

Transfer of Development Rights

Current Programs & Proposals for a
Standard Implementation Program



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objectives

Overview

Following the Georgia Legislature's approval of legislation enabling counties to begin transfer of development right ("TDR") programs, the Chattahoochee Hill Country ("CHC") and the Alliance monitoring the program has undertaken the first formal TDR program in Georgia and the entire southeast. The goal of this TDR program is to "promote the conservation of natural, agricultural, environmental, historical, and cultural resources and encouraging smart growth in the CHC." The implementation and effectiveness of the CHC's TDR program to other areas within the state of Georgia remains a challenge due to insufficient guidelines, improper funding, and an overall process that is difficult and foreign to many other areas. This group will explain how a TDR program works using the CHC as a reference. Furthermore, the group will develop recommendations for a standard TDR implementation program applicable to other localities in Georgia.

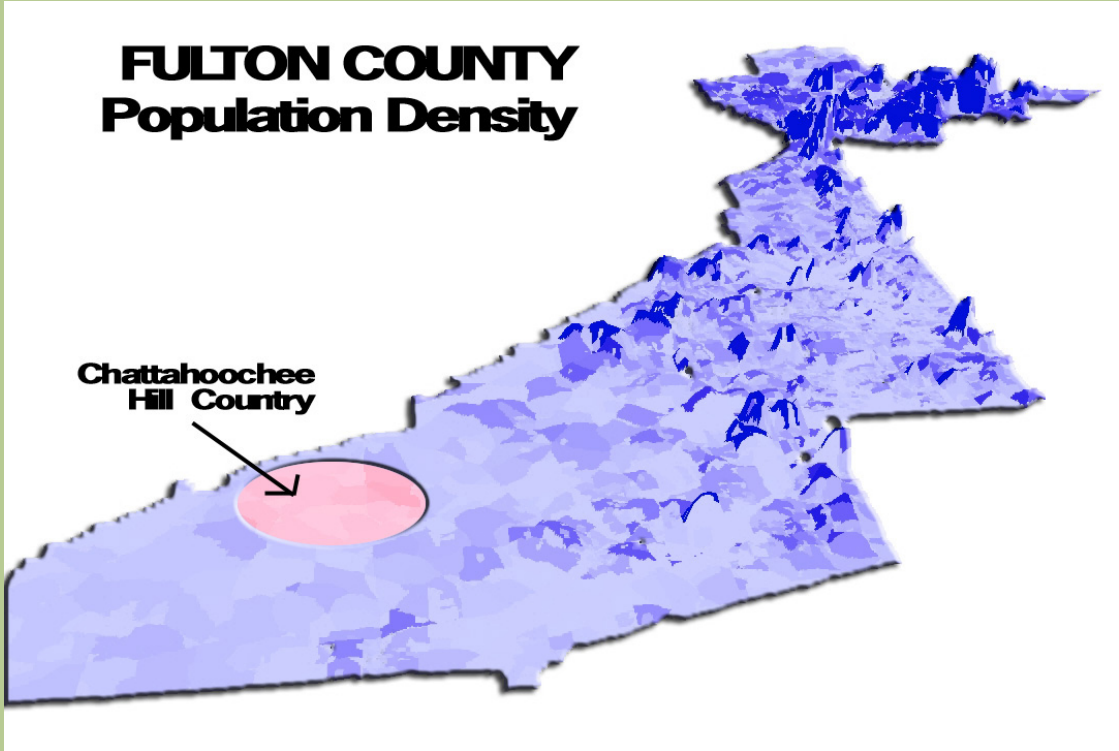
Process

In order to create a standard TDR implementation program for other counties in Georgia, this group focused on the current program in place in the CHC as well as other TDR programs across the nation that have experienced successes or failures based on their current practices. Through working and meeting with Terry King, the Executive Director of the CHC Alliance, the group discovered why a TDR program was necessary in the south Fulton County area and the respective benefits and downfalls of the Georgia program. Applying these practices to the American Planning Association's Model TDR ordinance and other best practices existing across the nation, this group developed a standard ordinance for a new TDR program.

Questions

What is a TDR program?
 Why a TDR program was began and desired in the CHC?
 What legal impediments exist to TDRs?
 What are the legal issues involved in TDRs?
 What are the successes and areas for improvement with the CHC's TDR ordinance?
 What are other state's best practices?
 How can new programs be created and implemented in Georgia?
 Is a new program even possible within the state of Georgia?

FULTON COUNTY Population Density



Section II. Overview of the Chattahoochee Hill Country

By: A. Rae Smith

A. Geography/demography of area

The Chattahoochee Hill Country is located in South Fulton County, Georgia. Fulton County is the most populous county in Georgia and includes the state capital of Atlanta. The county is strangely shaped because of a major annexation in 1952 that brought over 118 square miles into the city, including the affluent suburb of Buckhead. This move was motivated in part to maintain a majority percentage of white voters in the county. This highly affluent north end of the county has been at odds with the more rural, southern end ever sense.

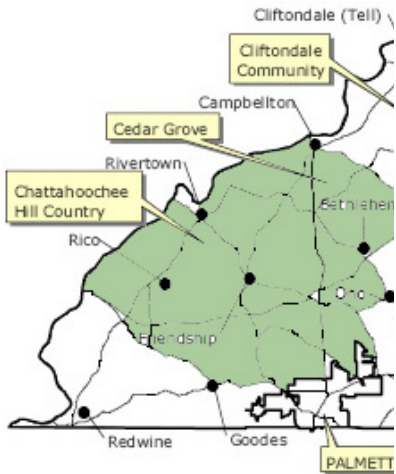
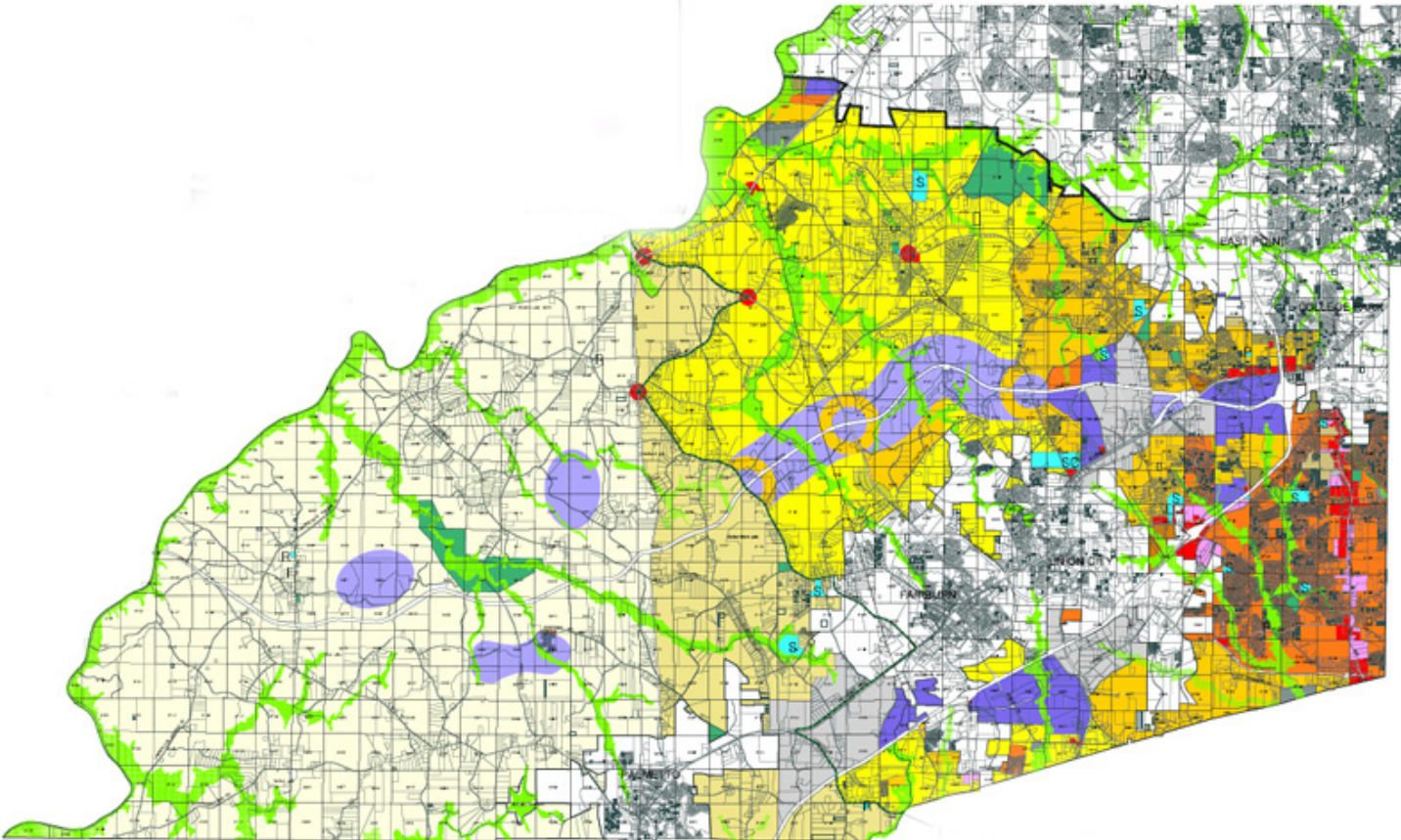
As of the 2000 Census, there were 816,000 people living in the county. The racial mix was essentially 45% black and 50% white, with an ever growing percentage of Hispanic individuals. Of the household composition, 37% were married couples, 17% were headed by single females, 32% were individuals, and 7% were elderly¹. The median family income was \$58,100 with about 15% of the population below the poverty line².



The Chattahoochee Hill Country resides in Palmetto, some 27 miles south west of Atlanta in South Fulton County.

Top: Population density graph. More populated areas are shown in darker red.

1 2000 Census Data. Available: www.census.gov.
 2 Census.



Historic neighborhood boundaries in South Fulton County.

Top: 2015 Fulton Focus Plan, land use. (see full map in Appendix)

The 2015 comprehensive plan was created to form polices and a land use map to serve as a guide to indicate the most appropriate locations for residential, commercial, office, and industrial uses as well as mixed use development.

B. SFC 2015 Plan

Of the existing land uses in South Fulton, forestry comprises 47,454 acres or 47.1% and is the largest land use category. The predominant uses in this category are forests and some mineral extraction activities. Most of the land used for agricultural is located west of Cascade Palmetto Highway in the 44,000 acre area known as the Chattahoochee Hill Country³.

Residential rezoning and development in South Fulton has increased since the late 1990s. Currently 19% of the land in South Fulton is zoned for low to medium density residential. Because of the increase in development here, county planners are just beginning to implement smart growth policies and principles. A token of 5,869 acres, or 3.1% is zoned for high density residential use in the county, with South Fulton accounting for a measly 0.5% of this⁴.

3 South Fulton County. Fulton Focus Plan. Available: (<http://www.fultonecd.org/focusfulton/plan-01-06/6landuse.pdf>)

4 Fulton Focus Plan

Existing Land Uses in South Fulton County in 2005		
Land Use	Acres	%
Low Density Residential	11,194	11.1%
Medium Density Residential	4,869	4.8%
High Density Residential	139	0.1%
Office	80	0.1%
Retail	818	0.8%
Industrial	1,818	1.2%
Government	314	0.3%
Institutional	710	0.7%
School	579	0.6%
TCU	8,373	8.3%
Private Recreation	74	0.1%
Public Recreation	1,253	1.2%
Forestry	47,454	47.1%
Agricultural	12,190	12.1%
Floodplain	9,100	9.0%
Water body	2,173	2.2%
No Data	194	0.2%
Total		100%

Source: Fulton County E&CD – GIS Section

South Fulton does have the highest number of acres zoned for agricultural uses, 67,575 acres, which accounts for 72% of land in this planning area⁵. A land use category such as this is attractive to developers and buyers who are looking for a house built on a large lot or for those who would like to live in a rural area. These large lot developments have been built in areas not well served by infrastructure, and therefore have contributed to the need for expansion of these systems and an increased consumption of natural resources. To address these issues, large lot development should be limited to areas where protection of open space is required, therefore only allowing the construction of a house and placing the remaining portion of the parcel in conservation.

Since the 1960s, commercial centers have been developed throughout South Fulton⁶. Many of these centers are located along state roads, easily accessed by the interstate system and in close proximity to residential uses. Most of these commercial developments can be characterized by strip developments. As development continues to move to green fields, these strip commercial centers have followed. In several areas, older strip commercial centers have declined, particularly when the anchor has closed. Leaving broken buildings and vacant properties behind.

Commercial strip developments have their place in Fulton County. However, with respect to land use, there may be a better way to provide these uses without construction potential future community eyesores. These types of spaces could be designed as flex spaces offering a variety of uses in on location, such as: housing, retail, and office or they could be a part of a mixed use development. Combining these uses reduces the impact on the county's infrastructure and natural resources.

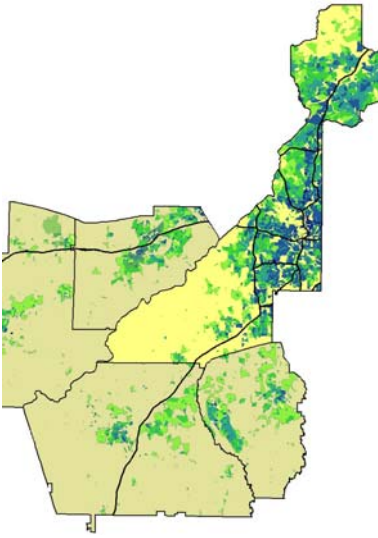
Leap frog development is also common throughout South Fulton. This type of development patten is inconsistent with infrastructure availability. In areas where there is none, or only limited sewer service, developments are under construction even though there are already areas that have ready access to sewer, water and well connected roads. This obviously puts a strain on the county to provide services where they had not before while existing infrastructure goes under-utilized.

However, good land use policies could support ideas such as conservation subdivisions, mixed use developments,

⁵ Fulton Focus Plan

⁶ Fulton Focus Plan

and TDRs. Each of these, if used collectively, could promote higher densities in appropriate locations, protect existing natural resources and ensure that goods and services are delivered in an efficient and effective manner.



Fulton County housing units per acre map. (see full in Appendix)

C. Land Issues

Historically, all of the cities in South Fulton grew around the rail lines. The rail lines have also been a catalyst for industrial development. Interstate I-85 and various state highways also spurred linear suburban type development. The construction of South Fulton Parkway, a developmental highway, increased the accessibility of South Fulton to the region's transportation system. Since its construction, development activity, industrial, residential, and commercial, has dramatically increased along the Parkway.

Since 1998, South Fulton has experienced unprecedented growth. Like North Fulton prior to its rapid population and employment growth, South Fulton has substantial amount of undeveloped land. Recent development has increased traffic volume on roads which were not originally designed to accommodate such capacity. These once rural roads will have to be improved to adequately handle the existing and projected growth. New collector roads may have to be built in order to keep up the transportation systems operating in a managed, efficient, and safe manner⁷.

Land development pressures associated with population and economic growth are expected to continue throughout the present decade and through 2025. Acres of land have been converted from woodlands and agricultural land to residential subdivisions, commercial, office, institutional and industrial land uses. Many environmental challenges that the county is experiencing today are directly or indirectly related to land development occurring partially in response to the population and job growth.

Development patterns have had as much of an impact on the environment as the amount of development. Fulton County and the surrounding area began experiencing the most intense development at the height of dependency on the automobile for transportation. As a result, land uses in Fulton County are decentralized, low density and fragmented⁸. Decentralized land development patterns are characterized by leap frog development, large lot residential subdivisions and separation of land uses. Low density development

⁷ Fulton Focus Plan

⁸ Fulton Focus Plan.

patterns influence every facet of the environment, particularly transportation choices and air quality.

A 2000 study, conducted by the Brookings Institution, compared population growth with increases in urbanized land in the Atlanta Metropolitan Area and found that land development is outpacing population growth. From 1982 to 1997 population increased 46% while land development increased 81%⁹. This data confirms that development in the region is decentralized and is consuming more land than is warranted by population growth.

Every land disturbing activity has an ecological impact. Minimizing the ecological impact of development and other human activities upon the land is critical and ultimately determines air and water quality, the availability of land for food production, recreation, wildlife habitats, and the presence of undisturbed land to sustain natural cycles that support life. Given the county's existing development patterns, preserving and protecting the county's land will be challenging. The community has a large percentage of its economy invested in agriculture and its natural resources are quickly dwindling.

D. What are TDRs?



Diagram of transferable development rights

Multiple methods are necessary to preserve the natural characteristics of our environment when it is encroached upon by human development. No single method alone has enough legal power or planning smarts to control the ingenuity of the human mind when it comes to finding loopholes around economic blockers. Inherently, moving development rights from one area to another merely transfers the impact of a proposed development while conservation subdivisions attempt to condense it. Only large minimum lot sizes actually reduce the number of proposed units. However, it may be more desirable to the community to allow larger numbers of units in smaller spaces than to have fewer units spread out over a larger space¹⁰.

On April 2, 2003, Fulton County was the first area in the entire southeastern United States to create a transfer of development rights ordinance. Their goal was to promote the conservation of natural, agricultural, environmental, historical, and

⁹ Lucy, William. Suburbs and the Census. Patterns of Growth and Decline. Available: <http://www.brookings.edu/dybdocroot/es/urban/census/lucy.pdf>. 2001.

¹⁰ Gilroy, Leonard. Urban Futures Program. Rason Public Policy Institute. Conservation Subdivision Design : A Market-Friendly Approach to Local Environmental Protection. <http://www.rppi.org/conservationsubdivision.html>

cultural resources and to encourage smart growth in appropriate areas¹¹. A TDR program is a growth management tool in which the potential development of one piece of land is transferred to another piece of land. This is typically done to remove harmful development from an environmentally sensitive area while still allowing the land owner to gain financially from their property. The program requires the establishment of “sending” and “receiving” zones and a bank with which to do the transfer. Development rights are bought and sold by potential developers. This creates a situation where the development companies themselves are paying for the protection of environmentally sensitive land instead of the government, which typically gets stuck with the bill.¹²

This public funding of natural resource protection comes from our historical system of Euclidian zoning. If a developer feels slighted by the lack of zoning density given to them on a particular plot of land, they have the right to compose a lawsuit charging a taking, demanding that the government pay them retribution for the lost value on their property. To prevent this time consuming and money draining process, a governing body could easily be coerced into granting partial development variances on the land in question. Transfers of development rights were create to prevent this issue of compensation.

Transferring development rights requires three elements, sending areas that are to be protected, receiving areas that are to be developed, and a TDR Bank. A TDR Bank can be a public, quasi-public, private, or non-profit organization. The primary purpose of a bank is to buy and sell TDRs and provide administrative assistance in the transfers. How much these development rights are worth depends on how community chooses to define the sending and receiving areas and the credits themselves. The primary benefits of creating a bank include: leading education programs to help landowners understand what the concept of development rights; providing interested parties with the appropriate forms and requirements for a successful transfer; and to supervise the process behind TDRs to prevent fraud or complications in the transfers.



The Chattahoochee river.

E. TDRs in Chattahoochee Hill Country

The Chattahoochee Hill Country Alliance began as a grassroots organization formed by South Fulton landowners in partnership with The Nature Conservancy. This organization evolved out of the recognition that now is the time for the pres-

¹¹ see Appendix, TDR Ordinance.

¹² Juergensmeyer, Julian Conrad. Land Use Planning and Development Regulation Law. Planned Unit Developments 7.15.



