

The **Feasibility** of a **Transferable Development Rights Program**

for

Athens-Clarke County, Georgia

Prepared by

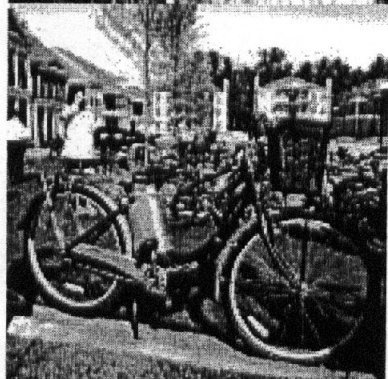
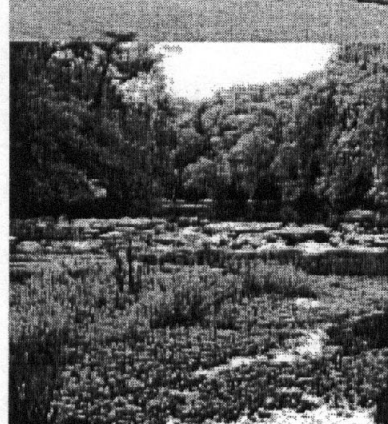
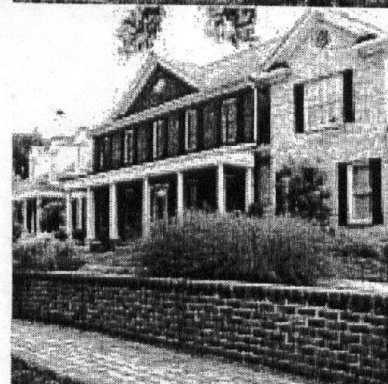
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February 2, 2005

*Preparation of this study was funded in part by a 2003 Quality Growth Grant
awarded to Athens-Clarke County
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I. Executive Summary

A transferable development rights program in Athens-Clarke County is feasible and has a reasonable chance of success if it is properly designed. Given community consensus on the goals of the program, appropriate sending and receiving areas can achieve those community goals over the next 10 or 20 years. TDR programs operate on a completely voluntary basis; if citizens do not believe in the goals and want to participate in the program, they will not. If TDR holders want to sell and developers want to purchase TDRs, the program will be a success.

To properly design a TDR program for Athens-Clarke County, the goals of the program must be clearly articulated. More than one goal can be accomplished by a single TDR program, so policy makers can choose more than one goal. Goals identified in this study are:

1. Farmland, Timberland, and Open Space Preservation
2. Corridor Preservation
3. Environmental Protection
4. Historic Preservation
5. Affordable Housing

After choosing the goals of the TDR program for Athens-Clarke County, the sending and receiving areas should be easy to identify based on the stated program goals. Potential sending areas include land zoned Agricultural Residential, Commercial -Rural, Employment-Office, Employment-Industrial, and Industrial; lands that are environmentally sensitive; and those containing historic properties. Depending on the goals of the program, different subsets of these land categories would be included in the sending areas. For example, land zoned Commercial-Rural might be included in a sending area to further a goal of corridor preservation.

Potential receiving areas include virtually all undeveloped land zoned as Residential, Commercial, Commercial-Rural, and Employment-Office. If higher density in specific single-family residential neighborhoods does not fit with the community's wishes, those areas can be excluded from receiving zones. Some commercial rural zoned land may be excluded if preservation of corridors is important. Receiving areas should be carefully chosen to ensure sufficient demand for the TDRs, to fit with the goals of the program, and to bring additional development only to those areas with infrastructure capable of handling the impacts of that growth.

TDRs must be awarded to landowners in the sending areas at a rate high enough to encourage a significant percentage of the land owners to sell the TDRs and preserve the land, thus achieving the program goals. Because this is a voluntary program, both landowners and developers must benefit from participating, or the program will fail.

The demand for TDRs is clearly related to the level of building permits issued. There were 954 residential permits approved for 2004, and an additional 99 new commercial construction permits issued over the same period. Thus, the potential market for TDRs exceeds 1053 per year. Clearly, not all projects will involve TDRs. However, if the TDR program is properly designed many projects will be developed using TDRs. Based on the findings in this study, developers are likely willing to pay \$8-10,000 per additional single family unit and about \$6,000 per additional multifamily unit. At these prices, a reasonable estimate is 400-600 TDRs purchased per year.

