

Index

I.	Introduction.....	2
II.	What are Urban Growth Boundaries?.....	3
III.	Examples of UGBs.....	4
IV.	The Challenges Presented by Urban Growth Boundaries.....	6
V.	Feasibility of Georgia and UGBs.....	9
VI.	Foundations of Growth Management in Georgia.....	10
VII.	How could an Urban Growth Boundary program be implemented under the existing laws in Georgia and the Georgia Constitution?.....	13
VIII.	Does the State of Georgia have authority under the Georgia Constitution to require local governments to implement a UGB program?.....	15
IX.	Can a statewide UGB program withstand a takings challenge under the U.S. and Georgia Constitutions?	16
X.	Would a UGB program violate vested rights of landowners?.....	20
XI.	Can a Transfer of Development Rights program or Impact Fees be used to mitigate the risks of takings challenges?.....	21
XII.	A View of Growth Management Practice in Georgia.....	25
XII.	Conclusion.....	28

Group members: Eric Pfeifer, Zack Ray, Jess Rafferty, Julie Saunders, and Michael Stewart

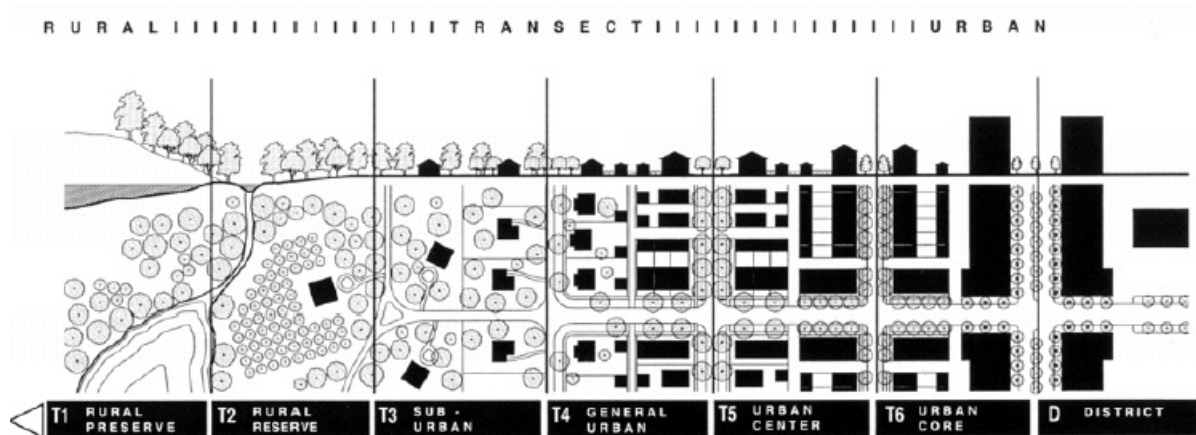


Image above from <http://www.planetizen.com/node/129>. The transect is a good example of growth boundaries and good planning.



I. Introduction

Urban growth boundaries have been found to be beneficial in preventing sprawl and encouraging healthier cities in many cities in the U.S. Can UGBs have a similar impact in Georgia? Can a local government in Georgia under the current state constitution, laws and legal precedents undertake UGBs? How would a local government undertake the process of setting up UGBs? What policies for compensation of value could apply? These are just some of the questions that this report will address.

First, we begin by briefly addressing what exactly an urban growth boundary is and some of the pros and cons of implementing an UGB. Examples of states who have successfully implemented UGBs are Oregon and Minnesota. Detailed narratives of these states' UGB history and implementation are provided. Next, we will provide a closer look into some of the risks localities take when implementing UGBs. Feasibility of Georgia implementing UGBs at the state level will be examined and then the legal implications. The legal questions include: are UGBs legal under the Georgia Constitution, can a transfer of development rights program to be implemented, and whether or not UGBs will cause takings issues. These legal issues are covered in the final sections of the report.



“Why Atlanta could use UGBs,” Caricature by Julie Saunders (2008)

II. What are Urban Growth Boundaries?

An urban growth boundary, or UGB, is a regional boundary set in an attempt to control development by designating the area inside the boundary for higher density urban development and the area outside for lower density rural development.

An urban growth boundary circumscribes an entire urbanized area and is used by local governments as a guide to zoning and land use decisions. If the area affected by the boundary includes multiple jurisdictions, a special urban planning agency is created to manage the boundary.

The boundary controls urban expansion onto farms and forestlands. Land inside the urban growth boundary supports urban services such as roads, water and sewer systems, parks, schools and fire and police protection that create thriving places to live, work and

play. The urban growth boundary is one of the tools used to protect farms and forests from urban sprawl and to promote the efficient use of land, public facilities and services inside the boundary. Other benefits of UGBs include:

- Motivation to develop and re-develop land and buildings in the urban core, helping keep core downtowns in business.
- Assurance for businesses and local governments about where to place infrastructure, needed for future development.
- Efficiency for businesses and local governments in terms of how that infrastructure is built. Instead of building infrastructure further out as is seen as the norm with sprawl, money can be spent making existing infrastructure more proficient.

Pros and Cons of UGBs:

Pro:

- Can ensure more compact development. May encourage retention and reuse of existing buildings, including those of historic significance.
- Reflects preference for urban-type, higher density development. Reduces “urban sprawl.”
- Can ensure housing diversity through careful forecasting and land allocation to meet market demand in the planning period.
- Can protect agricultural land from conflicts with urban uses.
- Establishes predictability as to where urbanization will occur in advance, directing private investment.
- Matches urbanization with new infrastructure and promotes reuse of existing infrastructure.

Cons:

- Requires increases in housing density and land-use intensity that may meet with homeowner opposition.
- May run counter to consumer preference for low-density development.
- Increases in land and housing costs may occur if land supply and market changes are not monitored.
- Requires strong controls or incentives on use of agricultural land outside urban growth boundary that may engender political opposition by farming interests.
- There may be no market for agricultural products.
- May prompt political opposition from communities that want little or no growth.

Metro Region, <http://www.metro-region.org/index.cfm/go/by.web/id=277>
APA. Growing Smart Legislative Guidebook, 2002 Edition. p. 6-53

III. Examples of UGBs:

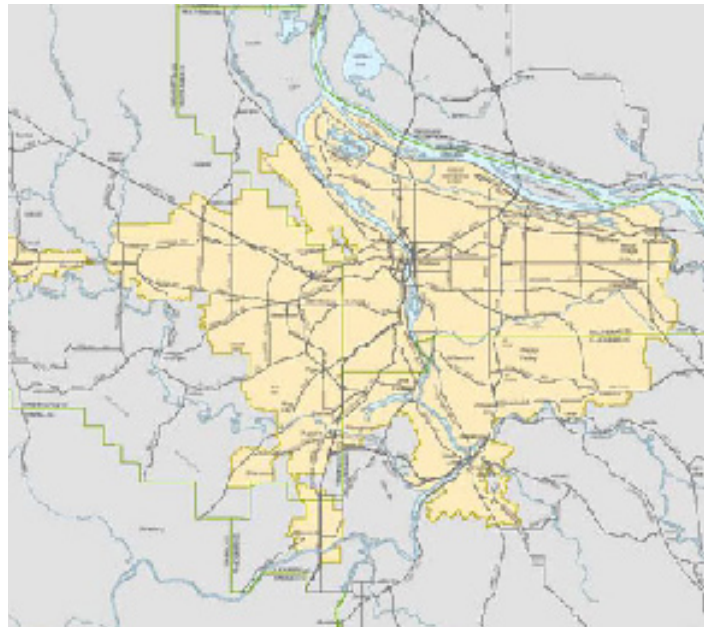
Oregon

Oregon has the most high profile UGB system in place, which many planners and advocates use an example of good planning practice. In 1973, the Oregon Legislature enacted the Comprehensive Land Use Planning Act, which is one of the strongest state growth management laws in the nation. The Act mandated the establishment of statewide goals for the development and conservation of land. The Act created a new commission, the Land Conservation and Development Commission (“LCDC”), and a new agency, the Department of Land Conservation and Development (“DLCD”). The mission of these new entities aimed to define and attain very specific state land use goals both in the cities and the countryside. The Act connected state and local planning programs by requiring that local comprehensive plans be consistent with statewide goals created by the LCDC. The LCDC reviews local plans and land use regulations and approves them if they comply with the state goals. Local land use regulations and decisions must be consistent with the approved plan.

The state planning goal requires incorporated municipalities to adopt UGBs. Local governments draw a clear line between urban and non-urban areas. Urban development may be built; however, not outside UGBs, even if land is no longer usable for agricultural purposes.

All cities and counties are required to zone land inside and outside cities. Inside UGBs, it is required that all types of housing, including apartments and manufactured housing, must be included in zoning. Additionally, state legislation prohibits local governments from adopting moratoria on new development or on the extension of urban services except in very limited circumstances.

Local governments must apply seven factors to decide on the size of the UGB: (1) the demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals; (2) the need for housing, employment opportunities, and livability; (3) the orderly and economic provision for public facilities and services; (4) the maximum efficiency of land uses within and on the fringe of the existing urban area; (5) the environmental, energy,



Portland's UGB. Photo from: <http://courses.umass.edu/greenurb/2006/amerolli/UGB.jpg>

economic, and social consequences; (6) the retention of agricultural land; and (7) the compatibility of the proposed urban uses with nearby agricultural activities.

Incorporated municipalities apply these factors to designate enough growth within their UGB to provide an adequate land supply for twenty years. A UGB can extend beyond municipal boundaries.

Local governments are required to review their boundaries every five years. Permit review is restricted to inside of the UGB and the imposition of impact fees is restricted. Additionally, local governments are required to plan for a variety of housing types that will accommodate all incomes.

Carrie Daniel, Land Use Planning-The Twin Cities Metropolitan Council: Novel Initiative, Futile Effort, 27 Wm. Mitchell L. Rev. 1941, 1956 (2001); Daniel R. Mandelker, Managing Space to Manage Growth, 23 Wm. & Mary Envtl. L. & Pol'y Rev. 801, 811-12 (1999).

Or. Rev. Stat. §§ 197.000-.860 (2006). See Rolf Pendall & Jonathan Martin, Holding the Line: Urban Containment in the United States, Brookings 2002.

