



Metropolitan Atlanta Regional TDR Program

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List of Figures	2
List of Tables	2
1 Introduction	3
1.1 Definition of TDRs	4
1.2 Why Does Atlanta need a regional TDR program?	6
1.2.1 Population Growth Control	6
1.2.2 Land Cover Change Consequences	8
2 Successful TDRs	10
2.1 Montgomery County, Maryland.....	10
2.1.1 Background	11
2.1.2 Sending Areas.....	11
2.1.3 Receiving Areas.....	12
2.1.4 Acres Preserved.....	13
2.2 King County, Washington.....	13
2.2.1 Background	13
2.2.2 Sending and Receiving Areas.....	13
2.2.3 Amenity Funds	14
2.2.4 Acres Preserved.....	15
2.3 The Pinelands, New Jersey	15
2.3.1 Background	15
2.3.2 Sending and Receiving Areas.....	15
2.3.3 Acres Preserved.....	16
3 The Metropolitan Atlanta Regional TDR Program.....	16
3.1 Introduction.....	16
3.2 Division of the TDR Participation Districts.....	17
3.2.1 Equity Concerns	19
3.2.2 Maintenance of Home Rule.....	19
3.2.3 Removal of Atlanta Mandates	19
3.2.4 Encouragement of Ingenuity and Creativity	19
3.3 TDR Implementation Strategy	21
3.4 TDR Bank	23
4 Georgia Specific Legal Problems.....	24
5 Metropolitan Atlanta Regional TDR Program: Vulnerable As Applied?.....	28
5.1 Takings Analysis: Sending Site Challenges.....	29
5.2 TDRs in Relation to Takings: Residual Value or Post-taking Just Compensation?.....	30
5.3 The Gulch Factors—Lower Hurdles for Challenging Zoning Restrictions as a Taking in Georgia.....	32
5.4 Protection from Takings Claims	34
5.5 Receiving Area Challenges	35
5.6 Due Process Concerns—Spot Zoning and Overdensification.....	35
5.7 Exactions: The Need for an Essential Nexus	36
6 Winning as Applied Challenges.....	37
7 Conclusion.....	38
Sources.....	39

List of Figures

Figure 1: Population by County	8
Figure 2: Land cover change, 1974 to 2005	10
Figure 3: 28-County Metropolitan Area Participating in the TDR Program	18
Figure 4: TDR Districts	20

List of Tables

Table 1: Population Changes and Projections	7
Table 2: TDR Districts and Counties Contained Therein	21

1 Introduction

Many communities recognize the need to preserve sensitive land in their area by protecting it from development. There are many reasons a community may wish to preserve a particular parcel of land. On the most basic level, the easiest way to ensure a parcel's preservation is for the local community through its government to purchase that land and encumber it with conservation easements. However, this is extremely costly, and is probably cost prohibitive for most communities. An alternative to buying the land a community wishes to protect is to use land use regulations, principally zoning, to achieve conservation, but this method also has some major limitations. First, when restrictive land use controls are passed, they often cause a decrease in monetary value for the parcel subject to the restrictions. This fact leads to land use regulators "being faced with fierce property rights sentiment which holds that any scheme which reduces the land value is a compensable taking" (Juergensmeyer 1998). Under the current interpretation of the U.S. Constitution's Fifth Amendment taking clause, if a regulation of land goes so far as to significantly destroy the property's value, than that regulation constitutes a regulatory taking of the property. (Lucas vs. South Carolina Coastal Council, 1992) If a taking is found, then the government must compensate the land owner for the fair value of the property, which, like purchasing sensitive lands, can become very costly. Second, because "[z]oning is just two public hearings and one vote away from changing," as it was succinctly put one land use planner, Jim Lively of the Michigan Land Use institute, using zoning or other similar land use regulations as a land conservation tool presents the problem of permanency (Hanly-Forde 2006). To truly conserve a piece of land, its

protection must be permanent. One way to overcome the problems presented above is through the implementation of a TDR Program.