Nature at Chattahoochee Hills.

ervation of our rural heritage and the creation of a community based upon the philosophy of sustainable development, and the conservation of greenspace which will lead to overall improvements in the quality of life¹³.

The Chattahoochee Hill Country Alliance developed a Master Plan for 40,000 acres of South Fulton County through a community-wide process. The Fulton County Board of Commissioners unanimously voted to adopt the Land Use Plan as part of its 2015 Land Comprehensive Land Use Plan in August 2002. Subsequently, Fulton County unanimously adopted the Overlay District guidelines in October 2002. This plan will serve as the blueprint for future growth in the area and has the potential to be a national model for sustainable community planning. The Chattahoochee Hill Country also wants to develop and assist in the adoption of alternative zoning ordinances and design standards to ensure smart growth for the region.

Key to the implementation of the Land Use Plan is the transfer of development. In April 2003, the State Legislature passed an amendment to the Transfer of Development Rights legislation¹⁴, making TDRs available to any county that adopts enabling TDR ordinances. Fulton County had already passed the enabling ordinance earlier that month, making Fulton County the first eligible area for TDR transactions, not only in Georgia, but in the entire southeastern United States.

Currently, the project has grown from a community organization and now has two components, the landowners' Alliance and the Chattahoochee Hill Country Conservancy, which works on the four county greenspace and land planning initiatives. While the Alliance is still an active organization that has grown to include landowners in both Fulton and Coweta counties, the Conservancy is the active piece that performs the day to day objectives of implementing the many projects taking place around the Hill Country including the greenspace plans and implementation of the TDR program. The Alliance continues to work with local residents to increase education and also works with the county government to implement the CHC standards that have been developed, but the Conservancy has taken the ideas that were began with the Alliance and are working with organizations, groups and governments from various area to implement plan of sustainable development and conservation.

¹³ Chattahoochee Hill Country Alliance. Available: <http://www.chatthill-country.org>.

¹⁴ Official Code of Georgia Annotated (2003) 05 SB 86.



Street view of Grand Central Terminal.

Top: Interior view, Grand Central Terminal.

Section III: Legal Overview

By: Jed Morton

A: Potential Legal Challenges to TDR programs

1. Federal takings issues

Any TDR program presents concerns about potential takings claims. However, Georgia's TDR enabling statute eliminates much of that concern by providing that all local TDR programs "shall be subject to the approval and consent of the property owners of both the sending and receiving property."¹⁵ There is no better way to obviate a potential TDR takings claim than to make the TDR program itself optional.

However, this provision of the enabling statute presents problems of its own.¹⁶ Therefore, it is possible that local governments may persuade the Georgia legislature to change the statute to allow for mandatory TDR. Alternatively, local governments might successfully challenge the statute as violative of Georgia's local home rule provisions.¹⁷ Therefore, it will be useful for local decision-makers considering TDR programs to have a basic familiarity with federal takings

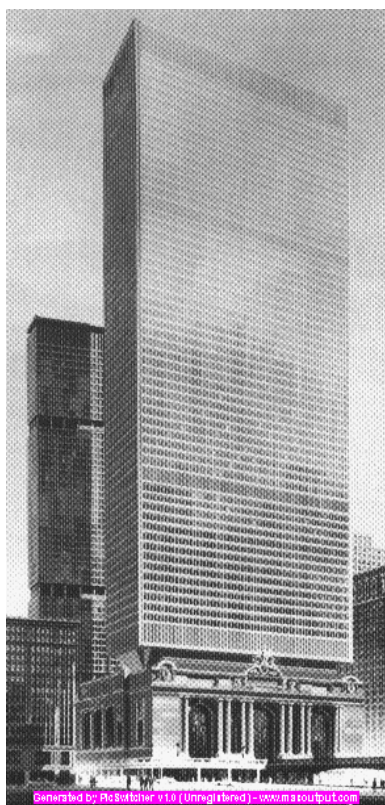
¹⁵ O.C.G.A. § 36-66A-2(b) (West 2007).

¹⁶ See *infra* subsection B.1(b).

¹⁷ See *Id.*

jurisprudence as it relates to TDRs.

The Fifth Amendment to the United States Constitution is the source from which all federal takings jurisprudence flows. It declares that, "...private property [shall not] be taken for public use without just compensation."¹⁸ In the regulatory context, the Supreme Court has held that if a regulation "goes too far" in interfering with a property owner's investment-backed expectations, that law can give rise to a Fifth Amendment takings claim.¹⁹ Moreover, regulatory takings are important in the analysis of any TDR program because it is in that context that the Supreme Court has addressed the issue of TDRs. The two relevant cases are *Penn Central Transportation Co. v. City of New York*²⁰ (1978) and *Suitum v. Tahoe Regional Planning Agency*²¹ (1997).



Proposed development over Grand Central Terminal, 1968.

Penn Central implicated New York City's longstanding Landmark Preservation Law, which was enacted to protect and preserve the character of the city's historic buildings. The law created a commission and vested it with the authority to approve or deny any proposed exterior alterations of landmark buildings like Grand Central Terminal.²² As a mitigation element, the ordinance provided that development rights restricted on a landmark property could be transferred to certain nearby lots or to other lots under the same ownership.²³

Plaintiff *Penn Central* owned Grand Central Terminal as well as several hotels and office buildings along Park Avenue. After the commission denied its request to construct a high-rise office tower atop the terminal, plaintiff brought suit alleging that the denial amounted to a Fifth Amendment taking of its air rights over the property.²⁴

In the course of rejecting the plaintiff's takings claim, the Supreme Court considered the effect of the Landmark Preservation Law's transferable development rights provisions. The Court found that at least eight of plaintiff's other lots were eligible to receive the air rights from the Grand Central property.²⁵ Thus, the Court reasoned, "it is not literally accurate to say that [plaintiffs] have been denied all use of...those pre-existing air rights."²⁶ The Court further found that the rights

18 U.S. CONST. amend. V.

19 See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

20 438 U.S. 104 (1978).

21 520 U.S. 725 (1997).

22 *Penn Central*, 438 U.S. at 110.

23 *Id.* at 114.

24 *Id.* at 119.

25 *Id.* at 137.

26 *Id.*

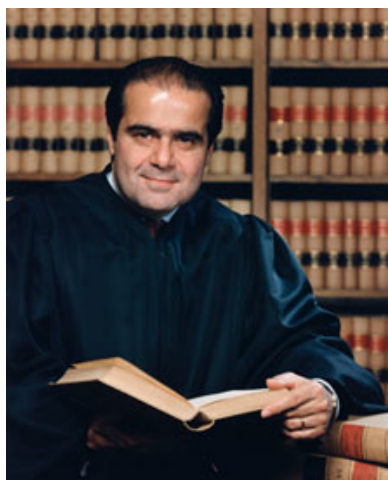
were valuable, stating that, “While these rights may well not have constituted just compensation if a taking had occurred, [they] nevertheless...mitigate whatever financial burdens the law has imposed on [plaintiffs]”²⁷



Mrs. Bernadine Suitum.

Nearly twenty years later, the Court revisited TDRs in *Suitum*.²⁸ There, the Tahoe Regional Planning Agency denied plaintiff Bernadine Suitum permission to build a home on a piece of property she owned near Lake Tahoe. Although Mrs. Suitum was denied permission to develop her property, she was entitled to certain allegedly valuable TDRs which she could have transferred for consideration to other property owners.²⁹ Instead of attempting to sell or convey her TDRs, Mrs. Suitum sued alleging that the denial amounted to a taking without just compensation.³⁰

Again the Court avoided dealing directly with the TDR issue by deciding the case on narrow ripeness grounds.³¹ However, the decision drew a separate concurrence from three Justices who disagreed with the majority’s analysis of the TDRs. That concurrence sheds light on how TDRs might be viewed by the High Court in future takings cases.



Justice Scalia.

Justice Scalia, joined by Justices O’Connor and Thomas, rejected the notion that TDRs are relevant to the initial determination whether a taking has occurred.³² According to Scalia, after a court determines that a taking has occurred, then and only then should the court consider the value of any TDRs. Moreover, the value of TDRs should only be considered for the purpose of determining whether “just compensation” had been paid. In other words, the only consideration these three justices would give to TDRs in a takings claim would be that their value might constitute a set-off against the amount of “just compensation” due a property owner whose property had been deemed “taken” for public use.³³

The bottom line is that Supreme Court jurisprudence with respect to takings in the TDR context is unsettled. The major unresolved issue is whether a court must consider the TDR in its initial takings analysis to determine whether there has been a taking; or whether the TDR would only be

²⁷ *Id.*

²⁸ 520 U.S. 725 (1997).

²⁹ *Id.* at 731.

³⁰ *Id.*

³¹ *Id.* at 728.

³² *Id.* at 747.

³³ Cf. *Corrigan v. City of Scottsdale*, 149 Ariz. 553, 720 P.2d 528 (Ariz. Ct. App. Div. 1 1985) (holding that TDRs were not a lawful form of just compensation under the Arizona State Constitution’s takings clause, which provides that just compensation be made “in money.”).

considered as part of the just compensation to be paid a property owner after a judicial determination that a taking had occurred. The former position is urged by some TDR advocates and commentators.³⁴ However, in light of recent personnel changes on the Supreme Court, it is possible that the Scalia concurrence could become the majority view when the appropriate TDR case comes before the Court and it elects not to side-step the issue.

2. Other legal issues with TDR

TDR systems face other legal barriers apart from takings claims. The following subsections address those issues.

i. Challenges to waivers of zoning restrictions

“TDR plans face potential legal challenges from developers who seek to develop at higher densities within designated receiving areas than those permitted under the current zoning plan.”

TDR plans face potential legal challenges from developers who seek to develop at higher densities within designated receiving areas than those permitted under the current zoning plan. If these developers determine that they can obtain a variance or a rezoning of the property and thus achieve their density goals at a significantly lower cost than acquiring TDRs, they may well challenge the TDR program as an unconstitutional condition on a waiver of a development restriction.³⁵

The United States Supreme Court dealt with this issue in *Nollan v. California Coastal Commission*,³⁶ holding that a condition imposed on a waiver of a development restriction (such as the hypothetical one posited in the preceding paragraph) must be substantially related to the purpose or justification supporting the restriction waived.³⁷ The developer in the above hypothetical would likely argue that the requirement to purchase TDRs to obtain the desired density increase constituted an unconstitutional condition on the waiver of existing development restrictions, in violation of the principles announced in *Nollan*.³⁸

In order to protect against *Nollan* challenges, a municipality should ensure that it maintains consistency

³⁴ See, e.g., Julian Conrad Juergensmeyer, James C. Nicholas, & Brian D. Leebrick, “Transferable Development Rights and Alternatives After Suitum,” 30 *Urban Law* 441 (1998) (Opining that, “If TDRs...are not relevant to the takings analysis, then their usefulness as a quasi-market based mechanism to equalize and mitigate the effects of land regulation...would be questionable.”).

³⁵ See generally, Rathkopf’s *The Law of Zoning and Planning*, § 59:19 (West 2007).

³⁶ 483 U.S. 825 (1987).

³⁷ *Id.*

³⁸ Commonly referred to as the *Nollan* nexus test.

between the goals of its overall land use plan, the use restrictions embodied in its zoning ordinances, and the goals outlined in the TDR enactment. Such consistency should thwart potential Nollan challenges by rendering moot any argument that the requirement to purchase TDRs is not substantially related to the original purpose or justification for the restriction.³⁹

- ii. Challenges from property owners in receiving areas and areas immediately surrounding them.

Additional development in receiving areas may be significantly out of character with the level of development permitted in the surrounding area.⁴⁰ Owners of single-family homes on relatively large lots seem to generally disfavor the construction of multi-family housing such as condominiums and townhouses in close proximity to their “traditional” neighborhoods. These property owners are likely to oppose any program which might result in higher density development “in their own back yards.”⁴¹ In addition to mounting a political attack, these citizens may also file lawsuits alleging that the rezoning is improper or constitutes illegal spot zoning.⁴²

Local governments seeking to implement TDR should take both practical and legal steps to reduce or eliminate challenges from recalcitrant property owners near receiving areas. From a practical standpoint, educating and informing citizens about the benefits that growth management confers on everyone is a natural first step. This may be accomplished through the use of charrettes,⁴³ town hall meetings, and other familiar forms of interaction and communication with the citizens of the local jurisdiction regarding the scope and purpose of proposed growth management plans.

39 See, e.g., *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1988) (applying Nollan and holding that, because a TDR program did not increase the total amount of development possible in a rural area, the regulation was rationally related to the overall purpose of preserving agriculture).

40 See Rathkopf’s *The Law of Zoning and Planning*, § 59:23 (2007).

41 Indeed, irate citizens killed, via the political process, a proposed TDR program in Forsyth County, Georgia over concerns about increased density development near the small towns that fell within the plan’s Receiving Areas, evidencing the reality that legal impediments are not the only ones that should concern advocates of TDR programs. Telephone Interview with Michelle MacAuley, Senior Planner, Fulton County, Georgia Department of Environment and Community Development (April 16, 2007).

42 See Rathkopf’s *The Law of Zoning and Planning*, §§ 59-22 and 59-23 (West 2007).

43 The term charrette is commonly used in the planning context to refer to a technique for consulting with all stakeholders: “Such charrettes typically involve intense, possibly multi-day meetings involving municipal officers, developers, and local residents.” (Wikipedia).

Another practical step that should be taken is the incorporation and encouragement of smart growth-type development into the jurisdiction's overall growth management plan. For example, the Serenbe development in the Chattahoochee Hill Country of South Fulton County is a type of "smart development" that would likely not draw the criticism or ire of neighboring property owners. To the contrary, such a development would likely be welcomed and encouraged.

In addition to these practical steps, municipalities should also protect against potential legal claims of spot zoning and improper rezoning. First, the TDR program must be implemented in accordance with required rezoning procedures and in accordance with a comprehensive land use plan.⁴⁴ Further, although courts have not yet dealt with a claim of illegal spot zoning in the context of TDRs,⁴⁵ local governments should be aware of the possibility of such challenges.⁴⁶

B: TDR implementation in Georgia

1. Georgia's enabling statute

i. Overview and explanation



Georgia state capitol building.

In 1998 the Georgia Legislature amended Title 36 ("Local Government") of the Official Code of Georgia, Annotated to add Chapter 66A, "Transfer of Development Rights."⁴⁷ The enactment was codified as O.C.G.A. §§ 36-66A-1 and 36-66A-2. The Legislature amended the statute in 2001 and again in 2003.⁴⁸

O.C.G.A. § 36-66A-1 contains definitions and lays the foundation for the procedural requirements set forth in § 36-66A-2. That section's definition of "development rights" encompasses the baseline development potential for a sending area prior to any local TDR enactment by defining it to mean "the maximum development that would be allowed on

⁴⁴ See *East Lands Inc. v. Floyd County*, 244 Ga. 761 (1979) (holding that, where cities and counties engage in the exercise of their zoning powers, the zoning must be done in accordance with a comprehensive plan).

⁴⁵ Rathkopf's *The Law of Zoning and Planning*, § 59:23 (West 2007).

⁴⁶ However, Georgia courts have been reluctant to set aside rezonings absent a showing of fraud or corruption, or that the rezoning power was manifestly abused to the oppression of the challenging homeowners. See *Johnson v. Glenn*, 246 Ga. 685 (1980) (reiterating settled Georgia law and corraling cases).

⁴⁷ 1998 Ga. Laws Act 1008.

⁴⁸ See 2001 Ga. Laws Act 375; 2003 Ga. Laws Act 378. The 2003 amendment was significant in that it removed the requirement for local government approval of each TDR transfer. Such a provision might have proved fatal to successful implementation of TDR because of the increased administrative costs and other burdens it would have imposed.

the sending property under any general or specific plan....”⁴⁹ Thus, the vested rights appurtenant to a particular piece of property prior to the local TDR enactment must be clearly established before any system to transfer those rights can be implemented. Typically the “general or specific plan” that would control and define those previously existing vested rights will be the local government’s zoning ordinance. Indeed, TDR cannot exist outside the context of an existing zoning ordinance, and TDR works best when it is implemented as a part of a comprehensive land use plan.

§ 66A-1 further specifies the factors to be used to calculate and allocate transferable development rights. Local governments have wide latitude in this area: “Development rights may be calculated and allocated in accordance with factors including dwelling units, area, floor area, floor area ratio [sic], 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.”⁵⁰

The statute further defines both sending and receiving areas. A receiving area is “an area identified by an ordinance as an area authorized to receive development rights transferred from a sending area;”⁵¹ while a sending area “means an area identified by an ordinance as an area from which development rights are authorized to be transferred to a receiving area.”⁵² Thus, the statute confers upon the local governing body almost unfettered statutory discretion in designating sending and receiving areas.

§ 36-66A-2 outlines the “procedures, methods, and standards for transfer of development rights.”⁵³ Although this section is relatively straightforward, a few statutory requirements warrant emphasis. First, as a prerequisite for TDR implementation, local governments must pass an ordinance that provides for all of the following: the issuance and recordation of the instruments necessary to sever development rights from the sending property and to affix development rights to the receiving property;⁵⁴ the preservation of the character of the sending property and assurance that the restrictions will bind the TDR-selling landowner and every successor in interest;⁵⁵ a system for monitoring the severance, ownership, assignment, and transfer of the TDRs;⁵⁶ provision

49 O.C.G.A. § 36-66A-1(1) (WESTLAW 2007).

50 O.C.G.A. § 36-66A-1(1) (WESTLAW 2007).

51 O.C.G.A. § 36-66A-1(3) (WESTLAW 2007).

52 O.C.G.A. § 36-66A-1(5) (WESTLAW 2007).

53 O.C.G.A. § 36-66A-2 (WESTLAW 2007).

54 O.C.G.A. § 36-66A-2(c)(1) (WESTLAW 2007).

55 O.C.G.A. § 36-66A-2(c)(2) (WESTLAW 2007).

56 O.C.G.A. § 36-66A-2(c)(5) (WESTLAW 2007).

for a TDR bank;⁵⁷ provisions that will allow private investors to purchase the TDRs;⁵⁸ a map “or other description of areas” as sending and receiving areas;⁵⁹ and “such other provisions as the municipality or county deems necessary to aid in the implementation of the provisions of this chapter.”⁶⁰

Additionally, the statute gives general guidance for addressing property tax concerns that inhere in any TDR program. It should be apparent that any piece of property that has had its development rights severed becomes less valuable; similarly, the values of receiving properties should increase; finally, the TDRs themselves, hopefully, will have some value. How to allocate property taxes as development rights are first severed from a piece of property; then “float around” with their new owner (whether an investor or a TDR bank); and finally attach to a receiving property; are issues of obvious importance. The statute provides that once the TDR has been sold by the owner of the sending parcel, that TDR may then be sold at will by the new purchaser.⁶¹ For property tax purposes, the TDR remains appurtenant to the sending property until the new purchaser records his interest in the county land records.⁶² At that point, the TDR is given a separate tax valuation and its new owner is taxed accordingly.⁶³ When the TDR is later sold to a receiving property, another recordation takes place, at which time the TDR and its value attach to the receiving property for tax purposes.⁶⁴ The same incentives exist for a purchaser of a TDR to record his interest as presently exist for any purchaser of real property.⁶⁵

The statute further requires local governments to conduct a hearing prior to the enactment of any TDR ordinance.⁶⁶ Notice of the hearing must be published in a “newspaper of general circulation” at least 15 but not more than 45 days in advance, stating the time, place, and purpose of the hearing.⁶⁷ Additionally, once an area is designated as a sending or receiving area the same hearing and notice requirements apply for any changes to those designations.⁶⁸

57 O.C.G.A. § 36-66A-2(c)(6) (WESTLAW 2007).

58 O.C.G.A. § 36-66A-2(c)(7) (WESTLAW 2007).

59 O.C.G.A. § 36-66A-2(c)(9) (WESTLAW 2007).

60 O.C.G.A. § 36-66A-2(c)(10) (WESTLAW 2007).

61 O.C.G.A. § 36-66A-2(c)(8) (WESTLAW 2007) (providing that the TDR is “freely alienable” once sold).

62 *Id.*

63 *Id.*

64 *Id.*

65 *I.e.*, constructive notice and protection against subsequent purchasers for value.