If TDRs are issued in the AR zone at a rate of 1 TDR per 10 acres (the amount of residential development allowed under baseline zoning), the total number of TDRs in the AR would be between 750 and 890 depending on precise program rules, too few to supply a TDR program for very long. Further, these landowners are unlikely to sell their TDRs if the bonuses are designed to have a value in the \$8-10,000 range. Issuing TDRs at a rate of 1 TDR per 1 acre will make landowners willing to participate in the program, increase the supply of TDRs enough to keep the program running for an extended period of time, and help preserve the "greenbelt."

If each TDR bought represented one acre of land preserved and 600-800 TDRs are purchased per year, this will preserve 3-5% of the undeveloped and underdeveloped land in Athens-Clarke County each year. This would be a successful rate of land preservation and makes the idea of a TDR program worth pursuing. It also suggests that additional land preservation tools should be employed along with a TDR program if the community wants to secure land more rapidly.

There has been some concern that growth management programs in general can have adverse impacts on housing affordability. Research detailed in this report shows that policies such as TDR programs do not generally help or hurt housing affordability.

Any impact of a TDR program on property tax collections in Athens-Clarke County should be small given the current size of the tax base. Athens-Clarke County has a property tax digest of approximately \$2.5 billion (on a 40% assessed value basis) and 2004 county millage rate of 13.40. After landowners sell their TDR, they are legally entitled to be reassessed, assumedly reducing the taxable value of the property. Reducing the assessed value on 800 acres per year (to use a high value) would cause the loss of less than \$40,000. The use of the TDRs would add taxable property to the digest, offsetting this loss. Given that the average assessed value of residential property in Athens-Clarke County is a little over \$30,000 (on a 40% basis), the additional tax collected could be as high as \$300,000.

One could argue that the same number of units would be built regardless, and the TDR program would merely change the location and density of the development. If this is true, the \$40,000 figure is an upper-bound estimate of the property tax loss on an annual basis (with a new \$40,000 being subtracted each year as more land is preserved). Taking this as a starting point of a worst case scenario, one should still factor in two offsets: reduced service costs due to more compact and higher density development and increased property values of properties surrounding preserved land. Research suggests surrounding property may rise in value by up to 10% due to proximity to permanent open space.

Overall, the program appears quite affordable in terms of fiscal impact. The program may actually result in a gain in property tax collections. At worst, there will be a small annual loss. Compared to the Athens-Clarke County budget of over \$86 million, this loss is equivalent to 0.04% of the budget. Even 20 years into a TDR program, the total property tax collection decrease due to the program would be less than 1% of the annual budget. This is before any offsetting due to increased tax collections on surrounding properties or additional development caused by the program or decreased service costs due to more efficient development patterns encouraged by the program.

II. TDR Background and Basics¹

Local governments are increasingly using Transferable Development Rights (TDR) programs to accommodate growth without increasing the amount of developed land or overextending the infrastructure within their jurisdictions. Many commentators see great promise in the power of TDRs. TDRs can be used to preserve or conserve a wide range of resources – natural, scenic, agricultural, environmental, historical and cultural.

The idea of harnessing the power and severability of development rights began in the 1960s with an Urban Land Institute document that initiated a flurry of scholarly discussion on “transferable density.”² In turn, the first TDR program was initiated in 1968 for the purpose of historic preservation; the New York City Landmark Preservation Law allowed the transfer of density from a designated landmark property to adjacent lots. Despite the historic preservation roots of TDRs, only seven out of 112 programs nationwide today are targeted exclusively at historic preservation. More popular are open space and land preservation TDR programs. For example, the national model for farmland TDR programs is Montgomery County, Maryland, where more than 40,000 acres of farmland have been preserved in a county pressured by the growth of adjacent Washington, D.C.³

TDRs in Georgia

The first local TDR program in Georgia was Atlanta’s preservation-oriented program,⁴ begun in 1977, and to date it has been utilized only once to protect a historic property. In 1998, the Georgia General Assembly passed state TDR legislation that was, unfortunately, burdened with a procedural snag. TDR programs were encouraged, and the legislation made clear how a program should be structured, but for each actual transfer of development rights, the local government was required by the statute to hold a public hearing analogous to the hearing held for a rezoning request. (This was in addition to the required hearings to initially pass a TDR ordinance.) This burden proved too great for many local governments who felt no TDR program was better than a too-complicated program. The legislation was amended in 2003 to alleviate this hurdle and improve other areas of the statute regarding issues like regional TDR programs and marsh hammock TDRs.⁵ The first TDR program developed in Georgia under the 1998 TDR enabling legislation is in the Chattahoochee Hill Country area of Fulton County.

¹ Thanks to Land Use Clinic Research Assistant Jennifer McStotts for her significant research and writing assistance with this section.