Or. Rev. Stat. § 197.005(2). See Robert Liberty, Give and Take Over Measure 37: Could Metro Reconcile Compensation for Reductions in Value with a Regional Plan for Compact Urban Growth and Preserving Farmland, 36 Envtl. L. 187, 191 (2006).

See Robert Liberty, Give and Take Over Measure 37: Could Metro Reconcile Compensation for Reductions in Value with a Regional Plan for Compact Urban Growth and Preserving Farmland, 36 Envtl. L. 187, 191 (2006).

Or. Admin. R. 660-15-0000 to 0010 (2006). Daniel R. Mandelker, Managing Space to Manage Growth, 23 Wm. & Mary Envtl. L. & Pol'y Rev. 801, 811-12 (1999)

DEPARTMENT OF LAND CONSERVATION & DEV., OREGON'S STATEWIDE PLANNING GOALS AND GUIDELINES (1995); Daniel R. Mandelker, Managing Space to Manage Growth, 23 Wm. & Mary Envtl. L. & Pol'y Rev. 801, 829, n. 48 (1999).

Minnesota authorizes the designation of UGBs on a voluntary basis. The voluntary statute defines urban growth areas as “the identified area around an urban area within which there is a sufficient supply of developable land for at least a prospective 20-year period, based on demographic forecasts and at the time reasonably required to effectively provide municipal services to the identified areas.”

Minnesota does not have a state-wide land use plan. Land use planning is at the local government level, and they are limited to activity within their jurisdiction. In the Minneapolis-St. Paul area, the operating body through which the state attempts to manage growth is the Metropolitan Council (“Metro Council”). The Metro Council serves as a policy maker, but does not serve as the operating body to implement those policies. The Council sets land use policies and other organizations implement the policies. The Council also is responsible for providing everyday services in the region, such as a bus system, wastewater collection, housing and redevelopment, parks and trails planning and funding, and planning for future development.

The Metropolitan Land Use Planning Act of 1976 required all local governments in the Twin Cities metropolitan area to adopt comprehensive land use and development plans that would be reviewed by the Metro Council. Through its review process, the Metro Council coordinates the land planning of communities within the region. A centerpiece of Metro Council’s plan is to confine half of the projected population growth within a UGB called the Metropolitan Urban Services Area (“MUSA line”). Within the MUSA line, the Council plans to further develop the urban core where sewers, roads, schools, and other infrastructure are readily available. The Council has a year 2020 UGB in place, as well as a year 2040 line. Between the MUSA line and the permanent agricultural reserve area exists the urban reserve, which contains land for the future expansion of the MUSA lines. The urban reserve is limited to growth of only



Minneapolis skyline. Photo from: <http://www.cincystreet.com/webcams/minneapolis.html>

one dwelling per 40 acres. Key agricultural areas outside the current and future MUSA lines are to be permanently preserved, and growth is limited to one dwelling per 40 acres.

Although the MUSA line has been regarded as a success in preserving open space, it has been hindered by weak enforcement by the Metro Council. The Council has limited powers to force compliance with its growth policies, and may only bring an enforcement action in court against a municipality if the plan has a “direct and radical effect on any of the four basic infrastructure systems.” Thus, the Council has traditionally not taken action to force compliance.

Under the Minnesota Land Use Planning Act, the land use plans submitted to the Metro Council by municipalities are only implemented as guides, not mandates for cities to comply. This allows for cities to adopt ordinances in direct conflict with the Council’s land use plan.

Minn. Stat. § 462.3535(2007).
Carrie Daniel, Land Use Planning-The Twin Cities Metropolitan Council: Novel Initiative, Futile Effort, 27 Wm. Mitchell L. Rev. 1941, 1950 (2001).
Minn. Stat. § 473.123 (2007).

IV. The Challenges Presented by Urban Growth Boundaries.

The greatest challenge to implementing urban growth boundaries (UGB) in Georgia is unfounded controversial press that urban growth boundaries have gained from media coverage in Oregon. UGBs are not complicated legislatively. Many other states, cities, regions, and countries have successfully implemented urban growth boundaries for better regional livability. UGBs are great assets to growing regions. Despite mostly unfounded market criticisms, UGBs do not harm a blossoming regional economy. Long-term growth management solutions fluctuate in early stages alarming certain regional economic sectors, but bolstering a region for long-term success at quality of life. A region's quality of life factor becomes as great an economic magnet as many other traditional industrial and agricultural economic stimulators.

Oregon's UGBs have been greatly criticized for raising the cost of housing and pushing low-income residents from the central city areas. Low-income residents have increasingly moved from the city center in Portland over the last thirty years, but they have not moved out of Portland or into other low-income areas. The demand for housing within the city caused heavy densification of the region as a whole. Multifamily housing was built throughout the region in high traffic centers and formerly single-family neighborhoods. The result is very efficient income mix throughout the region rather than a majority of neighborhoods separated by income inequalities. Portland was described in 2006 as the most racially and economically balanced city in the nation (Lucy and Phillips, 2006). The UGB is primarily responsible for the availability of affordable multifamily housing. Low-density single family housing developments would have continued to be built in suburban areas in price tiers similar to most other U.S. cities.

The National Association of Homebuilders (NAHB) is a major source of negative press about UGBs. The only industry directly affected by the UGB in Portland was the home building industry. This industry began to decline in the early 1990s as large tracts of greenfield became harder to find at the price of previous years. A population migration combined with this single-family land shortage made homebuilders feel

left out in the Portland market. Homes in the central city were substantially rehabilitated and new homes were built on infill lots, but large housing subdivisions were not pasted together at the scale of other suburban areas in the country. Yet, housing was built and continues to be built just not at rate and style preferable to the large-scale homebuilding industry. This market condition has been changing since 2003 when more homebuilders began specializing in creative mixed-use, multifamily, and infill construction. As a result, many Portland homebuilders have developed homebuilding skills that can be very profitably applied in other areas of the country (Marthens, 2006).

Presently, Portland lies above average for housing affordability of U.S. West Coast Cities. The cost of housing jumped significantly during the mid 1990s until suddenly leveling out in 2003. The Hi-Tech industry in Portland increased incomes and housing prices throughout the 1990s. Using data from the 2000 US Census, Portland's median income was \$65,800 compared to other US metro areas with a median income of \$57,500. Combine this data with a Portland median house price of \$201,000 and a US metro median house price of \$225,000 and Portland does not seem so unaffordable (Langdon, 2005). Similar house price increases of the magnitude of Portland happened in other US West Coast cities and significant house price increases occurred in almost every city within 100 miles of a sea coast. There is not enough evidence to conclude UGBs make housing unaffordable in Portland.

Parcels within the city of Knoxville, Tennessee were more likely to be developed than before UGB implementation (Cho, Chen, Yen, Eastwood, 2006). Knoxville, one of the most sprawling cities in the nation, continued to annex suburban areas as build up occurred (Ewing, Pendall, & Chen, 2000). After UGB implementation, the escalating annexation battles on the fringe of the city abruptly stopped. Suddenly infill development became very attractive and annexation was capped at the UGB boundary. The City of Knoxville, as a provision of their UGB regulation, was allowed to annex parcels within the UGB boundary without the landowners consent, further strengthening the UGBs powers of densification. New development was carefully regulated beyond the UGB boundary and essentially part of the city within the boundary



Townhomes in close proximity to Heathrow Airport in the \$400,000 range, courtesy Wikipedia 2008

reducing any zoning advantage of building outside the city limit. This UGB technique has substantially made building within the city more profitable to the developers, convenient to the homebuyers, and economically advantageous to decentralized Knoxville.

Internationally, London's greenbelt system acts as an urban growth boundary for the metro area. The structure is slightly different in legislation and design, but the goals are the same as other statewide UGB programs in the U.S. The British Government's Planning Policy Guidance 2: Greenbelts document explains precise greenbelt goals as:

- To check the unrestricted sprawl of large built-up areas;
- To prevent neighboring towns from merging into one another;
- To assist in safeguarding the countryside from encroachment;
- To preserve the setting and special character of historic towns;
- To assist in urban regeneration, by encouraging the

recycling of derelict and other urban land.

Once an area of land has been defined as green belt, opportunities and benefits include:

- Providing opportunities for access to the open countryside for the urban population;
- Providing opportunities for outdoor sport and outdoor recreation near urban areas;
- The retention of attractive landscapes and the enhancement of landscapes, near to where people live;
- Improvement of damaged and derelict land around towns;
- The securing of nature conservation interests;
- The retention of land in agricultural, forestry and related uses.

The major side effects of Britain's Greenbelt system are slow adaptation to population and environmental management. Britain's Greenbelt is much older than any U.S. UGB by at least thirty years, and London, especially, has a greater population than any U.S. city with a UGB. Complaints about London's Greenbelt may be echoed by Portlanders and Knoxvilleans in

years ahead. Greenbelt leapfrogging occurs far too often in London as regional residents prefer extreme commutes over paying for London housing. London certainly has vastly more expensive housing than the U.S. when square footage and lot size comparisons are made. However, Britain is an island nation twice the size of Cuba with a population over 60,000,000. Land is more valuable there than in comparative regions of the US.

The British solution to Greenbelt leapfrogging and overuse is more flexibility with the Greenbelt. Rather than a rigid ring of antidevelopment, environmentally valuable linear green wedges could be added and subtracted in marginal greenbelt areas. Affordable housing in London has many externalities independent of the Greenbelt in Britain to form a U.S. comparison. The lesson for London's Greenbelt system is providing legislative flexibility to adapt to changing urban environments.

A UGB could be applicable to numerous regions in Georgia. The population centers of Savannah, Macon, Columbus, Albany, and Athens all have historic centers and a water body running through the central city. These regional hubs are still at manageable population levels with significant rural land on the fringes. Like Portland, Oregon, most of Georgia's regional hubs have less than 500,000 people in the central city and less than two million in the region. A UGB like Portland's would be applicable to these Georgia regions. However, half the State of Georgia's population lies in the piedmont region around Atlanta. A UGB in the mold of Portland would be very difficult to implement. With up to 20 counties, several watersheds, fringe cities, extreme commuters, and almost four million people, the Atlanta region has a very fuzzy border. Plus, within 20 years another million citizens are projected to be migrating to the region.

