown its determination to keep the PDC program alive. For the program to realize its full potential, however, the State will have to apply a firm and coordinating hand to move all of the municipalities into line with the Pinelands Plan.

D - The Montgomery County, Maryland TDR Program

Program Goals: Montgomery County, Maryland is located immediately to the northwest of Washington, D.C. For many years it had remained a predominently rural county of open spaces and agricultural land. By the early 1960's, however, it had become apparent that suburban development spreading northwards from Washington was expanding over the county at an alarming rate. During the fourteen years between 1950 and 1964 farm acreage in the County declined from 213,000 acres to 155,305 acres.[38] By 1979 this figure had fallen even further to only 131,516 acres.[39] Clearly, there had to be some response to the burgeoning development pressures, or the county would be in danger of losing most of its productive farmland.

The Maryland-National Capital Park and Planning Commission (M-NCPPC) is a State created bi-county planning agency which has authority over Montgomery and Prince Georges Counties. Within the M-NCPPC, the Montgomery County Planning Board is directly responsible for planning in the county. In 1964, the M-NCPPC first proposed its General Plan for Montgomery County. This plan, the so-called "wedges and corridors" plan, was adopted by the County Council in 1969. The plan called for setting aside specified areas for open space and agricultural use. These preserved areas were to be wedges between the corridors of growth that were pushing out from Washington. In 1973, the County Council created a "Rural Zone" which occupied about one-third of northern part of the county. Lots in new subdivisions in that

zone were required to be at least five acres in size. When this measure failed to halt development the Council, in the fall of 1979, enacted emergency legislation restricting subdivision in a designated agricultural zone to one unit per twenty-five acres.

Following the Council's emergency stop-gap action the Planning Board was charged with creating a comprehensive plan to preserve the county's farmland resources. In 1980 the Board responded with the Functional Master Plan for the Preservation of Agriculture and Rural Open Space. The plan was primarily designed to focus on the "identification and application of land use regulations and incentives to help retain agricultural land in farming and complementary rural open spaces."[40] Central to this effort has been the implementation of the county's very successful TDR program. This section will examine the various components of the Montgomery County TDR program and assess the reasons behind its success.

Land-Use Policy: Land-use under the county's 1980 Functional Master Plan falls into one of four categories:[41]

1 - Agricultural Reserve (Primary Agricultural Area)

The Agricultural Reserve represents the "critical mass" of working farmland in the county. Its 110,000 acres were deemed of adequate size to provide a viable farmland system. Not all the land in the agricultural reserve is farmland. Some of the land is "complementary rural open space" which will serve to support the farmland both aesthetically and functionally. The Agricultural Reserve is the focus of the Functional Master Plan's farmland preservation policies, and is the sending area for the TDR program.

2 - Rural Open Space (Secondary Agricultural Areas)

These areas are located in close proximity to small

developing communities. Much of the farmland in this area has already been broken up by rural subdivisions. Under the Functional Master Plan these areas are to be developed for a mix of residential and farming uses. Cluster zoning techniques are recommended for preserving land in this area.

3 - Rural Communities and Villages

These are historic rural communities which are primarily zoned for residential use. They were not subject to the 1973 zoning regulations and most are zoned for 1/2 acre lots. Many of these communities have their own master plans with which the county's plan is consistent. The county's Functional Master Plan envisions these areas as agricultural support centers that will supply the farmland area with limited conveniences and agriculturally related commercial needs.

4 - Corridor Cities and Satellite Communites (Growth Centers)

These areas were designated for development under the 1964 General Plan. Density allowances have been or will be identified on area master plans. The growth areas are intended to serve as the receiving areas for TDRs transferred from the Agricultural Reserve. Distribution of the TDRs throughout the growth areas will be treated by individual area master plans.

Downzoning the Sending Area: The initial event in the TDR program was the creation of the Rural Density Transfer Zone (RDT) which encompasses all the land in the Agricultural Reserve. Land within the RDT was downzoned from one dwelling unit per five acres to one unit per twenty-five acres. Downzoning has several purposes. First, research had indicated that twenty-five acres was the minimum area necessary to maintain an economically viable farm. Through downzoning, then, the preservation of workable farmland is ensured. Second, while the land would still be useful for agriculture, the low density would probably eliminate its usefulness for residential purposes. Since landowners would not be deprived of all economic use of their property, the

program stands a better chance of weathering court challenges. Third, downzoning creates an incentive for farmers to market their TDRs. While landowners in the RDT can only develop their land at one unit per twenty-five acres, the number of TDRs they can sell is based on the former zoning ratio of one unit per five acres. By allowing landowners to sell their development rights at higher density levels than they would be allowed to develop their land, the landowners are protected from any potential "wipe out" arising out of the downzoning.

Defining the Receiving Areas: The sending areas are defined by their location within the Agricultural Reserve's Rural Density Transfer Zone. The Reserve includes the "critical mass" of active working farmland and complementary woods, parks and fallow areas in the county. Locating the receiving areas for the transferred rights is a somewhat more complicated process. Under the TDR scheme the receiving areas may be developed at higher densities than would otherwise be allowed. It is, therefore, very important that the receiving areas be properly located relative to existing residential development. To ensure that the receiving areas have a "minimal adverse impact" on the existing community, detailed master plans for each growth area have been developed. Only after a receiving area has been charted on an area master plan, submitted to pubic debate and approved by the County Planning Board, can TDRs be applied to development projects in the area. The first decision made in defining the receiving areas was to limit them to residential uses only.

Since TDRs of sending areas were measured in terms of the number of residential units, the planners believed it would only create complications if they tried to convert residential units into commercial or industrial units.[42] The actual selection of the receiving areas must follow the guidelines set out by the County's Functional Master Plan[43]:

a. The base or minimum density recommended by the master plan for receiving area would not be below the minimum that would be reasonable from a planning prespective.

b. The optional density through transferable development rights recommended for a receiving area in a new master plan shall not exceed the ability of the planned public facilities to serve the area or the ability of the land and the environment to accommodate the optional density, including MPDU's* and the optional density and related land uses shall be compatible with the density and uses planned for the surrounding areas.

c. In general, property proposed in a new plan for downzoning from its existing zoning should not be designated as a receiving areas.

d. The Transfer of Development Rights option generally should not be exercised to increase density derived from the Planned Development option.*

*MPDU's (Moderate Priced Dwelling Units) and the Planned Development Option are other land-usemanagement tools which use the opportunity for increased density allowances as an incentive for developers to participate.

Additionally, each area master plan must set out certain guidelines regarding the placement of receiving areas in its jurisdiction.

Calculating the TDR development densities is fairly simple. Each proposed receiving area has a base density; that is, a density up to which developers may build as of right under the existing zoning laws. Taking into account that base density

and the particular physical, environmental, and demographic characteristics of each proposed receiving area, an optional TDR density level is calculated. By subtracting the maximum number of units which could be built under the base density from the maximum number which could be built utilizing the optional TDR density level, the available number of TDR's for a receiving area can be found.[45] For example:

Size of tract - 100 acres

Base density - 2 units/acre

TDR density - 3 units/acre

TDR density x acres 3 x 100 = 300 units

Base density x acres 2 x 100 = 200 units

Number of TDR's which can be transferred to the receiving area: 300 units - 200 units = 100 units

The County's Master Plan requires that at least two-thirds of the available TDRs for a site be purchased before any project will be allowed to utilize the optional density level. This requirement may be waived by the Planning Board either for environmental reasons, or if the increase in density poses problems for adjoining land use.

The Transfer Process:

Some TDR programs, the New York program for instance, require a developer to negotiate numerous complicated and unfamiliar procedures to gain approval of a development rights transfer. In Montgomery County, however, a developer planning to

purchase and use TDRs does not need to take any extraordinary actions. After purchasing the RDRs the developer merely needs to follow the normal procedures used when apply for a permit to develop a subdivision. When the final plan for the receiving area subdivision is approved it is recorded along with a conservation easement on the sending property. Thereafter the development potential of the sending property is limited to the number to development rights retained. (Planners at M-NCPPC expressed the belief that recording TDR transactions in the land records office was more efficient than creating a separate recording authority. The land records office already has established procedures for recording real estate transactions, and administrative costs don't have to be covered by the Planning Board.)