² See Rick Pruetz, *Saved By Development: Preserving Environmental Areas, Farmland, and Historic Landmarks with Transfer of Development Rights* 9 (1997) (discussing the ULI technical bulletin authored by Gerald Lloyd in 1961 and subsequent related publications).

³ See Natural Resources Defense Council, *Montgomery County Agricultural Reserve: The Country’s Largest Farmland Protection Program*, at <http://www.nrdc.org/cities/smartGrowth/solve/mont.asp> (last visited Feb. 29, 2004).

⁴ Information on the development of the State Enabling Act is from the account of Professor Laurie Fowler, Co-Director of the University of Georgia Institute of Ecology’s River Basin Science and Policy Center.

⁵ See generally S.B. 86, 147th Gen. Assem., Reg. Sess. (Ga. 2003).

A. Basic Features of TDR Programs

The act of transferring development rights requires four elements:

1. Sending area(s) to be protected,
2. Receiving area(s) to be developed,
3. Transferable credits that symbolize and quantify the development rights being sold, and a
4. Procedure for carrying out the transaction.⁶

In short, a community must identify resources it seeks to protect and establish a sending area defined geographically to best protect those resources. A TDR program severs the right to develop a parcel from the land itself, but it leaves the landowner the other rights that came with the land, such as the right to exclude members of the public from the property. That land is then safeguarded with deed restrictions or conservation easements that secure the undeveloped state of the land in perpetuity.

How much are these development rights worth? That depends on how the community chooses to define the sending and receiving areas and the credits themselves. For example, the local government can assign credits to each land owner in the sending area based on acreage, based on resource features on the parcel, or based on the value of an easement on the land. The first is the simplest and most common method; communities often assign one credit per acre, per five acres, per ten acres, etc. The value of the credits then comes from how they can be used in the receiving area where growth is being directed by allowing increased density or other bonuses with the purchase of development credits. How much of a bonus is allowed per credit purchased is what sets the value of the credits. There needs to be a balance of supply and demand in the credit market, which is sometimes protected by the very structure of the program, such as through TDR banks.⁷

In some jurisdictions TDRs can be purchased to receive bonuses that have nothing to do with the size of the building; they can exempt the holder from any development requirement the city chooses, whether floor area ratio, height, parking, landscaping, or subdivision limits. For example, in Pittsburgh, Pennsylvania TDRs can be used for exemptions from minimum lot area and open space requirements. Similarly, in Sunderland, Massachusetts, TDRs get exemptions from minimum lots size and frontage regulations. New York, New York allows variations in height, setback, and yard requirements. This inherent flexibility is an important aspect of TDRs that is sometimes neglected.

⁶ See Pruetz, *supra* note 2 for an introductory discussion of TDRs.

⁷ There are three transactional structures available to TDR program developers: private, bank, or bank-as-purchaser-of-last-resort. See National Trust for Historic Preservation, *A Review of Transferable Development Rights (TDR) Programs in the United States*, SG040 ALI-ABA 409, 411 (2001) (first appeared in *Preservation Law Reporter* 1997).

B. TDR Banks

A TDR bank can be either a "public or quasi-public agency" or a private nonprofit corporation. Usually, the primary purpose of a bank is to buy and sell TDRs and provide administrative assistance in the transfers.

Creating a TDR bank has many advantages. First, the bank can undertake education programs to help landowners understand the concept of development rights. The bank may also provide interested parties with the appropriate forms and requirements for a successful transfer.

Additionally, the bank may take on vital administrative duties to prevent fraud or complications in the transfers. Registration of the rights, transfers, and statistics are important pieces of information necessary to conduct a successful program. Finally, education programs encourage property owners to participate in the program, as well as attract potential TDR purchasers.

Most TDR banks are county-run governmental agencies. However, it is possible for a TDR bank to be a nonprofit organization. For example, a nonprofit corporation in San Luis Obispo, California administers one of the nation's most successful TDR banks. Chattahoochee Hill Country Alliance is also forming a nonprofit TDR bank, although Fulton County may form one in the future for the entire county.

TDR banks take on different roles in the TDR program and market. Most banks have some administrative duties vital to the efficiency of the TDR program. In some cases, the bank is also involved in the TDR market as a "buyer of last resort," purchasing rights from landowners who cannot find a private purchaser. Finally, the bank may buy and sell rights in the open market, acting as a competitor.

Seed money for a TDR bank can come from federal and state grants, private foundations, county general funds, SPLOST or other proceeds. Another way to raise funds is through the purchase or donation and sale of TDRs. This strategy has worked well in Malibu, California where large land donations benefit the Malibu Coastal Zone revolving fund. Landowners donate their rights to the bank in exchange for the charitable-donation tax benefits.