Atlanta Metropolitan Area Projected Population Growth 2000-2030		
Year	Population	
2000	3,429,379	
2010	4,038,777	
2020	4,591,877	
2030	5,261,534	
Percent Change 2000-2030: 64.9%		

Atlanta Metropolitan Statistical Area population data for 2030 (Courtesy Atlanta Regional Commission, 2007)

With or without an urban growth boundary, a regional government would be a strong organizer for a well planned and livable region. Georgia would especially benefit from strong regional leadership on account of its large number of small counties. The positive externality of regional governing is demonstrated by Portland, Oregon. The regional governing body monitors Portland's UGB as well as regional planning, waste, recycling, regional greenspace, and transportation within the metro region. Georgia would benefit immensely from a similarly organized metro governing body. Regional transportation could be organized using federal monies connected to an already authorized Metropolitan Planning Organization (MPO). This transportation network would utilize a large scale regional plan with authorization from the State of Georgia to regulate regional land use, greenspace, water quality, and garbage collection.

Urban Growth Boundaries serve many political, economic, environmental purposes. Studies have linked the affects of UGBs on housing markets and elected governments overseeing UGBs. UGBs assume citizens will utilize many aspects of city life built into a city with an urban growth boundary. Increased density, smaller lots, smaller homes, more public space, less urban private golf clubs, use of transit, and much less parking, are only a few. These are positive externalities of UGBs from a long term growth management perspective as are the environmental benefits. Uncontrolled growth has a negative impact on open space and environmental systems. Even UGBs that are expanded allow time to examine sensitive areas that may be affected by new growth. UGBs allow for better connectivity among parks, greenways, stream corridors, and wildlife routes. Many of these aspects are neglected when growth is separated into multiple political jurisdictions. The side effects of UGBs are correctable if proper implementation legislation and care is taken to fit growth management solutions to a specific regions.

Atlanta Regional Commission. (2007). Regional Population Data 2007. Retrieved February 20, 2008, from the World Wide Web: http://www.atlantaregional.com/cps/rde/xchg/arc/hs.xsl/3938_ENU_HTML.htm

Cho, S, Chen, Z, Yen, S.T., & Eastwood, D.B. (2006). Estimating Effects of an Urban Growth Boundary on Land Development. *Journal of Agricultural and Applied Economics*, Retrieved April 15, 2008, from http://findarticles.com/p/articles/mi_qa4051/is_200608/ai_n17176794/pg_3.

Center of Excellence for Sustainable Development, Greenbelt

Alliance, (1998). Urban Growth Boundaries. Retrieved April 15, 2008, Web site: <http://www.walkablestreets.com/ugb.htm>

Government of the United Kingdom. (2001). Planning Policy Guidance 2: Greenbelts (2nd ed.) [Brochure]. London, England: Parliament.

Ewing, R, Pendall, R, & Chen, D Measuring Sprawl And Its Impact. Smart Growth America, Retrieved April 15, 2008, from <http://www.movingtoportland.net/documents/MeasuringSprawl.pdf>.

Langdon, P (2005). Urban growth boundary did not make Portland unaffordable. New Urban News, 10, No.2, Retrieved April 15, 2008, from <http://www.newurbannews.com/PortlandMar05.html>

Lucy, W, & Phillips, D (2006). Tomorrow's Cities, Tomorrow's Suburbs. Chicago: APA Planners Press.

Marthens, S (2006). Moving to Portland. Retrieved April 15, 2008, from Portland Planning and Zoning Web site: http://www.movingtoportland.net/portland_planning.htm

Pingstone, A (2004, August). Wikipedia. Retrieved April 16, 2008, from Qantas 747 Near Roofs Web site: <http://en.wikipedia.org/wiki/Image:Qantas.b747.roofs arp.750pix.jpg>



Photograph from <http://www.atlantaregional.com/arc/html/>

V. Steps Towards Applying A Statewide Growth Management Policy In Georgia

Georgia is one of the leading centers for growth in the southeastern United States. Our natural and constructed infrastructure is slowly becoming overwhelmed with new growth, and organized response has been somewhat lacking. Currently, the most comprehensive growth management plan in the state is the Atlanta Regional Commission's Envision6 land use plan, which is oriented specifically towards meeting the challenge of accommodating new growth. Other statewide responses have been scattered and lacking, without an overarching plan. Without effective growth control, new development in Georgia may slowly choke our economy.

Specific strategies for statewide implementation in Georgia must be flexible for two reasons. First, traditional UGBs rely on containment to keep land somewhat scarce and land prices high close to the city, resulting in a market push for higher densities. Distant cheap land removes value from downtown and suburban areas, resulting in lower central densities. Removing fringe land from the economic equation is one way to boost downtown land values, but

unfortunately it's too late to contain Georgia's sprawling capitol, and possibly too late to contain smaller cities experiencing growth. The 'line in the sand' model must be replaced with an adaptive solution of strict density/zoning caps or downzoning outside the boundary and increased focus on pedestrian walkability and transit within the boundary.

Diversity among Georgia's regional growth needs is the second difficulty faced by a statewide UGB law. Atlanta needs dense housing and transportation relief, northwest Georgia needs jobs and erosion control, southeast Georgia needs economic stimulus and wetlands preservation, and so on for each region in the state. Further, because of Georgia's status as a home rule state which possesses multiple fragmented municipalities and more counties than any other state relative to area, formulating an acceptable statewide strategy for growth management is a difficult task. Regulations which may work in one area will serve to hamper another, creating political conflict between jurisdictions that precludes successful top-down, comprehensive growth management. The huge number of political, private, administrative, and corporate concerns impacted by a UGB law means that flexibility will be the keystone component of statewide implementation.

For optimal flexibility, a three-tiered program matches local discretion with statewide funding and legislative power. The top tier is composed of the Georgia Department of Community Affairs (DCA), which oversees general planning throughout the state and, importantly, has the power to establish requirements for an acceptable comprehensive plan. Between the state and local levels are the Regional Development Centers (RDC), agencies linked to the DCA that coordinate and assist planning for smaller governments within the RDC's specific jurisdiction. Third is the tier of local and county governments, which will ultimately formulate their own UGBs in partnership with each other, coordinated and mediated by the overarching RDC.

The Department of Community Affairs, which operates on the state level, is the first component of this implementation plan. The DCA currently has power over composition of plans across the state, and mandates what a comprehensive plan should look like. Among the DCA's powers is the ability to set minimum regulations for an acceptable plan. State legis-



Photograph from http://lovelyarc.blogspot.com/2007_02_01_archive.html

ative action could push the DCA to include a clause that a complete plan must incorporate some element of comprehensive land use control somewhat similar to a UGB. The specific regulations are, at this stage, irrelevant – they could be made as broadly or as narrowly as necessary, tuned to either elicit political support or meet some specific need, such as workforce housing or watershed protection.

Regional Development Centers were established statewide as part of the Georgia Planning Act of 1989. As established, they provide basic support for zoning, land use, transportation planning and improvement, and overall comprehensive planning. Each RDC is owned and operated by the smaller member governments within its area of operation. UGB implementation will be mandated by the DCA, but guided by the RDC, which will provide regionally specific data regarding transportation, housing, employment, and public service. Coordinating UGBs across county and city lines will be an additional responsibility of the RDC, augmenting the RDCs existing role of conflict resolution and cross-jurisdictional coordination. By incorporating RDCs into the planning process, regional cohesion in growth management needs can be attained while keeping individual government liberty to plan as they see fit. RDCs are not a middle layer of government between the state and local levels, but rather a steering and coordinating agency that helps provide an interpretive power to local agencies when trying to comply with state law.

Multiple potential strategies exist for local growth management, and this is where diversity in planning methods is most needed. Due to diversity in needs

and ways, this document will not enumerate all possibilities. One particular example is the needs dichotomy of heavily urbanized and heavily rural areas – while strict zoning control, maximum house/lot sizes, and transportation development may aid growth management in Cobb County, in Ware County the best strategy may be pocket density focused on old town centers and low-tax empowerment zones to attract new employers while maintaining a reserve of open land for farming or environmental conservation. In rural areas experiencing virgin development, a simple UGB line or other strict land use plan may suffice to keep growth balanced and sustainably dense. In older suburbs of Atlanta, downzoning and zone density freezing with specific incentives towards selling development rights into transportation-accessible areas would aid in shifting development from traditional suburban sprawl into highway- and transit-megacorridors.

A Summary of Georgia's Regional Development Centers, Georgia Association of Regional Development Centers, 2004 – accessed at www.gardc.net/downloads/rdc2004.pdf

VI. Foundations of Growth Management in Georgia

The current foundation of comprehensive planning and growth management in Georgia is led by the DCA and offers an excellent foundation to build upon and incorporate more robust efforts through UGBs. Each county in Georgia, as required by the DCA, must prepare a comprehensive plan focused around the state's established planning goals as shown in Table 1 on the next page.

The Georgia DCA provides “guidance to assist communities in preparing plans and addressing the local planning requirements.” Clearly, cities and counties across the state are “diverse in terms of size, growth rate, economic base, and environmental and geographic conditions, and their needs, concerns and goals for the future differ dramatically.” Therefore, there are various levels of standards that counties and cities follow to complete their appropriate comprehensive plans. For the majority of counties and cities with a population above 15,000 people, the jurisdiction must meet three basic components to their comprehensive plan:

State Wide Planning Goals
(1) Foster a growing and balanced economy
(2) Protection of environmental, natural and cultural resources
(3) Provision of infrastructure and services to support efficient growth and development patterns
(4) Access to adequate and affordable housing for all residents
(5) Coordination of land use planning and transportation planning to support sustainable economic development, protection of natural and cultural resources and provision of adequate and affordable housing
(6) Coordination of local planning efforts with other local service providers and authorities, neighboring communities and state and regional plans

(1) Community Assessment -- objective and professional assessment of data and information about the community that is intended to be prepared without extensive direct public participation; concise and informative report used to inform decision-making by stakeholders during development of the Community Agenda portion of the plan.