The comparative simplicity and common acceptance of the subdivision process is considered to be an incentive for developers to use the TDR program.[45] It has been modified only slightly to include the TDR deed and easement transactions. The entire transfer process involves five steps. First, an RDT landowner sells all or part of his TDRs to a person owning land in a receiving area. This is accomplished through a deed of transfer. This instrument is merely a contractual agreement to buy and sell the TDRs. It may be drawn by the private parties involved in the sale, or the M-NCPPC has standardized forms available. (Because changes in unit density may be required before the site plan is approved, TDRs are usually bought on option contracts so the purchaser is not left with extra

credits.) Second, the rights purchaser files a preliminary plan of subdivision with the Planning Board. The plan must utilize at least two-thirds of the available rights transferable to that receiving site. Third, the purchaser must submit a site plan, which is a highly detailed outline of the proposed development. This requirement reflects the need to see that the project is compatible with the environment and residential setting of the receiving area. Fourth, a restrictive easement is recorded on the sending parcel. This easement is granted to the county; it is perpetual, runs with the land, and limits future development to the parcel's remaining development rights, if any exist. (The M-NCPPC will also supply easement forms.) Finally, a record plat for the subdivision is filed. It must indicate the number of TDRs used, and the reference number of the deed of transfer.

The TDR Bank: The Montgomery County Council has recently approved the creation of a TDR bank to supplement the TDR program. Unlike the Pinelands bank, the Montgomery County TDR bank is not meant to be the program's administrative branch. It will not issue certificates of TDR ownership or keep TDR transaction records. The bank's major function will be to guarantee loans for farmers who want to use their TDRs as collateral. There is presently one private bank (a second may be added) participating in the program. These banks will actually provide the loans and the TDR bank will guarantee it. Only as a last resort will the TDR bank purchase TDRs or provide loans with its own funds. The purpose of the bank is to help farmers secure

financing without being forced to sell off part of their land, and to lend credibiity to the program in the public's eye. The bank is not, however, meant to be a dumping ground for landowners who do not want to bother with marketing their TDRs.

Conclusions: Thus far the Montgomery County TDR program has been a success.

As of September, 1986, the Planning Board has given final approval to the use of 1,145 TDR's in receiving area development. Another 2,000 TDR's are in the approval process. Many factors have contributed to the program's good record. In assessing these factors the county's physical location and characteristics are not to be overlooked. TDR programs will not work equally well everywhere. It is essential that there be satisfactory receiving areas which are in demand as a residential locations. The receiving areas in Montgomery County are on the outskirts of Washington, D.C., and so the demand for residential construction is very high. Planners at the M-NCPPC warn that this might not be the case in other areas, especially rural ones. There will be no market for TDRs absent a demand for development in the receiving areas. Thus, the location of the project area relative to desirable residential locations is of vital importance.

Another major advantage of the County's TDR program is that it is overseen by a highly organized and well funded planning agency. Many local governments are only now awakening to the need to control development. They may enter into a TDR program

without any substantial planning experience. Montgomery County is lucky to have a well developed system of local planning, and cooperative governing units within the county. Moreover, prior to the enactment of the present master plan the M-NCPPC had run a trial TDR program in the village of Olney.[46] This type of experience is not be underestimated. The availability of a knowledgeable and practiced team of planners goes a long way towards organizing a successful TDR program.

Finally, the public seems to be behind the program. This can be attributed to at least three factors. First, all the area master plans which locate the receiving areas are open to public debate. This way no community will have higher densities thrust upon it without a chance to discuss the potential impact with planning officials. Second, there seems to be a general appreciation of the county's open spaces and a recognition that they are worth saving. Third, the planning agency has good lines of communcation with the public. Its facility houses an information center and explanatory material on TDRs is available. Moreover, the agency is willing to share its experience and expertise with other interested jurisdictions. All of these factors combine to produce a working TDR program.

E - Other TDR Programs and Proposals

The four programs reviewed thus far represent the most celebrated TDR plans. There are, however, a number of other TDR programs across the country and even within Maryland. These

programs represent the efforts of state and local governments trying to preserve the valuable assets of their jurisdictions. Some of the programs have met with success, while others have failed or have been held to be unconstitutional. Whether the results are positive or negative, though, the increasing use of TDR programs to solve land-use management problems is encouraging. (Note: most of the information in this section was obtained through telephone interviews with planning officials.)

Buckingham Township, Pa. - The Buckingham program to preserve farmland and open space is now essentially inactive. Poor communications between government and landowners spelled failure for this program. Farmers and the Board of Supervisors were at odds over the program and the farmers reportedly did not trust the planners. A major point of conflict was the price being offered for TDRs. Farmers found that they could not get more than $2,500 per credit. Local "gentleman farmers" (described by one municipal worker as "lawyers who had bought land in the country"), however, were able to sell their TDRs, mostly to each other, for several times that value. The vast majority of TDR owners, though, were farmers. Without their participation the program died.

Palm Beach County, Florida - Palm Beach County has operated a TDR program since 1980. The program has been plagued with problems, however, and only one transfer has been made under it. This program is aimed at preserving agricultural land. Four TDRs are

generated by every five acres in a designated agricultural reserve area. Rights may be purchased on the open market and transferred to designated receiving areas within an urban services zone.

Several problems have been identified. First, the area has a long history of poor land-use planning. Prior to 1980 numerous development projects were approved which did not have to meet the strict post-1980 regulations, especially those regulations concerning public facilities. There are still about 200,000 of these approved but unbuilt residential lots. The existence of these lots, which do not have to meet current standards, has depressed the TDR market.[46]

Second, prior to the implementation of the TDR program Palm Beach granted bonus density credits through a Planned Unit Development (PUD) program. The PUD program is still in operation and has deflated the TDR market by taking away the incentive to buy TDRs. Merely by building PUDs developers can gain density bonuses at no extra cost to them. Since TDRs cost money developers would rather just use the PUD program.

Third, the cost of TDRs is discouragingly high. Speculators own about 2/3 of the land in the Agricultural Reserve.[47] Because the TDR program has had so little success there is no reason to believe it will survive for long. Landowners are not willing to sell TDRs for low prices now, because they believe they will get more later on a decontrolled market.

Unless the county is willing to tighten up its zoning regulations the TDR program cannot survive. By allowing

developers to hold pre-1980 approved units in reserve, and to use PUDs to get density bonuses, the County is undermining the TDR program. With so little incentive to buy TDRs, a viable market - which is vital to any TDR program - will not develop.

Jackson, Wyoming - Jackson is located at the edge of the Grand Teton National Park. Surrounding the City are open spaces, farmland, and a grand view of the mountains. A large part of Jackson's economy is derived from tourism provided by those who come to take advantage of the city's close proximity to the mountains. It is a major goal of the Teton County Planning Office to preserve this panoramic setting.

Currently Jackson is utilizing a PUD program. The program operates by granting density bonuses to developers who reserve 50% of their project site for open space. This system has failed to produce adequate results, however, because many of the open spaces do not connect. The overall effect of these scattered open spaces has not preserved large open areas as desired by the Planning Board.

In an attempt to remedy the problem Jackson is planning to institute a TDR program. Unlike the Palm Beach plan, in Jackson, the TDR program will largely replace the PUD Program and not supplement it. Undoubtedly developers will present a strong opposition to the plan; if it passes they will have to pay for density bonuses in the form of TDR's, while they can currently get bonuses free with the PUD program. Nevertheless, the PUD program has shown that there is a demand for density bonuses, and

by eliminating the PUD option there will be no alternative to undermine the TDR program. Importantly, the Planning Board does not envision a need to rezone the preservation area. Zoned density allowances are already very low so only a restructuring of the bonus density system from PUDs to TDRs will be involved. This eliminates the chance that the downzoning will be challenged as a taking in court. The Board plans to offer high density allowances in the receiving areas as an incentive for transfers. Through use of the TDR program the Board hopes that large contiguous areas of open space will be preserved.