C. Public Involvement

Community support of TDR programs is crucial to their success. For example, as discussed below, the input of citizens from the very beginning of the planning process has been crucial to the development of the TDR program for Chattahoochee Hill Country, and has led to unprecedented levels of community involvement in a planning program. There has already been significant public discussion of a TDR program in Athens-Clarke County, as a program was originally envisioned as part of the Comprehensive Plan adopted in 1999. Also, the previous and current mayor have considered appointing a citizens committee to oversee creation of a TDR program, something that was delayed by various factors including consideration of the outcome of this feasibility study.

There should be some level of public input into development of a TDR ordinance in Athens-Clarke County. At a minimum, creation of a TDR program is a zoning decision under the State Zoning Procedures Act, and the public notice and hearing provisions of that statute should be observed. However, more input is likely needed in decisions such as what types of land should be preserved in sending areas, what types of densities allowed in receiving areas, where both of those types of areas are likely to be, etc.

TDR expert Rick Pruetz recommends the creation of a Citizens Advisory Committee (CAC), representing various interest groups, to assist with the planning process. These groups include landowners in potential sending and receiving areas, developers, real estate professionals, homeowner groups, and community activists, working with planning staff support. Under Pruetz's scheme, normally a CAC would have been appointed before the beginning of development of any TDR scheme. However, the majority of the work envisioned to be done by a CAC is still to be accomplished in Athens-Clarke County.⁸ The planning department will continue to need support in assessing the information gathered in this report, considering the options presented here (and others) of the potential structure of the program, including transfer ratios, and determining whether changes need be made in the zoning code or comprehensive plan to support the TDR program. The CAC could also be crucial in organizing community meetings and hearings to gather general community input on the process and plan. If a TDR bank is needed, the CAC could also be important in the bank's formation. The CAC could also consider whether a Purchase of Development Rights (PDR) program or other public acquisition programs might also be appropriate for Athens-Clarke County.

⁸ See, generally Pruetz supra note 2 at 120-123.

D. Examples of TDR Programs – Success Stories, Warnings, and Lessons Learned

Other TDR programs around the country can serve as examples, both positive and negative, for Athens-Clarke County. Following is a sample of some of the most successful programs in the country.

1. SUCCESS STORIES

Chattahoochee Hill Country, Fulton County, Georgia

The first TDR program developed in Georgia under the 1998 TDR enabling legislation is in the Chattahoochee Hill Country area of Fulton County. The TDR program is part of a larger master plan designed to cluster development in “villages” and “hamlets” while leaving surrounding land largely unspoiled.

Chattahoochee Hill Country (CHC) had been spared growth for many years because of transportation and infrastructure deficiencies, but with the rest of Fulton County being built out to capacity, residents of CHC no longer felt they had sufficient protection for their rural way of life.

In April 2001, landowners, academics, developers, planners, and conservation organizations came together for a planning charrette. The result was consensus for development of a master plan. During that summer, meetings were held with all landowners in the Hill Country area, who unanimously supported master plan development, and a team of consultants was hired.









The involved parties recognized that if growth occurred in the typical one house per acre pattern of the rest of Metro Atlanta, 80% of the land in the Hill Country would be disturbed. This included land that area residents knew was inherently valuable as open space. Therefore, the consultants began with an assessment of existing conditions, and found environmental, open space, historic, and agricultural values to be protected. Current infrastructure, such as roads, water, sewer and septic systems, and parks, as well as existing development, were also assessed. The consultants and community together then devised a Master Plan which clusters the same number of housing units allowed with the conventional development pattern into villages and hamlets, developments that would result in only 16% of the land being disturbed. The development “nodes” were located based on access to transportation, existing development, and available or planned infrastructure.

At this point the Fulton County Office of Environment and Community Development began implementing the plan by gaining passage of amendments to the South Fulton Comprehensive Plan and the county’s zoning ordinance. The University of Georgia’s Land Use Clinic was then asked to draft the TDR ordinance. A TDR program was needed to transfer density from the preserved land to the villages and hamlets, allowing landowners of protected land to obtain the development value by transferring it to areas designated for more density. Developers of the villages and hamlets would be required to purchase TDRs to obtain the necessary density – a clean and efficient way to transfer density in furtherance of the community’s goals and at the same time preserve the economic value of the protected land for its owners. The spatial development goals of this TDR plan can be seen in Figure 1 below.

