

Environmental & Energy Law Monitor

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Money May Be Available for Lost Development Potential in the New Jersey Highlands Region

In 2004, the New Jersey Highlands Water Protection and Planning Act (the “Act”) became law. The law created two distinct regions, the Preservation Area and the Planning Area. Development in the Preservation Area was severely restricted under the Act. To address the loss of development rights in the Preservation Area, the Act also authorized a Transfer of Development Rights (“TDR”) program to be administered by the New Jersey Highlands Council (the “Council”).

The TDR program is designed to allow property owners in the Preservation Area to sell their development rights [Highlands Development Credits (“HDCs”)] to developers in the Planning Area. Developers that buy HDCs will be able to use those purchased HDCs to undertake more intensive development than would otherwise be permitted. Planning Area municipalities can voluntarily elect to become “Receiving Zones,” which are areas where HDCs can be used for more intensive development. Because few Planning Area municipalities are opting to become Receiving Zones, there is an amendment to the Act currently pending before the state legislature which would expand the program and allow any municipality in the state to become a receiving Zone for HDCs

The Council further created a Highlands Development Credit Bank (the “Bank”), and has authorized the Bank to purchase HDCs to “jump start” the TDR program and alleviate financial hardships affecting property owners in the Preservation Area. The Bank has been funded with \$10 million, and has started the process of purchasing HDCs. The Bank’s purchase of HDCs will be based on a priority ranking undertaken by the Bank. The First Priority will be to buy HDCs for properties where both (a) the owner is experiencing “extenuating financial circumstances” and their equity in the property is “substantial” in relation to their net worth and (b) the owner had all development approvals except certain Department of Environmental Protection approvals when the Act was passed. The Second Priority is to purchase HDCs for properties where the property owner satisfies only (a) above. The Third Priority is to purchase HDCs for properties where the property owner only satisfies (b) above.

At this time, the Bank is only purchasing HDCs for residential-zoned properties. The initial value of one HDC is \$16,000. To implement this program, the Council has created an “HDC Estimator Tool” on its website (<http://www.highlands.state.nj.us/>), which will provide land owners with a

range of expected HDCs for properties in the Preservation Area. Thus, if the Council has estimated that a property may be “worth” 12-14 HDCs, the Bank would buy those HDCs for between \$192,000 and \$224,000.

The first step in the process of redeeming HDCs is to submit an HDC Allocation Application with the Council. Based upon this application, the Council will (a) determine if the applicant meets the “extenuating financial circumstances” criteria and (b) make a formal determination of how many HDCs apply to the property. If the property owner accepts the Council’s HDC allocation, the next step is to submit an HDC Certificate Application to the Bank. These applications will be prioritized by the Bank and the Bank will issue offers to buy those credits. If an offer is accepted, the property owner will record a conservation restriction in the property’s title. This conservation restriction will prevent any future development of that property. At that point, the Bank will make its payment to the property owner.

As of January 7, 2010, the Council has received only eleven applications. For this first round of hardship HDC purchases, the Council is accepting HDC Applications until March 1, 2010 and the Bank is accepting HDC Certificate Applications until April 15, 2010. Therefore, if you are interested in obtaining payment for lost development rights in the Highlands Preservation Area, you should act quickly to explore this option.

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