Dade County, Florida - In 1981 Dade County created a TDR program aimed at protecting the surface and ground water resources of the East Everglades. Under the TDR ordinance, landowners in the designated preservation areas were alloted from one Severable Use Right (SUR) per five acres of unimproved land, to one SUR per forty acres, depending on which zone within the preservation area the property is located. The SURs may be sold on the open market and used to secure development bonuses in unincorporated areas of the county designated for urban development on the county's master plan. The county's only role in the program is to record the transfers. Purchasers may develop, in addition to the authorized number of dwelling units in each zoning district, one dwelling unit for each SUR. Additional development utilizing the SURs may not exceed the limitations set forth for optional SUR development in each zoning district by the ordinance. In addition to the density bonus, SUR purchasers may also take

advantage of an easing in certain design standards including setbacks, height and frontage.[47a]

The Dade County plan is exceptional in that it allows for SUR transfers to increase density in commercial and office work development as well as residential development. Depending on the location of the receiving parcel, developers of designated commercially zoned land may obtain a .010 to .015 increase in their floor area ratio per acre for each SUR, subject to maximum lot development limitations.

Despite innovations like transfers to commercially zoned receiving areas the program has a poor record of success. Only a few transfers have been made and not all have lead to development in a receiving area. Three factors have contributed to the programs unenthusiastic performance. First, the County Commission, which oversees the program, has undermined its own plans by readily granting variances to developers. SURs cost, on average, from $2,000 to $3,000 each. By contrast the entire hearing and plan approval process to receive a variance costs only about $900-$3,000. No financially sensible developer is going to pay for each individual SUR when, except for the cost of the hearing, he can get an increase in density through a variance for a much more nominal processing fee.

The second factor working against the success of the program is the failure of the County Commission to adequately publicize the program. As a result, the public has little or no understanding of the TDR process. Planners try to introduce the SUR plan to people who want to get variances approved for their

land. Most people, though, are unfamiliar with the TDR concept and prefer to use the variance process which is simple and in many instances cheaper.

Finally, the county planning department does not know who owns many of the sending area properties. The land records office only records the owner of record. Many large parcels, however, are owned on record by management companies. Quite often, these management companies have sold the land on installment contracts to numerous private individuals. Because the planning department does not know who may have title to the land through a pending contract, it cannot notify owners about its TDR program. This situation may pose many future problems for the program. Each zone within the sending area has a minimum lot size requirement for development. The required lot sizes range from twelve acres to forty acres. Landowners with less than the required acreage will either have to sell their TDR's or retain the land in an undeveloped state. Further, much of the preservation area is not suited for any economic use besides development. Planners have already encountered preservation area landowners who did not know the land-use restrictions existed, and who now own land which cannot be developed. Legal challenges to the program will undoubtedly occur in increasing numbers as the many pending installment land contracts are completed.

III TDR's in the Courts

The transferability of development rights is a relatively

new concept in property law and has not yet spawned much litigation. Only a few cases actually focus on the legality of TDR programs. In most instances TDRs have merely constituted a subsidiary issue which the court has considered relevant to resolving the primary issue in the case. This section will examine those cases where TDRs have played a major, if not central, role in the conflict. Subsection A will survey federal cases in the Supreme Court and the lower federal courts. Subsection B will examine the decisions of several state courts which have addressed the TDR issue. Finally, subsection C will analyse two important Maryland court decisions which will affect the future of TDRs in that state.

A - Federal Courts

1. The Supreme Court

The constitutionality of a TDR program has never been directly addressed in federal court. TDRs have, however, figured as component issues in several federal cases. The seminal TDR case is Penn Central Transportation Co. v. New York City.[48] Although this is undoubtedly the most frequently cited case concerning TDRs, it actually reveals quite little about how the Supreme Court might rule in the future on the constitutionality of TDR schemes. The Penn Central case concerned the New York Landmark Commission's denial of Penn Central's request to build a fifty-five story office tower on top of Grand Central Station.

At issue in the case was whether the New York landmarks law, which restricted development on individual historic sites, constituted a "taking" which would require "just compensation" under the fifth amendment.[49] The legality of the city's TDR scheme, though, was not a question in the case.

Writing for the majority, Justice Brennan first considered the landmark law in general and found that it was "not rendered invalid by its failure to provide 'just compensation' whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws".[50] The Court then addressed the question of whether in this instance "interference with [the] appellant's property is of such magnitude" that compensation was required under the fifth amendment.[51] The Court gave several reasons why no compensation was required under the circumstances. First, the law both permits and promotes the continued use of the property as a train station, which has been its use for over sixty years. Thus, the appellant's "primary expectation concerning the use of the parcel" was not frustrated.[52] Second, while the Landmark Commission would not allow the proposed fifty-five story tower to be built, nothing in the Commission's report suggested that a smaller structure would not be allowed. The law does not prohibit further development of the landmark, it only prohibits development which does not "harmonize" with the landmark.[53]

The Court's third reason for finding that the landmark law did not interfere with Penn Central's use of the property to such

a degree that compensation was warranted, was because of the existence of the city's TDR program. Penn Central, the Court held, had not been denied the ability to use their development rights because the rights were made transferable to at least eight parcels in the vicinity. The Court stated that:

> While [the TDRs] may not have constituted "just compensation" if a "taking" had occurred, the [TDRs] nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.[54]

Caution should be exercised not to read too much approval into the Penn Central Court's comments on TDRs. The Court acknowledged the appellant's contention that the New York TDR program was "far from ideal", but noted that "at least in the case of the Terminal, the rights afforded are valuable."[55] It can be seen that the Court only considered the New York program, and only in the instance of its application to Grand Central Station. Moreover, it was the landmark preservation law, not the TDR program which was at issue. The TDR program was considered only as a mitigating component of the overall landmarks legislation. It is fair to say that the Court's opinion posed no objections to TDR schemes in general. It may even be said that the Court recognized the value of TDRs to the property owner in determining that a "taking" had not occurred. At the same time it must be remembered that had the Court held the landmark's law invalid as constituting a taking, the majority found that TDR's "may well not have constituted 'just compensation'."[56] Finally,

it should be noted that the TDRs were found to mitigate the regulation's effect here, because Penn Central had a number of viable receiving parcels to use them on.[57] If there were no apparent or substantial use for the TDRs it is probable that the Court would not have pointed towards the TDR Program as support for finding that there had been no "taking".

The majority's recognition of TDRs as a valuable asset relevant to the taking question was not shared by the minority. In his dissent, Justice Rhenquist found that the landmark law's restrictions did constitute a taking,[58] and that under the fifth amendment "[just] compensation must be a full and perfect equivalent for the property taken."[59] Notably, he did not rule out the possibility that TDRs might be a "full and perfect equivalent", but recommended that the case be remanded to decide that question. To the minority, then, the only function of the TDR program was to act as compensation for the landowner's lost rights: "Appellees [the city], apparently recognizing that constraints imposed on a landmark site constitute a taking for Fifth Amendment purposes, do not leave the property owner empty-handed."[60]

The Penn Central majority looks to TDRs as evidence that a taking has not occurred because they represent part of the economic value of the landowner's remaining rights in the property. The dissent however, looks only towards those rights which the regulation has taken from the landowner. To the dissent, TDR's do not represent rights remaining with the land but an attempt to meet the duty owed the landowner under the

fifth amendment's "just compensation" clause.