(2) Community Participation Program -- describes the local government's strategy for ensuring adequate public and stakeholder involvement in the preparation of the Community Agenda portion of the plan.

(3) Community Agenda -- community's vision for the future as well as its strategy for achieving this vision; used for future decision-making about the community; prepared with adequate input from stakeholders and the general public. Includes three main elements:

(a) Community vision for the future physical development of the community, expressed in the form of a map indicating unique character areas, each with its own strategy for guiding future development patterns;

(b) List of issues and opportunities identified by the community for further action;

(c) Implementation program for achieving the community's vision for the future and addressing the identified issues and opportunities.

Interestingly to note, all comprehensive plans must include a Future Development Map "delineating boundaries of major character areas covering the en-

tire community" (DCA 10). This element may also be coupled with future land use maps. These guidelines are very flexible in that progressive counties and cities and go beyond these requirements to enhance their plan; this results in a range and variety of plans from across Georgia.

In addition to the established statewide goals, DCA has declared a number of "Quality Community Objectives" that elaborate on the state goals, based specifically on growth and development issues as identified in local and regional plans. These objectives are "intended to provide guidance, or targets for local governments to achieve, in developing and implementing their comprehensive plan." One objective important to note in our study is the one Growth Preparedness Objective as seen below.

Each community should identify and put in place the prerequisites for the type of growth it seeks to achieve. These may include housing and infrastructure (roads, water, sewer and telecommunications) to support new growth, appropriate training of the workforce, ordinances to direct growth as desired, or leadership capable of responding to growth opportunities.

This DCA objective offers a tremendous foundation for further UGB implementation. A UGB program in Georgia would help counties and cities fully meet this

important planning objective and lead to more tangible, practical, and direct action.

One very important piece of this objective that must be at the center of any UGB program in Georgia is the need to accommodate and plan for infrastructure. A UGB program will not be successful or practical unless it is directly tied to the expansions and improvement of roads, water, sewer, and telecommunications. Those elements guide patterns of development in both advantageous and detrimental

manners; leading most commonly to either sustainable or sprawling communities. Consequently, UBGs are a meaningful growth management tool to adequately protect future land uses and direct future development.

Georgia Department of Community Affairs (2005), Chapter 110-12-1. Standards and Procedures for Local Comprehensive Planning.



VII. How could an Urban Growth Boundary program be implemented under the existing laws in Georgia and the Georgia Constitution?

a. The need for a regional approach

Just as the impact of sprawl is not limited solely to one municipality, sprawl results from decisions made across a large marketplace and beyond municipal political boundary lines.¹ When growth management programs have been administered at the local level, due to the placement of land use powers in counties and municipalities, the effort largely has been uncoordinated and incoherent.² Similarly, just as efforts at the local level lack consistency, a top-down state approach may fail to address some of a local government's or region's specific needs.³ Because the external costs of growth spread across jurisdictional borders, policymakers must recognize the interdependence of all local and state land use decisions and the need for a common approach.⁴ In jurisdictions where UGB programs have found success, such a regional approach has emerged through the creation of entities to exercise oversight over the program.⁵ A regional entity is best suited to facilitate growth management coordination over a sprawling urban area, while at the same time responding to a locality's particular needs.⁶

Successful UGB programs have utilized regional governance to combat sprawl, such as Portland's pioneering and successful plan.⁷ While the policies and strategies are set at the state level, local governments are given the responsibility to implement the goals.⁸ Local governments, however, should be monitored and held accountable by the regional entity to ensure compliance with the UGB program.⁹ Because of the success of other programs and the relative novelty of a UGB program in Georgia, the state should adopt a regional approach to implementing UGBs.

b. Implementing a program under the Georgia Planning Act

In Georgia, many of the pieces may already be in place to implement a UGB program on a regional level. The Georgia Planning Act of 1989 assigned the Department of Community Affairs ("DCA") the responsibility to coordinate local planning at the state and regional levels.¹⁰ The Act acknowledges that "the state has an essential public interest in establishing minimum standards for land use in order to protect and preserve its natural resources, environment, and vital areas."¹¹ To achieve these ends, the Act charges the DCA with providing technical assistance for planning to local governments, developing a comprehensive database to aid local

¹ See Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 Ga. St. U. L. Rev. 1019, 1026 (2001).

² See *Id.*

³ See generally *Id.* at 1026-30.

⁴ See *Id.* at 1026-27.

⁵ See *Id.* at 1030 (noting the existence of regional entities in Portland and Minneapolis).

⁶ See Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 Ga. St. U. L. Rev. 1019, 1030 (2001).

⁷ See *Id.*

⁸ See *Id.*

⁹ See *Id.*

¹⁰ Ga. Code Ann. § 50-8-1 et seq. (2006).

¹¹ § 50-8-3(a).

and state agencies with planning, and establishing minimum standards for coordinated and comprehensive planning.¹²

The Act sets forth that the DCA shall establish Regional Development Centers (“RDCs”) to implement the planning policies of the DCA and to assist local governments in their preparation and implementation of comprehensive plans.¹³ The DCA established several regions across the state, and a RDC has oversight over the municipalities and counties in each region.¹⁴ Each local government must submit its comprehensive plan for review, comment, and recommendation to its RDC.¹⁵ Additionally, local governments must “[d]evelop, establish, and implement land use regulations that are consistent with the comprehensive plan.”¹⁶

It may be possible for a UGB program to be facilitated and enforced by the DCA.¹⁷ The State Legislature should enact legislation requiring local governments to create UGBs through amendments to their comprehensive plan, creating a top down system akin to that in Oregon. The DCA and RDCs could then serve a role similar to the LCDC in Oregon by reviewing local plans for compliance with the statute. Because the DCA and RDCs already have oversight over comprehensive plans, the entities would likely have authority over the implementation of UGBs by local governments. Given their knowledge of the particular needs of localities, RDCs could work with local governments within their planning jurisdictions to designate urban growth areas. Although the Atlanta Regional Commission (“ARC”) would not have the broad powers assigned to Metro in Portland, it still could succeed in establishing a UGB in the Atlanta metropolitan region. ARC would have the authority to reject a local government’s comprehensive plan if it did not comply with the UGB statute, and as such, could withhold its approval until a local government’s plan was in conformance with ARC’s concepts for a regional UGB.

Although the DCA could oversee the implementation of UGBs, local governments likely would ignore the mandate in the absence of an enforcement measure. The current guidelines for local comprehensive plans under the Georgia Planning Act do not require local governments to implement any portion of their comprehensive plans.¹⁸ However, the DCA has unused authority to withhold small amounts of the local share of some taxes, and might use this limited authority to motivate local governments.¹⁹ Further, the Georgia Constitution provides the legislature with the ability to create incentives for local government compliance with state planning interests.²⁰ To enforce the UGB statute, the DCA likely will need to find money to persuade local governments to comply or hope that its authority to withhold funds will act as an effective motivational tool.

¹² § 50-8-7(b)(1); Ga. Comp. R. & Regs. R. 110-3-2-.03(c)(e) (2006).

¹³ § 50-8-22.

¹⁴ *Id.*

¹⁵ § 50-8-27(a).

¹⁶ Ga. Comp. R. & Regs. R. 110-3-2-.03(4)(d) (2006).

¹⁷ The idea to use the existing RDC boundaries in another way is not new to the Georgia General Assembly. See Georgia House Committee on Transportation’s Substitute to Senate Resolution 845, 2008 Ga. Gen. Assem., available at http://www.legis.ga.gov/legis/2007_08/versions/sr845_LC_34_1812S_hss_9.htm (proposing to use existing RDC boundaries for the purpose of creating a local option sales tax on a regional level).

¹⁸ James L. Bross, *Smart Growth in Georgia: Micro-Smart and Macro-Stupid*, 35 Wake Forest L. Rev. 609, 617 (2000).

¹⁹ *Id.*

²⁰ Ga. Const. art. VII, § 3, ¶ 3.

VIII. Does the State of Georgia have authority under the Georgia Constitution to require local governments to implement a UGB program?

It also must be determined whether Georgia has the authority to require local governments to implement UGBs under the Georgia Constitution and laws. Local governments in Georgia derive their powers by a mix of statutory and constitutional provisions.²¹ Counties in Georgia receive police power from a home rule provision in the Georgia Constitution.²² This provision allows counties to “adopt clearly reasonable ordinances, resolutions, or regulations relating to [their] property, affairs, and local government for which no provision has been made by general law and which is not inconsistent with this Constitution or any local law applicable thereto.”²³ The Georgia Constitution provides for the home rule for cities through the grant of authority to the Georgia Legislature to provide for “self-government of municipalities.”²⁴ The Legislature exercised this authority through the Municipal Home Rule Act.²⁵ This Act gives cities the same authority as counties to adopt “clearly reasonable ordinances.”²⁶ Finally, the Georgia Constitution grants planning and zoning powers to counties and cities, providing that “[t]he governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning.”²⁷

Although this provision seems to vest all local land use decisions with local governments, the Georgia Constitution also provides that “[t]his authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power.”²⁸ The Legislature has established such “procedures” by regulating the criteria of comprehensive plans and the requirement that land use decisions be made consistent with those plans.²⁹ Further, the Constitution grants the General Assembly the power to provide by law for “[r]estrictions upon land use in order to protect and preserve the natural resources, environment, and vital areas of this state.”³⁰ Thus, the state may regulate land uses that adversely affect such areas.

Further, although the Georgia Constitution grants local governments supplemental powers, it also gives the state powers by providing: “[n]othing...shall operate to prohibit the General Assembly from enacting general laws relative to [certain]...subject matters...[relating to police and fire protection, garbage and waste collection and disposal, public health facilities, streets and roads and related facilities, parks and recreational facilities, storm water facilities, water facilities, public housing facilities, public transportation facilities, libraries and related facilities, terminal and dock related facilities, building codes, and air quality measures]...or to prohibit the General Assembly by general law from regulating, restricting, or limiting the

²¹ See Jamie Baker Roskie & Janna Basingame Custer, *Adaptate Public Facilities Ordinances: A Comparison of Their Uses in Georgia and North Carolina*, 15 Southeastern Env't. L.J. 345, 357 (2007).

²² Ga. Const. art. IX, § 2.

