



**STATE OF NEW JERSEY
OFFICE OF THE STATE COMPTROLLER**

INVESTIGATIVE REPORT

CHESTERFIELD TOWNSHIP

***TOWNSHIP COMMITTEEMAN'S CONFLICT
OF INTEREST RESULTS
IN IMPROPER FINANCIAL GAIN***

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I. Introduction and Summary

An Office of the State Comptroller (OSC) investigation has found that former Chesterfield Township Committeeman Lawrence C. Durr improperly used his government position in facilitating a private land deal that brought him significant financial benefits. Durr agreed to sell personally owned development rights for approximately \$2 million to a land developer seeking to build residential units and retail space within Chesterfield, creating a conflict of interest. While that sale was pending, and without disclosing his relationship with the developer either to Chesterfield or on a state-required disclosure form, Durr took actions in his capacity as a township official that facilitated the developer's project and thereby made it more likely that the developer would follow through on its agreement with him. Shortly thereafter, Durr and the developer consummated their agreement, resulting in Durr paying off the mortgage on over 100 acres of property and earning him approximately \$200,000 in profit.

The actions taken by Durr were unethical under state law and, in addition, potentially violated the criminal law concerning official misconduct. In New Jersey, public officials who exercise their official influence over matters in which they have a conflict of interest commit a crime when they do so with a purpose to benefit themselves or others.

The OSC investigation confirmed that Durr used his official influence and unique position as a government official to gain benefit from the land use program he helped implement in Chesterfield, known as a Transfer of Development Rights (TDR) program. That program, which balances farmland preservation with controlled development, won national recognition and paved the way for legislation authorizing TDR programs statewide. It is vital for the future credibility of TDR as a land use strategy that those responsible for its administration not use their privileged position for personal advantage.

II. Methodology

OSC began its investigation following receipt of a complaint involving Durr and the TDR Program in Chesterfield Township. In completing this investigation, OSC obtained and reviewed numerous documents such as meeting minutes, ordinances, and resolutions of the Chesterfield Township Committee and Planning Board and the Burlington County TDR Bank, as well as documents related to the sale of TDR credits by Durr to Renaissance Properties, Inc. (Renaissance) and related to the financing of the underlying land purchase. The investigation also included interviews with Durr, the Chesterfield Township Clerk, the Township Attorney, the former Township Planner, representatives of the Burlington County TDR Bank and Renaissance's Vice President for Acquisitions. The investigation was conducted in accordance with the standards for investigations set forth by the Association of Inspectors General.

We provided a draft copy of this report to Durr, the Chesterfield Township Attorney (on behalf of Chesterfield), the Burlington County TDR Bank Board and counsel for Renaissance. In preparing this final report, we considered the responses we received and incorporated them herein where appropriate. OSC did not receive a response from Durr or the Burlington County TDR Bank Board.

Throughout this report, "Chesterfield" and "the Township" are used interchangeably to refer to Chesterfield Township. Although Renaissance formed a sub-entity called Chesterfield, LLC for the purpose of developing its project in Chesterfield and all of the developer's activities in Chesterfield were conducted under that name, to avoid confusion this report utilizes the name "Renaissance" when discussing the activities of Chesterfield, LLC.

III. Background

A. The TDR Program

The traditional model for farmland preservation involves the government's use of tax dollars to pay landowners not to develop their land. Chesterfield was one of the first communities in the country to adopt an alternative system, the TDR system, which relies on market forces rather than public money to preserve farmland and channel development into areas that are more appropriate for increased growth. Under the TDR system, developers pay landowners the difference between what the land is worth as a farm and its value as developed property, calculated in the form of TDR "credits," in return for which the landowners agree to restrict development on their properties. These credits then entitle the developers to build in a separate area designated by the locality for increased growth.