Planners may infer from the Penn Central case that, while the Court did not specifically say so, it did not question the validity of the TDR concept. This is lttle solace but it may be all that is forthcoming until the Court is faced squarely and unavoidably with the question of a TDR program's constitutionality. Even then, the Court is likely to restrict its opinion to the particular TDR scheme before it in determining just what kind of animal TDR is: the "perfect equivalent" of just compensation, or merely a form of mitigation that maybe examined on the taking scales. The Court is especially reluctant to make general rulings in "takings" law. Its tradition of making case by case decisions based on detailed factual inquiries is firmly established.[61] Because of this "ad hoc" approach it is difficult to say how the Court will treat the TDR issue if and when it comes up.[62]

2. Lower Federal Courts

In several instances lower federal courts have cited the Supreme Court's language in Penn Central to support the concept that TDRs and other land-use rights are factors which "mitigate whatever financial burdens the law has imposed" on the landowner.[63] In Deltona Corp. v. United States,[64] the plaintiff alleged that it had suffered an uncompensated "taking" because, acting in accordance with its authority under federal law, the Army Corps of Engineers would not allow the plaintiff to develop

land which it owned on a Florida waterway. While recognizing that Deltona had suffered some economic loss the Court of Claims held that the Army's action was not a taking. In support of its holding, the court noted that Deltona was not depived of all "economically viable use" of its land.[65] Among other land development possibilities, Deltona owned TDRs attached to the restricted parcel. Although the Army's action had nothing to do with the TDR program the court cited the Penn Central decision to the effect that TDRs mitigate the impact of restrictive regulations.[66] Similarly, the Ninth Circuit in Sederquist v. City of Tiburon found that the value of an alternative easement, like the TDRs in Penn Central, must be taken into account when measuring the economic impact of a challenged land use regulation.[67] Cases such as Deltona and Sederquist do not tell us much about how federal courts will view challenged TDR programs. It may, however, be somewhat reassuring to planners to note that these courts have embraced Penn Central in a positive light; they have treated TDRs as a mitigating factor in assessing the economic impact of a land-use regulation, and not as an attempt to compensate for a taking.

B - State Courts: - There have been several state cases challenging TDR programs either directly or as a component of a broad land-use management plan. The leading case in the direct challenge category is Fred F. French Inc. Co., Inc. v. City of New York.[68] (Discussed supra.) While the peculiar Special Parks District legislation involved in Fred French is not likely to

resemble any scheme enacted under the Critical Areas program, the lessons the case teaches are invaluable. The court identified two factors by which it evaluated the effect of the regulation on the landowner: the economic value of the property after restrictions were placed on its use and the value of the TDRs.[69] Since no development was allowed on the restricted parcels, and there was no designated receiving site for the TDRs, the court held that the economic value of the property had been destroyed.[70] The decision, however, sheds no light on the "takings" issue. The court held that as there was no physical invasion of the property there was no taking.[71] Instead the court held that the destruction of the property's economic value amounted to a "deprivation of property without due process of law."[72] Thus, Fred French indicates that there must be both a residual economic value to the regulated property and economic value to (i.e. a viable market for) the TDRs, if the TDR scheme is to be held valid.

In a recent Arizona case the court held that the absence of even one of these factors, a residual economic value to the regulated property , may defeat a TDR program. In Corrigan v. City of Scottsdale the Arizona High court held that a TDR program which left "no monetary value" to the regulated property constituted a taking.[73] The ordinance being challenged divided the hillside and mountain area which flanked the city's north end into two districts - a Conservation Area and a Development Area. A "no development line" was located wherever slopes were unstable, greater than a 15% grade, subject to easily eroded

soils or bedrock outcrops. Above that line, in the Conservation Area, no development was allowed. Below the line, in the Development Area, development was allowed as of right. Landowners in the Conservation Area could , however, transfer their development rights to the Development Area where they would be allowed to build at increased densities. The Plaintiff owned a 4,800 acre parcel of land; 80%, or 3,836 acres, of the parcel was in the no-development/Conservation area. Although the plaintiff's land holdings below the no-development line were of sufficient size to accommodate the TDRs from the restricted portion of the parcel, she brought suit to have the TDR ordinance declared unconstitutional.

In holding that the ordinance was invalid because it constituted an uncompensated taking, the court applied a two-pronged test. First the court held that "a legitimate state interest" was not "substantially advanced" by the ordinance: "Although the trial court found certain safety concerns it did not find that there would be a substantial threat to public safety without the ordinance. ... Therefore the ordinance was not a valid exercise of the police powers".[74] Second, the court held that the ordinance denied the plaintiff any "economically viable use of the land." No development at all was allowed on the regulated parcel. As such, appraisers for both the state and the plaintiff found that the parcel had no residual "monetary value". As a consequence of that finding the court held that the ordinance constituted a taking. The court further held that the TDRs did not constitute "just compensation" for taken property.

The Arizona Constitution explicitly states that such compensation must be paid in money.[75] (Note: The Maryland Court of Appeals recently interpreted the Maryland Constitution to require money as payment for just compensation. Thus, if a TDR scheme were held to be unconstitutional in Maryland, and a taking was found, the TDRs would not serve as just compensation.)[76]

In assessing the importance of this case to future TDR legislation several factors should be considered. First, the Scottsdale TDR scheme was very unusual. Like the Special Parks District law in Fred French it prohibited all development in the sending area. This type of TDR scheme, where the landowner either participates or is left with nothing, is called a mandatory scheme. In light of the holdings in Fred French and Corrigan, and the Supreme Court's reliance on the residual value of the train station in Penn Central, such mandatory schemes are not likely to pass consitutional muster in most courts. Most TDR programs, however, follow voluntary schemes and allow some residual use of the sending property.

It is interesting to note that while the New York court in Fred French required a physical invasion of the property to find a taking, the Corrigan court did not. The residual value of Corrigan's property was destroyed so the court found a taking; thus, the need to consider the value of the TDRs, which was the second factor in the Fred French court's due process analysis, was eliminated. Like the dissent in Penn Central the Corrigan court looks only to the rights which were lost and not to the rights which remain. The Corrigan court does not consider the

value of the TDRs as a mitigating factor in determining whether a taking has occurred. Moreover, because under the Arizona Constitution TDRs cannot provide "compensation" for a taking, once a taking has been found, the TDR's are effectively rendered meaningless to the controversy. (As previously mentioned, note 85 supra, the same would be true in Maryland).

Finally, the Corrigan court echos the Penn Central dissent in finding that by providing TDRs, and thereby not leaving the landowner "empty handed", the city is acknowledging that the regulation is a taking.[77] The court states:

> The city claims this action is a legitimate exercise of the police power and yet it attempts a form of compensation by way of the transfer of density credits. If this were a valid exercise of police power there would be no need for any form of compensation.[78]

The Scottsdale program was particularly open to this attack. Because the program left no residual economic value in the sending parcel, the TDRs look all the more like compensation for a taking. In part, then, the court's analysis can be tied to the underlying weaknesses in the TDR program. However, the court's reasoning is also a reflection of that school of thought which places primary emphasis on what has been taken from the landowner, and not what he has been given in return for, retained after, or gained from the regulation.

Several other state courts have considered the validity of TDR programs. In Aptos Seascape Corp. v. County of Santa Cruz[79]

the California Court of Appeals reversed a trial court's ruling that a land-use ordinance constituted a taking without just compensation. The plaintiff had purchased 110 acres of sea-side property in 1963. In 1967 the county rezoned the property. Under the new ordinance the plaintiff could not develop the seventy acres of its parcel which included beaches, arroyos, and palisades. The plaintiff was, however, allowed to transfer development rights from the restricted part of the parcel to the remaining forty acres which were "benchlands" located above the 100-foot contour line. The court held that the ordinance was not invalid because the TDRs mitigated the effects of the restriction:

> In other words, when governmental action has divided contiguous property under single ownership into separate zones, and has restricted development in one of those zones, a provision allowing some transfer of dvelopment rights from the restricted property or awarding compensating densities elsewhere may preclude a finding that an unconstitutional taking has occurred.[80]

The court directed the trial court to dismiss the damages that had been awarded to the plaintiff subject to the county's actually granting the TDRs.[81]

The Aptos case illustrates just how confused takings law is. Like the Special Parks District in Fred French, and the Scottsdale plan in Corrigan, Aptos presents a mandatory TDR scheme. Nevertheless, the court found no taking and no due process violation. The court held that because Aptos had not presented any development plans under the ordinance "it was

impossible to tell whether plaintiff had actually been deprived of rights or whether the county would make some provision for the transfer of those rights ..."[82] It seems, then, that the court did not want to rule that the mere enactment of the regulation constituted a taking. Even though this may be the rationale behind its holding, the Aptos court displayed a positive receptiveness to the TDR concept.

In City of Hollywood v. Hollywood Inc.,[83] the Florida Court of Appeals reversed a circuit court ruling which held that a TDR program was invalid under Florida law. The conflict centered on the rezoning of a 1 1/4 mile strip of land owned by the plaintiff. The city decreased the allowable multi-family densities on the western part of the parcel, and created a new, low density, single family unit zone in the eastern part. The ordinance also provided for an optional transfer of development rights from the eastern part of the parcel to the western part. Transfers were conditioned upon leaving the eastern part undeveloped. The plaintiff sued, claiming in part that the TDR scheme was invalid because it involved a transfer of title (not merely a conservation easement but a dedication of the land to the city),[84] and because, for all practical purposes, the transfer was mandatory.