²³ *Id.*

²⁴ *Id.*

²⁵ Ga. Code Ann. §§ 36-35-1 to -8 (2006).

²⁶ Ga. Code Ann. §§ 36-35-3 (2006).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ga. Code Ann. §§ 50-8-3, -30, -32 (2006); Ga. Comp. R. & Regs. R. 110-3-2-.03(4)(d)(2006).

³⁰ Ga. Const. art. IX, § 6, ¶ 2(a)(1).

exercise of powers listed therein.”³¹ Conceivably, therefore, much that local governments do affecting development may be regulated by the General Assembly as long as the action doesn’t “withdraw such powers” from the local government.³²

The General Assembly likely can enact a law requiring local governments to implement UGBs, and provide for oversight and enforcement on the state level. The Georgia Constitution expressly grants local governments the power to zone. Therefore, legislation must leave local zoning powers intact, and provide for the implementation of the plan on the local level. However, the Constitution also gives the state control over certain land uses. As such, the state may use this power concurrently with a locality’s zoning powers to establish and execute a UGB program.

The Georgia Constitution provides several provisions from where a UGB program might derive its authority. Through its power to regulate zoning procedures, the state may determine the requirements of a local government’s comprehensive plan, which would allow the state to mandate the inclusion of UGBs in each plan.³³ Additionally, because UGBs preserve “natural resources” and “vital areas of the state,” the state also has the constitutional authority to place restrictions on land uses.³⁴ Further, the state retains the power under the Georgia Constitution to regulate by general law many local public facilities, such as park and water facilities.³⁵ Urban Growth Boundaries help preserve parks and open space, and facilitate the efficient allocation of public facilities, thus placing their creation under the state’s control. Therefore, legislation requiring UGBs likely does not violate a local government’s home rule or zoning powers.

IX. Can a statewide UGB program withstand a takings challenge under the U.S. and Georgia Constitutions?

The general requirement that UGBs be established does not itself raise a takings issue. Instead, the risk of a takings challenge arises from the necessity to change zoning outside of the UGB to allow for larger minimum lot sizes and to down-zone some lands for rural and agricultural uses.

a. Analysis under the U.S. Constitution

The Fifth Amendment’s Takings Clause provides that private property shall not be “taken for public use without just compensation.”³⁶ When a takings involves a state actor, the Takings Clause applies to the state through the 14th Amendment.³⁷ Generally, a takings may occur when either the government physically takes possession of private property or regulates private property to the extent that the government has constructively possessed the property.³⁸ Because

³¹ Ga. Const. art. IX, § 2, ¶ 3(c).

³² Ga. Const. art. III, § 3, ¶ 3(b)(2)(c) (providing “[n]othing contained within this Paragraph shall operate to prohibit the General Assembly from enacting general laws relative to the subject matters listed in subparagraph (a) of this Paragraph or to prohibit the General Assembly by general law from regulating, restricting, or limiting the exercise of the powers listed therein; but it may not withdraw any such powers.”)

³³ See Ga. Code Ann. §§ 36-35-5 (2006).

³⁴ See Ga. Const. art. IX, § 6, ¶ 2(a)(1).

³⁵ See Ga. Const. art. III, § 3, ¶ 3(b)(2).

³⁶ U.S. Const. amend. V.

³⁷ See *Chicago Burlington and Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

³⁸ See Julian C. Jurgensmeyer & Thomas L. Roberts, *Land Use Planning and Development Regulation Law*, 396-400 (2003).

a zoning ordinance does not constitute physical possession of property, it must be determined whether the zoning action amounts to a regulatory taking.

In the 1978 case of Penn Central Transportation Co. v. New York City, the Supreme Court established a three-part balancing test governing regulatory takings cases.³⁹ In Penn Central, the owner of Grand Central Terminal in New York City challenged the city's historic preservation law because the owner had been denied a permit to build a fifty-story tower over the train terminal.⁴⁰ In determining whether a land use regulation is intrusive enough to constitute a taking, the court weighed the "economic impact of the regulation," the landowner's "investment-backed expectations," and the "character of the governmental action."⁴¹ In considering these factors, the Court held that the historic preservation ordinance was not a taking because it left the station exactly as it had been, did not amount to a physical invasion of the property, and did not interfere with the original investment-backed expectations of the owners.⁴²

Subsequent cases have attempted to provide guidance into the Penn Central balancing test. In Lucas v. South Carolina Coastal Council, the Court held that a taking occurs where a regulation deprives real property of all economically viable use.⁴³ Lucas involved an owner of two beachfront lots who was unable to build due to the application of a setback rule adopted to deter sand dune loss and beach erosion.⁴⁴ Because the statute prevented the owner from gaining any financial benefit from his land, the Court held that the owner suffered a constitutional taking unless the state could prove that the regulation did no more to restrict use than what the state courts could do under background principles of property law or the law of private or public nuisance.⁴⁵ The Court added in dicta that a landowner "whose deprivation is one step short of complete" may be entitled to compensation under certain circumstances, and noted the relevance of the economic impact of the regulation and the extent to which the regulation interfered with investment-backed expectations.⁴⁶

The Court in Palazzolo v. Rhode Island elaborated on Lucas by clarifying the definition of "total taking."⁴⁷ In Palazzolo, the property owner alleged that his 18 acres had a value of \$3,500,000 if developed with 74 single-family homes.⁴⁸ However, due to the state's wetlands laws, he could only build one home, leaving his parcel with a value of \$200,000.⁴⁹ Even though the owner alleged a 93.7% diminution in value, the Court held the regulations were not a total taking because the plaintiff could still build a residence on the parcel, and thus the property was not left "economically idle."⁵⁰

UGB regulations could be attacked as either "facial" or "as-applied" challenges. Under the Supreme Court's regulatory jurisprudence, it is unlikely that a facial challenge based upon either a total or partial takings argument could succeed.⁵¹ It is highly improbable that a UGB

³⁹ Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

⁴⁰ Id. at 118.

⁴¹ Id. at 124.

⁴² Id. at 137.

⁴³ Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992).

⁴⁴ Id. at 1006-1007.

⁴⁵ Id. at 1027.

⁴⁶ Id. at 1019 n. 3.

⁴⁷ Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

⁴⁸ Id. at 613-14.

⁴⁹ Id. at 620-31.

⁵⁰ Id.

⁵¹ See Chris J. Williams, *Do Smart Growth Policies Invite Regulatory Takings Challenges? A Survey of Smart Growth and Regulatory Takings in the Southeastern United States*, 52 Ala. L. Rev. 895, 907 (2004).

could limit all development over a wide area and allow a facial challenge for total economic deprivation to multiple landowners.⁵² Further, the three factors in the Penn Central analysis, by definition, prevent facial challenges because they require a case-by-case approach to regulatory takings.⁵³ Thus, a facial challenge to a UGB regulation likely would fail.

However, a regulatory takings as applied challenge, although unlikely, could potentially be successful. Here, UGB statutes clearly are not a total taking under Lucas and Palazzolo. The Court in Palazzolo refused to find a total taking despite the plaintiff's claim that he could build only one residence on an eighteen acre parcel. Therefore, a minimum lot size regulation of no more than, or possibly even more than, eighteen acres likely would escape a total takings challenge. Further, owners of down-zoned parcels are not limited in their uses, as they may still use the land outside the UGB for agricultural purposes. Moreover, a proposed UGB statute likely would allow owners to convert their property to urban uses if it is impracticable to allow any rural uses, as in the case in Oregon.⁵⁴ Because the land outside the UGB would retain some value, a total takings argument under Lucas likely would not succeed.

If a regulation does not create a "complete elimination of value" or a "total loss," but instead has some value, a Penn Central analysis is required.⁵⁵ The Court in Penn Central gave no weight to these factors, instead requiring an "ad hoc factual inquiry."⁵⁶ In partial economic deprivation cases, diminution in value, standing alone, does not result in a taking.⁵⁷ When land outside a UGB or land reserved for future growth is already zoned for agricultural or other rural uses, a diminution in value is unlikely to occur. However, when land is down-zoned to agricultural or another rural use, or when an increased minimum lot-size regulation is imposed, it is probable that the land may experience a decrease in value. Thus, this fact will contribute to a court's decision as to whether the regulation is a partial takings.

Further, UGBs likely will not interfere with a landowner's reasonable investment-backed expectations. One buys property with the understanding that it is subject to the police power of the state and "necessarily expects the use of his property to be restricted, from time to time, by various newly enacted measures."⁵⁸ The Court in Penn Central found that the railroad's belief that it could use the airspace above the terminal did not qualify as an investment-backed expectation.⁵⁹ It was sufficient for takings purposes that the railroad's expectation for use was for a railroad terminal and office building, which was unaffected by the regulation.⁶⁰ Similarly here, landowners buy land subject to the risk of rezoning. Further, if rural landowners were using their land for rural uses, such use was his or her expectation, just as was found in Penn Central. However, it is possible that if property outside the UGB had been previously zoned for intensive development and the landowner bought the property in reliance upon such zoning, then his or her investment backed expectations could be implicated. However, governments can easily minimize such problems by including land already zoned for development within UGBs.

⁵² Id.

⁵³ Id.

⁵⁴ Michael Lewyn, *Sprawl, Growth Boundaries and the Rebaquist Court*, 2002 Utah L. Rev. 1, 17 (2002)

⁵⁵ See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

⁵⁶ See Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law*, 416 (2003).

⁵⁷ Penn Central, 438 U.S. at 130.

⁵⁸ Lucas, 505 U.S. at 1027. See also Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law*, 421 (2003).

⁵⁹ Penn Central, 438 U.S. at 135-37.

⁶⁰ Id.

Thus, even if UGBs diminish rural property values outside of the UGB, it is unlikely that a takings argument can succeed.