TDRs were first authorized in New Jersey in 1981 under the Pinelands Protection Act, N.J.S.A. 13:18A-1 to -55. The success of that regional TDR program led the Legislature to authorize a pilot program in Burlington County to determine the feasibility of municipal TDR programs outside of the Pinelands region. The only two municipally run TDR programs that are currently functioning in New Jersey were authorized under that pilot program, passed in 1989. N.J.S.A. 40:55D-113 to -129. One of these is found in Chesterfield and the other is in Lumberton. Chesterfield adopted its TDR program in 1997.

The success of the Burlington County pilot program ultimately prompted the Legislature in 2004 to enact the State Transfer of Development Rights Act, which authorizes municipalities throughout New Jersey to establish TDR programs. N.J.S.A. 40:55D-137 to -163. Since its passage, more than two dozen additional municipalities are in the process of exploring or implementing a TDR program as a means to control growth.

In order to participate in the TDR program in Chesterfield, a parcel of land generally must be at least 10 acres in size, located in a part of the Township reserved for farmland preservation (called the “sending area”) and not already be deed restricted from further subdivision or development.

In Chesterfield, the area designated for development (called the “receiving area”) comprises 560 acres in the northwest corner of the Township known as Old York Village. The receiving area was chosen because of its proximity to existing water treatment facilities in Bordentown and easy access to transportation corridors such as the New Jersey Turnpike. It was designed to accommodate 1,200 single-family residential housing units and a mixed-use village center with retail and commercial uses.

The number of TDR credits assigned to a parcel of property is based upon its development potential as reflected by the parcel’s suitability for septic tanks. Under the Chesterfield Master Plan, a single TDR credit can be used to construct a single-family receiving area home, with fractions of credits used to construct smaller homes, townhouses and apartment units. Credits may also be used toward development of commercial uses within the mixed-use village center.

Article XVII of the Code of the Township of Chesterfield sets forth how a landowner in the sending area can create, transfer and use TDRs. First, the owner enrolls the land within the TDR program and TDR credits are created through the recording of a TDR easement that specifies the number of transferable credits assigned to that parcel. The landowner may appeal the TDR allocation to the Chesterfield Planning Board if dissatisfied with the number of credits assigned to the property. The landowner can then assign or sell the credits to another party.

Typically sold to a land developer, the credits are used to increase the number of units that lawfully may be developed within the receiving area.

Most successful TDR programs, including the Burlington County pilot program, have established “TDR banks” to facilitate the marketing and sale of TDR credits. *See* N.J.S.A. 40:55D-125. A TDR bank can buy and sell TDR credits as needed, and facilitate private transactions by bringing buyers and sellers together through an auction process.

For example, using public funds for farmland preservation, Burlington County purchased seven farms in Chesterfield in the early 1990s. When the Township later implemented its TDR program, the county converted that development potential into 321 TDR credits to be held by the County TDR Bank. Such credits could be sold as needed to facilitate the market for TDR credits, and the proceeds could be used to offset the cost of having purchased the farms.

The Chesterfield program has been described as “New Jersey’s premier municipal TDR success story.” New Jersey TDR Statewide Policy Task Force, *Realizing the Promise: Transfer of Development Rights in New Jersey* 19 (2010). In 2004, Chesterfield received a national planning award for developing its strategy to use TDRs “to preserve an agricultural past while accommodating a less pastoral, more populous future.”

B. Lawrence Durr’s TDR Transactions

From 1991 through 2009, Lawrence Durr was continually elected to three-year terms as a member of the Chesterfield Township Committee. Chesterfield operates under a form of government which is comprised of three committee members who are elected for overlapping three-year terms, one member being elected each year. The committee typically selects the committee member serving the last year of his or her term to serve as Mayor. Accordingly, Durr served as Mayor in 1993, 1996, 1999, 2002, 2005, 2008 and 2011. In certain other years, Durr

served as Deputy Mayor. Throughout his entire tenure in office, Durr also served on the Chesterfield Planning Board.

Several people interviewed by OSC described Durr as instrumental in the creation and success of the TDR program in Chesterfield. Durr's role was recognized, for example, when he helped present a seminar on TDRs sponsored by the New Jersey State League of Municipalities in June 2004.