The Court of Appeals found no support for either of the plaintiff's assertions. As to the first point the court stated:

> [W]e cannot see why an actual conveyance should prove fatal unless the preservation of open space is somehow temporary. To us, the quid

> pro quo is what should control. If the developer takes advantage of the increased density transferred and builds accordingly, does this not mean the preservation of the open space is forever? We certainly hope so and are suspicious of any motives for keeping a hold on it. [emphasis in original][85]

The court further held that the program was not mandatory because the plaintiff could forgo the transfer process and build single family homes.[86]

This case is important for several reasons. First, and most significantly, it is important because the court upheld the application of the TDR concept as a valid, legal, land-use management technique. Second, the court displayed unusual flexibility in upholding a very innovative TDR scheme. The transfer process was not mandatory in the sense that the landowner either participated or was left with nothing. However, it fits somewhere in between what have been defined as mandatory and voluntary schemes in that the landowner must transfer full title of the land to use the TDRs. This seems closer to the mandatory scheme than the voluntary, where typically the landowner is left with some residual use of the land. It is certainly open to question whether other state courts would uphold this law.

In Dupont Circle Citizens Ass'n. v. District of Columbia Zoning Com'n.[87] the court upheld the appropriateness of using TDRs to implement a Planned Unit Development (PUD) program. In a broad-based challenge to a proposed PUD, a citizens group charged that the District's zoning regulations did not provide for TDRs. The court disagreed and held that "[t]he very nature of

the PUD concept promulgated by the Zoning Commission . . . suggests that a transfer of development rights from one building to another must have been contemplated as one that was both feasible and appropriate in the development of such a plan."[88] The Commission having approved the PUD plan, the court held "we know of no good reason why . . . [the Commission] may not take into consideration a mutually agreed upon transfer of development rights."[89] This case does not directly consider a TDR program. It is, nonetheless, important because the court recognizes the validity of transferring development rights from one property to another. This, of course, is the essential component of any TDR program.

The state cases present a mixed record for TDR programs. Overall, however, the outlook is positive. Cases like Fred French and Corrigan, which both invalidated TDR programs, turned not on the invalidity of the TDR concept so much as the invalidity of the particular TDR scheme being considered. Both programs involved mandatory TDR schemes where the landowner either participated or was left holding property with no economic value. As of yet, no voluntary TDR scheme has been held invalid. Moreover, even in holding the Special Parks law to be unreasonable, the Fred French court did not find that the TDR program constituted a taking, and it recognized that development rights are a "potentially valuable and even transferable commodity [which] may not be disregarded in determining whether the ordinance has destroyed the value of the underlying property."[90] It can be seen, then, that TDR schemes have the

best chance of withstanding court scrutiny if they are not mandatory, leave some residual economic value in the sending parcel, and create a viable market for the development rights.

C - Maryland Cases - Maryland courts have considered several TDR related cases. The results of these cases are important primarily for two reasons. First, and obviously, the Critical Areas program will be implemented in Maryland, so State case law is extremely relevant. Second, Maryland TDR case law concerns the Montgomery County program. Because of its successs and its application to the preservation of open spaces the Montgomery County program is a likely paradigm for the counties involved in the Critical Areas program. As such, the way in which Maryland Courts view the various legal questions surrounding the Montgomery County program is especially significant.

In Dufour v. Montgomery County Council the Circuit Court for Montgomery County upheld the downzoning of the properties in the Rural Density Transfer (RDT) zone by holding that the downzoning did not constitute a "taking" without "just compensation".[91] As an alternative finding the court held that the existence of a TDR program reinforced its decision that no taking had occurred.[92] The court held that under Maryland law in order to constitute a taking a zoning regulation and must "deprive the owner of all beneficial use of the property'".[93] Even though the ordinance "significantly limited" the amount of allowable development on the plaintiff's property, the court held that it permitted a number of other uses.[94] Therefore, the court held that "there

has not been a taking in the constitutional sense accomplished by the enactment of this zoning ordinance."[95] Even though the ordinance "significantly limited" the amount of allowable development on the plaintiffs' property, the court held that it permitted a number of other uses.[95a]

Having found that, even when considered alone, the downzoning ordinance did not constitute a taking, the court, in an alternative finding, considered the effect of the creation of TDRs on the taking question. (At the time the case was originally brought before the District Council for Montgomery County no receiving areas for the TDRs had been designated. By the time of this administrative appeal to the Circuit Court, receiving areas for 3,800 TDRs had been located). The court held the original "express commitment" of the County Council to create receiving areas for the TDRs, and the current designation of receiving areas for 3,800 TDR's showed that the TDRs "have a reasonably significant value".[96] In considering the relation of the TDRs to the downzoning ordinance the court held that because the Council did create the TDRs, and because they have some value, the TDR program "buttresses the conclusion previously reached that upon consideration of all factors there has not been an impermissible taking.[97]

Interestingly, the court also held that because there was no taking, even without the TDRs, the government was under no duty to pay compensation. Therefore, it did not matter whether the TDRs had an equivalent value to the lost development rights. The court viewed the TDR program as an "attempt" by the government

"to provide some measure of benefit to the property owner short of 'a full and perfect equivalent for the property taken'."[98] The court emphasized, however, that the government had "no constitutional obligation to provide any compensation."[99]

For obvious reasons Dufour is an important opinion. All the court required to uphold the validity of the downzoning ordinance was: first, that the ordinance pursue objectives "reasonably related to the public welfare" without being "arbitrary or caprecious"[100]; second, that it "advance legitimate government goals"[101]; and, finally, that it not deny the landowner of all use of his property.[102] Since the downzoning ordinance met these tests the inclusion of the TDR program is gratuitous because no compensation is owed. It would probably be politically impossible to pass such a strict downzoning without TDRs, or some other form of compensation, as a supplement. Planners, though, may be reassured by the fact that at least one state circuit court has held that the downzoning can stand on its own.

In Dufour the plaintiff's challenge was against the constitutionality of the downzoning ordinance, and not the TDR component of the county's plan. The court considered the TDR program in an alternative finding only after it had upheld the validity of the challenged rezoning action. More recently, though, the Circuit Court for Montgomery County heard a direct challenge to the county's TDR program. The plaintiffs in The Matter of the Application of Rock Run Limited Partnership contended that the county's TDR ordinance violated the state's requirement for uniformity in zoning.[103] As a second contention

they also charged that the ordinance was invalid because it allowed the County Council to delegate its zoning power to the planning board.

The Rock Run court dismissed the plaintiff's contentions with little discussion. The court held that the TDR ordinance could not be discriminatory as it complied with the General Assembly's statement of legislative intent to preserve agricultural land. [104] The court stated that "[a]s long as legislative and administrative controls are exercised as provided for in the ordinance, no harm is done to any land owner's rights."[105] As to the uniformity requirement the court held that the ordinance "compare[d] favorably" with tests described in Montgomery County v. Woodward and Lothrop.[106] In that case the Maryland Court of Appeals held that:

> [I]nvidious distinctions and discriminations in applying the uniformity requirement are impermissible. [citations omitted];

but,

> [T]he uniformity requirement does not prohibit classification within a district so long as it is reasonable and based upon the public policy to be served.[107]

The Court quickly disposed of the plaintiff's second contention that the County Council had improperly delegated its authority to the Planning Commission. Finding that the Council

and made the challenged amendments to the zoning ordinance the court stated that it would not "substitute its judgment" for the Council's.[108] Further it held that it "could not conclude that the amendment to the zoning ordinance was rezoning", and stated that "it seems late in the day" to be challenging the Council's decisions.[109]

Rock Run is not a well considered opinion. The issues are complex while Judge Mitchell's opinion is almost totally devoid of reasoning and explanation. Both the West Montgomery County Citizens Association, and the Maryland-National Capital Park and Planning Commission have appealed the decision. The Court of Appeals of Maryland granted certiorari and heard arguments in January, 1986. As of this writing a decision has not been rendered in the appeal. Clearly, the future of TDR programs in the State of Maryland depend on the outcome of that case, because it directly addresses the validity of TDR programs under Maryland law.