1.1 Definition of TDRs

Transfer of development rights (TDRs) are a market-based technique encouraging the voluntary transfer of development rights from places where a community would like to see less development (called sending areas) to places where a community would like to see more development (called receiving areas) (Pruetz 1999)¹. A TDR program works by allowing the right to develop a piece of land to be severed from the land itself and sold (Stinson 1996). The concept of severable development rights arises from the American understanding of property rights. When a person buys real property, she buys more than the land itself and the buildings on it. Along with the land comes what is described as “a bundle rights” (Stinson 1996). Those rights include, among other things, the right to possess, the right to exclude others, the right to develop or dispose of property (Stinson 1996), to use it as collateral, or mine it. All of these rights are subject to reasonable restriction for the public welfare (Stinson 1996).

Many of the individual rights associated with land ownership can be sold to others without selling the land itself. For example, when a person rents out private property, such as a home, the owner of that property is basically selling to the renter the owner’s right to exclude others for the period of the lease. Or as another example, subsurface mining rights may be sold to a mining company while all the other property rights remain the landowner’s. TDR programs take this idea and apply it to the right to develop land.

¹ Citation style for planning-related sources follow APA guidelines; law citations follow Bluebook guidelines.

When we conserve land, we preserve the environment, greenspace, agricultural land, flood planes and steep slopes, historic developments, and we also mitigate sprawl. TDRs can be very useful in land conservation because the actual development of a parcel of land can be restricted, thus preserving the land, while at the same time allowing the owners of restricted land to realize the economic value of land development (Stinson 1996). TDRs help concentrate growth in places where such growth is appropriate. They correct market inefficiencies by rectifying market failures associated with social versus private benefits and costs. TDRs serve to improve the efficiency of externalities produced. Because of this TDRs are commonly used to conserve land.

TDRs provide a way for people who own valuable environmental land to capitalize on the value of that land without losing the land to development. In some cases, like agricultural land, the landowner can continue to make income from the land, even after the development rights have been sold to the receiving area (Pruetz 2003).

While TDRs are a very useful land conservation tool, there are some drawbacks. First of all, the concept of TDRs is unfamiliar to many people, and the implementation of a TDR program requires lengthy and often expensive public education campaign. Even after an extensive public education program, TDRs may not be viewed by all of the parties involved as entirely beneficial to them. This is particularly true of land owners in areas identified to become sending sites. Those owners have often been counting on selling their land to a developer, and the downzoning associated with the TDR program might either prevent this sale from occurring or greatly limit the profit that might be realized by the sale. For example, prior to a TDR program, land may be zoned at one unit per acre. With a TDR program, the land could be down zoned to 1 unit per 20 acres. Assuming the

TDR program would allow the owner of the restricted property to sell one development right for every five acres, the land owner would recoup some of the value perceived as lost, but would likely yield less profit than the sale of the property to a developer under its former 1 unit per one acre zoning density.

Another drawback to TDRs is less evident on the surface. There ought to be a tangible community benefit from the TDR program. However, because development rights from the sending area come from private land and are given to private land, the overall community "benefit" is somewhat abstract to people not part of the transaction. Certainly all of the community benefits from the preservation of environmentally sensitive areas and historic sites, but from the perspective of some the real result of a TDR program may be simply an increase in density, which some may view as negative, without the ability to utilize the positive aspects of the deal, *i.e.*, without being able to physically enjoy the conserved land still under private ownership. Granted, the increase in density should also provide walkable communities and better opportunities for viable transit centers, but some people simply may not like the tradeoff.

1.2 Why Does Atlanta need a regional TDR program?

1.2.1 Population Growth Control

According to the U.S Census Bureau, the Atlanta metro area had the largest numerical gain in population out of the nation's 361 metro areas. Specifically, the Atlanta area gained more than 890,000 residents between April 1, 2000 and July 1, 2006 (Census 2007). The Atlanta area is the ninth largest metro area in the country, and it is projected to continue growing at a similar rate. This explosive growth is accompanied by an

increased demand for resources like water, transportation, sewer, and electricity. Table 1, illustrated below, shows decennial population changes for the 28-county metropolitan statistical area, with population projections.

Table 1: Population Changes and Projections

	Greater Atlanta Area (number of counties = 28)						
	1960	1970	1980	1990	2000	2010	2015
Population / Projection	1,447,124	1,901,260	2,326,639	3,069,425	4,247,981	5,463,178	6,148,100
10-year change (count)	-	454,136	425,379	742,786	1,178,556	1,215,197	684,922
10-year change (percent)	-	31.40%	22.40%	31.90%	38.40%	28.60%	12.50%

Source: Population figures, U.S. Census Bureau. Population projections, Georgia Office of Planning and Budget, 2005.