In the fall of 2003, a developer from Red Bank needed approximately 350 TDR credits to build houses in the Chesterfield Township receiving area, but had managed to acquire only 64 credits despite extensive outreach to individual landholders in the sending area. As referenced previously, at that time the Burlington County TDR Bank (the Bank) already owned approximately 321 TDR credits. At the Bank Board's public meeting on November 21, 2003, the developer's representative urged the Bank to sell the developer its TDR credits. As reflected in a tape recording of the meeting, Durr, addressing the Bank Board as a representative of the Chesterfield Township Committee, urged the Bank not to sell its credits since "it would be perceived that selling 100 credits at this point would be interfering with their private market." Durr went on to explain that putting those credits on the market would interfere with the value of the credits held by the private landholders. During the Bank Board's subsequent meeting on January 9, 2004, Durr reiterated the Township's concern that the county would dilute the market by selling its TDR credits. In part to satisfy Chesterfield Township's concerns as expressed by Durr, the Bank decided to first hold an auction of private credits. Only if that auction failed to meet the outstanding need would the Bank auction off its own credits.

The Bank held what has been described in press reports as the first public auction of TDR credits in the country at the Chesterfield Firehouse on July 21, 2004. The auction was such a

success that the Bank saw no need to intervene by selling its own credits. That is, the successful bidder (the developer from Red Bank) was able to purchase a satisfactory number of TDR credits from private sellers for the then-unprecedented amount of \$50,000 per TDR credit.

In May 2005, another developer, Renaissance Properties, Inc., purchased land within the Chesterfield receiving area on which it intended to build more than 350 residential units and more than 40,000 square feet of retail space. The proposed project would be a mixed use development, containing the only commercial space in the receiving area, in accordance with Chesterfield's Old York Village Master Plan. The person in charge of the Chesterfield project was Robert Adinolfi, Renaissance's Vice President of Acquisitions. In early 2006, Durr began discussing with Adinolfi the possibility of Durr selling to Renaissance the TDR credits associated with 107 acres of farmland Durr planned to buy for himself in the sending area.

Adinolfi stated during an interview with OSC that at the time these discussions began, he was aware that Durr was a prominent public official in Chesterfield. Within weeks of their initial discussions, on February 7, 2006, Adinolfi sent Durr a written offer to purchase 24.25 TDR credits associated with the property Durr intended to purchase. The offer stated that Renaissance would pay \$65,000 per credit, for a total of \$1,576,250. The offer also stated:

Purchaser and Seller both acknowledge that should the purchase contract contemplated herein be consummated, a conflict of interest would be created which would force Seller to recuse himself from any governing body voting on the Purchaser's development applications.

Durr confirmed in an interview with OSC that he received this written offer and understood that he should not be participating as a member of the Chesterfield Township Committee in any vote on the Renaissance land development application. Adinolfi did not have any further conversations with Durr on this subject, and stated that he assumed that as a

longstanding public official, Durr was already aware of his recusal obligations and Adinolfi did not want to “wag my finger at him.”

On April 20, 2006, Durr and his wife executed a contract to purchase the 107 acres of property, located at 121 Old York Road, for \$2 million. The Durrs contributed 20 percent of the total cost in the form of a down payment; the balance of \$1.6 million was financed with a mortgage loan from a bank at a fixed interest rate of 7.5 percent per year.

On May 3, 2006, the Durrs signed a contract to sell 26.25 TDRs associated with this property (under the contract, Durr retained 2 TDR credits for his own construction purposes) to Renaissance at a purchase price of \$65,000 per TDR credit, for a total of \$1,706,250. Pursuant to the contract between the Durrs and Renaissance, closing on the sale of these TDRs was to take place not later than 12 months and one day from the date of contract execution. The contract provided that the Durrs’ only remedy for the developer’s failure to perform would be to retain the \$150,000 deposit as liquidated damages. Durr received that deposit on or about August 2, 2006.

On July 20, 2006, Durr successfully petitioned the Chesterfield Planning Board to increase the TDR credit allocation for 121 Old York Road by another 10.25 credits. This eventually resulted in additional revenue to Durr of \$666,250 under his purchase agreement with the developer.