A partial takings may occur if the regulation is not supported by a “substantial public purpose.”⁶¹ In Agins v. Tiburon, the court found that a zoning ordinance that prohibited the construction of more than five single-family homes on plaintiff’s five acre tract of land substantially advanced the legitimate governmental goal of protecting residents from the problems of urbanization.⁶² UGBs similarly limit development in order to prevent urbanization in certain areas. Further, just as the parcel in Agins was effectively limited to one single family home per acre, minimum lot size restrictions outside of UGBs similarly preserve low density areas and likely will be valid as effectuating a public purpose. Although there is some risk that a partial takings may arise in certain situations involving the thwarting of investment-backed expectations, UGBs most likely can survive a takings challenge.

b. Analysis under the Georgia Constitution

The Georgia Constitution provides that “private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.”⁶³ In a regulatory takings action, the issue is whether the existing zoning classification serves to deprive a landowner of property rights without due process of law.⁶⁴ A zoning ordinance is presumptively valid, and this presumption may be overcome only by clear and convincing evidence.⁶⁵ The burden is on the plaintiffs to show that the owner “will suffer a significant detriment under the existing zoning,” and that the existing zoning is “unsubstantially related to the public health, safety, morality, and welfare.”⁶⁶ “Only after both of these showings are made is the governing authority required to come forward to justify the zoning ordinance as reasonably related to the public interest.”⁶⁷ If the plaintiff cannot prove the two above mentioned elements, then the landowner’s challenge to the zoning ordinance fails.⁶⁸

The Georgia Supreme Court stated that a significant detriment to the landowner is not shown by the fact that the property would be more valuable if rezoned, or by the fact that it would be more difficult to develop as zoned.⁶⁹ Further, evidence that the owner will suffer an economic loss alone is not sufficient to show a significant detriment.⁷⁰ However, it is not necessary that the property be rendered totally useless.⁷¹ The validity of each zoning ordinance must be determined on the facts applicable to each case, but courts consider relevant: “(1) existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and

⁶¹ See Palazzolo, 533 U.S. at 634 (O’Connor, J., concurring).

⁶² Agins v. City of Tiburon, 447 U.S. 255, 261 (1980).

⁶³ Georgia Constitution, Art. I, § 3, ¶ 1(a).

⁶⁴ See DeKalb County v. Dobson, 267 Ga. 624, 625 (1997).

⁶⁵ See Guhl v. Holcomb Bridge Road Corp., 238 Ga. 322, 323 (1977).

⁶⁶ DeKalb County v. Dobson, 267 Ga. 624, 626 (1997); Gwinnett County v. Davis, 268 Ga. 653, 654 (1997).

⁶⁷ DeKalb County v. Dobson, 267 Ga. 624, 626 (1997).

⁶⁸ Id.

⁶⁹ See Id.; Delta Cascade Partners II v. Filton County, 260 Ga. 99, 100 (1990).

⁷⁰ Gwinnett County v. Davis, 268 Ga. 653, 654 (1997).

⁷¹ Guhl v. Holcomb Bridge Road Corp., 238 Ga. 322, 323 (1977).

(6) the length of time the property has been vacant as zoned considered in the context of land development in the area and vicinity of the property.”⁷²

In Georgia, it is unlikely that a UGB would be struck down as unconstitutional. Although a landowner possibly could succeed in showing a significant detriment if his or her land located outside of the UGB is down-zoned, it is highly likely that the zoning regulations implemented would be found not substantially related to a public interest. Limiting sprawl, preserving environmentally sensitive lands and open space, predictability, ensuring compact growth, revitalizing urban areas, and facilitating efficient allocation of infrastructure all are related to the public’s health, safety, and welfare. Although there is no Georgia case on point, the U.S. Supreme Court has supported the protection of the public from the ill effects of urbanization as a public interest.⁷³ Further, numerous courts have upheld minimum lot sizes, including for purposes of implementing a growth management plan.⁷⁴

Although the Georgia Supreme Court has struck down minimum lot size requirements, the case can be distinguished.⁷⁵ In Henry County v. Tim Jones Properties, Inc., the Court upheld the trial court’s decision to invalidate an ordinance requiring minimum lot sizes for plaintiff’s property because the classification resulted in a depressed value of the property, a lack of marketability, and an inability to use the property as zoned.⁷⁶ In addition, the court found that the county had not presented any evidence of the public benefit that would result from the zoning classification.⁷⁷ In contrast, the zoning classifications outside of the UGB will present a public benefit, as mentioned above. Further, property may still be used for agricultural purposes, and thus have some use, and also will retain its marketability, as the UGB may eventually be moved outward, permitting urban uses on the property. Thus, UGBs likely can withstand a constitutional challenge in Georgia.

X. Would a UGB program violate vested rights of landowners?

Because certain properties outside of the UGB will require rezoning, situations may arise regarding vested rights. The doctrine of vested rights enables a permit holder to complete a land development despite subsequent changes to the zoning code that would prohibit or otherwise affect the project.⁷⁸ In Georgia, where a landowner is in compliance with zoning regulations at the time he or she requests a building permit, the landowner has vested rights to use property in accordance with zoning regulations in force when he or she applied for a building permit.⁷⁹

⁷² Id. at 324-25.

⁷³ Agin v. City of Tiburon, 447 U.S. 255, 261 (1980).

⁷⁴ See Norbeck Village Joint Venture v. Mountainery Comm’y Council, 254 A.2d 700 (Md. 1969) (upholding down-zoning to large minimum lot sizes to protect watersheds and a greenbelt around a city to protect it from urban sprawl); Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law*, 233 (2003).

⁷⁵ See Henry County v. Tim Jones Properties, Inc., 273 Ga. 190, 193 (2000).

⁷⁶ Id. at 193.

⁷⁷ Id.

⁷⁸ Eric S. Laschever, *An Overview of Washington’s Growth Management Act*, 7 Pac. Rim. L. & Pol’y J. 657, 673 (1998).

⁷⁹ WMM Properties v. Cobb County, 255 Ga. 436, 437-439 (1986); Buckner v. Douglas County, 273 Ga. App. 365, 367 (2005); Hanks County v. Chambers of Georgia, Inc., 264 Ga. 421, 423 (1994).

Additionally, where a landowner makes a substantial change in position by expenditures in reliance upon the an existing zoning ordinance and the assurances of zoning officials, he acquires vested rights and is entitled to have the permit issued despite a change in the zoning ordinance which would otherwise preclude the issuance of a permit.⁸⁰ Accordingly, local ordinances down-zoning property should operate only prospectively or risk law suits for violations of landowners' vested rights.

XI. Can a Transfer of Development Rights program or Impact Fees be used to mitigate the risks of takings challenges?

a. Transfer of Development Rights

Because some risk remains involving potential Takings Clause claims, it may be practical to consider a Transfer of Development Rights ("TDR") strategy and the imposition of impact fees to mitigate takings risks. TDR programs require designation of sending sites eligible for severable development rights. Where land outside of the UGB is zoned for large lot, rural and agricultural uses, TDRs are offered to owners as a form of mitigation or compensation for the restrictions. In return for a TDR, the landowner accepts a negative covenant on the land that at least semi-permanently restricts development to that required under the zoning regulation. The TDRs issued to sending-site owners are fungible, and may be purchased and used by qualifying developers on receiving sites, which would include the areas inside the UGB. Receiving-site developers could use their TDRs to develop at higher densities within the receiving area. In order to maintain a market for TDRs from the sending zone, receiving area property owners are required to acquire TDRs in order to attain their desired level of intensity.

The Georgia Legislature has authorized municipalities and counties to provide by ordinance for TDR programs.⁸¹ The statute permits development on the receiving property in excess of that otherwise permitted by law in exchange for reduced development on the sending property.⁸² The aim of the TDR program is to preserve the sending property from environmental and social costs associated with development, and broadly defines sending property to include property with special characteristics, including farms, woods, mountains, natural habitats, recreation areas, and parks.⁸³ Therefore, protecting open space outside of the UGB would likely fall under the broad goals of Georgia's statute. Additionally, Georgia's TDR statute permits the transfer of rights on a sending property in a municipality or county to a receiving property in another municipality or county.⁸⁴ Thus, land outside of the UGB could be preserved by transferring the development rights associated with this property to a receiving property within the UGB.

In order to effectively mitigate a UGBs regulatory takings risk, a TDR program must be able to withstand a takings challenge itself. In Penn Central, New York City used a TDR

⁸⁰ WMM Properties, 255 Ga. At 439.

⁸¹ Ga. Code Ann. §§ 36-66A-1 to -2.

⁸² See Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 25 Wake Forest L. Rev. 563, 595-96 (2000).

⁸³ Ga. Code Ann. § 36-66A-1(4).

⁸⁴ Ga. Code Ann. §§ 36-66A-2.

program to mitigate the financial effects of building permit denial, and the program received favorable comment from the majority in the decision.⁸⁵ The Court stated that “the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.”⁸⁶ However, it is not clear whether TDRs can be used to determine if a takings has occurred or if they only can be considered as just compensation for a takings.⁸⁷ In Suitum v. Tahoe Regional Planning Agency, the Supreme Court passed on deciding the issue.⁸⁸ Justice Scalia, however, authored a partial concurrence stating that if a government easement leaves no economic use, a taking has occurred, regardless of TDR availability.⁸⁹ Scalia stated that TDRs cannot serve as residual value, but instead should be evaluated on the compensation side of the takings analysis.⁹⁰ For this reason, Scalia argued that TDRs should serve as partial compensation for a taking, depending on the amount of the taking and the value of the TDRs given.⁹¹

If faced with a takings challenge, it is unclear whether a court would follow Penn Central or Scalia’s concurrence in Suitum. If the money that the TDR program gives to the landowner can be counted in determining whether there is a taking, a court likely would find that the land retains substantial value, and thus has not been taken under Lucas or Penn Central. Even if a court follows Scalia’s opinion in Suitum, a TDR program may still be found constitutional. The TDR program is not “taking” property rights, but rather facilitating an exchange by sending the rights to property owners in receiving zones. Further, even after the property is burdened by a conservation easement, land in sending zones retains economically viable uses, such as recreation and agriculture. Thus, the program is likely immune from a takings challenge based upon LUCAS or Penn Central. Therefore, a TDR program may be useful in implementing a UGB.

b. Impact Fees

The uncertainty of takings law regarding TDR programs may make the use of impact fees a more feasible way to mitigate takings challenges. Impact fees are charges levied by local governments on new development to pay a proportionate share of the capital costs of providing public infrastructure to those developments.⁹² These fees help local governments cope with the economic burdens of population growth.⁹³ By imposing impact fees on new development within the UGB, local governments can generate revenue to purchase conservation easements on land outside of the UGB. Local governments can therefore reduce the possibility of a takings challenge by purchasing the development rights of the land out-right.