IV - Conclusions and Recommendations

In the realm of land use-management techniques, TDR programs are still a fairly new concept. Much has been written and said about such programs but, until very recently, comparatively few have been implemented. Nevertheless, the successes and failures of those TDR programs which have been implemented shed light on

how other jurisdictions which are considering the use of TDRs should design their programs. The following section will consider the experience of TDR programs both as a land-use management tool and in the courts. It will make several general recommendations on what is desirable and what should be avoided in a TDR program.

A - Creating a Market for TDRs:

This is without doubt the most important factor in the operation of a successful TDR program. Creating the TDRs involves nothing more than a legislative act. Creating a market for those rights, however, involves much more. Two elements are essential in creating a viable TDR market: first, a well planned land-use management system, and second, enough desirable receiving sites to fulfill all the possible transfers of rights.

In terms of TDR programs, good land-use management must accurately and efficiently define the program's sending and receiving areas. Defining the sending area involves identifying those areas which will exemplify and perpetuate the special resources which the TDR program is designed to preserve. Defining the receiving areas, though, involves several steps. The receiving areas must be desirable locations for the type of increased development (residential, industrial, or commercial) which the TDR program is going to allow. Beyond being in a desirable location for prospective developers the receiving areas must be located wisely with regard to existing development.

[illegible] these minimal considerations, developers will have no incentive to use the TDR's, and current receiving area landowners will fight the planned development. The best way to avoid these problems is to take the path Montgomery County has chosen. Each receiving area should be the subject of a detailed area master plan which assesses both development possibilities and the impact on existing communities. These plans should be submitted to the public for open debate and consideration.

Along with identifying the sending and receiving areas a well planned land-use management system must create an incentive for both the sellers and buyers of TDR's to participate in the program. In part this will be accomplished by properly identifying desirable receiving areas. However, there are other planning factors which need to be considered in creating incentive. Most importantly, planners must adapt their zoning policies to fit the needs of the TDR program. If allowable base densities are at too high a level in either the receiving or the sending areas there will be no need for developers to utilize the TDR program. An efficient balance must be struck between base densities and optional TDR densities. Further, the zoning system must be a tight one with no leaks. If variances are easily obtained, or if there are other means available to receive increased density allowances, then the need to utilize the TDR program will be obviated.

The second element involved in creating a viable TDR market, having a sufficient supply of desirable receiving sites to accommodate all the probable TDR transfers -- is necessary, but

not always possible. It must be emphasized that TDR programs will not work equally well everywhere; TDRs are not for everyone. The capacity a region has for TDR transfers is directly limited by the availability of desirable receiving sites. In areas where sending sites far out-number desirable receiving sites it will be necessary either to limit the size of the preservation area, or to utilize other land-use management techniques in concert with the TDRs. This may, for instance, be necessary in rural Chesapeake Bay area counties where a disproportionate number of the desirable areas for development are located in that portion of the local critical areas which is intended to be preserved. Further, very rural areas may tend to face the market problems noted above, and receiving areas may be difficult to locate because of low levels of existing development.

B - Communication Between the Planning Authority and the Community:

Even a perfectly designed TDR system will fail if the public will not participate in it. TDRs not only represent a new land-use management tool for planners, they also represent a new concept in property law and the public's popular understanding of "zoning" controls. It is to be expected that there will be resistence to the concept.[110] Jerome Rose analyzes the problem as follows:

> The psychological problem of the program for the transfer of development rights results from the fact that it comes on too strong. It comes on to the scene of well established land use controls with a boldness and a confidence that shatters the complacency and comfort of well-known truths and conventional wisdom. TDR calls into question many a priori principles. It defies classification into known categories; it raises anxieties about its impact upon cherished and settled doctrines upon which professional, proprietary, and physchological stability is founded.[111]

As Professor Rose correctly notes, the only way to overcome the resistance to TDRs is to promote a better understanding of the concept. This may best be accomplished by opening the planning process and it's products to the public. That is, planning decisions and recommendations should be open to public debate. There should also be ready public access to master plans and other information concerning the program. Moreover, the planning authority must take an active role in promoting the program. This means more than providing the public with copies of technical planning documents; it means preparing literature and programs aimed at educating the public about TDRs. Unlike zoning regulations, TDR programs are not just drawn up, implemented, and followed by the public. TDR programs require the public's active participation, and it is largely up to the planning authority to gain their cooperation.

C - Keeping the Program Simple:

While the planning stages of a TDR program are necesarily complex, the actual transfer process which the public utilizes need not be complicated. The New York program is the perfect example of what to avoid: numerous government agencies all get their say, several separate application processes all subject to different standards of approval, and an extremely limited choice of receiving areas is present. The optimal TDR scheme will involve only one administrative agency. It should, like the Montgomery County plan, tie the application process for development of receiving area to established appliation procedures, and should allow TDR sales to take place in an open market environment. Overall, the simpler the scheme the more receptive the pubilc is likely to be to it.

D - TDR Programs Should be Voluntary:

As previously noted, mandatory TDR programs are not desirable. Mandatory schemes are far more open to legal attack than voluntary schemes. Under a mandatory scheme a landowner must participate in the TDR program because he is totally prohibited from developing his property. If he does not participate then he is left with property which may be of no economic value unless it has a possible use besides development. Even then, the residual use of the property may produce only a fraction of the economic return that development

valid. For these reasons, mandatory schemes are open to takings and due process challenges in court.

By contrast, voluntary schemes leave some residual development value to the regulated property (e.g., Montgomery County allows one unit per twenty-five acres to be built under the downzoning ordinance). Only if the landowner chooses to participate in the TDR program will his right to develop be entirely curtailed. Because there is economic value left to the property after a voluntary TDR program is instituted, voluntary programs are less open to legal attack and public resentment than are mandatory schemes.

E - Discarding the Compensation Concept:

In property law the concept of compensation is inextricably bound up with the concept of takings. Both the Corrigan Court, and Justice Rehquist in his dissent in the Penn Central ,case, expressed the belief that the TDR programs were government attempts to compensate for takings.[112] Obviously, there is no way to prevent TDR opponents from expressing these views but, there is no reason to add fuel to their fire. In truth, TDRs are not meant to provide what is known as compensation (i.e., "just compensation") in the constitutional sense. TDR programs are an attempt by local governments to manipulate land-use through a combination of regulation and the open market to the best advantage of the general public. Compensation, in the constitutional sense, is a duty government owes a landowner for

[illegible] there is a fine line between the benefit given by TDRs and the benefit given by compensation. Local governments and planning authorities, however, should recognize this line and utilize the difference to their advantage.

The general guidelines presented in this paper should provide some idea of what is needed to operate a successful TDR program. Almost as important, is the recognition of what to avoid. Specific recommendations are impossible because TDR programs must be designed to fit the needs of each individual jurisdiction. TDRs are an innovative technique and utilized properly they may yield success where other land-use management schemes have failed. Thus far both the public and the courts in Maryland have been very receptive to TDRs. There are successful programs in both Montgomery and Calvert counties. If the Court of Appeals rules favorably in the now pending Rock Run Ltd. case, TDRs could be advantageously, albeit selectively, implemented in the Critical Areas program.

1 Carmichael, Transferable Development Rights as a Basis for Land Use Control, 2 Fla. St. U.L. Rev. 35 (1974).

2 Penn Central Transp. Co. v. New York City, 436 U.S. 104, 136 (1978).

3 Rose, A proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space, 2 Real Est. L. J. 635, 635-42 (1974).

4 Richards, Transferable Development Rights: Corrective Catastrophe or Curiosity, 12 Real Est. L. Rev. 26,29 (1983).

5 See, Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, in Transfer of Development Rights, 97-103 (J. Rose ed. 1975).

6 N.Y., N.Y. Zoning Resolution (1961).

7 Rose, note 3 supra, at 649.

8 Richards, note 4 supra, at 29.

9 Costonis, note 5 supra, at 101-103.

10 N.Y., N.Y. Zoning Resolution, Art VII, ch. 4, §74-79 et seq. (1980).

11 See, Richards, note 4 supra, at 32-52. (a discussion of the 1965 amendment and subsequent amendments to the New York zoning law and TDR program.)