This information can be better visualized spatially. Figure 1, below, shows the population change for each county in the MSA between 1960 and 2015 [projected]. In 1960, only one county had a population over 400,000 (Fulton with 556,326 residents). By 2015, four counties are expected to have such massive populations: DeKalb (726,058), Cobb (811,129), Fulton, (832,751) and Gwinnett (1,030,700). These projections are conservative, as the U.S. Census Bureau estimates Fulton County's population already exceeding these numbers. An additional eight counties are expected to have populations greater than 100,000, and four additional counties will have between 100,000 and 400,000 residents. Finally, no county in this region has lost or is expected to lose population.

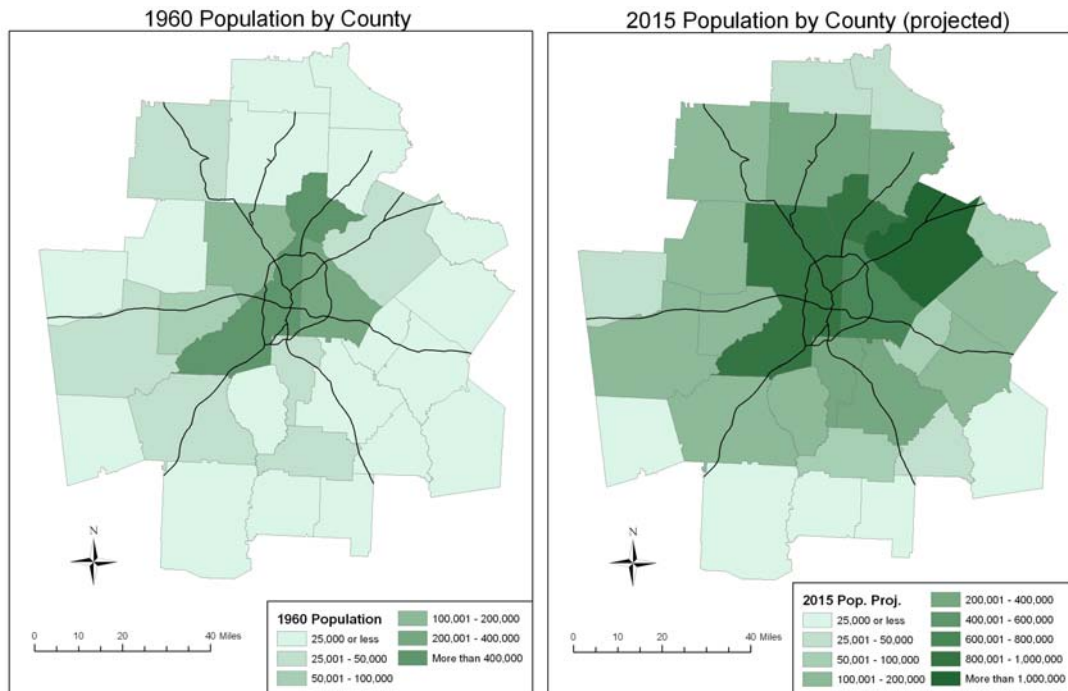


Figure 1: Population by County

With these growth rates, the Atlanta area will sprawl into large areas of sensitive land in a continuous fit of consumptive development unless real action is taken to preserve undeveloped land. A TDR program, coupled with principles like Smart Growth and infill development, will help reduce sprawl and also provide a way for Atlantans to become stewards of the land that they have at their disposal.

1.2.2 Land Cover Change Consequences

All of Atlanta's burgeoning population must live and work someplace. Because this growth was not necessarily planned in an orderly fashion, much of this can easily be called 'sprawl'. Sprawl and the suburbanization of land lead to numerous problems. First, transportation issues and the length of time the average person must spend commuting to work increases. This, in turn, causes environmental problems because of increased pollutants from automobiles. It can also exacerbate social problems because

people have less time to spend with their families (which is a contributing factor to divorce) and on leisure activities (which are necessary for good mental health). Perhaps the most important problem is the change in land cover, as we lose valuable forest, agriculture, and environmental land to urbanization.