66 O.C.G.A. § 36-66A-2(d)(1) (WESTLAW 2007).

67 *Id.*

68 O.C.G.A. § 36-66A-2(d)(2) (WESTLAW 2007).

Finally, the statute gives local governments the authority to enter into “intergovernmental agreements” in the event a TDR ordinance jointly affects more than one municipality or county.⁶⁹ Although the statute does not enumerate the concerns such an agreement should address, among them are methods of property tax allocation between local governments; allocation of the administrative costs of the program; and provisions for joint implementation.⁷⁰

ii. Problems



Roadblock.

Georgia’s TDR enabling statute sets up significant roadblocks for counties seeking to implement effective TDR programs. To illustrate these problems, the proposed Friendship Development in South Fulton County, Georgia will be considered. The Friendship Development is the first Development of Regional Impact to be proposed in one of the Chattahoochee Hill Country receiving areas.⁷¹ The outcome could very well decide the issue whether TDRs are a viable option in the Chattahoochee Hill Country, or for that matter any local jurisdiction in Georgia.

“Georgia’s TDR enabling statute sets up significant roadblocks for counties seeking to implement effective TDR programs.”

The Friendship developers have applied to develop approximately 6000 units on 2000 acres as a “Village” within one of the Chattahoochee Hill Country receiving areas.⁷² The term “Village” carries special meaning within Article XIIJ of the Fulton County, Georgia zoning code, including an allowable zoning density of 14 units per acre.⁷³ Thus, it would appear from this code section that the Friendship developers need only qualify their development as a “Village,” per that ordinance, in order to achieve their required density of only 3 units per acre.

However, the Chattahoochee Hill Country Alliance (the “Alliance”) is advocating imposition of a TDR purchase requirement on these developers as a requisite for obtaining a zoning density increase above one unit per acre—the maximum density for all rural lands in the Chattahoochee Hill Country.⁷⁴ The developer would need approximately 5500 TDRs in order to achieve their desired density.⁷⁵

⁶⁹ O.C.G.A. § 36-66A-2(f) (WESTLAW 2007).

⁷⁰ Research reveals that there are no such programs currently existing in Georgia, although they are common in other areas of the country. Examples include Montgomery County, Maryland; the Central Pine Barrens of Long Island; and the Pinelands region of central New Jersey.

⁷¹ Telephone Interview with Michelle MacAuley, Senior Planner, Fulton County, Georgia Department of Environment and Community Development (April 16, 2007).

⁷² Id.

⁷³ Fulton County Georgia Zoning Ordinances, Article XIIJ, § 12J-5 (2003).

⁷⁴ Michele MacAuley Telephone Interview, supra Note 57.

⁷⁵ Miclele MacAuley Telephone Interview, supra Note 57. See also

Not surprisingly, the Friendship developers are seeking a rezoning or a variance in lieu of having to purchase the TDRs. A hearing is scheduled for May 2nd, 2007 to consider their request. The outcome of that hearing will likely be that the Friendship Developers will be allowed to develop the property without being required to purchase TDRs. If this prediction holds true, it will show that the weaknesses in Georgia's TDR enabling statute, combined with complementary weaknesses in the Fulton County Zoning ordinance, serve to render the concept of TDR at present a purely academic one in Georgia. This will continue to hold true until certain statutory changes are made to reflect the importance of TDRs in implementing comprehensive land use and growth management. There are several reasons that support this prediction and conclusion.

“Any TDR program will likely not be a viable option in Georgia as long as the state enabling statute makes participation in TDR entirely optional”

First, any TDR program will likely not be a viable option in Georgia as long as the state enabling statute makes participation in TDR entirely optional for both sending and receiving property owners.⁷⁶ Applying this concept to our Friendship example, Friendship, by state statute, cannot be forced to purchase TDRs any more than farmers in the CHC Sending Areas can be forced to sell them to Friendship. Thus, if Friendship's lawyers argue in the rezoning hearing that the Fulton County Board of Commissioners is without the statutory authority to require them to purchase the TDRs, and thus the only option is to approve the rezoning or variance, it is an argument that will be difficult to rebut. Moreover, Friendship could buttress this argument by pointing out that there is nothing in either the Fulton County zoning ordinance or the TDR ordinance that makes their desired density increase contingent upon the purchase of TDRs. Indeed, as explained above, if such a provision did exist it would appear to contravene the state enabling statute.

In rebuttal, the Alliance intends to rely on the South Fulton County 2025 Comprehensive Plan (the “Plan”) as support for its argument that Friendship should be required to purchase the TDRs.⁷⁷ The Plan's “Policy Statement 12” reflects a policy goal to “Promote the Use of Transfer [sic] Development Rights” to effectuate the overall growth plan for South Fulton County.⁷⁸

Fulton County, Georgia Code of Ordinances, § 58-248 (2003) (providing TDR unit plan and example of density increase possible through the use of TDRs).

⁷⁶ See *infra*, Section III.A.1 and O.C.G.A. § 36-66A-2(b).

⁷⁷ Outline of intended comments by Christine McCauley, Executive Director, Chattahoochee Hill Country Conservancy, to the April 17th, 2007 Fulton County Board of Commissioners Recess Meeting, as provided via e-mail to the author (April 16, 2007).

⁷⁸ South Fulton County 2025 Comprehensive Plan, Chapter 9, § 9.3.4.0, available at <http://www.fultonecd.org>.

However, the Plan is hardly positive law, and its stated purpose clearly undermines any attempt to use it as such: "...the Plan will be used by the County to guide decisions about proposed ordinances, policies, and programs..."⁷⁹ Thus, since the purpose of the Plan is to guide decision-makers in drafting new laws and formulating policy, it cannot bind the Fulton County Commission into to a decision forcing the Friendship developers to purchase TDRs.

Another serious problem with the South Fulton TDR system involves the lack of TDRs on the market or in the current TDR bank. As of April, 2007—some four years after the inception of the CHC TDR program—a total of two property owners had conveyed a mere 21 TDRs to the Chattahoochee Hill Country Conservancy, which acts as the bank.⁸⁰ In the meantime, the Friendship Development will need approximately 5500 TDRs for its proposed development.⁸¹ The Alliance is advocating that the Fulton County Board of Commissioners require Friendship to purchase as yet non-existing TDRs by paying into the TDR bank an amount of money equal to the projected cost of these TDRs. Aside from the obvious practical difficulties involved in determining the projected cost of 5479 nonexistent TDRs, there may be legal problems associated with attempting to force a developer to pay for rights that are as yet nonexistent and indeed may never exist.⁸² This highlights yet another problem with a TDR program that is strictly optional for both sellers and purchasers.

For these reasons, it is almost certain that Friendship will be granted permission to proceed with its development in the Chattahoochee Hill Country without the need to purchase a single TDR. This will set the precedent for future development and will thus likely vitiate the South Fulton County/Chattahoochee Hill Country TDR program.

iii. Proposed changes

First and foremost, § 36-66A-2(b) of the state enabling statute, which makes the use of TDRs strictly optional, should be repealed. Local governments in Georgia need the authority to make their TDR ordinances mandatory in order to put "teeth" into them. The potential legal consequences of mandatory

⁷⁹ Id., Introduction, p. vii.

⁸⁰ Telephone Interview with Christine McCauley, Executive Director, Chattahoochee Hill Country Conservancy (April 16th, 2007).

⁸¹ Michele MacAuley Telephone Interview, *supra* Note 57.

⁸² For example, the developer could argue that the requirement to purchase non-existent TDRs amounts to an illegal exaction under the state's impact fee statute. Such issues are beyond the scope of this project except to the extent that they illuminate the problems associated with having a strictly optional TDR program.

TDR programs were discussed above and can be avoided. However, the political consequences of such a change might make it an unlikely possibility in Georgia.



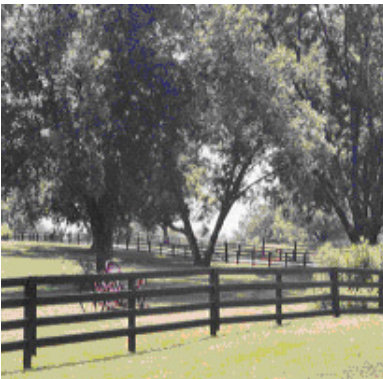
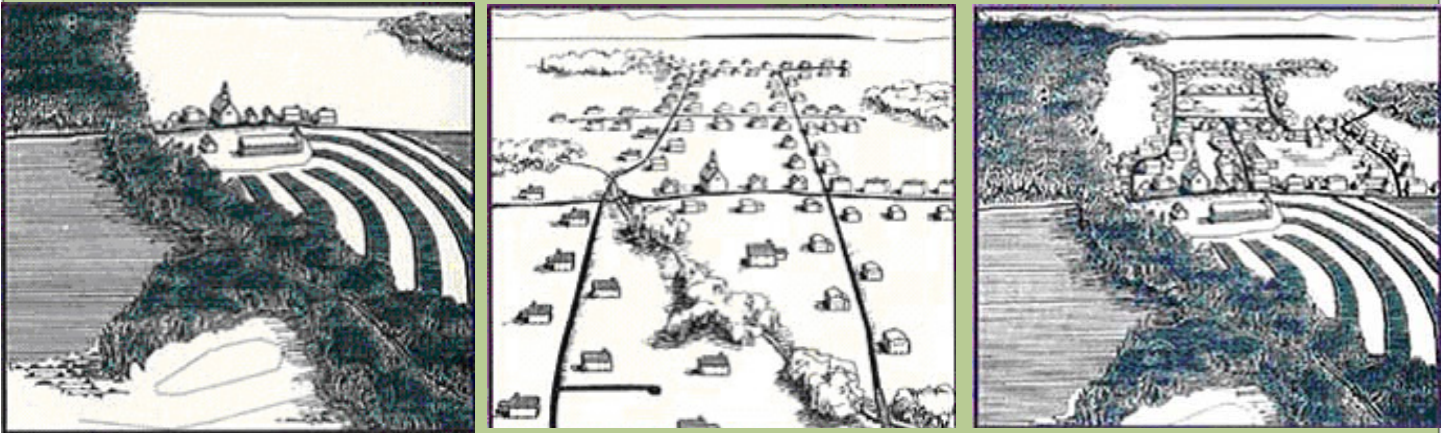
Artist rendering of a sustainable village in the Chattahoochee Hill Country.

Alternatively, counties desiring to implement mandatory TDR programs might challenge O.C.G.A. § 36-66A-2(b) as being an infringement on their home rule authority under the Georgia Constitution. One way to mount such a challenge would be for the county to simply pass a mandatory TDR ordinance and then wait to see whether someone files suit. In the event of a lawsuit, the county could then set up its constitutional attack on the enabling statute. Another variation on this theme would be for a local government to simply ignore the state TDR enabling statute altogether and argue that Georgia's Home Rule provisions reserve zoning and planning authority to local governments.⁸³

Assuming the state enabling statute could either be ignored or amended to allow for mandatory TDR programs, an amendment to the County zoning ordinance would then be necessary to make TDR purchase mandatory for developers seeking to obtain zoning density increases in Receiving Areas. In our example, the Chattahoochee Hill Country Alliance needs to seize upon the policy recommendations in the 2025 plan not for the purpose of attempting to influence individual zoning decisions, but instead to have the zoning ordinance amended to eliminate any question whether developers seeking to develop Villages in the CHC Receiving Areas must use TDR to effectuate density increases.

In summary, the current statutory scheme in Georgia is protective of landowners' rights to develop property as they see fit. While staying true to Georgia's heritage as a strong property rights state, it makes implementation of a successful TDR program in Georgia unlikely. Moreover, as long as developers have other less expensive and easier methods to obtain desired density increases, they will have no incentive to utilize TDRs. That leaves Georgia as a state that can say that it has a TDR ordinance on its books, but with little to show for it in terms of effective growth management.

⁸³ The chances of such an argument being successful would require in-depth research and analysis of Georgia Home Rule provisions as they might apply to the TDR enabling statute and is beyond the scope of this Report.



Farmland to be saved by TDRs.

Top: Existing village, Traditional development, Development with TDRs.

Section IV: Implementation of the South Fulton County Ordinance

By: Lauren Rooney

A. What did Fulton County do?

Due to the 1998 Georgia General Assembly's passage of the TDR enabling legislation and the threat of sprawling development emanating from the greater Atlanta area as it was being built out to capacity, residents in the precious areas of the Chattahoochee Hill Country ("CHC") began recognizing that progressive steps must be taken to protect their rural lifestyles.⁸⁴ Thus, many agencies, departments and individuals combined to undertake enforcement of this protection. First, the Fulton County Office of Environment and Community Development ("OECD") sought implementation of the CHC's Master Plan by getting amendments passed to the South Fulton Comprehensive Plan and the Fulton County zoning ordinance.⁸⁵ Through the CHC Master Plan's design of housing development "nodes" in the pattern of villages and hamlets, only 16% of the Hill Country land would be disturbed,

⁸⁴ Jeffrey H. Dorfman et al., *The Feasibility of a Transferable Development Rights Program for Athens-Clarke County, Georgia*, p. 7 (Feb. 2, 2005) [hereinafter referred to as "Athens-Clarke"].

⁸⁵ *Id.*

Development Comparison

Conventional Development
30,000 Houses



80% of Land Disturbed

Conservation Subdivision
38,000 Houses



14% of Land Disturbed

rather than the estimated 80% of land disrupted had the typical Fulton County pattern of growth occurred.⁸⁶ A TDR ordinance specific to the CHC area was then drafted by the University of Georgia Land Use Clinic.⁸⁷ Lastly, on April 22, 2003, the Georgia State Legislature approved of the TDR legislation, making TDRs available to any county that adopts enabling TDR ordinances, and due to the April 2, 2003, unanimous adoption of the drafted TDR ordinance by the Fulton County Board of Commissioners, Fulton County was the first eligible area for TDR transactions in both the State and the entire southeastern United States.⁸⁸

B. Evaluation of the SFC TDR Ordinance⁸⁹

1. APA Model TDR Ordinance

The SFC TDR ordinance operates very similarly to the American Planning Association's ("APA") model TDR ordinance.⁹⁰ Under Section 104 of the APA Model Ordinance, a local government can begin a TDR program through the use of overlay districts to specifically zone areas consistent with the comprehensive plan as sending and receiving parcels followed by the subsequent amendment to the zoning ordinance of their respective locations.⁹¹ A second avenue for a local government to follow in implementing a TDR program is through the classification of sending and receiving areas within the actual text of the ordinance itself.⁹² The Fulton County TDR ordinance demarcates sending and receiving areas based on the master plan by delineating three villages in the 2015 Comprehensive Plan as receiving areas and the remaining land within the Hill Country as possible sending areas.⁹³ Coupled with the amending of the Fulton County zoning ordinance, the APA's model ordinance's first option is precisely followed and complied with by the CHC TDR preservation plan.

⁸⁶ Id.

⁸⁷ Id. at p. 9.

⁸⁸ Chattahoochee Hill Country, Meeting Archives, http://www.chatthill-country.org/news/meeting_archives.htm (last accessed Apr. 12, 2007).

⁸⁹ Fulton County Code Ordinance (Ga.) Art. VI (amended 2003); See http://www.chatthillcountry.org/main/fulton_tdr.PDF; See also Appendix - Fulton County TDR Ordinance, for Georgia's most recent version of the TDR Ordinance for SFC - Resolution to Amendment developed on June 4, 2006.

⁹⁰ APA, Model Smart Growth Land Development Regulations, Interim PAS Report, Ch. 4 - Model Smart Land Development Regulations with Commentary, § 4.6 - Model Transfer of Development Rights Ordinance, (Mar. 2006) (may be found at <http://www.planning.org/smartgrowthcodes/pdf/chapter4.pdf>).

⁹¹ Id.

⁹² Id.

⁹³ Id.

2. TDR Ordinance Successes

Upon looking deeper at the ordinance's attributes, the SFC TDR ordinance does possess some positive characteristics. First, the ordinance contains very specific criteria for a sending area.⁹⁴ Precisely clarifying the criterion of a sending area is a pivotal component of an effective TDR program.⁹⁵ In SFC, a landowner is unable to transfer their development rights if their property has been previously sold or transferred, already developed to full capacity based on existing zoning standards or already contains a permanent deed restriction, like a conservation easement.⁹⁶ Furthermore, any parcel that is designated as open space, is owned publicly or is located within the riparian buffers required by state law is also exempted from being a sending area under the TDR ordinance.⁹⁷ A second success of the SFC TDR ordinance is its clear listing of the advantages of acquiring certain properties based on different factors such as the property's proximity to the Chattahoochee River or the property's nearness to other properties with existing easement and development restrictions.⁹⁸ The TDR Bank gives priority to purchasing rights from these respective properties because these areas promote the County's public policy interests of preserving continuing tracts of land and enhancing the natural beauty of the rural and riverbank area.⁹⁹

"These areas promote the County's public policy interests of preserving continuing tracts of land and enhancing the natural beauty of the rural and riverbank area."

3. TDR Ordinance's Areas for Improvement

Modifications still need to be made in order to make the SFC TDR program more effective and more capable of making a lasting impact on development in Georgia. First, though sending areas are defined with great particularity, receiving areas lack an adequate definition and are classified simply as "properties intended for mixed-use development, specifically within the three villages in the CHC."¹⁰⁰ A productive ordinance should clearly specify what exact development is allowed in a receiving area.¹⁰¹ Second, the ordinance does not address allowing for additional infrastructure needed by increasing densities within the receiving areas. Though insufficient density has not been a problem thus far to the CHC, failing to include applicable precautionary standards could cause difficulties

⁹⁴ Fulton County Code Ordinance at § 58-245.

⁹⁵ Julian C. Juergensmeyer et al., Transferable Development Rights and Alternatives after Suitum, The Urban Lawyer, Vol. 30, No. 2, 441, 457 (1998) [hereinafter referred to as "Juergensmeyer"].

⁹⁶ Id. at § 58-245(1)-(3).

⁹⁷ Id. at § 58-245(4)-(6).

⁹⁸ Fulton County Code Ordinance at § 58-255(4).

⁹⁹ Id.

¹⁰⁰ Id. at § 58-244; See also Athens-Clarke at p. 14.

¹⁰¹ See Juergensmeyer at 457.

should the need arise. Lastly, as the next section will illustrate, the SFC TDR ordinance's process to receiving certification of TDRs can be complicated to the landowner.¹⁰²

C. Procedural Issues with the SFC TDR Ordinance

A facet of the SFC ordinance that has been particularly burdensome on the program and the CHC Alliance is the procedures mandated by the Ordinance in order to transfer one's property rights.¹⁰³ The specific problems include the repetition of similar information and the required inclusion by the sender of difficult information needing the input of outside sources. The three disjointed steps to the SFC TDR application process involve severing the development rights, recording and issuing development certificates and then attaching development rights to a permit or other land in need of the applicable density.¹⁰⁴ Each of these main steps involves subsidiary steps, time delays or lack of necessity which increase the constraints and duration upon the sender in order for them to ultimately transfer their development rights.