12 Penn Central Transp. Co. v. New York City , 438 U.S. 104, 137 (1978).

13 N.Y., N.Y. Zoning Resolution §91-00 et seq. (1973).

14 See Generally, Marcus, Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks, 24 Buff. L. Rev. 77 (1974); see also, Note, Urban Park Preservation Through Transferable Development Rights: Fred F. French Investing Co. v. City of New York, 90 Harvard L. Rev. 637 (1977).

15 Fred F. French Inv. Co., Inc. v. City of New York, 39 N.Y. 2d 587, 350 N.E.2d 381, 385 N.Y.S.5 (1976).

16 Id. at 595, 350 N.E.2d at 386, 385 N.Y.S.2d at 9-10.

17 Id. at 598, 359 N.E.2d at 387-88, 385 N.Y.S.2d at 11-12.

18 See, Richards, note 4 supra, for an overview of the New York program.

19 See, J. Costonis, Space Adrift: Landmark Preservation and the Marketplace (1974), (for a discussion of the "Chicago Plan" which proposed many modifications of the New York program.)

20 B. Chavooshian, T. Norman and G. H. Nieswand, Transfer of Development Rights: New Concepts in Land Management, in Transfer of Development Rights, at 165 (J. Rose ed. 1975).

21 See, Id. at 172-174; Rose, note 3, supra at 651-2.

22 Rose, Farmland Preservation Policy and Programs, 24 Nat. Resources J. 618, 624 (1984).

23 Id. at 625.

24 Chavooshian, et al., note 20 supra at 181; Rose, note 21 at supra 635-6.

25 Id.

26 National Parks and Recreation Act of 1978 §502, 16 U.S.C.A. §471(i)(West 1985).

27 N.J. Stat. Ann. § 13:18A-1 to 29.

28 Id. at § 13:18A-5,6.

29 Id. at §13:18 A-8.

30 New Jersey Pinelands Commission, Pinelands Development Credits: A Landowners Guide (1982).

31 Id.

32 N.J. Stat. Ann. § 13:18A-30,45.

33 Id. at § 13:18A-34.

34 Id.

35 Id. at §13:18A-36.

36 New Jersey Pinelands Commission, Annual Report (1985). (All municipalities were originally required to have their new master plans completed by January, 1982.)

37 Pizor, Making TDR Work: A Study of Program Implementation, American Planners Association Journal 205, 209 (Spring

[illegible]. (Mr. Pizer noted that many of the receiving areas were not served by septic systems. Such areas cannot adequately support the [illegible] densities allowed by TDRs.)

38 Maryland - National Capital Park and Planning Commission, Functional Master Plan for the Preservation of Agricultural and Rural Open Space in Montgomery County at 14 (1980).

39 Id.

40 Id. at 8.

41 Id. at 38-39.

42 Tustian, Preserving Farmland Through TDR's, Am. Land Forum Mag., 63, 67 (Summer 1983).

43 Id., note 38 supra at 41-3.

44 Maryland-National Capital Park and Planning Commission. Approved and Adopted Amendment to the Master Plan for the Potomac Subregion (Sept. 1982).

45 Tustian, note 42 supra, at 72.

46 Schriff, Real World Experience With TDR's - An Update, at 5 (Piedmont Environmental Council) (undated pamphlet).

47 Id. at 6.

47a Dade County Ordinance no. 81-122 §5(G) (1982).

48 Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

49 Id. at 107.

50 Id. at 136.

51 Id.

52 Id.

53 Id. at 137.

54 Id.

55 Id.

56 Id.

57 Id. at 115, 137.

Id. at 150 (quoting, Monongahela Navigation Co. v. United States, 148 U.S. 312, 326).

60 Id. at 150.

61 See, MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); See also, Penn Central Transp. Co., 438 U.S. at 124.

62 (See, Malone, The Future of Transferable Development Rights in the Supreme Court, 73 Ky. L.J. 755 (1985) (Professor Malone analyzes recent Supreme Court decisions on the taking and just compensation doctrines. In her analysis she utilized the well known concept of a "bundle of sticks" representing the many rights a landowner has in his property -- i.e., the right to develop, the right to exclude others, air rights, mineral rights, etc., She notes the emerging difference between the Penn Central majority which followed an "approach focusing on how many of the 'entire bundle of sticks are lost as opposed to Justice Rhenquist's approach of focusing on the economic significance of the individual stick lost." One can only conclude that if incoming Chief Justice Rhenquist's views prevail, TDR programs will have to be designed in an extremely efficient manner so as not to run afoul of the just compensation question.

63 Penn Central Transp. Co., 438 U.S. at 137.

64 Deltona Corp. v. United States, 657 F.2d 1184, 228 Ct. Cl. 476 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982).

65 Id. at 1192, 228 Ct. Cl. at 490.

66 Id.

67 Sederquist v. City of Tiburon, 765 F.2d 756, 763 (9th Cir. 1984).

68 Fred F. French Inv. Co., Inc. v. City of New York, 39 N.Y. 2d 587, 350 N.E.2d 381, 385 N.Y.S.5 (1976).

69 Id. at 597-8, 350 N.E.2d at 387-89, 385 N.Y.S.2d at 11-12.

70 Id.

71 Id. at 595, 350 N.E.2d at 386, 385 N.Y.S.2d at 9.

72 Id. at 595-97, 350 N.E.2d at 386-87, 385 N.Y.S.2d at 10-11.

Corrigan v. City of Scottsdale, No. 1 CA-[illegible]10, [illegible] (Ariz. App., Feb. 28, 1985) (The decision was appealed to the Arizona Supreme Court where the court reversed the appellate court's holding on the "takings" question, but only discussed the issue of monetary damages for the taking. It remanded the case to the trial court for a determination of the damages after holding that the plaintiff was entitled to compensation. Corrigan v. City of Scottsdale, No C-3599808, slip op. (Ariz. Sup.Ct., June 2, 1986)).

74 Id.

75 Ariz. Const. art 2, § 17.

76 See, King v. State Roads Comm'n. of the State Highway Admin., 298 Md. 80, 467 A.2d 1032 (1983). (The Court of Appeals of Maryland held that "'just compensation' for the taking of property demands the full monetary equivalent of the property taken; the property owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.")

77 Penn Central Transp. Co., 438 U.S. at 150 (Rhenquist J., dissenting).

78 Corrigan v. City of Scottsdale, No. 1 CA-CIV 6300, slip op. (Ariz. App., Feb. 28, 1985).

79 Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d 484, 188 Cal. Rptr. 292 (1982), appeal dismissed for want of a final judgement, 191 464 U.S. 805 (1983).

80 Id. at 496, 188 Cal. Rptr. at 198.

81 Id. at 499-50, 188 Cal. Rptr. at 200.

82 Id. at 496, 188 Cal. Rptr. at 198.

83 City of Hollywood v. Hollywood, Inc., 432 So.2d 1332 (Fla. Ap. 1983), pet. for rev. denied, 441 So.2d 632 (Fla. Sup. Ct. 1983).

84 Id. at 1333.

85 Id. at 1338.

86 Id.

87 Dupont Circle Citizen's Ass'n. v. District of Columbia Zoning Comm'n, 355 A.2d 550 (1976), cert. denied, 429 U.S. 966 (1976).

88 Id. at 556-57.

89 Id. at 337.

90 Fred F. French Inv. Co., Inc., at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11.

91 Dufour v. Montgomery County Council, Law Nos. 56964, 56968, 56970 and 56983 (Consolidated) (Circuit Court for Montgomery County, Md. Jan. 20, 1983).

92 Id. at 15.

93 Id. at 5, (quoting Maryland-National Capital Park and Planning Comm'n. v. Chadwick, 286 Md. 1, 10, 405 A.2d 241, 246 (1978)).

94 Dufour at 14.

95 Id. at 14.

95a Id. at 14, 15.