The effects of urbanization, in addition to the traffic congestion and pollutants discussed above, include the loss of pervious land cover. The more urbanization in a region, the less land is available for absorbing rain and the greater amount of impervious surface in the area. Impervious and other man-made surfaces absorb more radiation, and their heat reflectance can lead to a heat island effect. This can exacerbate smog, which in turn can increase the risk of breathing problems among the very young, the elderly, and people with breathing problems like asthmatics. The increase in impervious surface means that fewer trees are able to receive adequate water for their root systems (which span underground the approximate diameter of their above-ground leaf canopy). Trees are vital to our communities not only for their shade, the habitats they provide to birds and small animals, or the increased value they give to property, but also because of their ability to convert carbon dioxide to oxygen. Finally, an increase in impervious surface means that any rainfall received must be funneled into the community's sewers, adding further stress to Atlanta's aged and already overtaxed water infrastructure system.

The maps in Figure 2 below illustrate the change in land cover in Atlanta in just 30 years.

The green areas are forested land, and the red areas are urban land.

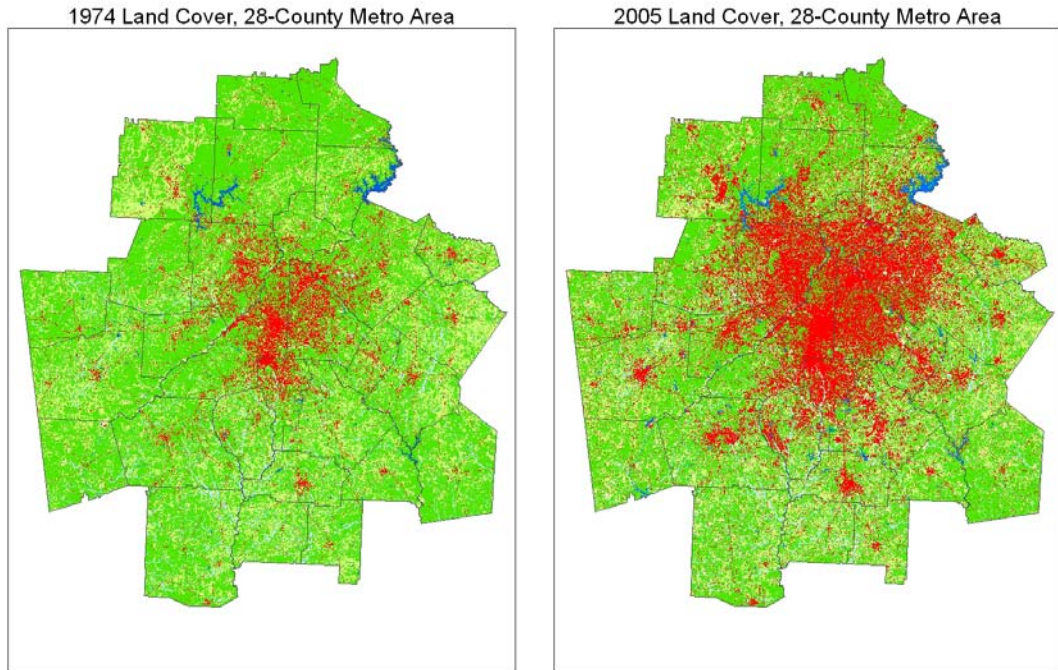


Figure 2: Land cover change, 1974 to 2005

These maps show exactly why we need a TDR program here. The dramatic change in the amount of urbanized land and these associated problems will only increase unless we deliberately set aside land to remain undeveloped.

2 Successful TDRs

Of the many successful TDR programs in the United States, none are more acclaimed than those in Montgomery County, Maryland, King County, Washington, and the New Jersey Pinelands. The TDR plan for the Atlanta region, proposed later in this paper, while fresh and innovative, also borrows tried and true elements from each of these highly successful programs.

2.1 Montgomery County, Maryland

Montgomery County is a suburban Maryland county on the northwest border of Washington, D.C., with approximately 930,000 people living in just over 500 square

miles. It is one of the most populous and wealthiest counties in the nation. Montgomery County has developed various plans over the years to counteract the continuous suburban sprawl that has resulted from its proximity to the capital.

