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HOUSE OF REPRESENTATIVES

141st GENERAL ASSEMBLY

HOUSE BILL NO. 540

AN ACT TO AMEND TITLE 29 OF THE DELAWARE CODE TO ESTABLISH A VOLUNTARY TRANSFER OF DEVELOPMENT RIGHTS PROGRAM AND BANKING SYSTEM RELATING THERETO.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend Chapter 91 of Title 29 of the Delaware Code to provide for a new Subchapter III to read as  
2 follows:

3 "Subchapter III. Transfer of Development Rights and Banking Program

4 § 9131. Findings and Purposes.

5 The General Assembly finds that a critical need exists to direct growth in Delaware to those areas  
6 earmarked for services, encourage well-designed and efficient communities rather than inefficient sprawl,  
7 preserve farmland, cultural and historic lands, and other sensitive lands identified by the State and local  
8 governments, and ensure equitable transactions for the purchase of development rights. The adoption of a  
9 transfer of development rights and banking program that encourages and facilitates the voluntary participation of  
10 county and municipal governments is a means of achieving those objectives. It is the purpose of this Subchapter  
11 to establish the framework, guidelines and incentives for adoption of transfer of developments rights programs  
12 by Counties and Municipalities which serve to direct growth and development to areas having adequate  
13 infrastructure to accommodate such growth and development, while providing permanent protection to valuable  
14 agricultural lands, open space, cultural and historic lands, and critical and sensitive areas.

15 § 9132. Definitions.

16 For purpose of this Subchapter the following definitions shall apply:

17 'Bank' shall mean the depository for TDR Units, which are purchased or received by the Board;

18 'Board' shall mean the nine-member TDR Banking Board established under this Subchapter;

19 'County' shall mean any county in Delaware, namely; New Castle County, Kent County or Sussex  
20 County;

21 'Delaware Agricultural Lands Preservation Program' shall mean the program established and operated  
22 by the Foundation pursuant to the provisions of 3 Del. C. Chapter.9;

23 'Development Unit' shall mean a residential dwelling unit or defined equivalent for nonresidential uses;  
24 'Foundation' shall mean the Delaware Agricultural Lands Preservation Foundation;  
25 'Guideline' shall mean the substantive provisions adopted by the Board after consultation with Counties  
26 and Municipalities and after public hearings to be used by Municipalities and Counties in:

- 27 (1) establishing Sending Districts and Receiving Districts;
- 28 (2) developing the criteria for determining and utilizing TDR Units; and
- 29 (3) adopting provisions for operation of a TDR Program subject to this Subchapter.

30 'Municipality' shall mean a municipal government established by the State of Delaware and having  
31 defined geographic boundaries.

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

34 'Preservation Easement' shall mean an easement as defined in 3 Del. C. § 902(11).

35 'Receiving District' shall mean one or more defined and mapped geographic areas under county or  
36 municipal jurisdiction, which is identified by the county or municipality for use of TDR Units and adopted  
37 following public notice and public hearing.

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

40 'Sending District' shall mean one or more defined and mapped geographic areas under county or  
41 municipal jurisdiction, which is identified by the county or municipality for purchase or acquisition of TDR  
42 Units by the Board and adopted following public notice and public hearing.

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

45 'TDR' shall mean transfer of development rights.

46 'TDR Units' shall mean a residential development unit or equivalent, which is acquired from the Bank  
47 and utilized by the owner of the Receiving Parcel to increase development density.

48 § 9133. TDR Banking Board.

49 (a) There is hereby established a TDR Banking Board comprised of the following members:

- 50 1. The Chairperson, who shall be a Delaware citizen from the private sector appointed by  
51 the Governor, and who shall serve at the pleasure of the Governor.
- 52 2. An active, full-time farmer/land-owner nominated by the Council of Farm Organizations.
- 53 3. A designee of the New Castle County Executive, to be confirmed by the New Castle  
54 County Council.
- 55 4. The President of the Kent County Levy Court, or his or her designee.
- 56 5. The President of the Sussex County Council, or his or her designee.
- 57 6. A representative of the home building industry, to be nominated by the Delaware  
58 Homebuilders Association.