Chattahoochee Hill Country

Conceptual Land Plan South Fulton County, Georgia

Legend:

-  Rural Protection Buffer
-  CHC Boundary
-  Agricultural Conservation
-  Roads
-  Scenic Protection Buffer
-  Village
-  Riparian Protection Buffer
-  Chattahoochee River

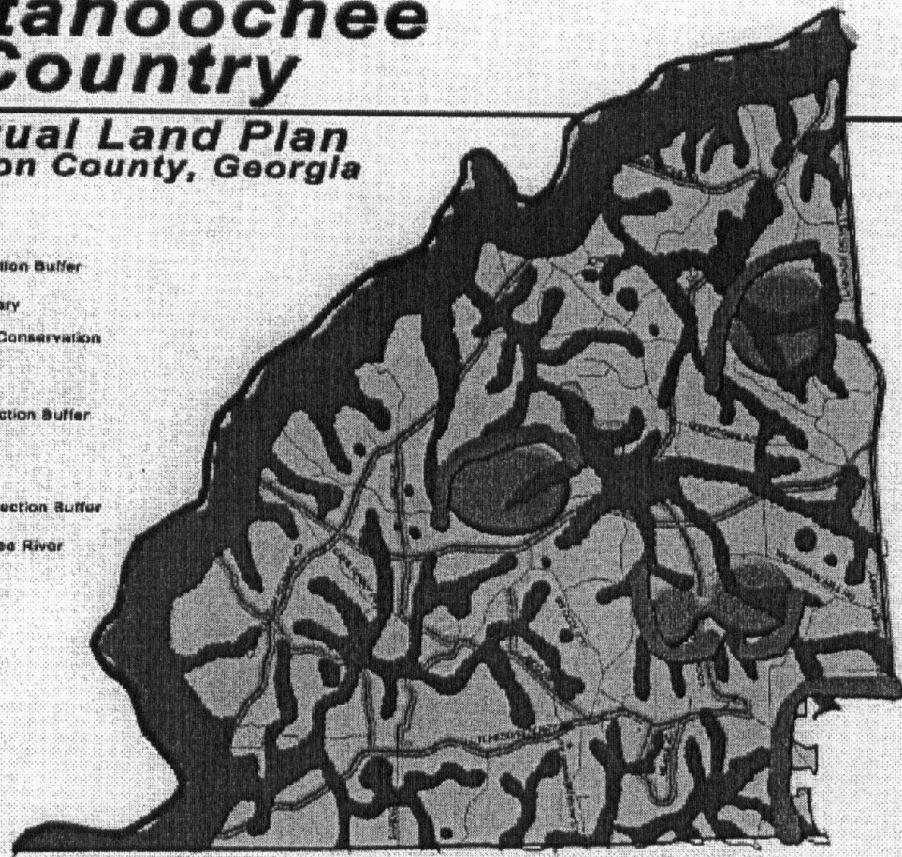


Figure 1. Envisioned distribution of development and preserved land under the TDR program.

The ordinance delineates sending and receiving areas based on the plan, designating the villages as receiving areas and all other land in the Hill Country as potential sending areas. It regulates the certification and transfer of TDRs, and allows for creation of a TDR bank. It creates an open TDR market wherein any developer, investor, conservation organization, or other interested party may buy TDRs. The TDR ordinance was passed unanimously by the Fulton County Board of Commissioners on April 22, 2003.

As of this writing, CHCA is in conversation with developers interested in creating the three villages. There is planning underway to create a TDR bank to buy and hold TDRs from landowners ready to sell. This may help jump start the market and create a ready source for developers to purchase TDRs once plans are developed.

Montgomery County, Maryland

As mentioned above, the most successful TDR program in the country is Montgomery County, Maryland's.⁹ By most accounts the program has now protected approximately 40,000 acres of farmland. TDRs transfer density from the northern part to the southern part of the county. The TDR program was initially developed as part of a 1980 master plan which "downzoned" agricultural areas to one dwelling per 25 acres, yet allowed TDR transfer rates at one unit per five acres. This created a five to one incentive to transfer. All of the receiving areas were not created initially – instead, the County adds acreage to receiving areas as needed to maintain demand for TDRs. This has been somewhat controversial but the program has been able to be successful because officials stay on top of the demand issue through periodic review of market needs.

Primary reasons given for Montgomery County's success include the inclusion of the TDR program in a larger master plan; the "mandatory" nature of the program (to achieve the full development potential of the land, landowners must transfer that density off-site;) and the recognition that some farmland in the path of growth at the southern end of the county could not be protected because of rising land values and the reduced desirability of farming in developing areas.