1. Step 1 – Severe Development Rights

“The three steps to the SFC TDR application process involve severing of development rights, recording and issuing development certificates, and then attaching development rights to a permit or other land in need of the applicable density.”

The first step to the SFC TDR program requires the landowner to sever their property rights. To do so, the landowner must follow the filing processes of two supplementary steps. First, a conservation easement must be signed and recorded with the Fulton County Clerk.¹⁰⁵ By filing the conservation easement, a piece of property is “freed” from development and is protected eternally.¹⁰⁶ However, this step is a nuisance in that the main requirement to applying to the TDR program, the actual TDR document, can only be filed after the easement is in place.¹⁰⁷ Also, there are several conditions upon receiving approval of a conservation easement by the Clerk, some of which are repeated in the TDR document. These include a surveyor's metes and bounds legal description of the property, the inclusion of the TDR serial numbers being transferred and different assurances and statements by the landowner as to rights not allowed on the property.¹⁰⁸ A final condition upon the conservation easement is that prior to its recording, the landowner party must provide to the Clerk a

¹⁰² See Athens-Clarke at p. 15.

¹⁰³ See Appendix - Personal emails with Terry King, for emails with Terry King, Exec. Director of CHC Alliance; Information also generated through meeting with Terry King.

¹⁰⁴ Fulton County Code Ordinance at §§ 58-252, 58-253, 58-255.

¹⁰⁵ Id. at § 58-252(b).

¹⁰⁶ Id. at § 58-245(2).

¹⁰⁷ See Appendix- Personal emails with Terry King.

¹⁰⁸ Fulton County Code Ordinance at § 58-252(b)(1)-(5).

licensed Georgia attorney's opinion that the easement was executed by the necessary parties and is perpetual upon the party and his successors in interest.¹⁰⁹ Thus, the conservation easement is an arduous and difficult document to file with many conditions to satisfy, especially to a landowner who is uneducated in legal jargon and property rights. Only after completing the many parts to the conservation easement can a landowner finally begin completing the second ancillary step to severing their development rights which is to apply for the TDR certificate. The information required here includes the applicant's identification, proof of ownership, a second metes and bounds written legal description of the property, a site plan and written description of the property's physical character and lastly, a processing fee.¹¹⁰ After providing the proper documentation for the TDR certificate, the landowner is finally eligible to transfer their development rights.¹¹¹

2. Step 2 – Recording and Issuing of Development Certificates

The second step to the TDR program is the recording and issuing of development certificates by Fulton County.¹¹² This step can take a significant period of time because Fulton County is allowed up to 95 days to certify the number of TDRs the landowner will receive, assign serial numbers to the respective rights and actually record and issue the certificate.¹¹³ Though this step can take a substantial amount of time, it does have the beneficial attribute of flexibility. The SFC TDR ordinance was purposefully written to allow for different banks that may be issued the certificate to hold the right until its assignment is necessary.¹¹⁴ The county, a public or private entity or an individual is able to hold the certificate depending on how the certificate is issued and how the arrangement with the landowner is constructed.¹¹⁵ The Hill Country Conservancy's nonprofit TDR bank has held the certificates for the two TDRs that have occurred thus far in SFC for two reasons.¹¹⁶ First, Fulton County chose not to personally hold the certificates because the County is currently averse to accepting new undertakings since the incorporation referendum of the Hill Country, which may bring additional programs responsibilities upon the County, is not scheduled

109 Id. at §58-252(c).

110 Id. at § 58-246(1)-(6).

111 Id. at §§ 58-246, 58-252(a); See also Appendix - Personal emails with Terry King. .

112 Id. at § 58-247; See Appendix - Personal emails with Terry King. .

113 Id. at § 58-247.

114 See Appendix - Personal emails with Terry King.

115 Id.

116 Id.

until June 2007.¹¹⁷ Second, due to a generous anonymous donation to the CHC, the Conservancy bank had the funds to undertake the task and see that it is completed appropriately.¹¹⁸ For an individual to be issued a TDR certificate, the individual would have to use their own funds, negotiate their own satisfactory terms, and proceed to hold the right forever or either sell or donate the right to another entity for the development of a Village or future holding by a bank. This type of issuance has not yet occurred with the SFC TDR program but it is presently being contemplated by some individuals in the Hill Country.¹¹⁹

3. Step 3 – Attaching Development Rights

The final step to the TDR program is to apply the issued development rights to satisfy the density requirements in a village, either immediately after their severance or at a future time.¹²⁰ The CHC has not yet undertaken this step since the first village has not yet been rezoned to the classification of “CHC MIX – Village zoning” which would allow for a variety of development uses.¹²¹ This is not scheduled to occur until at least May of 2007. However, the application of development rights will not be necessary until the village’s density surpasses the one acre per one unit ratio or the growth exceeds the number of units per acre by one.¹²² Only then will a developer actually need to purchase development rights. Since this has not occurred at this time, the County has not made internal program policies for “attaching” density to a village pursuant to each TDR certificate and the subsequent “retiring” and “cashing” of the actual TDR certificate. The lack of need for this step involves an issue that frequently causes a barrier in other TDR programs around the nation because a developer will be satisfied with densities allowed by the existing zoning code and therefore, will have little motivation to follow the procedures of a TDR program.¹²³

D. Other TDR Programs & Their Procedures

The SFC TDR Ordinance is not the only TDR program with procedural issues. Several TDR programs have mastered their application process in order to provide ease to their residents. However, there are also programs that equal the Hill Country in regards to the procedural burdens that hamper a

117 Id.

118 Id.

119 Id.

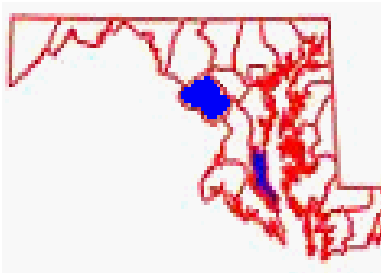
120 Id.

121 Id.; Chattahoochee Hill Country, Villages, <http://www.chatthillcountry.org/SusDev/villages.htm> (last accessed Apr. 16, 2007).

122 See Appendix - Personal emails with Terry King.

123 See Athens-Clarke at pg. 10.

residents' ability or desire to apply for the TDR program.



Maryland's Montgomery (top) and Calvert (bottom) counties.

Maryland is an exemplar state for TDR program procedures. In Maryland's Montgomery County, the program design is simple and straightforward without any complex approvals or requirements. Property owners located within agricultural reserves are granted one development right for every five acres of farmland they own.¹²⁴ To save a step for the applicant, Maryland's legislation incorporates the TDR program administration within the subdivision administration process.¹²⁵ Thus, when a developer is awarded TDRs from the sending zone, the TDR sale is approved as part of the subdivision approval process.¹²⁶ In order to get to the step of selling TDRs, the landowner must file a preliminary subdivision plan for the receiving area with the Montgomery County Planning Board.¹²⁷ The Board must grant or deny approval within 60 days.¹²⁸ Next, after receiving approval of the preliminary plans, the landowner must submit a site plan to the Board which must include the complete amount of dwelling units including TDRs and affordable housing units.¹²⁹ This second step assures that the transferred density to the receiving areas does not overwhelm the receiving site or cause problems for adjacent properties.¹³⁰ Once the site plan is approved, the buyer can begin the final step of tendering a Record Plat of Subdivision to the Board. At the exact same time, the seller can file a deed of transfer with the county attorney's office to transmit the TDRs to the buyer as well as a conservation easement on the sending area agricultural land that limits the development potential of the property.¹³¹

Maryland's Calvert County is another successful TDR program whose procedural requirements are not difficult on those desiring to participate. For a landowner to qualify to sell their development rights, the landowner's property must first be registered in an Agricultural Preservation District ("APD") of either the state or county APD program.¹³² Once the property is enrolled and approved, it is recorded with either the state or county and the landowner then prepares a plan

124 Etowah Initiative, Institute of Ecology, University of Georgia, Transfer of Development Rights, p. 11, 1998 (may also be found at <http://www.rivercenter.uga.edu/education/etowah/documents/pdf/tdr.pdf> [hereinafter referred to as "Etowah"].

125 See Juergensmeyer at p. 451.

126 Id.

127 Boone County Planning Commission, Purchase of Development Rights and Transfer of Development Rights Case Studies, American Farmland Trust, p. 5 (May 4, 2001).

128 Id.

129 Id.

130 Id.

131 Id.

132 See Etowah at p. 19.

documenting permissible land use.¹³³ The county will certify the number of development rights that will accompany the land and a restrictive covenant is recorded listing the admissible land uses.¹³⁴ The ultimate step is that a development option agreement is negotiated and the rights are transferred.¹³⁵



San Luis Obispo County, California.

On the opposite side of the spectrum is the San Luis Obispo County program in California. Though having steps that are easy for the landowner to comprehend and a TDR bank that is the most successful in the country, the TDR process requires many approvals and prerequisites before the TDR certificate is actually issued.¹³⁶ First, a landowner is not even eligible for the TDR program unless the chosen sending tract satisfies the criterion for agricultural land, resource land or antiquated subdivisions.¹³⁷ Only if the land is qualified may a landowner file a TDR application and deed with the county.¹³⁸ Within the application, the landowner must mark the sending area as eligible for full or partial development rights depending on whether the landowner desires to reserve some development potential that is not residential.¹³⁹ The Transfer of Development Credit Technical Advisory Committee ["TAC"] assesses the application and distributes to the landowner a "Notice of Eligibility" approving the sending site and specifying the amount of land credits awarded.¹⁴⁰ The owner then registers a conservation easement to run with the land which then allows the San Luis Obispo County TDR program administrator to issue a TDR certificate to the landowner.¹⁴¹ The County will then amend its general master plan to reflect this new sending site.¹⁴²

E. Possible modifications to SFC TDR Procedures

The SFC ordinance and its respective TDR application procedures could undergo three modifications which would likely make the program more attractive and easier to use, in both SFC and other future Georgia TDR locations. First, similar to the San Luis Obispo TDR program, the SFC ordinance involves three steps that are entirely independent from each other. By merging documents that possess overlapping information, such as the conservation easement and the

133 Id. at p. 19-20.

134 Id. at 20.

135 Id.

136 See Athens-Clarke at p. 8;

137 See Etowah at p. 24.

138 Id. at p. 25.

139 Id.

140 Id.

141 Id.

142 Id.

TDR document, the SFC TDR application procedure would be less time-consuming and difficult upon the landowner. Secondly, following Maryland's Montgomery County's example, the SFC TDR approval process could be joined with the overlay ordinance's approval process. Both of these CHC ordinances pertain to zoning which pursue similar goals of protecting natural areas and ensuring planned growth. Thus, by combining the overlay administration process with the TDR administration process, most likely where determining the density requirements and availabilities for the villages, the application process would have one less step for the landowner to satisfy.¹⁴³

“Three modifications which would make the program more attractive to the residents of the CHC area and allow the TDR program to be easier to use.”

Lastly, unlike the Calvert County TDR program which requires the state or county to supply the more difficult legal information, the SFC ordinance requires much information to be supplied and generated by the landowner. By switching the responsibilities in the SFC ordinance to more upon the County, while still ensuring that the County can not impede the TDR process by having excessive time approval ranges, the SFC TDR program would be easier upon the resident landowners. Through these minor changes, the SFC ordinance would be more attractive because of simpler procedural processes and thus, would likely attract more individuals to participate in the program for preserving treasured rural and undeveloped land areas.

¹⁴³ Fulton County Code Ordinance Art. XIIJ, § 12J.5 (amended 2006); See <http://www.fultonecd.org/zoning%20resolution/zoning%20resolution%20for%20website/art12-j.pdf>.



Top left: The Pinelands.
Top right: Montgomery County.

Section V. Best TDR Practices

By: Holden Spaht

Transfer of Development Rights (TDR) programs have been and can be designed and implemented in a number of ways. The details of successful TDR programs tend to be developed based upon the objective to be achieved. In developing a new TDR program, communities should take heed of successful cases, while allowing room for some innovation and adaptation to specific circumstances.

A. Two Types of TDR Programs

There are two main types of TDR are program: zoning-based and permit-based. Which type a community chooses tends to depend upon the specific goals to be achieved as well as political circumstances.

Permit-based TDR programs are usually voluntary, and tend only to have one transfer district. While sending and receiving are commonly associated with TDR programs, permit-based programs usually do not make this distinction. Under a permit-based system, development credits are shifted on a lot-by-lot basis, or sometimes even from one portion of a lot to another. A permit-based system is not an effective tool when the goal includes preserving a specific area; however, they can be useful for redirecting development based upon

specific elements, such as slopes or soil types. They also tend to be more flexible and adaptable than zoning-based systems, but also often more expensive to manage.¹⁴⁴

Zoning-based programs use the traditional distinction between sending and receiving areas, or “dual transfer districts.” Zoning-based systems are useful when the goal is to preserve defined areas, especially for specific purposes, such as agriculture. Under these systems, planners can guide development to more suitable areas, whereas in a voluntary system, the market ultimately decides where credits will be shifted. Zoning-based programs provide a straightforward way to target areas for development, but at the loss of the flexibility enjoyed under a permit-based system. However, they are also often less expensive to implement.¹⁴⁵

B. The Politics of TDR

TDR programs often spur the creation of new institutional layers for the management and administration of the program. These layers have particular implications for how successful a program will be.

New Agencies are often formed, either by state or local government, or by a non-profit agency to manage the program. Having one agency often makes the program more efficient. These are especially effective if they have a strong mandate from the government that created them. A system of approval and management through numerous parties sometimes emerges, especially in permit-based systems. This may disperse conflict, but it also may slow the process.

Finally, facilitators, such as credit banks are often created and used to buy, sell, and store transferred development credits. This is an effective way to manage when and where credits are sold. Any of the above layers of management, as well as numerous other aspects of TDR programs can drive political conflict. Successful programs tend to have been created with full engagement of stakeholders.

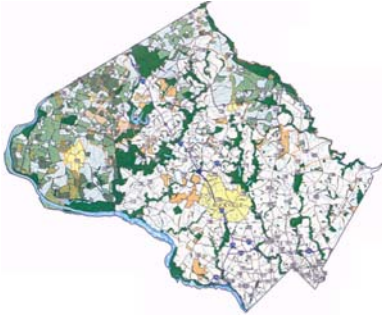
C. Successful Examples:

1. Montgomery County, MD

“Numerous . . . aspects of TDR programs can drive political conflict. Successful programs tend to have been created with the full engagement of stakeholders.”

144 Robert A Johnson and Mary E. Madison “From Landmarks to Landscapes: A Review of Current Practices in the Transfer of Development Rights” *Journal of the American Planning Association*, Vol. 63, No. 3, Summer 1997, Pp. 365-378

145 Johnson and Madison.



Montgomery County agricultural preservation. See full in appendix.

Introduction:

Montgomery County, MD, located just northwest of Washington, DC, has had a mandatory TDR program in place since 1980. One of the first counties in the nation to do so. The program was developed after many attempts to slow the accelerated development that had been occurring in the 1960s and 70s and was chipping away at the area's farmlands.

The program was launched with the county's adoption of a master plan entitled Preservation of Agriculture and Rural Open Space, which created an 89,000-acre Agriculture Reserve and Rural Density Transfer (RDT) zone.¹⁴⁶ The new RDT zone allowed only one unit per 25 acres of land. The first transfer occurred in 1983, and by 2000, to 40,583 acres of farm land had been protected.¹⁴⁷ The Agricultural Reserve has expanded over the years to include around 93,000 acres.

Program Objective:

Montgomery County's TDR program is a mandatory zoning-based program that was created to preserve agricultural land.

Type:

Mandatory, zoning based.

Institutional/Administrative Structures:

The TDR program is administered by two public agencies: The Maryland-National Capital Park and Planning Commission (M-NCPPC), which is the regional planning agency for Montgomery and Prince George Counties, and the Agricultural Services Division of the county's Economic Development Department. The M-NCPPC develops master plans that identify land to be designated sending or receiving areas, reviews site plans and subdivision plans for proposed developments using TDR, monitor the capacity of receiving areas, and enforce RDT zoning. The Agricultural Services Division oversees the county's farmland protection programs.¹⁴⁸

TDR Bank:

The county initially created a County Development Rights Fund to buy TDRs and to guaranteed loans by private institutions to landowners who use development credits as collateral.¹⁴⁹ The fund was intended to get involved in the

¹⁴⁶ American Farmland Trust. "Purchase of Development Rights and Transfer of Development Rights Case Studies," Prepared for Boone County Planning Commission, May 4, 2001, 3

¹⁴⁷ Ibid., 4.

¹⁴⁸ Ibid., 5

¹⁴⁹ Johnson and Madison.

TDR market only as a last resort. It was never used and was eliminated in 1990.¹⁵⁰

Public Engagement:

M-NCPPC staff held a number of public meetings in the early 1980s to educate landowners about the program and to encourage participation. They also produced an educational pamphlet, which is available today.¹⁵¹

General Program Procedures:

Landowners in sending areas are awarded one development right per five acres. A landowner can sell his or her development rights to developers in receiving areas, based upon existing infrastructure. Once a landowner has sold his credits, a restrictive easement is placed on the deed for his or her property. Purchased credits allow developers to exceed the level of density usually allowed in the receiving areas; however, the exact amount is not predetermined, but decided upon during the site plan review process. Nonetheless, the increase in density more than offsets the cost of the credits, which ensures a strong credit market.¹⁵²



Montgomery County farm house.

Because TDR values are not certain until after a site plan review, credits are usually optioned by developers, instead of purchased, pending the M-NCPPC's decision. Once a development right has been separated from property in the sending area, it is assigned a serial number, which is then listed on the record plat for the property that receives increased density.¹⁵³ Receiving areas are identified by M-NCPPC and designated in the county's comprehensive zoning ordinance. The zoning districts in receiving areas contain two different density limits: one for developments not using TDR, and one for those using TDRs, although neither is guaranteed by right. TDRs are the only way developers can increase density in receiving areas, other than an unrelated ordinance encouraging affordable housing. There are variances for increased density.¹⁵⁴

The price of TDR credits is determined by the market. The county began a Purchase of Development Rights (PDR) program in 1988, which drove the price of credits up significantly. The county uses a formula to value easement prices instead of an appraisal process, which would show limitations set by zoning.¹⁵⁵

150 AFT., 7

151 Ibid.

152 Johnson and Madison.

153 AFT, 5-6

154 Ibid., 7

155 Ibid.,5-7

Challenges:

Montgomery County's TDR program has been facing a substantial obstacle in the "fifth TDR." Landowners often sell four of their five TDRs, but retain the fifth one in order to keep one dwelling unit on the property. Individuals have been purchasing these to build country estates. Once an estate has been constructed, the property often becomes too expensive for commercial farmers to purchase.¹⁵⁶

2. Pinelands New Jersey



Pinelands map showing TDR areas.
Source: www.usgennet.org.

Introduction:

The New Jersey Pinelands Area includes portions of 7 counties and 53 municipalities. The area includes a large amount of forest-land as well as a significant portion of the Cohansey fresh water aquifer. After the US Congress created the nation's first National Reserve in the New Jersey Pinelands in 1978, the state of New Jersey established the Pinelands Commission to study the ecological significance of the area and how it could be protected and produce a management plan. The commission drafted a Comprehensive Management Plan (CMP) to balance the protection of environmentally sensitive land with new development. The CMP created the Pinelands Development Credit Program, which allows development rights to be transferred from protection areas to growth areas.¹⁵⁷

Program Objective:

The goal of the Pinelands New Jersey TDR program is to protect critical forest-land and the Cohansey fresh water aquifer that much of the state sits upon.¹⁵⁸

Type:

Mandatory, zoning based.