2.1.1 Background

One of the first methods to control sprawl was labeled the “Wedges and Corridors” program. It aimed to focus future development along a spine of built-up area along the county's I-270 corridor and to limit development in agricultural areas elsewhere. This program was not especially successful, but it led the way to later attempts to halt sprawl . One of these later attempts was the rezoning of land in the northwest part of the county to 1 unit per 5 acres. This section of the county is the farthest from D.C., and suburban sprawl had not yet overtaken it and it still maintained much of its rural character. Because this also did little to slow certain types of growth, the county devised another strategy, and in 1980, Montgomery County Council announced a new master plan entitled: “Preservation of Agriculture and Rural Open Space” which divided much of the county into sending and receiving areas, beginning one of the nation’s flagship TDR programs (Pruetz 2003).

2.1.2 Sending Areas

The county designated a 92,000 square mile area within the county’s Agricultural Reserve Area as the “Rural Density Transfer Zone.” In the Rural Density Transfer Zone, land was downzoned to 1 unit per 25 acres: “The 25 acre minimum was based on an economic study showing that this was the minimum size for a farm in Montgomery County to function on a cash crop basis” (Pruetz 2003). This was implemented in

conjunction with a TDR program which allowed landowners to sell their development rights to developers and other private parties at their pre-downzoned densities. So, while a landowner who chose not to take advantage of the TDR program was allowed to build only one unit per 25 acres, a landowner who chose to participate in the TDR program would be able to sell 1 development right per every 5 acres. Further, TDRs could be bought and sold for speculative resale through private party transactions.

2.1.3 Receiving Areas

Receiving areas were designated throughout the county near or within existing built-up or developing areas. Developers would be allowed to use those rights to add extra density to developments in the receiving areas above and beyond the currently allowed density. Basically, a baseline density was established for developers proceeding without purchasing TDRs, but for developers that had acquired TDRs, and a higher density was permitted: “[T]he County wanted to ensure that the base limit was reasonable and that the bonus limit was high enough to justify the purchase of development rights but not so high that the additional development might overwhelm the infrastructure system” (Pruetz 2003). Under the program, and aside from using TDRs, the only way that a developer is able to build at higher densities than those allowed by the baseline density zoning is for the developer to construct “moderately priced dwelling units” (*i.e.*, affordable housing) (Pruetz 2003).

The Montgomery County, Maryland program has been highly successful and is often lauded, alongside King County’s program, as the most successful TDR program in the country. The program is not without its critics, however. Some say that “the sending area densities were established in a blanket fashion rather than in recognition of

differences in land value, thereby creating inequities in compensation” (Pruetz 2003).

Also, the county’s TDR program is somewhat limited in scope as TDRs cannot be used in incorporated cities within the county. (Pruetz 2003).

2.1.4 Acres Preserved

Despite the criticism, Montgomery County’s TDR program has proven itself to be quite useful in conserving rural and agricultural land. Since implementation of the program, over 40,000 acres have been preserved in Montgomery County from development and sprawl.

2.2 King County, Washington

2.2.1 Background

Seattle is located in King County, Washington. Like Montgomery County, King County’s rural areas face pressure from ever-expanding suburbs. In the 1990s, King County implemented a TDR program. It has been called one of the most successful in the nation and it is modeled on programs in the Pinelands, New Jersey, and Montgomery County.

2.2.2 Sending and Receiving Areas

Sending areas designated by the County include agricultural areas, wildlife preserve areas, forests and any other area deemed worthy of preservation for the benefit of the public. Receiving areas include unincorporated urban areas within King County, incorporated cities and even some rural areas. Cities have the choice of choosing where they would like to receive their TDRs from, in order to specifically preserve land in certain areas. “Interlocal agreements,” agreements between incorporated cities and King

County, are drawn up to facilitate TDR transfers to municipalities. Interlocal agreements detail the conversion ratio which equates TDRs to a certain density bonus in a receiving area in an incorporated city (Pruetz 2003).