On March 27, 2007, Durr agreed to extend the closing date for the sale of the TDRs from May 4, 2007 to September 5, 2007. In return, Renaissance agreed to pay Durr an additional non-refundable deposit of \$100,000 on May 4, 2007 and to pay the interest on Durr’s mortgage from that point forward. The developer paid that additional non-refundable deposit on or about May 1, 2007. By the time of closing and final payment three months later, Durr had received

compensation of \$280,575.61 from Renaissance in non-refundable deposits and mortgage interest paid.

On July 26, 2007, Durr closed on the sale of 36.5 TDR credits to Renaissance for a total purchase price of \$2,372,500. It was the largest amount ever received by a Chesterfield landowner from a developer in the history of the Chesterfield TDR program. This 15-month investment produced a gain to Durr of approximately \$196,449 (an annual rate of return of approximately 40 percent), as well as debt-free title to over 100 acres of preserved farmland.

As of the writing of this report, due to changed economic circumstances Renaissance has yet to commence construction on its Chesterfield project.

IV. Relevant Ethical and Criminal Standards

A. The Local Government Ethics Law and the Township's Conflict of Interest Policy

New Jersey's Local Government Ethics Law (LGEL) regulates the conduct of municipal officers and board members. That law provides that "[n]o local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others." N.J.S.A. 40A:9-22.5c. Additionally, "[n]o local government officer or employee shall act in his official capacity in any matter where he . . . has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment." N.J.S.A. 40A:9-22.5d.

In addition, Chesterfield Township has a "Conflict of Interest Policy" that requires its officials to "conduct business according to the highest ethical standards of public service." The policy provides that "[a] potential or actual conflict of interest occurs whenever an employee, including a Township official, is in a position to influence a Township decision that may result in a personal gain for the employee." It requires Township employees "to disclose possible

conflicts so that the Township may assess and prevent potential conflicts.” Any questions as to whether an act or proposed course of conduct would create a conflict of interest are to be immediately presented to the Township Clerk or Township Attorney. Failure to comply with the policy is grounds for appropriate discipline, including termination.

New Jersey court decisions put forth other restrictions on the ability of local public officials to pursue personal business before a local agency, such as a planning board, when they themselves are members of or have appointed members of the agency. For example, a state appellate court has held that a member of a local zoning board may not represent his own interests before the board on which he serves in presenting an application that will result in personal gain. *Jock v. Shire Realty, Inc.*, 295 N.J. Super. 67 (App. Div. 1996), *certif. denied*, 148 N.J. 462 (1997). The impartiality of the board’s decision is further subject to question when the member participated in appointing other voting members to the board and the decision provides him with a significant financial benefit. *See Wzyzkowski v. Rizas*, 132 N.J. 509, 526, 532 (1993).

B. The Crime of Official Misconduct

A public official commits official misconduct when he exercises his official discretion over matters in which he has a conflict of interest and does so with the purpose to obtain a benefit for himself or others. *State v. Thompson*, 402 N.J. Super. 177, 194-95 (App. Div. 2008). A public official also can be found guilty of official misconduct when he “has an undisclosed interest in a venture which comes before the body of which he is a member, and he acts in favor of that interest through the office he holds.” *State v. Furey*, 128 N.J. Super. 12, 21 (App. Div.), *certif. denied*, 65 N.J. 578 (1974).

“The crime of official misconduct serves to insure that those who stand in a fiduciary relationship to the public will serve with the highest fidelity, will exercise their discretion

reasonably, and will display good faith, honesty, and integrity. These are the obligations which every public officer assumes as a matter of law upon entering office.” *State v. Schenkolewski*, 301 N.J. Super. 115, 145-46 (App. Div.), *certif. denied*, 151 N.J. 77 (1997).