Institutional/Administrative Structures:

The program is administered by the Pinelands Development Commission.¹⁵⁹ Two public other public agencies were created to serve as TDR banks: the Pinelands Development Credit Bank (created by the state) and the Burlington County Development Credit Exchange (created by Burlington County). The banks acquire credits, but only sell them when they are not available on the market.¹⁶⁰

¹⁵⁶ Ibid., 9.

¹⁵⁷ AFT, 15-18

¹⁵⁸ Johnson and Madison.

¹⁵⁹ AFT, 18

¹⁶⁰ Johnson and Madison

Public Engagement:

The program was created with very little public debate. However, the Pinelands Commission and the PDC Bank publicize the program and educate landowners as to the benefits of the program as well as the technical procedures.¹⁶¹

General Program Procedures:

Land in environmentally sensitive areas are given “Pinelands Development Credits,” which property owners can sell to developers operating in receiving areas. Once a landowner sells his credits, an amendment is placed on his deed, which prohibits further development.¹⁶²

The process for transferring PDCs requires a landowner in the preserve area to request a letter of interpretation from the Pinelands Development Commission on the value of the property in terms of development rights. The Commission then issues the letter and allocates credits to the landowner, the number of which is determined by the Pinelands statute. Landowners then apply to the PDC Bank to receive a PDC certificate, which in severs the development rights from the property and can be sold on the market.¹⁶³

Each PDC is worth four TDRs, or four dwelling units. The number of credits a particular plot of land is allocated depends upon the area’s level of ecological sensitivity.¹⁶⁴ To create a market for the development credits, opportunities for credit use are made to be about twice the number of credits available. To further encourage the purchase of credits, buyers are often given special building waivers that allow them to defy some aspect of the zoning in the receiving area, such as set back or lot coverage.¹⁶⁵

Protection and Regional Growth Areas are designated in the CMP. About 360,000 acres of the Pinelands are protected with a few exceptions for farmers and families who lived in the areas prior to the initial CMP. Municipalities with Regional Growth Areas in their jurisdictions are required by the CMP to designate receiving areas for PDC credits.¹⁶⁶

Challenges:

Residents of the New Jersey Pinelands often complain about the complexity of the program and confusing process for transferring PDCs.

¹⁶¹ AFT, 18.

¹⁶² Johnson and Madison.

¹⁶³ AFT, 20

¹⁶⁴ Ibid., 21-22.

¹⁶⁵ Johnson and Madison.

¹⁶⁶ AFT, 21.



Another issue of concern is the low market value of the credits. Many believe that the low price can be accounted for by misalignment in state preservation policies. The State Agriculture Development Committee (SADC) administers a farmland preservation program through which it purchases development easements at prices based on appraisals.¹⁶⁷ The appraisal value takes into account the limitations placed on the land by zoning, which lowers the value of the property.¹⁶⁸

(The following are comparatively brief examples of voluntary permit-based TDR programs. Because the CHC TDR program is zoning based, we feel that permit-based systems are only peripherally relevant to this manual. Therefore, a brief description should suffice.)

3. Lake Tahoe Basin, CA and NV



Lake Tahoe Basin boundaries.

The Lake Tahoe Basin TDR program was adopted in 1987 by the Tahoe Regional Planning Agency (an authority created jointly by California and Nevada) and is a voluntary, permit-based system. The goal of the program was not to stop development completely, but rather to slow it in order to mitigate sediment erosion into the lake.¹⁶⁹

All parcels in the basin are rated for their “land capability.” Land is scored based upon environmental sensitivity. The ratings limit development. TRPA administers three types of transfer programs: lot coverage, permit allocations, and development rights. Under the lot coverage program, property owners can exceed lot coverage limits by retiring lot coverage on another parcel with the same land capability rating.¹⁷⁰

On the California side, the California Tahoe Conservancy, which is a state authority, operates a revolving fund via the Land Coverage Bank that acquires property for conservation and banks the coverage rights for distribution to public or private projects.¹⁷¹

4. California Coastal Commission

The California Coastal Commission TDR program is a permit-based voluntary system that was created by the state of California to protect coastal land.¹⁷² Credits are issued to

167 Ibid., 26.

168 Ibid., 26.

169 Johnson and Madison.

170 Ibid.

171 Ibid.

172 Ibid.

landowners that own property in areas that are designated to be environmentally sensitive upon retiring a lot from development. In order to receive credits, the retired lot can be up to 20 acres in size and must be arguably buildable. Development credits can then be transferred to other lots in the Santa Monica Coastal Zone.¹⁷³

The Coastal Commission and the State Coastal Conservancy facilitate the program jointly. The Conservancy purchases land and provides funding and guidance for land conservation. It set up a nonprofit organization called the Mountains Restoration Trust, which operates a program that receives and applies development fees in lieu of lot retirement.¹⁷⁴

D. Lessons from CHC and National Examples:



Public TDR meeting.

Public Engagement is Essential:

Successful TDR programs generally include public engagement both in process of creating the program, Consensus-building, while potentially costly, is an essential part of creating a successful TDR program. Public meetings, charettes, surveys and other methods of engaging the public are recommended for developing the program and for designating protection and growth areas. The CHC utilized the charette process to allow the public to decide where growth should occur. Because of active engagement of stakeholders, the program has met little local opposition.

Education is another key component to public engagement. TDR programs can often be confusing and misunderstood by the public. A successful program should actively seek to educate landowners and developers as to the details of the transfer process as well as the benefits of the program.

Ensuring a Vibrant TDR Market:

In order to create a vibrant market for TDR credits, there must be a balance of how many credits are available and the demand for them in receiving areas.¹⁷⁵ Only one TDR credit has been transferred in the CHC since the implementation of the program. This may be because there are very few receiving areas, and a large sending area.

Another way to ensure a TDR market is by aligning

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Juergensmeyer, Julian C., James C. Nicholas, and Brian D. Leebrick. "Transferable Development Rights After Suitum." *The Urban Lawyer*. Vol. 30, No. 2. Spring 1998.

other local policies so as not to conflict with the TDR program. Developers should not be able to obtain variances or other rezoning in order to increase density, thus making the purchase of TDRs essential. Furthermore, receiving areas should be zoned in such a way as to create a need for increased density.¹⁷⁶ In the CHC, developers have a choice between three development types and only one of them requires TDR credits. This does not create a need for TDRs, and should be taken note of.



Above: Georgia counties.

Top left: Forestry area successfully saved through TDRs. (Washington)

Top right: Dairy farm successfully saved through TDRs. (Colorado)

Section VI: Implementation of TDRs in Georgia

By: Scott Stephens

A. Can TDRs be successful in Georgia?

Transfer of development rights programs are currently authorized within the state of Georgia. The Georgia Code states in Section 36-66A-2 that “the governing body of any municipality or county by ordinance may . . . establish procedures, methods, and standards for the transfer of development rights within its jurisdiction.” This section will discuss the implementation of transfer of development rights (TDR) programs within the state, as well as present a model ordinance that presents a basic framework for the formation of a TDR ordinance within a county or municipality.

In their article, “Transferable Development Rights and Alternatives After Suitum,” Juergensmeyer, Nicholas, and Leebrick state that “the problem [with TDR programs], is not with the concept, but with the implementation.” They further state that the two most frequently occurring problems appear to be not providing sufficient receiving zones, and

poor program development.¹⁷⁷ Sufficient receiving zones ensure that there will be an adequate market to purchase rights from sending areas. If the TDRs are not utilized, the purpose of the program is moot. Receiving areas should be designated where the local government feels that infrastructure can provide adequate service and sustain denser growth. Additionally, the receiving areas must also be in sufficient number and capacity to accommodate the TDRs introduced into the market. The second frequent problem of poor program implementation can be solved by creating an ordinance that allows for an efficient transfer of rights between the “transferor” and the “transferee”, enough incentive for land owners to participate, as well as the local government providing adequate facilities and staffing to make it happen.

B. Template for Successful TDR Program

Additionally in the “Transferable Development Rights and Alternatives After Suitum” article, the authors offer thirteen guidelines to help prevent program failure and ensure “fair, efficient, and effective land preservation.”² These guidelines will be listed and discussed individually.

1. The agency must have legal authority to implement the program.

This exists now in the State of Georgia, as stated earlier, the Georgia legislature passed in 2006 Section 36-66A-2 of the Georgia Code that enables local governments to ability to create standards for the transfer of development rights by ordinance.

2. It must also have the expertise to design and implement the program. It must monitor the program carefully.

This is vital to prevent the second of the most common problems, which is poor program implementation. Expertise is required in not only crafting an ordinance, but as well as implementing the individual components of the ordinance such as valuing the TDRs, developing a TDR bank, delineating the sending and receiving areas, among others. The provided model ordinance offers a framework for beginning a TDR program for local governments within the State of Georgia.

¹⁷⁷ Juergensmeyer, Julian C., James C. Nicholas, and Brian D. Leebrick. “Transferable Development Rights After Suitum.” *The Urban Lawyer*. Vol. 30, No. 2. Spring 1998.

3. The program should be the only way to exceed the prior density levels.

The third item on the list addresses the ability of developers to build beyond current allowed density levels. If a rezoning or variance is easier and less costly to obtain than participating in the TDR program, then the TDR program will not be used. The local government cannot allow rezonings or variances to compete against TDRs if the program is to be successful.

4. The program must have clear objectives.

It is necessary to go beyond the usual “public health, safety, welfare, and morals” in order to clearly establish the objectives of a TDR program. One of the most common objectives is to protect sensitive resources from development. This can include the conservation of land, protection of areas of historic importance, aquifer recharge areas, or areas of scenic value. Also, it encourages growth in areas that are better suited additional density, and minimizes public infrastructure expansion. Section 1 of the model ordinance provides a list of common objectives.

5. The program should address problems of regional significance.

As most urban planners will agree, the activities of a particular city or county go beyond its jurisdictional boundaries. This point addresses not only the need to give attention to the particular needs within the borders of the city or county, such as the local infrastructure, but also to surrounding counties or the state as a whole. Wetlands and rivers, such as the Chattahoochee, are just two environmental features that can affect a very large area, and should be taken into account when implementing a TDR program. The Chattahoochee River provides drinking water to many Georgians, but then travels through the states of Alabama and Florida.

6. The TDRs must have an economic value and there must be incentives for a market to develop.

Incentives are created by allowing for increased growth within the receiving areas that otherwise would not be allowed (see number 3 above). The values assigned to the TDRs are of utmost importance. If they are worth too little, no one in the sending areas will sell, if they are worth too much, it will not be worth purchasing them to apply to the receiving areas. There are options available to local governments addressing the

valuation of TDRs that will be discussed later.

7. The original allocation of TDRs to sending areas properties should be simple and equitable.

The less confusing the calculations are in assigning TDRs to the sending areas, the more likely they will be utilized. Some ordinances simply assign one TDR per acre. Some have formulae that give more weight to areas of particular concern such as river buffers or areas with particular underlying soils. It is essential that the allocation of TDRs is straight-forward, as well as fair to the landowners in the sending areas.

8. Agencies should try to minimize the complexity, confusion and costs associated with the acquisition, transfer and use of TDRs.

If a developer has numerous forms to complete, multiple departments to visit, excessive procedural costs, and has to wait months and months to transfer and use a TDR, the program will be underutilized. This is why adequate staffing and initial funding is required when implementing a TDR program. This is similar to number 6, where if the cost in fees and time is higher than the marginal value of the increased allowable density, a developer will seek other means or simply do without. The model ordinance addresses these issues. While the legal process of recording conservation easements and the transfer of development rights, and having the land surveyed and described can be ostensibly formidable, this can be mitigated by adequate staff support on the local government level, and is already a similar process when subdivisions are created. This is partially addressed in sections 10 and 11 of the model ordinance.

9. Agencies should clearly articulate the development allowed in the receiving areas, both with and without TDRs.

This allows developers to plainly see the benefit provided by participating in the TDR program, and provide incentive to purchase TDRs. This can be addressed in Section 5 of the model ordinance which establishes the receiving and sending areas. The currently allowed densities and development should already be known from the zoning ordinance, but the increased densities should also be clearly stated.

10. Agencies must consider what to do with developments that have already begun the development process prior to the implementation of the TDR scheme.

This issue will affect some agencies, and not others. If a project is begun, it will oftentimes be difficult to make sufficient changes to take advantage of TDRs. This will most like need to be dealt with on a case by case basis.

11. Agencies should consider the infrastructure needs associated with increased growth in the receiving areas and make those infrastructure needs budgetary priorities.

If the receiving areas are to accommodate increased growth, the infrastructure must be available. This includes roads, water access, sewers, and even public facilities such as police and fire, or schools.

12. Agencies must define the sending zones clearly.

If the purpose and objective of the TDR program is to preserve areas of environmental or cultural concern, then those areas need to be clearly defined. This will ensure that those areas that are most sensitive to growth will be protected. The establishment of sending and receiving areas is found in section 5 of the model ordinance.

13. Agencies should clearly describe those residual or remaining uses for the land after the TDRs have been severed.

The remaining development rights of the land in a sending area need to be made clear to the owner of the land. Often, all development rights are not relinquished, but sufficiently reduced. For instance, if the previous density maximum was one house per acre, the maximum may become one house per ten acres after the sell of a TDR. Other low impact activities may be allowed such as a passive park, agriculture, or utilities such as cell towers.

C. Conclusion

With the passage of enabling legislation for transfer of development rights programs in Georgia, another tool has been added to aid in responsible growth. An important part of the act states that “Municipalities and counties which are jointly affected by development are authorized to enter into intergovernmental agreements” which allow the two governments to work together to manage growth. This would

allow land owners in unincorporated areas of the county, which often are the areas most desirable to preserve, to sell development rights to areas located within a city, which are most often better equipped to handle the growth through infrastructure and facilities.

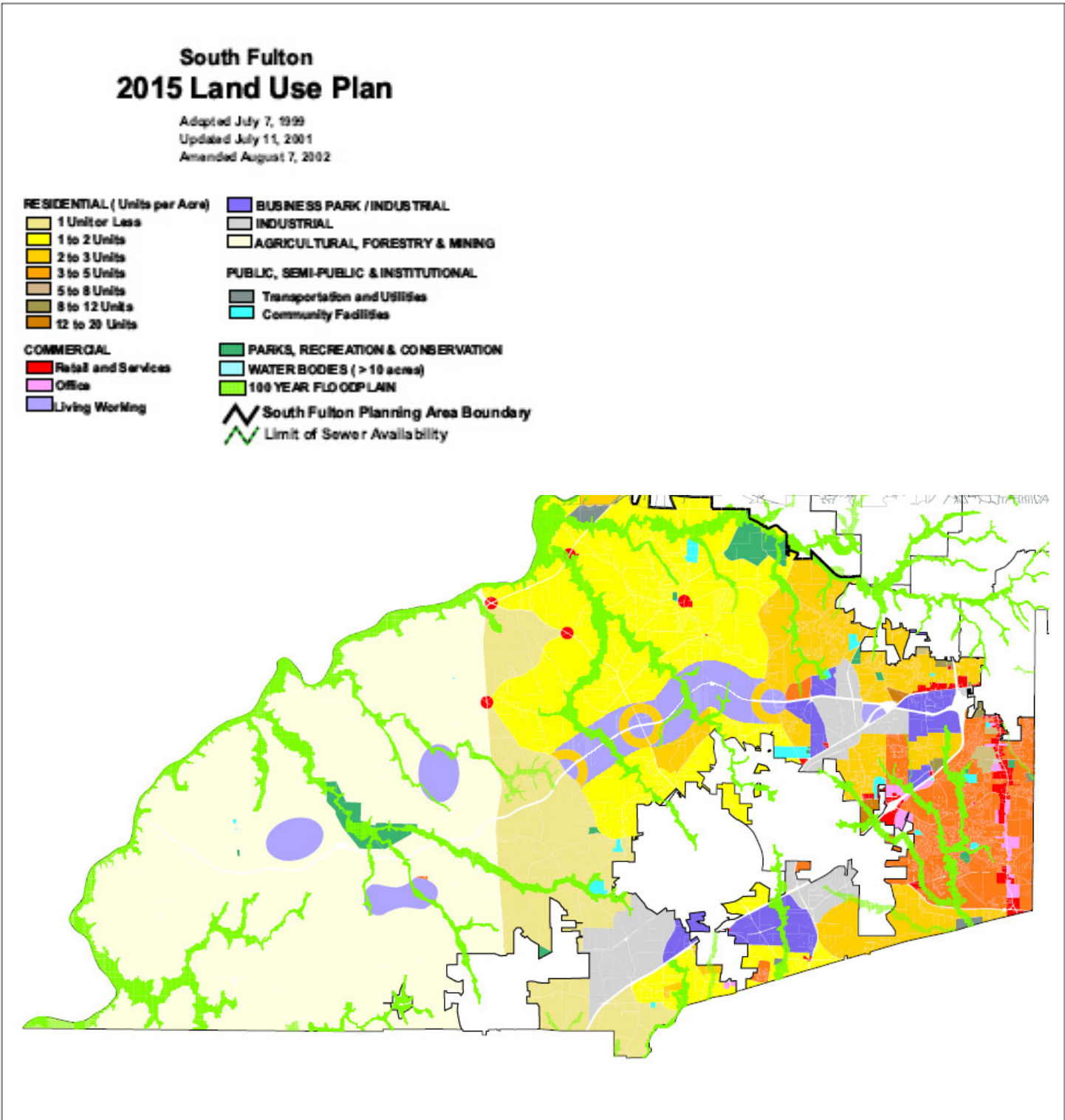
The main obstacles of implementing a TDR program in Georgia now begin with drafting an adequate ordinance that best addresses the local government's needs, with the greater region in mind, and providing the technical and staff resources to implement the program. The included model Georgia ordinance provides the framework for creating an ordinance that will work in most Georgia counties and cities, and the additional research and insight provided in this complete document will aid in the implementation of a successful TDR program.

South Fulton 2015 Land Use Plan

ITEM DESCRIPTION:

The land use plan was approved by the Board of Commissioners on August 8, 2002 and subsequently amended on October 2, 2002. The South Fulton 2015 Comprehensive Plan established the Chattahoochee Hill Country (CHC) planning area, identified growth area and set forth policies that promote preservation of areas surrounding the growth areas.

Corresponding Page: Overview of Chattahoochee Hill Country, 5.