Georgia addressed the issue of impact fees in the Georgia Development Impact Fee Act.⁹⁴ A “development impact fee” is defined by the Act as “a payment of money imposed upon development as a condition of development approval to pay for a proportionate share of the cost

⁸⁵ See Penn Central, 438 U.S. at 137; Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law*, 375 (2003).

⁸⁶ *Id.*

⁸⁷ Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law*, 375 (2003).

⁸⁸ Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997).

⁸⁹ *Id.* at 748-50.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Julian C. Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law*, 350 (2003).

⁹³ *Id.*

⁹⁴ Ga. Code Ann. §§ 36-71(1)-(15).

of system improvements needed to serve new growth and development.”⁹⁵ Impact fees in Georgia can be made only for “system improvements” that create additional service available to serve new growth.⁹⁶ “System improvements” are defined as “capital improvements that are public facilities and are designed to provide service to the community at large.”⁹⁷ A “capital improvement” is defined as an improvement with at least a ten-year useful life that increases the service capacity of a public facility.⁹⁸ “Public facilities” include “[p]arks, open space, and recreation areas and related facilities.”⁹⁹

In addition, the Act provides that impact fees imposed must not exceed a proportionate share of system improvement costs and must be imposed on the basis of geographically defined service areas.¹⁰⁰ The Act requires that impact fees “be calculated on the basis of levels of service for public facilities” contained in a municipal or county comprehensive plan.¹⁰¹ Further, the Act mandates that impact fees be based on actual system improvement costs or reasonable cost estimates, and the calculation of the fee must be done “on a basis which is net of credits for the present value of revenues that will be generated by new growth and development.”¹⁰²

To implement an impact fee program, a local government must adopt an impact fee ordinance which includes a schedule of fees.¹⁰³ The schedule specifies the impact fee for various land uses on a per unit of development and service basis.¹⁰⁴ The ordinance must provide that impact fees can only be spent for the category of system improvement and in the service area for which the fees were collected.¹⁰⁵ The Act also requires that local governments must establish a Development Impact Fee Advisory Committee with a membership of at least 40% comprised from representatives of the development, real estate, and building industries.¹⁰⁶ The committee advises a governing body as it considers adopting an impact fee ordinance.¹⁰⁷

Provided that the prerequisite conditions of a comprehensive plan and an impact fee ordinance have been met, impact fees likely can be charged in Georgia to create open spaces outside of a UGB. The Act expressly provides for “capital improvements that are public facilities,” which include parks, open spaces, and recreation areas. Therefore, the impact fees can be used to purchase lands for these uses, and permanently protect them using conservation easements, which are also authorized by statute in Georgia.¹⁰⁸ However, the sophisticated financial planning and fee calculation required by the Act have deterred widespread adoption of

⁹⁵ Ga. Code Ann. §§ 36-71-2(8).

⁹⁶ Ga. Code Ann. §§ 36-71-8(b).

⁹⁷ Ga. Code Ann. §§ 36-71-2(19).

⁹⁸ Ga. Code Ann. §§ 36-71-2(1).

⁹⁹ Ga. Code Ann. §§ 36-71-2(16)(E).

¹⁰⁰ Ga. Code Ann. §§ 36-71-4(a), (b); 36-71-2(17).

¹⁰¹ Ga. Code Ann. §§ 36-71-4(e).

¹⁰² Ga. Code Ann. §§ 36-71-4(q), 4(r).

¹⁰³ Ga. Code Ann. §§ 36-71-4(e).

¹⁰⁴ Ga. Code Ann. §§ 36-71-4.

¹⁰⁵ Ga. Code Ann. §§ 36-71-4(e).

¹⁰⁶ Ga. Code Ann. §§ 36-71-8(b).

¹⁰⁷ Ga. Code Ann. §§ 36-71-5.

¹⁰⁸ Georgia Uniform Conservation Easement Act, Ga. Code Ann. §§ 44-10-1 to -8 (authorizing the creation of conservation easements for the preservation of open space, the protection of natural resources, the improvement of air or water quality, and the availability of land for agricultural, forest, recreational, or open space uses).

impact fee ordinances in Georgia, and may similarly serve as an impediment for the use of impact fees in a UGB program.¹⁰⁹

Additionally, the utilization of impact fees in a UGB program must not result in an unconstitutional taking. The Supreme Court has enunciated the standard to be applied to exactions, but has not specifically addressed whether impact fees can or cannot be takings. Under Nollan v. California Coastal Commission, an exaction must be related by an "essential nexus" to the legitimate state interest it seeks to advance.¹¹⁰ Under the later Dolan v. City of Tigard decision, an exaction must also be roughly proportional to the impact caused by the development.¹¹¹ Georgia courts have not expressly articulated the standard applied to unconstitutional exactions claims, but in Greater Atlanta Homebuilders Association v. DeKalb County the Georgia Supreme Court indicated that the Dolan test may be utilized only in an as-applied challenge to land use regulations in Georgia.¹¹² Thus, as long as the impact fees are roughly proportional to the impact of the development, the ordinance as applied should survive a takings challenge under Georgia law. Such a showing likely will be successful, as increased growth and density in each service area caused by new development will create the need for increased open space and recreational areas. Therefore, the use of impact fees likely will be found constitutional.



Image from <http://www.cooperativeindividualism.org/takings-cartoon.jpg>

¹⁰⁹ See Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 25 Wake Forest L. Rev. 563, 591 (2000).

¹¹⁰ Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987).

¹¹¹ Dolan v. City of Tigard, 512 U.S. 374, 395 (1994).

¹¹² Greater Atlanta Homebuilders Association v. DeKalb County, 277 Ga. 295, 298 (2003).

XII. A View of Growth Management Practice in Georgia

One of the most helpful ways to analyze effective growth management techniques in Georgia, particularly those pertaining to UGBs, can be found in discussion with seasoned professionals. As a group, we spoke briefly with a well experienced community planner who has worked in several counties in Georgia. Our discussions highlighted the reality that controlling urbanized areas and preserving rural communities through growth management planning and implementation varies drastically between counties.

Particularly, this discussion brought to our attention the challenges that counties and other jurisdictions face that lead them towards poor growth management decisions and practices. Some of the most prevalent challenges include:

- (1) Rapid speed of development;
- (2) Economics of growth and development, balancing a rapidly-expanding residential base with a growing need for associated services, as well as the need for commercial or industrial development;
- (3) Lack of educated planning staff in broader principles of growth management;
- (4) Fractional elements of government which divide functions of infrastructure (Water and Sewer Authority, Board of Education, local government), leading to uncoordinated actions which do not adhere to future land use planning;
- (5) Lack of professional knowledge of growth management principles within elected officials, leading to ad-hoc decision-making which is inconsistent with proven facts and accepted standards.

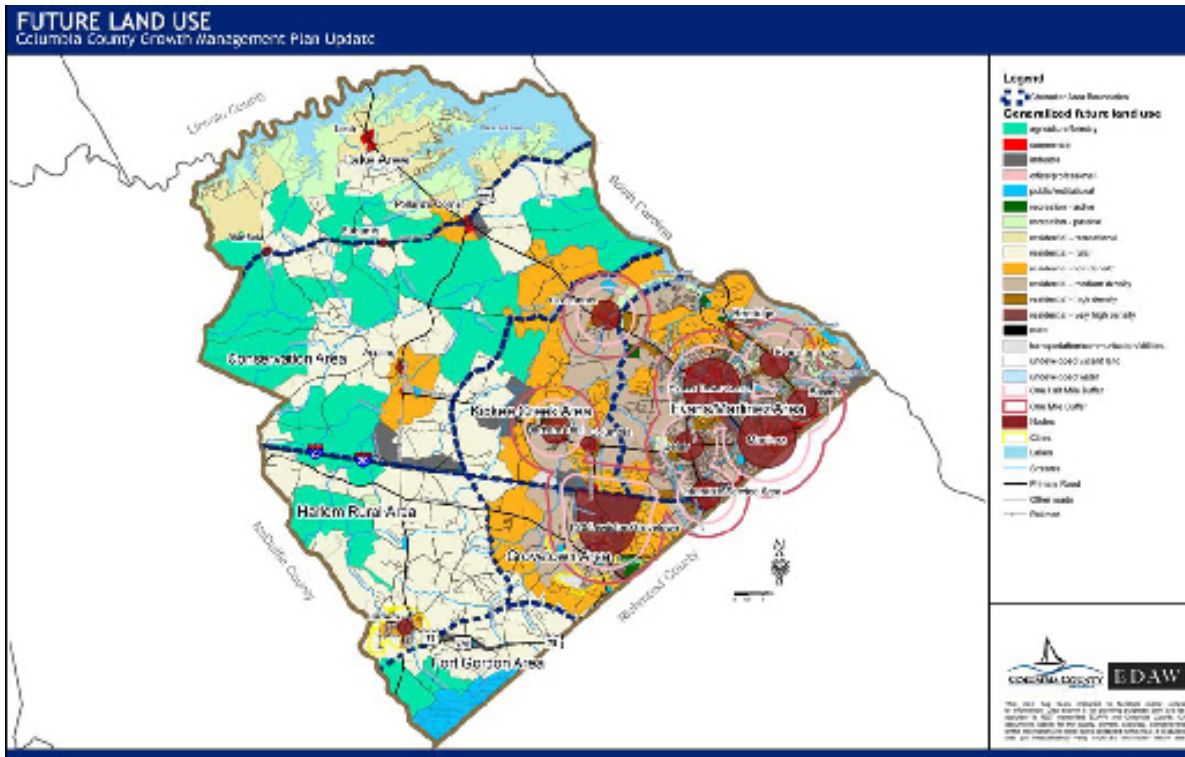
These challenges listed above lead to drastically different planning practices across the state. One specific case in Georgia we discussed was the drastic difference between Henry County and Columbia County. These two counties are helpful to compare because both counties began their countywide planning efforts in mid 1960s. By the 1980s, both counties had relatively similar demographics, in terms of population growth, area, and socioeconomic factors. Today however, the two counties vary drastically “in terms of which has the greater quality of life and experience in growth management” (Young). Henry County has recently experienced drastic population growth and is categorized by a more sprawling land pattern. The

area “suffers from much of the chronic elements of sprawl.” Columbia County is better known for the opposite opinion; as a place of smart growth practice. Notably, as compared to the sprawling environment in Henry County, Columbia County has 76% of its population on 22% of its land area. Columbia County has been able to successfully balance growth and avoid many challenges through progressive and intentional planning efforts.