V. Investigative Findings: Lawrence Durr Engaged in Various Acts Constituting Ethical and Potentially Criminal Violations

A. July 20, 2006: Durr Successfully Applies to the Planning Board to Increase the TDR Credit Allocation for 121 Old York Road by 10.25 Credits

Durr stated during his interview with OSC that at the time he bought the property located at 121 Old York Road, he resolved to seek an increase in the TDR credits that had been allocated to that property. Under Durr’s agreement with Renaissance, if he could get more credits for the property, Renaissance would buy those additional credits as well. Even before Durr had closed on his purchase of 121 Old York Road, he filed an application for an increase in the property’s TDR allocation with the Township Planning Board. Durr represented himself in presenting his application to his colleagues on the board at its public meeting on July 20, 2006. The minutes reveal that Durr “stepped down” from the Planning Board dais and “was sworn” prior to giving his presentation. Durr did not vote on his own application.

In his interview with OSC, Durr stated that he represented himself at the hearing because he knew the TDR program better than anyone he could have hired. At the hearing, the other six Planning Board members who were present unanimously voted to increase the TDR credits assigned to Durr’s property by another 10.25 credits. These additional credits were worth \$666,250 to Durr under his agreement with Renaissance. The Planning Board minutes state that after the vote, Durr “returned to the dais” to participate as a member of the Planning Board in other matters. While serving on the Township Committee, Durr previously had approved the appointments to the Planning Board of the six persons who voted on his application and

personally had appointed one of the six while serving as Mayor. In his capacity as Mayor, Durr also previously had appointed all but one of those members to previous terms on the Planning Board.

Although Durr appropriately recused himself from participating in the deliberations or vote of the Planning Board on his TDR application, his self-representation and testimony before the board were legally problematic, particularly since he stood to gain a significant financial benefit of approximately \$666,250 from the Planning Board's approval of his application to increase his property's TDR credit allocation. *See generally* William M. Cox and Stuart R. Koenig, *New Jersey Zoning and Land Use Administration* § 3-1.3, at 72 (2012). Municipalities are advised to be cautious in such circumstances and take appropriate action under the LGEL, perhaps by requiring the board member-applicant to rely on a third-party intermediary such as an attorney or land use expert to present the case before the other board members. *See id.* § 3-2, at 74.

Moreover, the Planning Board made no attempt to analyze the potential conflict posed by Durr's application being considered by board members he either appointed as Mayor or whose appointments he approved as a member of the township committee. Indeed, his application yielded Durr nearly a 40 percent increase in the credits assigned to 121 Old York Road from persons whose appointments he approved. Although no rule automatically disqualifies mayoral appointees on a planning board from hearing a mayor's application brought before that body, where Durr was the Deputy Mayor at the time with the expectation of serving again as Mayor, had previously appointed all but one of the voting members to previous or current terms on the board and stood to gain a significant financial benefit from the application, an analysis of the potential conflict should have been undertaken by the board. *See Wzykowski*, 132 N.J. 509.

B. September 6, 2006: Durr, as Representative of Chesterfield, Urges the TDR Bank to Sell its Credits to Renaissance so Renaissance Can Accumulate Enough Credits to Continue with its Project

As noted above, Durr received from Renaissance his first non-refundable deposit of \$150,000 on August 2, 2006. One week later, on August 9, 2006, Adinolfi addressed the members of the Chesterfield Township Committee, including Durr, on a matter involving Renaissance. Specifically, Adinolfi told the Committee that Renaissance had undertaken a mass solicitation of all TDR credit holders in Chesterfield but that it had been able to acquire only 60 of the approximately 260 credits required for its Old York Village project.

Speaking as a member of the Township Committee, Durr then suggested that the Bank open its vault of TDR credits for sale to allow Renaissance an opportunity to obtain the credits required for its project. This suggestion was diametrically opposed to the position that Durr previously had taken before the Bank Board regarding the Red Bank developer's project in November 2003. A representative of the Bank who was present at the committee meeting indicated that the Bank would speak to the County Freeholders and recommend that 150 TDR credits be offered to Renaissance.