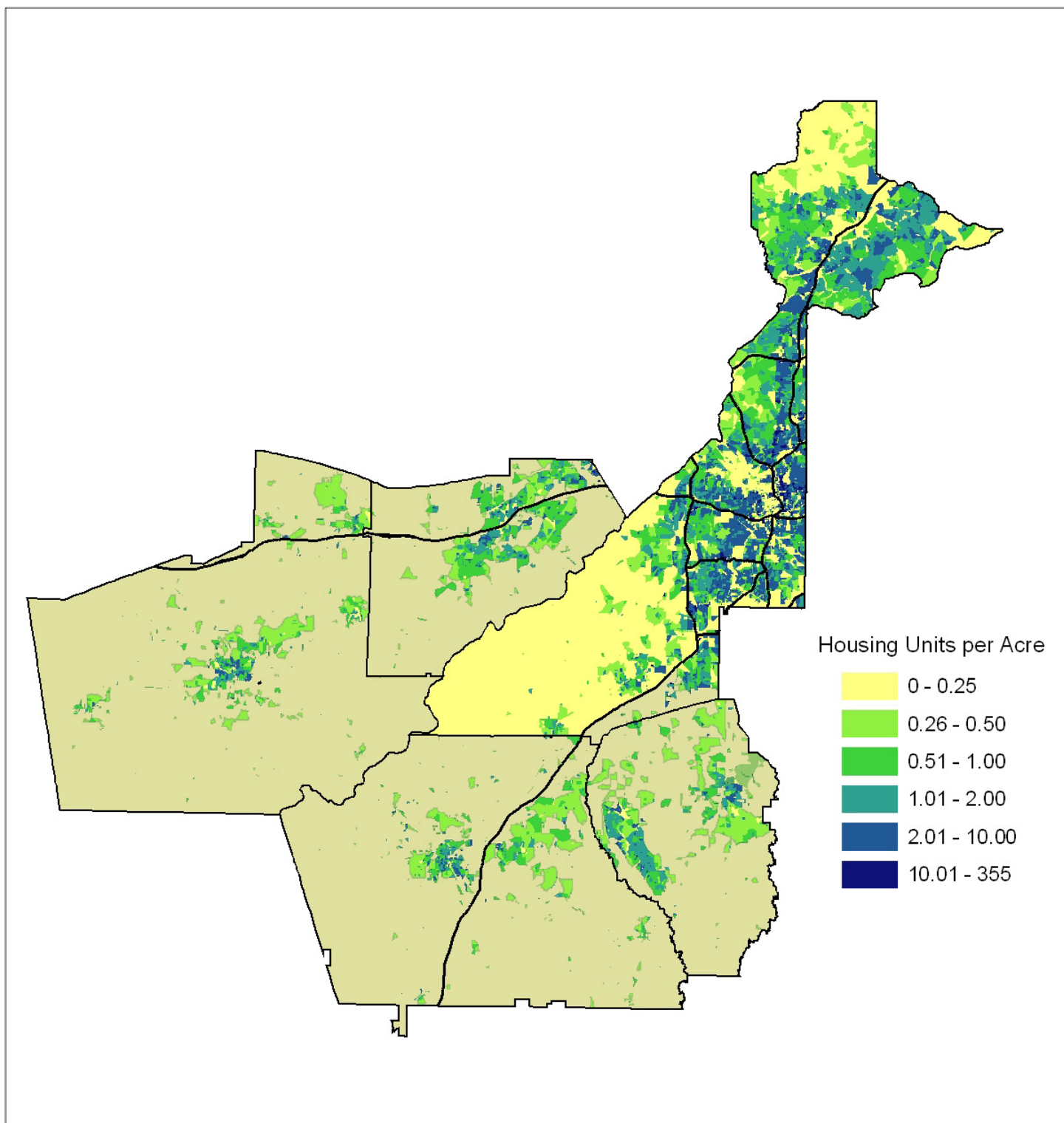


Housing Unit Density in Fulton Co.

ITEM DESCRIPTION:

As of the 2000 Census, there were 348,632 housing units in the county at an average density of 255/km² (660/mi²). This document was created by Scott Stephens.

Corresponding Page: Overview of Chattahoochee Hill Country, 7.



Georgia Enabling Legislation

ITEM DESCRIPTION:

This includes Georgia code sections 36-66A-1 and 36-66A-2. This legislation enables TDR ordinances to be passed by local municipalities.

Corresponding Page: Section III: Legal Overview, page 13.

Ga. Code Ann., § 36-66A-1

West's Code of Georgia Annotated [Currentness](#)

Title 36. Local Government

Provisions Applicable to Counties and Municipal Corporations

[Chapter 66A](#). Transfer of Development Rights

§ 36-66A-1. Definitions

As used in this chapter, the term:

(1) "Development rights" means the maximum development that would be allowed on the sending property under any general or specific plan and local zoning ordinance of a municipality or county in effect on the date the municipality or county adopts an ordinance pursuant to this chapter. Development rights may be calculated and allocated in accordance with factors including dwelling units, area, floor area, floor area ration, 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.

(2) "Person" means any natural person, corporation, partnership, trust, foundation, nonprofit agency, or other legal entity.

(3) "Receiving area" means an area identified by an ordinance as an area authorized to receive development rights transferred from a sending area.

(4) "Receiving property" means a lot or parcel within which development rights are increased pursuant to a transfer of development rights. Receiving property shall be appropriate and suitable for development and shall be sufficient to accommodate the transferable development rights of the sending property without substantial adverse environmental, economic, or social impact to the receiving property or to neighboring property.

(5) "Sending area" means an area identified by an ordinance as an area from which development rights are authorized to be transferred to a receiving area.

(6) "Sending property" means a lot or parcel with special characteristics, including farm land; woodland; desert land; mountain land; a flood plain; natural habitats; wetlands; groundwater recharge area; marsh hammocks; recreation areas or parkland, including golf course areas; or land that has unique aesthetic, architectural, or historic value that a municipality or county desires to protect from future development.

(7) "Transfer of development rights" means the process by which development rights from a sending property are affixed to one or more receiving properties.

Laws 1998, p. 1678, § 1; Laws 2001, p. 1219, § 2; [Laws 2003, Act 378, § 1, eff. June 4, 2003](#).

Ga. Code Ann., § 36-66A-2

West's Code of Georgia Annotated [Currentness](#)

Title 36. Local Government

Provisions Applicable to Counties and Municipal Corporations

[Chapter 66A](#). Transfer of Development Rights

§ 36-66A-2. Procedures, methods, and standards for transfer of development rights

(a) Pursuant to the provisions of this Code section, the governing body of any municipality or county by ordinance may, in order to conserve and promote the public health, safety, and general welfare, establish procedures, methods, and standards for the transfer of development rights within its jurisdiction.

(b) Any proposed transfer of development rights shall be subject to the approval and consent of the property owners of both the sending and receiving property.

(c) Prior to any transfer of development rights, a municipality or county shall adopt an ordinance providing for:

(1) The issuance and recordation of the instruments necessary to sever development rights from the sending property and to affix development rights to the receiving property. These instruments shall be executed by the affected property owners and lienholders;

(2) The preservation of the character of the sending property and assurance that the prohibitions against the use and development of the sending property shall bind the landowner and every successor in interest to the landowner;

(3) The severance of transferable development rights from the sending property and the delayed transfer of development rights to a receiving property;

(4) The purchase, sale, exchange, or other conveyance of transferable development rights prior to the rights being affixed to a receiving property;

(5) A system for monitoring the severance, ownership, assignment, and transfer of transferable development rights;

(6) The right of a municipality or county to purchase development rights and to hold them for conservation purposes or resale;

(7) The right of a person to purchase development rights and to hold them for conservation purposes or resale;

(8) Development rights made transferable pursuant to this Code section shall be interests in real property and shall be considered as such for purposes of conveyancing and taxation. Once a deed of transferable development rights created pursuant to this Code section has been sold, conveyed, or otherwise transferred by the owner of the parcel from which the development rights were derived, the transfer of development rights shall vest in the grantee and become freely alienable. For the purposes of ad valorem real property taxation, the value of a transferable development right shall be deemed appurtenant to the sending property until the transferable development right is registered as a distinct interest in real property with the appropriate tax assessor or the transferable development right is used at a receiving property and becomes appurtenant thereto;

(9) A map or other description of areas designated as sending and receiving areas for the transfer of development rights between properties; and

(10) Such other provisions as the municipality or county deems necessary to aid in the implementation of the

provisions of this chapter.

(d)(1) Prior to the enactment of an ordinance as provided in subsection (c) of this Code section, the local governing authority shall provide for a hearing on the proposed ordinance. At least 15 but not more than 45 days prior to the date of the hearing, the local governing authority shall cause to be published in a newspaper of general circulation within the territorial boundaries of the political subdivision a notice of the hearing. The notice shall state the time, place, and purpose of the hearing.

(2) Prior to any changes in an area designated in an ordinance as a sending or receiving area, the local governing authority shall provide for notice and a hearing as provided in paragraph (1) of this subsection.

(e) Proposed transfers of development rights shall become effective upon the recording of the conveyance with the appropriate deed-recording authorities and the filing of a certified copy of such recording with the local governing authority of each political subdivision in which a sending or receiving area is located in whole or in part.

(f) Municipalities and counties which are jointly affected by development are authorized to enter in to intergovernmental agreements for the purpose of enacting interdependent ordinances providing for the transfer of development rights between or among such jurisdictions, provided that such agreements otherwise comply with applicable laws. Any ordinances enacted pursuant to this subsection may provide for additional notice and hearing and signage requirements applicable to properties within the sending and receiving areas in each participating political subdivision.

Laws 1998, p. 1678, § 1; Laws 2001, p. 1219, § 3; [Laws 2003, Act 378, § 1, eff. June 4, 2003](#).

Fulton County TDR Ordinance

ITEM DESCRIPTION:

This document represents the TDR Ordinance specific to the Chattahoochee Hill Country area. Once the state passed TDR enabling legislation, Fulton County became the first area eligible for TDRs in the South East.

Corresponding Page: Section IV: Implementation of the South Fulton County Ordinance, page 25.

A RESOLUTION TO AMEND CHAPTER 58 OF THE FULTON COUNTY CODE OF LAWS TO ADD ARTICLE VI TO ENACT AN ORDINANCE TO CREATE A TRANSFER OF DEVELOPMENT RIGHTS PROGRAM

WHEREAS, the Board of Commissioners is charged with protecting the health, safety and well being of the citizens of Fulton County; and with population growth, economic prosperity, and increased development activities, the strategic protection of the natural and cultural resources of the environment becomes increasingly difficult; and

WHEREAS, in 1998 the Georgia General Assembly passed legislation which authorizes local governments to implement a transfer of development rights program, commonly referred to as TDR; and

WHEREAS, the TDR program allows a local government to preserve a community's rural, natural, historic and scenic resources, while protecting property values and accommodating growth; and

WHEREAS, the Fulton County Board of Commissioners has the authority and responsibility to protect county resources and property values and direct growth to appropriate locations in unincorporated Fulton County; and

WHEREAS, approved by the Board of Commissioners on August 8, 2002 and subsequently amended on October 2, 2002, the South Fulton 2015 Comprehensive Plan and Plan Map, established the Chattahoochee Hill Country (CHC) planning area, identified growth areas and set forth policies that promote preservation of areas surrounding the growth areas; and

WHEREAS, the amended Comprehensive Plan policies promote the creation of a Transfer of Development Rights Program to implement the desired goal in the CHC planning area to encourage preservation of the rural, natural and scenic resources while allowing for growth.

NOW, THEREFORE, BE IT ORDAINED by the Board of Commissioners of Fulton County, Georgia as follows:

Transfer of Development Rights Ordinance

Sec. 58-240. PURPOSE AND INTENT. It is the purpose and intent of this ordinance to provide for the transfer of development rights (the maximum development that would be allowed on a parcel under its current zoning) from one property to another to promote the conservation of natural, agricultural, environmental, historical and cultural resources and encourage smart growth in appropriate areas. Further this ordinance provides a means to achieve the visions and goals of the

South Fulton 2015 Comprehensive Land Use Plan and the Chattahoochee Hill Country Overlay District.

Sec. 58-241. APPLICABILITY OF REGULATIONS. The provisions of this ordinance apply only to the Chattahoochee Hill Country, which is that portion of South Fulton County bordered to the west by the Chattahoochee River, to the south by Coweta County, and to the east by Cascade-Palmetto Highway (SR 154), as illustrated on the attached map. Compliance with all other applicable Fulton County ordinances, regulations and resolutions is required; however, when in conflict, the provisions of this ordinance shall prevail.

Sec. 58-242. TRANSFER OF DEVELOPMENT RIGHTS. The transfer of development rights is a method for permanently conserving and protecting land by transferring the rights to develop from one property (sending area) to another (receiving area).

Sec. 58-243. SENDING AREA. Sending areas are those properties from which development rights may be transferred to a receiving area. Sending areas may be any properties in the Chattahoochee Hill Country except those areas designated as receiving areas or as otherwise prohibited by this ordinance. Additional sending areas may be designated through the amendment process as set forth in Section XXVIII of the Zoning Resolution of Fulton County and the procedures and requirements set forth in O.C.G.A. §36-66A-2.

Sec. 58-244. RECEIVING AREA. Receiving areas are those properties which may receive development rights from a sending area. Receiving areas are those properties intended for mixed-use development, specifically the three Living Working Areas in the Chattahoochee Hill Country designated on the South Fulton 2015 Land Use Plan. Additional receiving areas may be designated through the amendment process as set forth in Section XXVIII of the Zoning Resolution of Fulton County and the procedures and requirements set forth in O.C.G.A. §36-66A-2.

Sec. 58-245. ELIGIBILITY. Landowners or representatives with the authority to transfer fee simple ownership of any parcel in the Chattahoochee Hill Country (except as noted below) may apply for a Transfer of Development Rights Certificate. Parcels not eligible are as follows:

- (a) any parcel from which all development rights have previously been sold or transferred;
- (b) any parcel on which a conservation easement (legally binding agreement between a property owner and a governmental body or charitable organization qualified under O.C.G.A. § 44-10-2(2) that restricts the type and amount of development and use that may take place on a property) or other permanent deed restriction has been previously granted;
- (c) any parcel fully developed based on its existing zoning;
- (d) any parcel or portion of a parcel that has been designated as open space (land on which no additional development associated with residential, industrial or commercial purposes is allowed, except in compliance with this ordinance and other Fulton County zoning and planning regulations) in a hamlet or conservation subdivision;
- (e) any publicly owned parcel; and
- (f) any land within riparian buffers mandated by state or local law.

Sec. 58-246. APPLICATION REQUIREMENTS FOR A TRANSFER OF DEVELOPMENT RIGHTS CERTIFICATE. An eligible landowner or authorized representative must provide the following:

- (a) name, address and telephone number of applicant and applicant's agent, if any;
- b) proof of ownership of the sending property;
- c) metes and bounds written legal description and plat prepared within 90 days of the date of application by a

- licensed surveyor;
- d) written description of the physical characteristics of the property;
- e) site plan which illustrates existing or proposed dwellings, historic structures, easements or other encumbrances; and
- f) the processing fee as established by the Department of Environment and Community Development (“the Department”).

Sec. 58-247. CALCULATION OF DEVELOPMENT RIGHTS. Within 95 days of the receipt of a complete application for a Transfer of Development Rights Certificate, the Department shall certify the number of transferable development rights, assign serial numbers accordingly, and issue a Transfer of Development Rights Certificate. Development rights shall be calculated in accordance with the formula included in the South Fulton 2015 Land Use Plan on a gross acreage basis. For each eligible gross acre of the sending area, one development right (TDR) will be issued. The area of a parcel with fractional acreage will be calculated by rounding the total acreage down to the nearest whole number and issuing one TDR per acre.

Sec. 58-248. CALCULATION METHODS FOR ACQUISITION OF DEVELOPMENT RIGHTS. The following formulas shall be used to compute the amount of land that must be preserved in the sending areas to develop a receiving area:

a. Residential:

Total number of proposed residential units in the receiving area (Living Working) minus the total gross acreage of the area to be developed (excluding the acreage required for the 300-foot rural protection development setback) = Total Number of Acres to be Preserved in the Sending Areas

Example #1:

Suppose 500 acres in a Living Working Area are to be developed at 14 units per acre (the maximum residential density permitted in a Living Working area). Therefore, 500 acres x 14 units per acre = 7,000 units to be developed. 7,000 Units minus 500 acres (acreage of Living Working Area to be developed) = 6,500 Acres to be preserved in the sending areas 1 TDR = 1 Acre. Therefore, 6,500 TDRs must be transferred to the receiving area.

b. Commercial:

Total square feet of commercial space in the receiving area divided by 2,000 = Total Number of Acres to be Preserved in the Sending Area

Example #1:

Suppose 30,000 square feet of commercial uses are proposed to be developed in a receiving area: 30,000 / 2,000 = 15 TDRs 1 TDR = 1 Acre. Therefore, 15 TDRs must be transferred to the receiving area.

Sec. 58-249. APPEAL OF CALCULATION. Any landowner or authorized representative aggrieved by a final decision of the Department related to the certification of Transfer of Development Rights may appeal such final decision to the Board of Zoning Appeals by filing, in writing, setting forth plainly and fully why the calculation is in error. Such appeal shall be filed no later than thirty (30) days after the date of the Department’s final decision.

Sec. 58-250. APPROVAL OF TRANSFER OF DEVELOPMENT RIGHTS AND APPEAL PROCESS. Any proposed transfer of development rights shall be subject to the notice, hearing and approval requirements of O.C.G.A. § 36-66A-2. A transfer of development rights shall be approved by the Board of Commissioners if it meets the requirements of this ordinance.

Sec. 58-251. APPEAL OF TRANSFER DECISION. Any appeal or other legal challenge to the Board of Commissioners’ final decision regarding a Transfer of Development Rights shall be pursued by petition for

writ of certiorari filed with the Superior Court of Fulton County within thirty (30) days of the date of the Board of Commissioners' decision. The applicant's petition and all other initial filings with the Superior Court shall be served upon the named defendants/respondents in accordance with O.C.G.A. § 9-11-4. Upon filing such appeal, the Clerk of Superior Court shall give immediate notice thereof to the Director of the Department. Within thirty (30) days of such notice, the Director shall cause to be filed with the Clerk of the Superior Court a certified copy of the proceedings before the Commission and the decision of the Commission. Upon appeal there is a presumption of correctness of the Commission's decision which must be overcome by the appealing party.

Sec. 58-252. RECORDATION OF TRANSFER OF DEVELOPMENT RIGHTS TRANSACTIONS (SENDING AREAS).

Deed of Transfer. A Deed of Transfer shall be required to convey development rights from a sending parcel to a purchaser. The Deed shall be valid only if it is signed by the owner or authorized representative of the sending parcel, complies with all legal requirements for the transfer of real estate, contains provisions established by the Department and is recorded in the chain of title after the conservation easement is secured against the sending parcel

A Deed of Transfer shall contain a metes and bounds written legal description and a plat prepared by a licensed surveyor, the names and addresses of the Grantor and the Grantee of the development rights, the serial numbers of the TDRs being conveyed along with a copy of the TDR certificate issued by the Department and proof of the execution and recordation of a conservation easement on the sending parcel.

Conservation Easement. To convey the certified development rights on a sending area, a conservation easement between the owner of the sending area and an organization authorized by the laws of the State of Georgia to accept, hold and administer conservation easements, pursuant to O.C.G.A. § 44-10-1 Georgia Uniform Conservation Easement Act must be signed and recorded with the Fulton County Clerk, prior to the Deed of Transfer. Conservation easements established pursuant to this section may not be released or nullified by any party.

The Department may develop a model conservation easement form and require it be used to fulfill the requirements of this section. In addition to the provisions of the Georgia Uniform Conservation Easement Act, each conservation easement shall contain:

- (a) a metes and bounds written legal description and plat prepared by a licensed surveyor;
- (b) prohibitions against the use and development of the sending area property which are inconsistent with open space as defined in Sec. 58-245.(d);
- (c) assurances that prohibitions will run with the land and bind the landowner and every successor in interest to include a statement that the easement shall survive any merger of the easement interest and the fee simple interest of the property;
- (d) the serial numbers of the TDRs being transferred in the Deed of Transfer from the sending area property subject to the conservation easement; and
- (e) a statement that nothing in the easement shall be construed to convey to the public a right of access or use of the property and that the owner of the property, his heirs, successors and assignees will retain exclusive right to such access or use subject to the terms of the easement.