Dade County, Florida

In 1981 Dade County, Florida adopted a TDR program as a component of a plan to protect the East Everglades. Potential sending sites are parcels in the East Everglades, and receiving areas are unincorporated lands within an "urban boundary line" designated in the County's Comprehensive Plan. The number of TDRs that can be transferred from a site depends on the amount of development pressure on that parcel. For example, parcels near existing urban areas have a transfer ratio of one TDR (called a SUR, or "severable use right" by the County) to every five acres. (The underlying density is one unit per 40 acres.) Agricultural land and other land with less development potential have a transfer ratio of one to 12 or one to 40. The SURs can be used in sending sites to deviate from density, lot area, frontage and other development

⁹ Descriptions of TDR programs throughout this document are derived principally from Fulton, Mazurek, Pruetz and Williamson TDRs and Other Market-Based Land Mechanisms: How They Work and Their Role in Shaping Metropolitan Growth, Brookings Institution (2004) and from Rick Pruetz, Beyond Takings and Givings: Saving Natural Areas, Farmland, and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges (2003).

requirements on both residential and commercial properties. Only environmental, open space, agricultural and recreational zones are ineligible to receive SURs.

Factors in Dade County's success include strong regulations prohibiting or limiting development on environmentally sensitive land, and a strong market for development. In most cases the use of SURs are also a matter of right in the receiving areas – no additional zoning approval is needed.

2. WARNINGS

Programs that have had less success have often had one of several problems: 1) developers are satisfied with development densities allowed by the existing zoning code and therefore have had little motivation to use the TDR program, 2) rezonings allowing greater density are easily granted by the local zoning body, making the use of TDRs unnecessary, and 3) developers use other methods for achieving density, such as clustering/conservation subdivisions, rather than TDRs.

Caroline County, Maryland

Caroline County, Maryland, has suffered from the first problem. This small municipality in eastern Maryland is predominantly rural, and adopted a TDR program to conserve natural resources and productive agricultural land. The program has a one to one transfer ratio. (The underlying density is one unit per four acres for small subdivisions, one to 20 for those over five lots.) Despite the relative simplicity of the program, there is little demand for TDR because there is little demand for higher density in the county.

San Marcos, Texas

San Marcos, Texas, suffers from the second problem. This Texas town, population 35,000, has a TDR program designed to protect environmentally sensitive areas along local rivers. However, few transfers have occurred because rezonings to higher density are regularly granted by the City council, making the TDR program unattractive to developers.

St. Mary's County, Maryland

St. Mary's County, Maryland has suffered from a combination of problems. St Mary's is a primarily rural county and the TDR program preserves farmland. Residential development can occur in the sending area at one unit per three acres and one unit per five acre densities. The transfer ratio is one to one. Development rights can be transferred to Rural Village Center, Rural Town Center, Low-Density and High-Density Residential Districts and Planned Unit Developments. Planning staff in the county have identified at least two barriers to the program's success. First, the one to one transfer ratio means that landowners can develop on-site or transfer at the same density to a receiving zone (although there are density bonuses on receiving sites, which is some incentive for developers on those sites). The other problem is that baseline densities on sites in sending areas can be increased simply by applying for Planned Unit Development (PUD) status.

3. LESSONS LEARNED

Certain lessons can be derived from the TDR program experiences of others. It is clear that there are several necessary components of a successful TDR program.¹⁰ One is the creation of adequate receiving areas. Communities that designate too few receiving areas because of political opposition from neighbors handicap their TDR programs from the beginning.

A related issue is a good balance of demand and supply. TDR programs work best when demand for development is high and market participants are motivated to participate. Routinely approving "upzonings," ignoring the TDR mechanism, creates a mindset in developers that they should not buy what they can get for free.

Also, it is best not to try to save areas that are under immediate threat of development, such as land bordering urbanizing areas. This land will typically have a high development value, forcing the allocation of high numbers of TDRs to this land to motivate owner participation. More successful programs allocate sufficient TDRs in the sending area to keep TDRs affordable for receiving area developers while also offering sufficient compensation for sending area landowners.

Possibilities for Inter-Governmental TDR Programs

One criticism of even successful TDR programs such as Montgomery County's is that TDRs do not prevent regional sprawl. Instead, sprawl "leapfrogs" over counties where land is protected to counties where there are fewer mechanisms for protecting land-based resources. A few regions and states have programs addressing this trend, and might serve as an example for Athens-Clarke County and neighboring counties in creating a cross-county TDR program or other land preservation mechanisms. This strategy might enable the creation of a larger number of sending and receiving areas in each county, allowing a more regional approach to both greenspace preservation and development in appropriate areas.