One month later, at the Bank's public meeting on September 6, 2006, representatives of Renaissance, including Adinolfi, urged the Bank to sell credits to Renaissance to address its credit gap. Durr attended the meeting as a representative from Chesterfield Township and was invited to provide "the township's perspective." According to the tape recording of that meeting, Durr stated:

The Township would support the efforts of the Freeholders to discuss with us how we could supply [Renaissance's] needs. . . . If there was some way the credits could be utilized now for sale, the money they would return could be left in the Bank to purchase credits in the future. . . . We support the project. . . . There have been numerous meetings with [an informal advisory body

composed of the Township Planner and several members of the Planning Board], my understanding is they've given [Renaissance] their blessing, so hopefully this will go to the Planning Board and be approved rather smoothly.

Later on during the meeting, one of the Board members asked Durr whether the Township had “any concerns about this project moving forward.” Durr replied, “No, we would very much like it to move forward.”

One of the Bank Board members stated during an interview with OSC that he was very surprised by Durr's position in 2006, since previously Durr had urged the Bank to stay out of Chesterfield's credit market. In fact, whereas before Durr considered the Bank's sale of its credits as “interfering with their private market,” now that he had a financial stake in the development Durr advocated such a sale so the project could proceed.

The Bank eventually decided to hold another auction at which it would sell its own TDR credits as a last resort. On the eve of this second auction, held on March 1, 2007, Renaissance informed the Bank that it had “at least 150 TDR Credits under our control” and planned to bid on at least 30 credits at the auction. Accordingly, at the auction, Renaissance purchased 30 TDR credits – 8.25 from private credit holders and 21.75 from the Bank – at a price of \$62,000 per credit, \$3,000 less than the deal Durr had secured with the developer for his credits ten months earlier.

Bank representatives stated to OSC that at the time Durr, as a Chesterfield official, was advocating that the Bank sell its credits they were unaware, nor had they been informed, that Durr had a personal stake in the development. In fact, the Bank representatives stated that they did not become aware of Durr's relationship with Renaissance until well after the sale of his TDR credits to Renaissance closed in July 2007.

As noted above, Durr's only remedy in the event that his deal with Renaissance fell through would have been to keep the non-refundable deposit (while remaining tied to a \$1.6 million mortgage), and he therefore had a powerful personal incentive to facilitate the developer's acquisition of enough additional credits to make its Old York Village project a reality. He acted with conflicting loyalties and violated both the LGEL and the Township's "Conflict of Interest Policy" when he urged the Bank Board as Chesterfield's representative to sell TDR credits to Renaissance so the developer could make up its credit shortfall.

C. April 26, 2007: As a Member of the Township Committee, Durr Votes on a Measure Reducing the TDR Credit Requirement for Renaissance

Following the March 2007 auction, Renaissance remained approximately 40 TDR credits short of its credit needs based on its development plan. As a member of the Chesterfield Township Committee, Durr then undertook other official actions which had the effect of shaving additional credits off of that shortage, at a cost savings to Renaissance of more than \$1 million.

Chesterfield's TDR Ordinance set forth the number of TDR credits required for various kinds of development within the receiving area. As originally formulated, the ordinance required 0.5 TDR credit per apartment unit and 1.0 TDR credit per 2,000 square feet of retail/office space. According to both Adinolfi and the then-Township Planner for Chesterfield, Renaissance had been seeking to reduce the TDR credits (and thereby the cost) required for such development as early as 2005. According to both men, Renaissance's efforts to persuade Chesterfield to reduce the TDR requirements continued until finally the matter was presented to the Township Committee for a vote.

On April 10, 2007, the Township Planning Board voted to recommend to the Township Committee an amendment reducing the number of credits required for apartments and retail/office space within the receiving area. According to a memorandum written by the

Township Planner to the Planning Board, the effect of the amendment would be to reduce the number of credits required by Renaissance to complete its project by an estimated 15 to 20 credits. The minutes of the Planning Board meeting show that Durr had left the meeting before this issue was discussed or voted upon.