Sufficiency of Documents. Prior to the recordation of the Deed of Transfer and the conservation easement, parties to the transaction must obtain an opinion from a licensed Georgia attorney that the Deed and easement have been executed by all necessary parties and is perpetual and binding on the property owner and every successor in interest. A copy of this document shall be provided to Fulton County.

Re-issuance of TDR Certificates. In the event of the transfer of fewer than all of a landowner's development rights, the landowner must return the original TDR certificate to the Department upon the recordation of the conservation easement and Deed of Transfer. The landowner must provide a copy of the Deed of Transfer that contains the serial numbers of the development rights transferred. Within 95 days of the receipt of the complete TDR certificate, the Department shall reissue a certificate to the landowner reflecting the remaining TDRs and the corresponding serial numbers.

Sec. 58-253. RECORDATION OF TRANSFER OF DEVELOPMENT RIGHTS TRANSACTIONS (RECEIVING AREAS).

The following information shall be recorded on the face of any plat for property which receives development rights under the provisions of this Ordinance:

- (a) A statement that the development rights used in the plat have been transferred in accordance with the Deed of Transfer, prescribed in Sec. 58- 252.
- (b) The serial numbers of the TDRs conveyed along with a copy of the TDR certificate issued by the Department.

Sec. 58-254. TRANSFER OF DEVELOPMENT RIGHTS BANK. Subsequent to the adoption of this ordinance, Fulton County may create a Transfer of Development Rights Bank ("the Bank") to encourage the exchange of development rights in the private market and encourage the preservation of land. The Bank will facilitate the exchange by purchasing and selling development rights. Also for the purposes of conserving land, the Bank may hold TDRs for any length of time to include in perpetuity.

Sec. 58-255. ORGANIZATION OF THE BANK.

The Bank shall be directed and managed by a Bank Board to consist of 5 members who shall be residents of Fulton County, nominated by the Department and approved by the Fulton County Board of Commissioners. Specifically, one member shall be experienced in the banking or financial industry, one member shall be a private landowner in the CHC area, one member shall be experienced in the legal industry, one member shall represent a conservation organization, and one member shall be a representative from the real estate development industry. The terms of office for the Bank Board members shall be four years and staggered. Three (3) members shall constitute a quorum. A majority vote shall be required for any action before the Bank Board. The Bank Board may adopt procedural and substantive rules to govern its powers, duties and functions. Staff support shall be provided by the Department. Empowerments. The Bank Board shall be empowered to:

- (a) enter into agreements for professional services, e.g. consulting, appraising, accounting, subject to available funding;
- (b) apply for and accept grants or loans for the Bank Board's authorized purposes;
- (c) purchase, receive, sell or hold TDRs;
- (d) purchase properties in fee simple to preserve them through conservation easements and resell the restricted properties at fair market value; and
- (e) do all other things necessary to carry out the functions and operations of the Bank.

Authority and Compensation. The members of the Bank Board shall receive no compensation from the Bank except reimbursement for expenses incurred for the performance of their duties as Board members.

Registry of TDRs. For the purposes of tracking and marketing transfer of development rights, a central registry of available Transfer of Development Rights Certificates shall be established by the Bank or the Department in the event the Bank is not established.

Acquisition Priorities. The following priorities shall be considered by the Bank Board for purchasing TDRs:

- (a) properties adjacent to the Living Working Areas (outside the 300-foot rural protection setback);
- (b) properties that border the Chattahoochee River, its tributaries, and any associated water features such as wetlands.
- (c) development pressures on the land;
- (d) price of the development rights;
- (e) pre-existing perpetual restrictions against development;
- (f) proximity to other properties with easement restrictions for the purpose of creating large, contiguous tracts of conserved land;
- (g) environmental assessments; and
- (h) other factors of public interest determined by the Bank Board.

Purchase, Sale and Value of TDRs. To determine purchase and/or sales price of development rights, the Bank Board may negotiate, use a competitive bid process, or any other method deemed fair and equitable by the Bank Board. Purchase and sale prices must be supported by an appraisal paid for by the Bank Board. Any eligible landowner may approach the Bank Board with an offer to sell TDRs. The Bank Board shall have 60 days to consider and respond to such offers. Landowners shall follow the procedures and requirements for certification of TDRs as prescribed by this ordinance. All transactions through the Bank Board must follow the recordation requirements prescribed by this ordinance.

The Bank Board may, as a preservation measure, acquire fee simple interest in sending area parcels on a competitive basis in the open market. The intent of a purchase is to place a perpetual conservation easement on a property and then resell the restricted parcel for fair market value. Purchase and resale of sending area parcels is limited to those parcels where development pressures or the prospects of a change of the use of the property are high and/or whose location and/or quality are such that the property's preservation is important to the continued viability of the Chattahoochee Hill Country.

Right of First Refusal. The Bank Board shall have the authority to enter into Right of First Refusal Agreements with sending area landowners for the purchase of either TDRs or property in fee simple. The Right of First Refusal Agreement is an instrument that is recorded in the chain of title for the subject property, and is to be effective concurrent with the ownership of the signer(s) of the agreement and to be renewed by immediate family members who may become successive owners.

In the event that all or a portion of the TDRs or property may be sold to someone other than an immediate family member or developed or subdivided, notification by the landowner to the Bank Board shall be required.

Within 90 days of notification, the Bank Board may exercise the right of first refusal by acquiring either the development rights or the property in fee simple at a price which is equal to any bona fide offer which has been tendered to the landowner or the appraised fair market value, if an offer has not been tendered, plus \$1.00.

BE IT FURTHER RESOLVED, THAT the Transfer of Development Rights program shall be implemented only for the Chattahoochee Hill Country sixty (60) days following the adoption of this Resolution.

BE IT SO RESOLVED, THIS second day of April, 2003.

BOARD OF COMMISSIONERS

OF FULTON COUNTY, GEORGIA

Chairman Mike Kenn

ATTEST: APPROVED AS TO FORM:

Mark Massey, Clerk to Commission O. V. Brantley, County Attorney

SPONSORED BY:

William "Bill" Edwards, Commissioner

Personal Emails with Terry King

ITEM DESCRIPTION:

These emails took place from March 30, 2007 until April 2, 2007. Topics included procedural analysis of TDRs.

Corresponding Page: Section IV: Implementation of the South Fulton County Ordinance, page 28.

From: Terry-King terrydemeoking@comcast.net
 Sent: Monday, April 2, 2007 10:22 AM
 To: "Lauren-Rooney" lrooney7@hotmail.com
 CC: tking@chatthillcountry.org
 Subject: RE: Growth Mgmt Project
 Lauren,

I described the TDR process as having three distinct procedures, somewhat independent of each other.

1. Severing the development rights, via a conservation easement (CE) and the TDR document. Fulton County requires that the CE be legally in place prior to the development rights (DR) being severed. This can be accomplished by filing the CE first, before the DR document, at the Superior Court. (Both can be executed at the same time or the CE can be executed and filed prior to the DR being executed and signed.) The fact that the CE is filed first, places permanent protection on the property prior to the DR being severed – a requirement of the Fulton County Ordinance and probably good practice since one would not want the DR to be 'freed' without protecting the land.

2. Issuance of the DR certificates by the governing authority – in this case Fulton County. Once both the CE and the DR documents are signed and filed, Fulton County issues the DR certificates (like bonds). The certificates can be issued to several different entities depending on the TDR program, how the TDR ordinance is written and how the deal is constructed. This is the step that most resembles a 'bank'. The Fulton County Ordinance was purposefully written to allow the county, another entity or an individual to be the 'bank' or to hold the DR certificates.

Scenario one: The County's program originally was conceived so Fulton

County would hold the certificates until a developer who needs the density purchases the DR from the county – this kind of presumes that the County bought the DRs using county dollars.

Because of the incorporation referendum, scheduled for June 2007, the county doesn't want to launch any new endeavors, not knowing what programs it will 'own' after the referendum, so it has not stepped up to act as the bank.

Scenario two: With the two TDRs that have taken place so far, the CHC

Conservancy has served as the 'bank'. This is because of two things: 1. the County wasn't moving forward with the program as described under the first scenario and 2. The Conservancy received an anonymous donation to 'seed the bank' and begin the TDR transaction process. So, the CHC Conservancy has 'bought' DRs and the County has issued the DR certificates to the Conservancy. When a developer of a Village needs the density, they can purchase the DRs from the Conservancy, at which time the Conservancy will have the funds to purchase additional DRs.

Scenario three: A private individual may purchase DRs under the same process as described in procedure 1.

The individual uses their own money, negotiates their own price/deal, the same CE and DR documents are signed and filed, and the County issues the DR certificates to that individual. That individual could use the DR density if they were building a Village, hold them forever, or sell them (or donated them) to someone else building a Village or to a 'bank'. There are a couple of TDR transactions being contemplated under this third scenario right now.

3. Applying the DR to meet density requirements in a Village, immediately after their severance or at a future time. (This is the step that has not been undertaken since the first Village has not yet received their rezoning from AG-1 to CHC MIX – Village zoning – it may happen in May/June 2007. But even then, the Village will not need to gain additional density until it tips past the 1 acre to 1 unit ratio or the build-out exceeds the number of units/acre by one). At that time, the developer must purchase the needed DRs and somehow the County must 'attach' the density to the Village per each DR certificate (perhaps, via the deed?, and then is it attached to entire site or the actual parcel where the density was needed?) and 'retire' the actual DR certificates. As in the bond example, the 'certificate' would have been 'cashed'.

As I mentioned, currently a private individual is exploring how to privately or individually purchased DRs as described in procedure 2.

The third procedure is what has not happened yet because no developer has yet needed to gain or apply additional density. This is the step that Fulton County has not yet developed internal program procedures or policies or regulations for and is not clear on how to accomplish. But obviously, if the DRs are not applied there is no reason to sell them or buy them.

As to your last question, all of the ordinances can be found at Fulton County's website: <http://www.fultonecd.org/planning>. Perhaps the TDR ordinance could be linked to the Overlay Ordinance where the Overlay specifies the requirement for density for the Villages. If this piece is beyond what you are interested in doing, I'd be very pleased if you can concentrate on:

1. Procedures - Analyze and determine the effectiveness of Fulton County's TDR program/bank procedures compared to a couple of other successful TDR programs and make recommendations for improvement, if needed. Remember the procedures include: 1. severing development rights, 2. Recording and issuing development certificates, and 3. Attaching development rights to land/permit needing the density.

Thanks so much, Terry

P.S. Please feel free to call, if I'm not responding in a timely manner. The network connections in the country are not always quick!

Call anytime at: 404/276-1099.

From: "Lauren Rooney" <larooney7@hotmail.com>
Date: Fri, 30 Mar 2007 19:49:56
To: king@chatthillcountry.org
Cc: LaRooney7@hotmail.com
Subject: RE: Growth Mgmt Project

Hey Terry!

I wanted to run by some issues I have been having now that I am redirecting my focus on this new search topic. I had to put Growth Management on hold for a while because I had two 25 page term papers due today. Now they are done so I can get back to this finally!

From our meeting, you talked about the 3-step process a person must take in GA to abide by the TDR procedures:

1. File a conservation easement
2. (seconds later), Severe TDR rights - once filed and cleared, a certificate is issued with contains your value and the conservancy bank holds these certificates
3. File document that protects the land forever and applies density units to another piece of property.

You had mentioned that step 3 was not been done yet - the County has not followed through on this. What did you mean by that? Are you saying that people are transferring their rights and then these sending rights are not been fully transferred to the receiving areas?

I am also researching other areas and seeing what their procedures are for abiding by the TDR process.

My other question deals with the Overlay ordinance. I am having trouble finding what part you believe the TDR ordinance should be linked to?? If you can tell me where to find the ordinance that you are speaking of, what portions should be linked, etc. that would really help because I feel like I am a little over my head and getting bogged down in issues that are outside of what our group project is really to focus on.

Thanks Terry! I hope that things are going great down there!

-Lauren

Model Georgia TDR Ordinance

ITEM DESCRIPTION:

This is a model ordinance tailored to Georgia's respective ordinances from the state code.

Corresponding Page: Section VI: Implementation of TDRs in Georgia, page 25.

Model Georgia Transfer of Development Rights Ordinance¹

Section 1: Purpose

The purpose and intent of this ordinance is to provide for and enable the transfer of development rights (TDR) among properties for the following objectives:

- i. promote the conservation of natural, agricultural, or environmental resources
- ii. protect lands and structures of aesthetic, architectural, and historic significance
- iii. encourage more compact and dense development within certain receiving areas
- iv. conserve public funds by minimizing the need for further infrastructure and facilities expansion
- v. allow landowners to be compensated for reduced long-term development potential
- vi. implement the comprehensive plan
- vii. *[additional objectives]*

Section 2: Authority

This ordinance is enacted pursuant to the authority granted by O.C.G.A § 36-66A-2.

Section 3: Definitions

As used in this ordinance, the following words and terms shall have the meanings specified herein:

“Development rights” means the maximum development that would be allowed on the sending parcel in effect on the date of adoption of this ordinance. The rights of the owner of a parcel of land to configure that parcel and the structures thereon to a particular density for residential uses or floor area ratio for nonresidential uses. Development rights exclude the rights to the area of or height of a sign.

“Person” means any natural person, corporation, partnership, trust, foundation, nonprofit agency, or other legal entity.

“Receiving area” means an area identified by *[local government]* as an area authorized to receive development rights transferred from a sending area.

“Receiving parcel” means a parcel of land in the receiving area that is the subject of a transfer of development rights, where the owner of the parcel is receiving development rights, directly or by intermediate transfers, from a sending parcel, and on which increased density and/or intensity is allowed by reason of the transfer of development rights. Receiving parcels shall be appropriate and suitable for

development and shall be sufficient to accommodate the transferable development rights of the sending property without substantial adverse environmental, economic, or social impact to the receiving parcel or to neighboring property.

“Sending area” means an area identified by an [City / County] as an area from which development rights are authorized to be transferred to a receiving area.

“Sending parcel” means a parcel of land in the sending area that is the subject of a transfer of development rights, where the owner of the parcel is conveying development rights of the parcel, and on which those rights so conveyed are extinguished and may not be used by reason of the transfer of development rights.

“Transfer of development rights (TDRs)” means the process prescribed in this ordinance by which development rights from one or more sending parcels are affixed to one or more receiving parcels, whereby the development rights so conveyed are extinguished on the sending parcel and may be exercised on the receiving parcel in addition to the development rights already existing regarding that parcel or may be held by the receiving person.

“Transferee” means the person who purchases the development rights.

“Transferor” means the landowner or authorized representative of a parcel in a sending area.

Section 4: Eligibility

Transferors with the authority to transfer fee simple ownership of any parcel in the sending areas (except as noted below) may apply for a transfer of development rights certificate. Parcels not eligible are as follows:

- i. Any parcel from which all development rights have previously been sold or transferred;
- ii. Any parcel on which a conservation easement (legally binding agreement between a property owner and a governmental body or charitable organization qualified under O.C.G.A. § 44-10-2(2) that restricts the type and amount of development and use that may take place on a property) or other permanent deed restriction has been previously granted;
- iii. Any parcel fully developed based on its existing zoning;
- iv. Any parcel or portion of a parcel that has been designated as open space (land on which no additional development associated with residential, industrial or commercial purposes is allowed, except in compliance with this article and other local zoning and planning regulations) in a hamlet or conservation subdivision;
- v. Any publicly owned parcel; and
- vi. Any land within riparian buffers mandated by state or local law.

Section 5: Establishment of Sending and Receiving Areas

[Alternative 1: Amend the zoning map using overlays]

The [local government] may establish sending and receiving districts as overlays to the zoning map by ordinance in the manner of zoning district amendments. The [Zoning Official] shall cause the official zoning district map to be amended by overlay districts to the affected properties. The designation [“TDR-S”] shall be the title of the overlay for a sending area, and the designation [“TDR-R”] shall be the title of the overlay

for a receiving area.

[Alternative 2: Specify zoning districts that can serve as sending and receiving areas]

The following zoning districts shall be sending areas for the purposes of this ordinance:

[list names of districts]

The following zoning districts shall be receiving areas for the purposes this ordinance:

[list names of districts]

Section 6: Determination of Development Rights; Issuance of Certificate

1) The *[Zoning Official]* shall be responsible for:

- i. determining, upon application by a transferor, the development rights that may be transferred from a property in a sending area to a property in a receiving area and issuing a transfer of development rights certificate upon application by the transferor.
- ii. maintaining permanent records of all certificates issued, deed restrictions and covenants recorded, and development rights retired or otherwise extinguished, and transferred to specific properties; and
- iii. making available forms on which to apply for a transfer of development rights certificate.
- iv. determining the residual uses of land in the sending area after development rights have been severed.

2) An application for a transfer of development rights certificate shall contain:

- i. name, address and telephone number of transferor;
- ii. proof of ownership of the sending parcel, including clear proof of title;
- iii. written legal description and plat prepared within 90 days of date of application by a surveyor licensed by the State of Georgia, including structures and easements or other encumbrances;
- iv. applicable fees as established by the *[Zoning Official]*
- v. *[additional requirements]*

3) A transfer of development rights certificate shall contain:

- i. the transferor;
- ii. the transferee, if known;
- iii. written legal description;
- iv. a statement of the number of development rights eligible for transfer;
- v. the date of issuance
- vi. signature of the *[Zoning Official]*;
- vii. a serial number assigned by the *[Zoning Official]*
- viii. *[additional items]*

4) Calculation of development rights

*No model ordinance language for the calculation of development rights is provided here because the specifics must be determined by the local government.
See Appendix 1 for examples from other TDR ordinances.*

Section 7: Appeal of calculation

Any transferor aggrieved by a final decision of the [Zoning Official] related to the calculation of transfer of development rights may appeal such final decision to the [board of zoning appeals] by submitting, in writing, setting forth plainly and fully why the calculation is in error. Such appeal shall be filed no later than 30 days after the date of the [Zoning Official's] final decision.

Section 8: Approval of transfer of development rights and appeal process

Any proposed transfer of development rights shall be subject to the notice, hearing and approval requirements of O.C.G.A. § 36-66A-2. A transfer of development rights shall be approved by the board of commissioners if it meets the requirements of this article.

Section 9: Appeal of transfer decision

Any appeal or other legal challenge to the [local government's] final decision regarding a transfer of development rights shall be pursued by petition for writ of certiorari filed with the Superior Court of Fulton County within 30 days of the date of the decision. The applicant's petition and all other initial filings with the Superior Court shall be served upon the named defendants/respondents in accordance with O.C.G.A. § 9-11-4.

Upon filing such appeal, the Clerk of Superior Court shall give immediate notice thereof to the [Zoning Official]. Within 30 days of such notice, the [Zoning Official] shall cause to be filed with the Clerk of the Superior Court a certified copy of the proceedings before the [local government] and the decision of the [local government].

Upon appeal there is a presumption of correctness of the [local government's] decision which must be overcome by the appealing party.

Section 10: Recordation of transfer of development rights transactions (sending areas)

1) Deed of transfer. A deed of transfer shall be required to convey development rights from a sending parcel to a transferee. The deed shall be valid only if it is signed by the transferor of the sending parcel, complies with all legal requirements for the transfer of real estate, contains provisions established by the [Zoning Official] and is recorded in the chain of title after the conservation easement is secured against the sending parcel.

A deed of transfer shall contain a written legal description and a plat prepared by a licensed surveyor, the names and addresses of the transferor and transferee of the development rights, the serial numbers of the TDR certificates being conveyed along with a copy of the TDR certificate issued by the [Zoning Official] and proof of the execution and recordation of a conservation easement on the sending parcel.