New Jersey Pinelands is the most frequently cited inter-jurisdictional TDR program in the country. The program is designed to protect environmentally sensitive areas and specialty agriculture. The 1.1 million acre region spans seven counties and 56 municipalities. The program is managed by the regional Pinelands Commission, made up of representatives of the jurisdictions. The program was created by state statute. TDRs (called Pineland Development Credits or PDCs) are transferred at a specific rate based on the land's development potential and environmental sensitivity. However, one problem with the program is that it lacks sufficient receiving sites; another is that it is very administratively complex. The program has nevertheless succeeded in protecting over 30,000 acres.

The other inter-jurisdictional program that is frequently cited is in Boulder County, Colorado. This program is inter-jurisdictional because it allows transfers between Boulder County and its cities. The TDR program is sometimes used in conjunction with city and county acquisition funds. Landowners sell their TDRs to other landowners, and then sell the property to the city or county at a reduced price reflecting the reduced development value. The city or county then

¹⁰ Pruetz and his co-authors identify these components in their report to the Brookings Institution, *supra* note 9 at 22-23.

leases or sells the lots to area farmers while retaining the easement. The county grosses about \$350,000 a year from leases.

Neither of these programs allows TDR transfers by inter-jurisdictional agreement between counties. However, the UGA Institute of Ecology and Land Use Clinic are currently studying the feasibility of such a program in an eleven county area of the Etowah River basin. Their findings may provide support for other inter-jurisdictional programs in Georgia.

E. Necessary Elements of a TDR Ordinance under Georgia's Amended TDR Legislation

The legislation that controls the transfer of development rights in Georgia comprises only two brief provisions within the Georgia Code: sections 36-66A-1 and 2.¹¹ The two sections are titled "Definitions" and "Procedures, methods, and standards for transfer of development rights" respectively. Section 36-66A-1 requires a local TDR ordinance to include a sending area and a receiving area, meaning areas designated in the ordinance as authorized to send and receive the transferred development rights. Reference to a zone on a zoning map will be sufficient to satisfy the definition in the statute so long as it is established by ordinance.¹² Similarly, references to overlay zones or historic districts, so long as officially mapped or defined with sufficient specificity, should meet the definition. Development rights may be calculated by a number of different factors, "including dwelling units, area, floor area, floor area ratio, height limitations, traffic generation, or any other criteria that will quantify a value for the development rights in a manner that will carry out the objectives of this Code section."¹³ The rights may then be transferred to – "affixed to" – one or more receiving parcels.¹⁴

Section 36-66A-2(c) goes into additional detail regarding requirements of the ordinance itself, which must provide for: (1) the issuance and recording of those instruments necessary to sever and affix the development rights; (2) the preservation of the sending property's character and prohibitions against use and development that "bind the landowner and every successor in interest to the landowner;" (3) the severance of the TDRs and delayed transfer; (4) the exchange of the rights before they are affixed; (5) the system to monitor the exchange; (6) the right of the local government to purchase and hold TDRs; (7) the right of persons to purchase and hold TDRs; (8) the tax assessment of TDRs; and (9) "a map or other description" of the sending and receiving areas.¹⁵

Following is a discussion of other possible elements for a TDR ordinance. Some provisions may not be appropriate for Athens-Clarke County. While the general structure is a good guideline, each of the provisions in an ordinance should be individually designed to meet ACC's particular needs and goals. Reviewing ordinances of jurisdictions in other states, especially those localities with conditions similar to ACC's, would also be helpful.

Purpose and Intent

The Purpose and Intent section of the ordinance gives the reasons for implementing a TDR program. It also specifies the public purposes that are promoted by the ordinance. In the event of a legal challenge, this section demonstrates that the legislation is not arbitrary or discriminatory, and that it is a valid exercise of the police power.

¹¹ See O.C.G.A. §§ 36-66A-1 and -2.

¹² See O.C.G.A. §§ 36-66A-1(3) (defining a receiving areas as "an area identified by an ordinance as an area authorized to receive development rights transferred from a sending area"); 36-66A-1(5) (defining a sending area as "an area identified by an ordinance as an area from which development rights are authorized to be transferred to a receiving area"); and 36-66A-2(c)(9) (requiring "[a] map or other description of areas designated as sending and receiving areas for the transfer of development rights between properties").

¹³ O.C.G.A. § 36-66A-1(1).

¹⁴ O.C.G.A. § 36-66A-1(7).

¹⁵ O.C.G.A. § 36-66A-2(c).