- 59 7. A representative from the Cabinet Council on State Planning Issues, to be selected by the  
60 Governor.
- 61 8. The President of the Delaware League of Local Governments, or his or her designee.
- 62 9. Chair of the Open Space Council, or his or her designee.
- 63 (b) Appointments of the Board members identified in 9133 (a) 2, and (a) 6 shall be made by the  
64 Governor from among three (3) nominees provided to him or her by the represented organization.
- 65 (c) For purposes of conducting business, six (6) members shall constitute a quorum. A vote of the  
66 majority of members of the Board, five (5) members, shall be required for action on any matter  
67 before the Board.
- 68 (d) Staff assistance to the Board shall be provided by the Office of State Planning Coordination and  
69 the Department of Agriculture.
- 70 (e) The Board shall be empowered, without limitation and notwithstanding any other laws:
- 71 1. To adopt procedural rules, without public hearing, to conduct its affairs and carry out and  
72 discharge its powers, duties and functions.
- 73 2. To adopt substantive rules and regulations, after public hearing and in accordance with  
74 the Delaware Administrative Procedures Act, Title 29, Chapter 101, to carry out and  
75 discharge its powers, duties and functions.
- 76 3. To enter into agreements for consultant, appraisal, legal, accounting, audit and other  
77 services deemed advisable or necessary in the exercise of its purposes and powers and  
78 upon such terms as it deems appropriate, subject to available funding.
- 79 4. To establish the criteria for the purchase and sale of TDR Units, which may include  
80 transactions that do not involve the TDR bank.
- 81 5. To purchase or receive, by gift or otherwise, and retain if desired, TDR Units under such  
82 terms and conditions deemed appropriate.
- 83 6. To sell TDR Units under such terms and conditions as deemed appropriate.
- 84 7. To develop and utilize documents as desirable or necessary to engage in TDR  
85 transactions.
- 86 8. To enter into agreements with Counties and Municipalities, State agencies, Authorities,  
87 Foundations and instrumentalities of the State and adopt guidelines for participation and  
88 operation of the TDR program.
- 89 9. To authorize an agent or agents to act on its behalf, and delegate authorization to the  
90 Chairperson to act on behalf of the Board on specific matters.
- 91 10. To receive, deposit, withdraw and expend monies from dedicated State accounts for the  
92 purpose of engaging in and completing TDR transactions, including the payment of  
93 transaction costs related thereto.
- 94 11. To establish use restrictions on Sending Parcels as deemed desirable and necessary.

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

(f) The members of the Board shall receive no compensation from the Bank but shall be reimbursed for travel, out of pocket expenses, and other expenses related to the performance of duties as Board members.

(g) Term lengths for members of the Board identified in § 9133 (a)1, (a)2, and (a)6 shall be as follows:

1. The member identified in (a) 1 shall be appointed for a three (3) year term.

2. The member identified in (a) 2 shall be appointed for an initial two (2) year term, thereafter to be appointed for three (3) year terms.

3. The member identified in (a) 6 shall be appointed for an initial one (1) year term, thereafter to be appointed for three (3) year terms.

#### § 9134. Reports.

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

#### § 9135. Tax Status.

(a) The powers and functions exercised by the Board are and will be in all respects for the benefit of the people of the State, and to such end, the Board will be exercising essential governmental functions. To this end the Board shall not be required to pay any taxes on assessments or charges of any character, including, without limitation, real property taxes, real estate transfer taxes, taxes on any of its property used, leased or exchanged, or any income or revenue derived from its activities, including, without any limitation, any profit from any sale or exchange of TDR Units.

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

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

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

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

#### § 9136. County and Municipal Authorization.

(a) Notwithstanding any provision of law to the contrary, each County and Municipality shall be authorized, but not required, to adopt as part of its Comprehensive Development Plan and subsequent land-use ordinance pursuant to the Land Use Planning Act, Chapter 92 of Title 29, a TDR program which at a minimum:

(1) Identifies any Sending District and any Receiving District located in its jurisdiction or in another jurisdiction in the same county, located in cooperation with that jurisdiction;

- (2) Establishes the criteria for determining the number of TDR Units available in each Sending District or part thereof, so that the available number of TDR Units for the parcels located in the Sending District can be readily calculated. Establishment of the Sending District shall not result in an effective down-zoning of parcels in the Sending District ;
- (3) Establish the criteria for determining the number of TDR Units which may be utilized in the Receiving District or part thereof, provided however, that such criteria shall include an allowance of at least forty three percent (43%) more Development Units by right than would otherwise be allowed in the receiving areas; and
- (4) Is consistent with the Guidelines adopted by the Board.
- (b) Any TDR program which is adopted by a County or Municipality as part of a Comprehensive Development Plan and subsequent land-use ordinance pursuant to the Land Use Planning Act, Chapter 92 of Title 29, shall be subject to review for consistency with the Guidelines under the provisions of Subchapter I of Chapter 91, Title 29 of the Delaware Code. No TDR program adopted by a County or Municipality pursuant to this Subchapter shall be implemented unless it is certified pursuant to 29 Del. C. § 9103(f).
- (c) Any County or Municipality operating a certified TDR program which includes Receiving Districts within its jurisdiction, shall receive from the Board, at the time of transfer and final approval of use of TDR Units in an approved project, an amount equal to ten percent (10%) of the proceeds received by the Board from the sale of the TDR Units by the Board. Said monies shall be used by the County or Municipality for new infrastructure improvements and municipal services demanded by the new higher density development in the Receiving District.
- (d) The use of TDR Units on any Receiving Parcel shall be subject to compliance with all other applicable federal, State and local requirements; provided however, that no separate approval shall be required with respect to the use of the TDR Units in a Receiving District which has been adopted through public notice and public hearing.
- § 9137. TDR Bank.
- (a) All TDR Units acquired by purchase, transfer, donation or otherwise shall be held in the TDR Bank for sale and use in TDR programs adopted by Counties and Municipalities under this Subchapter.
- (b) The proceeds from the sale of TDR Units shall, after payment to Counties and Municipalities as provided in § 9136(c) above, be used to purchase TDR Units and pay for the transaction costs related thereto.
- § 9138. Administration of Voluntary TDR Program and Banking System
- (a) The administration of the TDR bank and voluntary program shall be conducted on behalf of the Board by the Foundation under the terms and conditions of a Memorandum of Agreement between the Board and the Foundation.
- (b) The Foundation shall be authorized and responsible for monitoring compliance and enforcing use restrictions imposed on Sending Parcels to the same extent that the Foundation is authorized to