96 Id. at 18.

97 Id.

98 Id. at 17.

99 Id.

100 Id. at 7.

101 Id. at 10.

102 Id. at 13.

103 In the Matter of the Application of Rock Run Limited Partnership for Approval of the Maryland-National Capital Park and Planning Commission of Preliminary Subdivision Plan Application No. 1-84104-Avenel Farm, Civil No. 2600 (Consolidated), (Circuit court for Montgomery County, Md., July 12, 1985) and
In the Matter of the Application of Rock Run Limited Partnership for Approval by the Mrayland-National Capital Park and Planning Commission of Site Plan Application Nos. 8-84095, 8-84106, 8-84107, 8-84108, 8-84109 and 8-84111-Avenel Farm, Civil No. 2601 (Consolidated), (Circuit Court for Montgomery County, Md. July 12, 1985). [hereinafter cited as Rock Run Ltd.]

104 See, Md. Agric. Code Ann. §2-501 (1985).

105 Rock Run Ltd., at 2-3.

106 Bd. Cnty. Comm'rs of Prince George's County v. Woodward and Lothrop, Inc., 280 Md. 344, 378 A.2d 483 (1977).

107 Id. at 719-20, 378 A.2d at 501.

108 Rock Run Ltd., at).

109 Id.

110 The defeat of a TDR proposal for Loudon County, Virginia is illustrative of the type of probelms TDR programs may face. The proposed TDR scheme was very innovative. It would preserve open space in the western county, while transferring development rights for both residential and commercial development to the eastern county which borders Washington, D.C.. The most unusual feature of the program was that it would allow for the re-attachment of development rights to the sending parcel if, after twnenty-five years from the original TDR transaction, the landowner bought back TDRs from another source. Virginia counties do not have home rule. Although the Loudon County Council passed the proposed legislation, it was rejected by the State legislature. Heavy lobbying efforts by the Virginia Association of Realtors, and complaints by residents in the already thickly settled eastern part of the county combined to sway the legislature's vote.
See, Harris, Loudon Limits Development Rights in Rural Areas, Washington Post, Jan. 3, 1986, at D1, col. 1; Washington Post, Feb. 5, 1986, at B3, col. 3; Washington Post, Feb. 11, 1986, at C5, col. 5; Harris, Fate of Open-Space Bill Miffs Loudon Official, Washington Post, Feb. 12, 1986 at C7, col. 1; Washington Post Feb. 18, 1986, at C3 Col. 1.

111 J. Rose, Psycological, Legal and Administrative Problems of the Proposal to use the Transfer of Development Rights As a Technique to Preserve Open Space, in Transfer of Development Rights at 295 (J. Rose ed. 1975).

112 Penn Central Transp. Co., 438 U.S. at 150 (Rhenquist, J. dissenting); Corrigan v. City of Scottsdale, No. 1 CA-CIV 6300, slip op. (Ariz. App. Feb. 25, 1985).

CB/jtd

Corresp
State Depts
Coastal
Resources
Div

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM, entered into this 28th day of November, 1986, by and between the

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREA COMMISSION
D-4 Tawes State Office Building
Annapolis, Maryland, 21401

hereinafter ("Commission"),

and the

STATE OF MARYLAND
COASTAL ZONE MANAGEMENT PROGRAM
DEPARTMENT OF NATURAL RESOURCES
Tidewater Administration
Coastal Resources Division
B-3 Tawes State Office Building
Annapolis, Maryland, 21401

hereinafter ("Program");

ARTICLE I - GENERAL SCOPE OF MEMORANDUM

This memorandum constitutes an Agreement between the Commission and the Program to develop a process for coordination of the activities of the Commission and the Program in accordance with the Commission's responsibilities to approve and ensure the effective implementation of local Chesapeake Bay Critical Area Management Programs and the Program's responsibility to ensure the effective implementation of Maryland's Coastal Zone Management Program.

ARTICLE II - MEMORANDUM REPRESENTATIVES

The following individuals shall have authority to act, in accordance with the terms of this Memorandum, for their respective parties:

Commission: Sarah J. Taylor, Executive Director
Chesapeake Bay Critical Area Commission
Phone: (301) 269-2426

Program: Jacob N. Lima, Director
Maryland Coastal Zone Management Program
Tidewater Administration - Coastal Resources Division
Phone: (301) 269-2784

Should either or both of these representatives become unavailable, (a) substitute representative(s) may be named by their respective supervisor(s), with adequate notice to the other representative.

ARTICLE III - DETAILED SCOPE OF MEMORANDUM

(1) The Commission and the Program will keep each other informed on matters of mutual interest (pertinent meetings, reports, work efforts, etc.). Specifically, the Program and the Commission will meet periodically to review and discuss activities undertaken in accordance with the CZMP county contracts, and with the Commission's contracts to local governments to ensure that they complement and do not duplicate each other. In addition, both the Program and the Commission will provide each other with copies of the Scopes of Work of contracts they enter into with local governments along with copies of the progress reports and work products submitted pursuant to those contracts.

(2) The Program will provide technical assistance to the Commission, and in conjunction with the Commission's Regional Planners, to local governments, regarding the development and implementation of local Critical Area Management Programs, particularly with regard to subject areas in which the Program has particular expertise; i.e., non-tidal wetlands, non-structural shore erosion, and SAV's. The Program will also provide assistance to the Commission on public education and public participation matters. The Commission will provide appropriate materials (handbooks, white papers, regulations, etc.) to the staff of the Program, and specific study material to the Coastal Resources Advisory Committee (CRAC) and its task forces (particularly the Geographic Priorities Task Force and the Economic Task Force) for review and comment.

(3) The Commission will undertake its activities in the Critical Area in a manner consistent with Maryland's Coastal Zone Management Program. The Program will ensure that its activities and those to which it provides financial assistance are undertaken in a manner consistent with the Local Critical Area Program Development Criteria, and the approved Local Critical Area Programs.

(4) The Program will give appropriate consideration to requests for financial assistance from the Commission either on its own behalf or on behalf of local coastal governments in accordance with the budget allocation procedures developed for Maryland's CZM Program. The Commission will give appropriate consideration to requests for financial assistance from the Program on its own behalf or on behalf of local coastal governments in accordance with the budget allocation procedures developed by the Commission.

(5) The Commission and the Program will meet as a team to review and comment upon the draft Local Government Critical Area Management Programs as to their overall general adequacy, and their consistency with the goals and objectives of Maryland's CZM Program specifically. In such review, the Commission will recognize the Program's responsibility for ensuring the acceptability of local governmental management programs for incorporation into Maryland's CZM Program. Both parties will ensure that this review is undertaken in a timely manner.

(6) The Commission and the Program shall meet periodically as a team for coordinated review of projects submitted for Commission review after local Critical Area Management Program approval has been given. The Program shall submit proposed Federal Consistency findings regarding proposed projects in the Chesapeake Bay Critical Area to the Commission for its review and comment in accordance with the MOU signed between the Commission and the Program, dated May 2, 1986.

(7) The Program and the Commission will work together to resolve any inconsistencies that may arise with the implementation of State programs and projects involving coastal resources and activities and the implementation of local Critical Area Management Programs.

ARTICLE IV - MODIFICATIONS TO SCOPE

Any changes to this Memorandum must be made in writing and must be agreed to by both parties to the Memorandum.

ARTICAL V - MERGER

This Memorandum embodies the whole agreement of the parties. There are no promises, terms, conditions, or obligations referring to the subject matter, other than those contained herein.

IN WITNESS WHEREOF, the parties have executed this Memorandum by causing the same to be signed on the day and year first above written.

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREA
COMMISSION

Veronica Nicholls
WITNESS

BY Sarah J. Taylor (SEAL)
Sarah J. Taylor, Executive Director
Chesapeake Bay Critical Area
Commission

STATE OF MARYLAND
MARYLAND COASTAL ZONE
MANAGEMENT PROGRAM
DEPARTMENT OF NATURAL RESOURCES
Tidewater Administration
Coastal Resources Division

Susan E. Smith
WITNESS

BY _____ (SEAL)
Jacob N. Lima, Director
Maryland Coastal Zone
Management Program

Sheila B. Harrison
WITNESS

BY _____ (SEAL)

Approved as to form and legal sufficiency
this 25th day of November, 1985.

Assistant Attorney General