This section also demonstrates the ordinance's consistency with the goals and guidelines set forth by the local governing body and the State of Georgia for TDRs and land preservation. Any TDR ordinance should similarly draw on the goals and purposes of the community's Comprehensive Plan and any additional planning processes or documents.

Applicability and Conflict

It is important to delineate the area to which the TDR ordinance will be applied. Whenever "overlying" a set of regulations onto existing zoning, it is important to clarify which regulations prevail in the event of a conflict between the two. TDR regulations should probably prevail over other zoning regulations, so that the purposes of the TDR program can be achieved. A simple statement that the TDR ordinance does prevail in those situations should suffice.

Definitions

This section should provide the legal definitions of particular words within the context of the ordinance. All words that have meanings particular or unique to the ordinance should be defined, including those terms that may not be familiar to the reader. Also, any terms that are abbreviated throughout the ordinance should be defined fully and their consistent short version provided. The definitions should also be consistent with those used in the State TDR Enabling Act.

Sending and Receiving Areas

These sections delineate which lands are eligible to send and receive TDRs. Most ordinances refer to the areas by their positions on a map, rather than specific physical locations. Also, the procedure for creation of additional sending and receiving areas should ensure that sending and receiving zones are not changed in such a way to upset the balance of the overall plan. The ability to move or change receiving areas might result in development in places where the community has already determined the land should be preserved. The important thing to remember in delineating sending and receiving areas is that it must be clear to all parties which areas are eligible to either send or receive.

Eligibility

Obviously, a parcel of land that has been enrolled in the program and from which all TDRs have already been transferred should no longer be eligible to participate, and this should be made clear in the ordinance. Also, usually parcels already protected by a perpetual deed restriction or easement are also not eligible to participate, as there is no legal or practical reason to attempt to permanently protect the same land twice.

Land that is already developed to its maximum potential should not be eligible. In addition, as the purpose is to protect the maximum amount of land possible, land that is required to be set aside as greenspace, for example, in conservation subdivisions should not be eligible for TDRs. For the same reason, land that may not legally be developed under state-mandated riparian buffers or other environmental restrictions such as steep slopes, wetlands, floodplains, or unsuitable soils is often not eligible. However, in cases where land may need additional protection – for example, wetlands that might be filled if the developer gets the proper permit – such land might be made eligible for the TDR program.

As the purpose of the ordinance is to allow private landowners to receive the financial benefit of development of their land while preserving it in its pristine state, the program is open only to privately held land. Land that is held in public ownership, such as a county/state owned park, school, roadway, etc., should not be eligible.

Certification of TDRs/Application process

The application process should make the certification of TDRs as easy as possible. However, it should also provide the county with sufficient data to appropriately assess the application. The planning department usually processes the form. Application forms usually require the landowner to describe the property in various respects. The form may also require a legal description of the property, including a plat map prepared by a licensed surveyor. Some programs do not require surveys, as they consider it an unnecessary added expense for the landowner. However, this is legally risky, as the TDR program dispenses with certain property rights. Also, a survey will likely be necessary to make the conservation easement on the protected land effective. The survey also allows the county to accurately calculate the number of the landowner's TDRs. Therefore, a requirement for a survey is recommended.

Calculation method for sending areas/Issuance of TDR certificates

There should be a section showing the method used to calculate the number of TDRs that landowners will receive for their land. For example, in the Hill Country, landowners receive one TDR for each acre of land they own. As discussed above, other jurisdictions use higher or lower transfer ratios.

This section can also delineate how the TDR certificates will be issued. While some programs issue a certificate for each TDR (similar to traditional stock certificates) it is more convenient to issue one certificate with serial numbers for each TDR. This is less cumbersome in the case of large tracts, especially those numbering in the hundreds of acres. Also, to avoid delays, a deadline on the issuance may be mandated. For example, in the Hill Country program, the county is required to issue the certificates within 95 days of receipt of the application.

Also, when the landowner chooses to sell less than all of his or her TDRs, the certificate must be re-issued to accurately reflect the remaining number of development rights. Therefore, once the TDR transfer is complete and recorded, the landowner should be required to submit the original certificate, along with a copy of the Deed of Transfer, to the local governing body. That body should then be required to issue a new certificate reflecting the landowner's remaining TDRs and the corresponding serial numbers.

Appeal of calculation

To avoid due process problems, it is important to include appropriate appeals processes in the ordinance. It is often most convenient to use an appeals process that was already established for other types of zoning actions within the zoning code. Using an already established board as the decision maker avoids creating additional bureaucracy. Also, the county zoning body is familiar with appeals to zoning and planning decisions.