Two of the most noteworthy elements to Columbia County’s success as a best practice example stem from their fundamental land use decisions and its governmental organization of infrastructure. Firstly, Columbia County was progressive in that during the late 1960s they zoned the county in accordance to a comprehensive plan created by hired planning consultants. All major large areas were zoned to a “district befitting the future land use” which avoided later ad-hoc decision-making or “knee-jerk” reactions from county commissioners and elected officials. Secondly, Columbia County does not have a separate water and sewer authority but instead they operate it through a department of the local government. This has allowed the county to conservatively control the availability of water and sanitary sewer over the years; ensuring that fundamental and largely important infrastructure decisions are made in congruence with the county-wide vision. In addition, the county works closely with the Board of Education to assist in selecting the site of new schools; representing a relationship that is normally strained in many jurisdictions.

It is even more helpful and noticeable to recognize the vast difference in planning practices across counties by examining their future land use plans. The figures below display Columbia County’s future land use plans. The county’s focused approach to following basic land use principles is evident. The process undertaken to formulate these plans demonstrate the county’s commitment to continue their success and achieve the county’s future vision by “organizing future development into a rational system of nodes.” As discussed in their most recent community agenda,

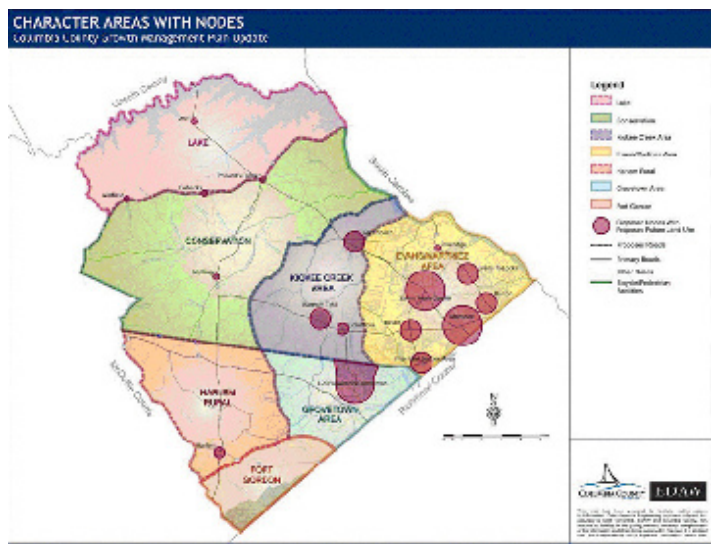
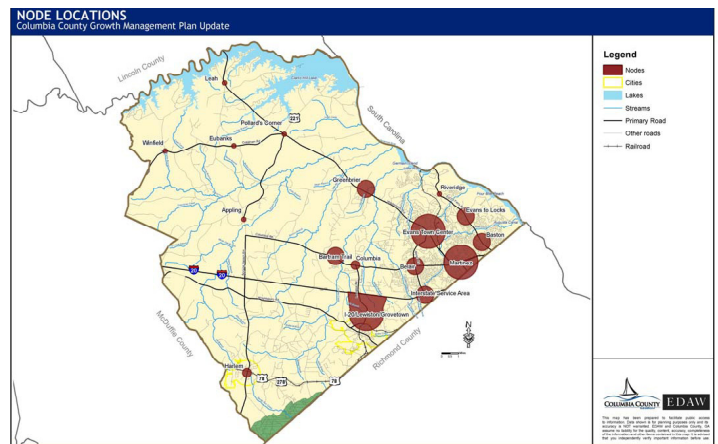
“A Node is a concentrated activity center with a balance of commercial, office and residential uses. The Nodal Development Concept is a plan to organize these more intense land uses into nodes, and thus protecting existing neighborhoods, lessening sprawl,



and making the most efficient use of existing infrastructure. Most new commercial, office, and mixed-use developments are planned for designated nodes. Multifamily residential is also planned in designated nodes and along major arterial roads where appropriate. Nodes have been placed predominantly where major infrastructure exists and in the more developed parts of the county. All nodes are placed at existing intersections, usually of two major roads. Most of the proposed nodes currently have access to water and sewer infrastructure.”

The language and evident practice of Columbia County’s comprehensive planning and implementation coincides with many of the foundational elements emphasized in UGB programs. The nodal approach taken by Columbia County compliments the goals that specified boundaries and designated urban development areas pertain to. In contrast it is helpful to see the draft future land use plan created by Henry County on the following page. The uses are notably more displaced and less concentrated; the plan visibility lacks much of the conformity and direction as seen in the Columbia County future land use map.

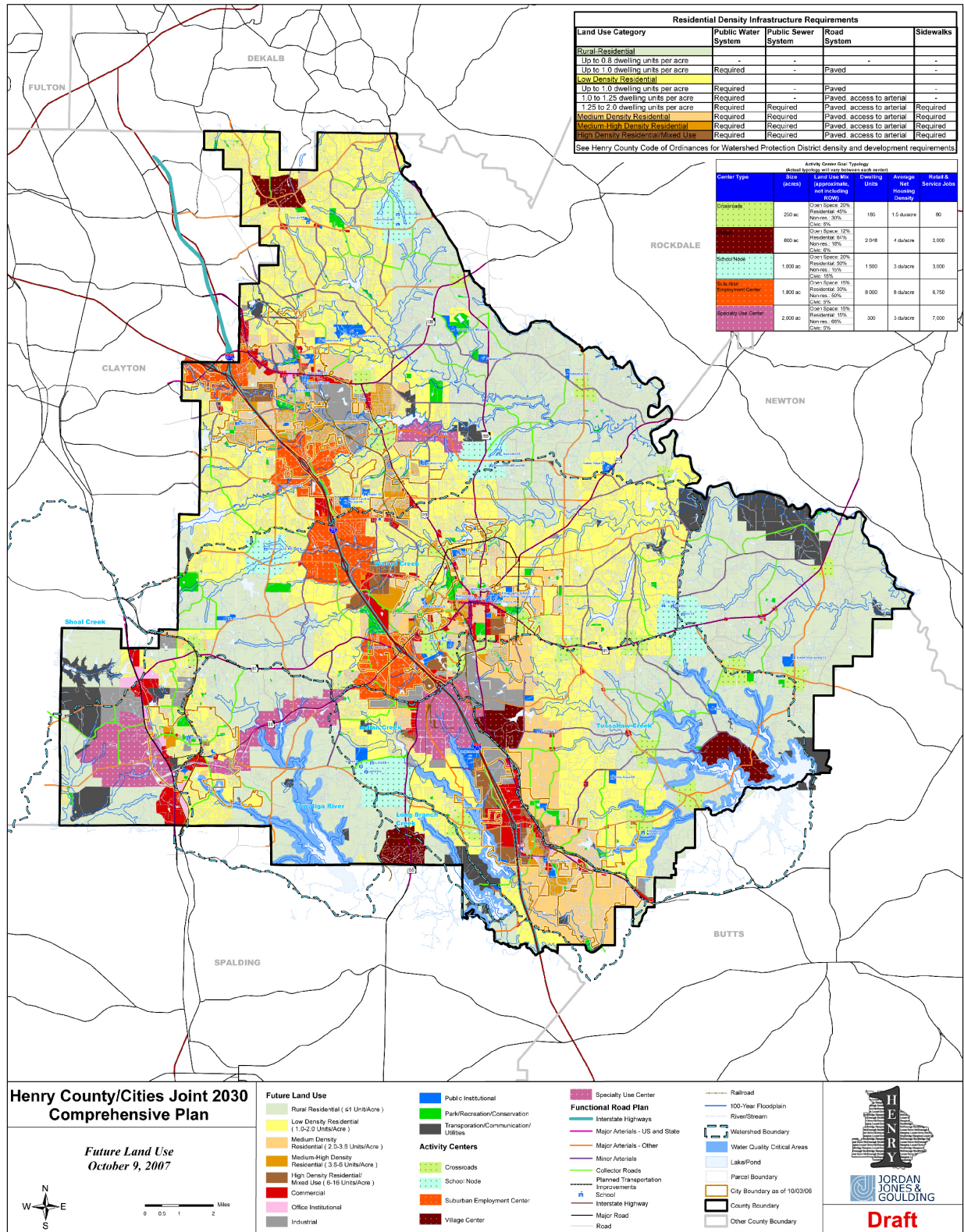
This positive growth management example in Columbia County demonstrates many of the same principles encouraged through UGBs. This example reaffirms and encourages the practice of fundamental land use. Regardless of the program name, basic land use prin-



ciples must be considered and implemented to ensure smart growth. As seen in Columbia County, follow through with intentional planning efforts has led it to be one of the most well planned and livable counties in the state.

This portion reflects an interview with Tim Young, Director of Community Development City of Locust Grove, on April 11, 2008.

Henry County Future Land Use Map



XIII. Conclusion

This report highlights the fundamental elements that have made UGBs successful across the country. Georgia can greatly improve upon its current efforts by learning from the best practices of other states. The regional planning structure already in place in Georgia offers excellent potential to create a more robust growth management program. A UGB plan would work to enhance the already existing growth management objectives of the state. Implementing such a program would be appropriate on the local level, as a positive supplement to the existing comprehensive planning requirements.

Overall, the topic of UGBs emphasized the importance of using land use fundamentals to guide growth. Open communication between local governments, elected officials, and public service providers is essential. Concentrating development around existing transportation facilities and expanding water and sewer in a complimentary manner is an essential growth management practice, emphasized in UGB programs. Importantly, following basic land use practices works to preserve rural areas and enhance urbanized sectors of the community. UGBs are not a cure-all growth management practice, but are effective in reinforcing smart growth practices.