enforce, take action, and impose penalties for violations of restrictions under the provisions of 3  
Del. C. § 920(a) and (b).

- (c) The sale and purchase of TDR Units shall be on a voluntary basis, and the Board or the Foundation, acting on behalf of the Board, shall not be required to purchase TDR Units from eligible landowners. Eligible landowners in Sending Districts shall not be required to sell TDR Units to the Board, or to the Foundation acting on behalf of the Board.
- (d) The TDR program shall be conducted in a manner which is consistent with the goals and objectives of the Delaware Agricultural Lands Preservation Program and the Delaware Open Space Council, and to the extent possible the TDR program requirements shall be made compatible with the goals, objectives and requirements of the Delaware Agricultural Lands Preservation Program and the Delaware Open Space Council. The Board may join with the Foundation and/or the Open Space Council in the funding of purchases of both TDR units under this Subchapter, and Preservation Easements under the Foundation's purchase program, for Parcels which are located in both Sending Districts and Preservation Districts, and which have been identified by the Foundation as high priority farmlands and/or identified by the Open Space Council as high priority open space.
- (e) TDR Units purchased from a Sending District in a County shall only be sold for use in a Receiving District located in the same County. TDR Units from Sending Districts outside a Municipality may only be used in a Municipality by agreement between the Municipality and the County or Municipality in which the Sending District is located.

§ 9139. Additional Benefits.

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

§ 9140. Saving.

- (a) Nothing provided in this Subchapter shall prevent a Municipality or County which elects not to participate in the TDR program established under this Subchapter from establishing or conducting its own transfer of developments rights program.
- (b) Transfer of development rights programs adopted by Municipalities and Counties and existing at the time of enactment of this Subchapter shall remain in force and effect until modified or abolished, and any transaction, determination or approval which has occurred or which may occur in the future involving an existing transfer of developments rights program shall not be affected by this Subchapter.
- (c) If a property owner in a Sending District chooses not to sell TDR Units to the Board, the establishment of the Sending District under the provisions of this Subchapter shall have no effect on the right of a property owner to develop the property consistent with existing zoning requirements and restrictions.

205 (d) If any provision of this Subchapter or the application thereof to any person or circumstance is held  
206 invalid, such invalidity shall not affect other provisions or applications of the Subchapter which can  
207 be given effect without the invalid provision or application, and, to that end, the provisions of this  
208 Subchapter are declared to be severable.”.

#### SYNOPSIS

This legislation provides for a voluntary transfer of developments rights (TDR) program to be administered through a Banking system and guidelines operated by a Board. The purpose of the program is to deter sprawl, preserve farmland and open space, and promote the development of well-designed communities that use infrastructure more efficiently. The Board is comprised of private, State, county and municipal representatives and is chaired by a representative of the private sector. Through the guidance provided by the Board, municipalities and counties choosing to participate in the TDR program can identify sending areas and receiving areas in their jurisdictions, and establish the quantity of development units available from the sending areas for use in the receiving areas. The development units from sending areas are required to be used in receiving areas in the same county. Municipalities and counties with designated receiving areas would receive from the Bank ten percent (10%) of the value of the development units utilized in the receiving areas. Additional incentives in the form of priorities for State grants and funding for infrastructure improvements would also be available to participating municipalities and counties.

Any municipality or county choosing not to participate in the TDR program established by this legislation would be entitled to conduct its own transfer of development rights program.

The TDR transactions approved by the Board would be administered by the Delaware Agricultural Lands Preservation Foundation, which has developed extensive experience in handling real estate rights acquisitions through its permanent Preservation Easement program. The Foundation would also be responsible for monitoring and enforcing the development restrictions placed on sending parcels on which development rights have been sold. The TDR program would be structured so as to be compatible with the Agricultural Lands Preservation Program and the Open Space Program.