Two days later on April 12, 2007, Durr moved to introduce the proposed amendment at a meeting of the Township Committee. This was less than one month after Durr had agreed to extend the closing date for the sale of his personal TDR credits in return for Renaissance paying him an additional \$100,000 non-refundable deposit and reimbursing him for future interest payments on his mortgage. Durr and the other committee member present then approved the motion, which included scheduling the necessary public hearing for April 26, 2007.

The minutes of the Township Committee's meeting on April 26, 2007 reveal that Durr made the motion to open discussion on the proposed ordinance. Hearing no comments, Durr made a motion to close the public hearing, which was seconded. Durr then moved for the committee's adoption of the amendment, which was seconded. Durr and the two other members of the committee then voted in favor, and the reduction in TDR requirements for retail space and apartments in Chesterfield's receiving area became law.

The amendment had the effect of reducing the credits required for Renaissance's project by 17.39 credits, approximately one-half of the remaining credits that Renaissance needed. When valued at the rate Renaissance agreed to pay for Durr's TDR credits, or \$65,000 per credit, the value of that reduction was \$1,130,350. Four days after Durr's favorable vote on the amendment, Renaissance paid Durr the second non-refundable deposit of \$100,000 and the first of three separate interest payments of \$10,191.97.

OSC questioned Durr as to why he did not recuse himself from voting on this ordinance given his pending sale to Renaissance for over \$2 million. Durr stated that he did not regard the pending sale as presenting a conflict because he thought his “deal was done.” Durr acknowledged, however, that under the contract Renaissance could walk away from the deal at any time and his only remedy would have been to keep the non-refundable deposit.

Durr never disclosed his financial arrangement with Renaissance to either the Township Attorney or Township Clerk before his sale to Renaissance closed on July 26, 2007, as required by the Township’s “Conflict of Interest Policy.” When questioned about his failure to disclose this information, Durr expressed his belief that “everybody knew” he was selling his TDR credits, but he was unable to specifically identify any person to whom he disclosed his relationship with Renaissance or when he did so. In fact, a number of Township officials serving at the time, including the Township Planner, Attorney and Clerk, told OSC that they were not aware of Durr’s financial relationship with Renaissance at the time he took these official actions.

Durr also failed to disclose his relationship with Renaissance on an official form that specifically asked for such information. Under state law, local government officers are required to file a financial disclosure statement on or before April 30 of each year that discloses “[e]ach source of income, earned or unearned, exceeding \$2,000 received by the local government officer” during the preceding calendar year. N.J.S.A. 40A:9-22.6a(1). On his financial disclosure statement for 2006, which Durr filed on or about February 22, 2007 and certified that it contained “no willful . . . omission of material fact,” Durr did not list Renaissance as a source of income for that year, even though he had received the \$150,000 non-refundable deposit on or about August 2, 2006. By contrast, Durr’s financial disclosure statement for 2007, which he filed on March 26, 2008, after all aspects of his arrangement with Renaissance were completed,

correctly listed Renaissance as a source of income for that year. In his interview with OSC, Durr agreed that he should have disclosed that Renaissance was a source of income exceeding \$2,000 on the 2006 form, but could not explain why he failed to do so.

Under the terms of his agreement with Renaissance, Durr's only remedy in case of the developer's breach was to retain the deposit (which as of April 26, 2007 was only \$150,000). He already had dedicated hundreds of thousands of dollars to this investment and would continue to be responsible for interest charges of \$328.77 per day on the mortgage if the developer had walked away. Durr's total costs on the investment ultimately amounted to at least \$735,000. Durr should have disqualified himself from participating in the discussions and vote by the Township Committee to reduce the credit requirements for Renaissance's development. By failing to do so, Durr violated the LGEL and, to the extent he was motivated by a purpose to benefit himself, may also have committed the crime of official misconduct under state law.