2) Conservation easement. To convey the certified development rights on a sending area, a conservation easement between the owner of the sending area and an organization authorized by the laws of the State of Georgia to accept, hold and administer conservation easements, pursuant to O.C.G.A. § 44-10-1 Georgia Uniform Conservation Easement Act, must be signed and recorded with the [county clerk], prior to the deed

of transfer. Conservation easements established pursuant to this section may not be released or nullified by any party. The [Zoning Official] may develop a model conservation easement form and require it be used to fulfill the requirements of this section.

In addition to the provisions of the Georgia Uniform Conservation Easement Act, each conservation easement shall contain:

- i. A written legal description and plat prepared by a licensed surveyor;
- ii. Assurances that prohibitions will run with the land and bind the landowner and every successor in interest to include a statement that the easement shall survive any merger of the easement interest and the fee simple interest of the property;
- iii. The serial numbers of the TDR certificates being transferred in the deed of transfer from the sending area property subject to the conservation easement; and
- iv. A statement that nothing in the easement shall be construed to convey to the public a right of access or use of the property and that the owner of the property, his heirs, successors and assignees will retain exclusive right to such access or use subject to the terms of the easement.
- v. General reservation language for future rights-of-way and easement areas that may be needed for county and municipal infrastructure improvements as future road and drainage improvements.

3) Sufficiency of documents. Prior to the recordation of the deed of transfer and the conservation easement, parties to the transaction must obtain an opinion from a licensed Georgia attorney that the deed and easement have been executed by all necessary parties and is perpetual and binding on the property owner and every successor in interest. A copy of this document shall be provided to the [Zoning Official].

4) Re-issuance of TDR certificates. In the event of the transfer of fewer than all of a landowner's development rights, the landowner must return the original TDR certificate to the [Zoning Official] upon the recordation of the conservation easement and deed of transfer. The landowner must provide a copy of the deed of transfer that contains the serial numbers of the development rights transferred. Within 95 days of the receipt of the complete TDR certificate, the [Zoning Official] shall reissue a certificate to the landowner reflecting the remaining TDRs and the corresponding serial numbers.

Section 11: Recordation of transfer of development rights transactions (receiving areas)

The following information shall be recorded on the face of any plat for property which receives development rights under the provisions of this article:

- 1) A statement that the development rights used in the plat have been transferred in accordance with the deed of transfer, prescribed in [Section 10].
- 2) The serial numbers of the TDR certificates conveyed along with a copy of the TDR certificate issued by the [Zoning Official].

Section 12: Purchase, sale, and value of TDRs

No model ordinance language for the purchase, sale, and value of TDRs is provided here because specifics must be determined by the local government based.

The monetary value of the TDRs may be completely determined by negotiation between transferor and transferee, set price by the local government, or regulated through the establishment of a TDR Bank.

[Optional] Section 13: Transfer of development rights bank

No model ordinance language for the creation of a TDR bank is provided here because the specifics must be determined by the local government. See Appendix 1 for example language.

The TDR Bank should:

- have the power to purchase and sell or convey development rights, subject to the local legislative body's approval;*
- have the power to recommend to the local legislative body property where the local government should acquire development rights by condemnation;*
- have the power, to hold indefinitely any development rights it possesses for conservation or other purposes;*
- receive donations of development rights from any person or entity; and*
 - receive funding from the local government, the proceeds from the sale of development rights, or grants or donations from any source.*

¹ Adapted from the Chattahoochee Hill Country (Georgia) TDR Ordinance and the American Planning Association's *Model Transfer of Development Rights (TDR) Ordinance*

APA Model TDR Ordinance

ITEM DESCRIPTION:

This is a model TDR Ordinance created by the American Planning Association. It was created for municipalities interested in TDRs. It can be found at www.planning.org.

Corresponding Page: Section VI: Implementation of TDRs in Georgia, page 25.

4.6 MODEL TRANSFER OF DEVELOPMENT RIGHTS (TDR) ORDINANCE

The model ordinance below establishes a general framework for severing development rights involving net density and intensity (through FARs) from a sending parcel and transferring them to a receiving parcel. Section 101 of the ordinance authorizes a transfer of development rights (TDR) for a variety of purposes, including environmental protection, open space preservation, and historic preservation, which are the most typical.

Under Section 104, the local government has two options in setting up the TDR program. The first involves the use of overlay districts, which would zone specific areas as sending and receiving parcels. The second involves identifying which zoning districts would be sending and receiving districts in the text of the ordinance itself, rather than through a separate amendment to the zoning ordinance. In both cases, the designations must be consistent with the comprehensive plan. Section 105 of the ordinance contains a table that shows, by use district, the permitted maximum increases in density and FAR that can be brought about through TDR.

Section 106 outlines a process by which the zoning administrator would determine the specific number of development rights for a sending parcel in terms of dwelling units per net acre or square feet of nonresidential floor area (for commercial and industrial parcels) and issue a certificate to the transferor. Sections 107 and 108 describe the instruments by which the development rights are legally severed from the sending parcel through instruments of transfer and attached to the receiving parcel. Section 107 describes how the applicant for a subdivision or other type of development permit would formally seek the use of development rights in a development project (e.g., a subdivision). Note that the transfer would not apply to rezonings, but only to specific projects where a development permit is going to be issued in order that development may commence.

Commentary to the ordinance describes, in Section 109, a development rights bank, a mechanism by which the local government purchases development rights before they are applied to receiving parcels, retains them permanently in order to prevent development, or sells them as appropriate in order to make a profit or direct development of a certain character to a specific area. Whether this is an appropriate role for local government or should be left to nonprofit organizations (e.g., land trusts) is matter for local discussion and debate. No ordinance language is provided, although the description in the commentary should be sufficient for local government officials to draft language establishing the bank.

Primary Smart Growth Principle Addressed: Preserve open space and farmland

Secondary Smart Growth Principle Addressed: Direct development towards existing communities

101. Purposes

The purposes of this ordinance are to:

- (a) preserve open space, scenic views, critical and sensitive areas, and natural hazard areas;
- (b) conserve agriculture and forestry uses of land;
- (c) protect lands and structures of aesthetic, architectural, and historic significance;
- (d) retain open areas in which healthful outdoor recreation can occur;
- (e) implement the comprehensive plan;
- (f) ensure that the owners of preserved, conserved, or protected land may make reasonable use of their property rights by transferring their right to develop to eligible zones;
- (g) provide a mechanism whereby development rights may be reliably transferred; and
- (h) ensure that development rights are transferred to properties in areas or districts that have adequate community facilities, including transportation, to accommodate additional development.

Comment: *The local government may tailor this list of purposes to its particular planning goals and objectives or leave it with a wide range of purposes and implement the ordinance to achieve specific goals and objectives.*

102. Authority

This ordinance is enacted pursuant to the authority granted by [*cite to state statute or local government charter or similar law*].

Comment: *It is important to determine whether the local government has legal authority to enact a TDR program because not all local governments in all states have identical powers. In addition, enabling legislation for TDR may require that the transfers be done in a certain manner other than is described in this model.*

103. Definitions

As used in this ordinance, the following words and terms shall have the meanings specified herein:

“**Development Rights**” mean the rights of the owner of a parcel of land, under land development regulations, to configure that parcel and the structures thereon to a particular density for residential uses or floor area ratio for nonresidential uses. Development rights exclude the rights to the area of or height of a sign.

Comment: *Unless sign area and height are excluded from the definition of “development rights,” it is possible to transfer them to another parcel, resulting in larger or taller signs. In some cases, development*

rights might extend to impervious surface coverage, and a transfer of such rights would allow more extensive lot coverage.

“Density” or **“Net Density”** means the result of multiplying the net area in acres times 43,560 square feet per acre and then dividing the product by the required minimum number of square feet per dwelling unit required by the zoning ordinance for a specific use district.

“Density” or “Net Density” is expressed as dwelling units per acre or per net acre

“Floor Area” means the gross horizontal area of a floor of a building or structure measured from the exterior walls or from the centerline of party walls. “Floor Area” includes the floor area of accessory buildings and structures.

“Floor Area Ratio” means the maximum amount of floor area on a lot or parcel expressed as a proportion of the net area of the lot or parcel.

“Net Area” means the total area of a site for residential or nonresidential development, excluding street rights-of-way and other publicly dedicated improvements, such as parks, open space, and stormwater detention and retention facilities, and easements, covenants, or deed restrictions, that prohibit the construction of building on any part of the site. “Net area” is expressed in either acres or square feet.

[**“Overlay District”** means a district superimposed over one or more zoning districts or parts of districts that imposes additional requirements to those applicable for the underlying zone.]

Comment: *This definition is only necessary if the TDR designation is accomplished via an overlay district.*

“Receiving District” means one or more districts in which the development rights of parcels in the sending district may be used.

“Receiving Parcel” means a parcel of land in the receiving district that is the subject of a transfer of development rights, where the owner of the parcel is receiving development rights, directly or by intermediate transfers, from a sending parcel, and on which increased density and/or intensity is allowed by reason of the transfer of development rights;

“Sending District” means one or more districts in which the development rights of parcels in the district may be designated for use in one or more receiving districts;

“Sending Parcel” means a parcel of land in the sending district that is the subject of a transfer of development rights, where the owner of the parcel is conveying development rights of the parcel, and on which those rights so conveyed are extinguished and may not be used by reason of the transfer of development rights; and

“Transfer of Development Rights” means the procedure prescribed by this ordinance whereby the owner of a parcel in the sending district may convey development rights to the owner of a parcel in the receiving district or other person or entity, whereby the development rights so conveyed are extinguished on the sending parcel and may be exercised on the receiving parcel in addition to the development rights already existing regarding that parcel or may be held by the receiving person or entity.

Comment: *This definition recognizes that development rights may be sold to an entity (e.g., the local government or a nonprofit organization) that will hold them indefinitely.*

“**Transferee**” means the person or legal entity, including a person or legal entity that owns property in a receiving district, who purchases the development rights.

“**Transferor**” means the landowner of a parcel in a sending district.

104. Establishment of Sending and Receiving Districts.

[Alternative 1: Amend the zoning map using overlays]

(1) The [local legislative body] may establish sending and receiving districts as overlays to the zoning district map by ordinance in the manner of zoning district amendments. The [planning director] shall cause the official zoning district map to be amended by overlay districts to the affected properties. The designation “TDR-S” shall be the title of the overlay for a sending district, and the designation “TDR-R” shall be the title of the overlay for a receiving district.

Comment: *When a zoning map is amended, one practice is to list the ordinance number and the enactment date in a box on the map, along with the signatures of the planning director and the clerk of the local legislative body (e.g., the clerk of council). This allows for an easy reference if there should be any later questions about whether the map amendment accurately reflects the legal description in the ordinance.*

(2) Sending and receiving districts established pursuant to Paragraph (1) shall be consistent with the local comprehensive plan.

[Alternative 2—Specify zoning districts that can serve as sending and receiving districts]

(1) The following zoning districts shall be sending districts for the purposes of the transfer of development rights program:

[list names of districts]

(2) The following zoning districts shall be receiving districts for the purposes of the transfer of development rights program:

[list names of districts]

Comment: *Since the sending and receiving districts are being established as part of the ordinance rather than through separate overlays, the local government would need to make a declaration of consistency with the comprehensive plan for such districts as part of the enactment of these two paragraphs.*

105. Right to Transfer Development Rights

(1) Each transferor shall have the right to sever all or a portion of the rights to develop from the parcel in a sending district and to sell, trade, or barter all or a portion of those rights to a transferee consistent with the

purposes of Section 101 above .

(2) The transferee may retire the rights, resell them, or apply them to property in a receiving district in order to obtain approval for development at a density or intensity of use greater than would otherwise be allowed on the land, up to the maximum density or intensity indicated in Table 1.

Table 1
Maximum Density and Intensity Allowed in Zoning Districts through Transfer of Development Rights (TDR)

Note: District names, densities, and intensities are hypothetical examples only.

R-1	4		8	
R-2	8		16	
R-3	16		32	
C-1		0.2		0.4
C-2		1.0		2.0
C-3		2.0		4.0
C-4		4.0		8.0
I-1		0.75		1.5

(3) Any transfer of development rights pursuant to this ordinance authorizes only an increase in maximum density or maximum floor area ratio and shall not alter or waive the development standards of the receiving district, including standards for floodplains, wetlands, and [other environmentally sensitive areas]. Nor shall it allow a use otherwise prohibited in a receiving district.

Comment: *In some cases, it may be desirable to allow the transfer of the right to additional impervious surface coverage on a site. For example, if a certain zoning district limits the amount of surface parking by a maximum impervious surface parking ratio and additional parking is needed, Table 1 should be amended to authorize this.*

106. Determination of Development Rights; Issuance of Certificate

(1) The [zoning administrator] shall be responsible for:

(a) determining, upon application by a transferor, the development rights that may be transferred from a property in a sending district to a property in a receiving district and issuing a transfer of development rights certificate upon application by the transferor.

(b) maintaining permanent records of all certificates issued, deed restrictions and covenants recorded, and development rights retired or otherwise extinguished, and transferred to specific

properties; and

(c) making available forms on which to apply for a transfer of development rights certificate.

(2) An application for a transfer of development rights certificate shall contain:

(a) a certificate of title for the sending parcel prepared by an attorney licensed to practice law in the state of [*name of state*];

(b) [five] copies of a plat of the proposed sending parcel and a legal description of the sending parcel prepared by [licensed *or* registered] land surveyor;

(c) a statement of the type and number of development rights in terms of density or FAR being transferred from the sending parcel, and calculations showing their determination.

(d) applicable fees; and

(e) such additional information required by the [zoning administrator] as necessary to determine the number of development rights that qualify for transfer

Comment: *A local government should consult with its law director or other legal counsel to determine the requirements for an application for a TDR. Consequently, this paragraph as well as other Sections of the ordinance may need to be revised to reflect state-specific issues concerning real property law and local conditions.*

(3) A transfer of development rights certificate shall identify:

(a) the transferor;

(b) the transferee, if known;

(c) a legal description of the sending parcel on which the calculation of development rights is based;

(d) a statement of the number of development rights in either dwelling units per net acre or square feet of nonresidential floor area eligible for transfer;

(e) if only a portion of the total development rights are being transferred from the sending property, a statement of the number of remaining development rights in either dwelling units per net acre or square feet of nonresidential floor space remaining on the sending property;

(f) the date of issuance;

(g) the signature of the [zoning administrator]; and

(h) a serial number assigned by the [zoning administrator].

(4) No transfer of development rights under this ordinance shall be recognized by the [local government] as valid unless the instrument of original transfer contains the [zoning administrator's] certification.

107. Instruments of Transfer

(1) An instrument of transfer shall conform to the requirements of this Section. An instrument of transfer, other than an instrument of original transfer, need not contain a legal description or plat of the sending parcel.

(2) Any instrument of transfer shall contain:

(a) the names of the transferor and the transferee;

(b) a certificate of title for the rights to be transferred prepared by an attorney licensed to practice law in the state of [name of state];

(c) a covenant the transferor grants and assigns to the transferee and the transferee's heirs, assigns, and successors, and assigns a specific number of development rights from the sending parcel to the receiving parcel;

(d) a covenant by which the transferor acknowledges that he has no further use or right of use with respect to the development rights being transferred; and

(e) [*any other relevant information or covenants*].

(3) An instrument of original transfer is required when a development right is initially separated from a sending parcel. It shall contain the information set forth in paragraph (2) above and the following information:

(a) a legal description and plat of the sending parcel prepared by a licensed surveyor named in the instrument;

(b) the transfer of development rights certificate described in Section 106 (4) above.

(c) a covenant indicating the number of development rights remaining on the sending parcel and stating the sending parcel may not be subdivided or developed to a greater density or intensity than permitted by the remaining development rights;

(d) a covenant that all provisions of the instrument of original transfer shall run with and bind the sending parcel and may be enforced by the [*local government*] and [*list other parties, such as nonprofit conservation organizations*]; and

(d) [*indicate topics of other covenants, as appropriate*].

(4) If the instrument is not an instrument of original transfer, it shall include information set forth in paragraph (2) above and the following information :

(a) a statement that the transfer is an intermediate transfer of rights derived from a sending parcel described in an instrument of original transfer identified by its date, names of the original transferor and transferee, and the book and the page where it is recorded in the [land records of the county].

(b) copies and a listing of all previous intermediate instruments of transfer identified by its date,

names of the original transferor and transferee, and the book and the page where it is recorded in the [land records of the county].

(5) The local government's [law director] shall review and approve as to the form and legal sufficiency of the following instruments in order to affect a transfer of development rights to a receiving parcel:

- (a) An instrument of original transfer
- (b) An instrument of transfer to the owner of the receiving parcel
- (c) Instrument(s) of transfer between any intervening transferees

Upon such approval, the [law director] shall notify the transferor or his or her agent, who shall record the instruments with the [name of county official responsible for deeds and land records] and shall provide a copy to the [county assessor]. Such instruments shall be recorded prior to release of development permits, including building permits, for the receiving parcel.

Comment: *The procedures in paragraph (5) may need to be modified based on the structure of local government in a particular state and the responsibilities of governmental officials for land records and assessments. The important point is that the TDRs must be permanently recorded, and the property of the owner of the sending parcel, the value of which is reduced because of the transfer, should be assessed only on the basis of its remaining value.*

108. Application of Development Rights to a Receiving Parcel

(1) A person who wants to use development rights on a property in a receiving district up to the maximums specified in Table 1 in Section 105 above shall submit an application for the use of such rights on a receiving parcel. The application shall be part of an application for a development permit. In addition to any other information required for the development permit, the application shall be accompanied by:

- (a) an affidavit of intent to transfer development rights to the property; and
- (b) either of the following:
 1. a certified copy of a recorded instrument of the original transfer of the development rights proposed to be used and any intermediate instruments of transfer through which the applicant became a transferee of those rights; or
 2. a signed written agreement between the applicant and a proposed original transferor, which contains information required by Section 106(2) above and in which the proposed transferor agrees to execute an instrument of such rights on the proposed receiving parcel when the use of those rights, as determined by the issuance of a development permit, is finally approved.

(2) The [local government] may grant preliminary subdivision approval of a proposed development incorporating additional development rights upon proof of ownership of development rights and covenants on the sending parcel being presented to the [local government] as a condition precedent to final subdivision approval.

(3) No final plat of subdivision, including minor subdivisions, shall be approved and no development

permits shall be issued for development involving the use of development rights unless the applicant has demonstrated that:

- (a) the applicant will be the bona fide owner of all transferred development rights that will be used for the construction of additional dwellings, the creation of additional lots, or the creation of additional nonresidential floor area;
- (b) a deed of transfer for each transferred development right has been recorded in the chain of title of the sending parcel and such instrument restricts the use of the parcel in accordance with this ordinance; and
- (c) the development rights proposed for the subdivision or development have not been previously used. The applicant shall submit proof in the form of a current title search prepared by an attorney licensed to practice law in the state of [name of state] .

109. Development Rights Bank *[optional]*

Comment: *This section should establish a development rights bank, otherwise referred to as a “TDR Bank.” The local government or any other existing or designated entity may operate the bank. The TDR Bank should:*

- *have the power to purchase and sell or convey development rights, subject to the local legislative body’s approval;*
- *have the power to recommend to the local legislative body property where the local government should acquire development rights by condemnation;*
- *have the power, to hold indefinitely any development rights it possesses for conservation or other purposes;*
- *receive donations of development rights from any person or entity; and*
- *receive funding from the local government, the proceeds from the sale of development rights, or grants or donations from any source.*

No model ordinance language for the creation of the TDR bank is provided here because the specifics of such must be determined by the operating entity.

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