VI. Conclusions and Recommendations

1. Government officials may not take official action on a matter when they have a personal financial interest in the matter. Durr should have disclosed to Chesterfield his agreement to sell TDR credits to Renaissance and should have recused himself from taking any official action that might have affected the Renaissance project in the Chesterfield receiving area. Specifically, Durr should not have sought on Chesterfield's behalf to persuade the Burlington County TDR Bank to intervene in Chesterfield's TDR credit market in September 2006, and he should not have participated in the deliberations and vote of the Chesterfield Township Committee in April 2007 to reduce the TDR credit requirement for apartments and retail/office space in the receiving area.

2. The integrity of any market-based system, including the TDR system, is dependent on the prevention of self-dealing by market insiders such as Durr. The agreement to sell personal TDR credits by one who then exercises official influence over the market for those credits is inconsistent with the notion of an arms-length transaction and is akin to insider trading. Under state ethics and criminal law, public officials may not use their influence, position or official access to inside information to secure a personal financial benefit.

3. In order to ensure effective deterrence against misconduct, OSC recommends that the Legislature increase the monetary sanctions for violating the conflict of interest provisions of the LGEL, consistent with those sanctions applicable to state employees who violate the law regulating their ethical behavior, N.J.S.A. 52:13D-1 to -28. For each violation, the former law imposes a sanction limited to a *maximum* of \$500, while the latter authorizes fines of not *less* than \$500 and up to a maximum of \$10,000. *Compare* N.J.S.A. 40A:9-22.10b *with* N.J.S.A. 52:13D-21(i). Considered in light of the present matter, a possible fine of no more than \$500 appears inadequate to punish a government official for failing to disclose a personal interest in valuable assets such as TDR credits and for acting in the face of a conflict of interest involving their sale. Wrongdoers may view such a minimal sanction simply as a cost of doing business.

4. Municipalities that implement TDR programs should further require local government officials with authority over such programs to disclose to the municipality any and all personal contractual arrangements producing or expected to produce income from the sale of TDR credits. Renaissance has asserted that it was under no duty to disclose to Chesterfield any contract for TDR credits and that it is “standard practice for a Developer to enter contracts to purchase credits for TDRs in the same manner that happened in this instance.” Therefore, as an additional prophylactic measure, OSC recommends that municipalities consider requiring

developers to certify, at the time they submit their development applications, as to the identity of any members of the governing body or planning board who have a financial interest in the project or developer. This certification could be included in the list of documents each municipality requires before the development application is deemed complete. *See* N.J.S.A. 40:55D-10.3.

5. When a member of a local government board seeks to personally transact business before that board, the municipality must proceed with caution and consider avenues to avoid the potential for a conflict or the appearance of a conflict, such as by requiring the board member to use an intermediary to make his or her case before the other board members.

6. Public officials such as a mayor and planning board members must similarly proceed with caution when the mayor in his personal capacity appears before a board comprised of individuals the mayor has appointed. The argument for disqualification becomes most compelling when the mayor or other appointing official stands to gain a significant financial benefit from the personal application, in which circumstances a perception of favoritism is most likely. In such cases, the planning board should make every effort to identify suitable members to rule on the application. Many smaller communities such as Chesterfield have combined local planning and zoning functions into one “consolidated” land use board. *See* N.J.S.A. 40:55D-25c(1). Our investigation raises the question of what happens when such a board cannot muster a quorum as a result of conflicts. Whereas N.J.S.A. 40:55D-23.2 authorizes the replacement of conflicted members of a planning board using members of the zoning board on a temporary basis, no such mechanism exists to authorize the replacement of conflicted members of a consolidated board. *See Gunthner v. Planning Bd.*, 335 N.J. Super. 452, 461-62 (Law Div. 2000). We recommend the enactment of legislation to address the situation where a municipality

has no zoning board from which to draw replacement members and the planning board cannot otherwise produce a quorum because of conflicts.

VII. Referrals

This matter will be referred to the Division of Criminal Justice to determine whether Durr's actions and omissions as described in this report constitute criminal conduct for which prosecution is appropriate. This matter also will be referred to the Local Finance Board to determine whether Durr's actions and omissions as described in this report constitute violations of the LGEL and, if so, the appropriate penalty under N.J.S.A. 40A:9-22.11.