TDRs in King County can be bought by developers from private landowners or they can be purchased through King County's TDR Bank. The TDR Bank was established with \$1.5 million in seed money from the County. This money was largely used to buy up the development rights of 250 acres of land on Sugarloaf Mountain. Sugarloaf Mountain was determined by the TDR Bank to be of public benefit to the County. The TDR Bank, can choose which developers to sell to, and aim to sell to those that have projects in keeping with the program's vision (Pruetz 2003).

The TDR Bank "must buy and sell [TDRs] at fair market value" (Pruetz 2003). The bank "can also facilitate transfers by maintaining web sites [and] marketing [TDR] receiving sites" (Pruetz 2003).

2.2.3 Amenity Funds

The County also gave \$500,000 to the TDR Bank to be put aside for amenity funds. Amenity funds help mitigate the effects of added density and they are a method for attracting an incorporated city to take part in the TDR program (Pruetz 2003). Amenity funds are most often used for additional transit facilities, parks, roadway and sidewalk improvements, public art installations and the construction of community facilities. Sometimes these types of funds come directly from the County, as in the case of the \$500,000 allocated to the King County TDR Bank. However, the burden of amenity funds also sometimes falls on the developer.

2.2.4 Acres Preserved

The King County TDR program has proven effective for the Seattle metropolitan area. To date, over 90,000 acres have been preserved through the TDR program.

2.3 The Pinelands, New Jersey

2.3.1 Background

The Pinelands is an environmentally sensitive area in southeast New Jersey covering over 1 million acres. The Pinelands consist of wetlands and agricultural lands that the State of New Jersey seeks to protect. In the 1970s, the Pinelands experienced increased development pressure, as New Jersey's rising suburbanization pushed toward its boundaries, spurred on by a trend toward vacation homes in the area and development near Atlantic City. To protect this ecologically diverse area from destruction by development, the U.S. Congress designated the Pinelands as the country's first National Reserve in 1978. As a part of the greater conservation plan, a TDR program for the region was put in place in the early 1980s.

2.3.2 Sending and Receiving Areas

The program, covering the whole of the Pinelands, spans 7 counties and includes unincorporated county land and dozens of municipalities. Sending sites include forests, lowlands and wetlands. Receiving sites, designated "Regional Growth Areas" exist in 23 municipalities. Each municipality can decide its own density bonus level. Under the Pinelands' plan, TDRs are called Pinelands Development Credits (PDC), and measures have been put into place to ensure that PDCs remain viable: "the Pinelands Commission

has prevented local governments from increasing density, through rezoning or planned unit developments, unless PDCs are used” (Pruetz 2003).

The sale of PDCs in the Pinelands is typically between private parties. Sellers can actively seek out buyers for their PCDs, and often employ real estate agents for this purpose. The exchange ratio is 4 to 1 for PDCs in the Pinelands, and most of the credits were bought and sold for about \$10,000 in the 1980s.

The Pinelands, similar to King County, employs TDR Banks in its program. Established in Burlington County and initially funded by a \$1.5 million county bond, the Burlington County Conservation Easement and Pinelands Development Credit Exchange functions as a buyer of last resort. Also the TDR Bank “can [only] sell the PDCs that it owns...if there is sufficient demand for PDCs to warrant a sale and only if the sale would not substantially impair the private sale of PDCs” (Pruetz 2003). The Bank can bestow credits for free; however, the bank can "convey PDCs at no cost to projects which serve a compelling public purpose” (Pruetz 2003).

2.3.3 Acres Preserved

Since the Pinelands program’s inception, over 31,000 acres have been preserved.

3 The Metropolitan Atlanta Regional TDR Program

3.1 Introduction

The fair and logical implementation of a TDR program was the primary concern in developing a system for the Atlanta region. The plan takes into consideration many legal and social issues. Broad, state-level issues as well as those at the county and community

level were considered in order to implement a strategy for regional growth management in Atlanta, its suburbs and the outer predominately rural areas.

The primary goal of the Metropolitan Atlanta Regional TDR Program (MARTP) is the development of smart growth policies and practices that will help the region develop sustainably into the future without compromising the ability of individual counties and municipalities to continue to grow and expand their economies. More thoroughly integrating the need for the preservation of greenspace and focusing development in specific transit oriented regions is the primary tool of smart growth encouraged by the TDR program.

3.2 Division of the TDR Participation Districts

Figure 3, below, illustrates the geographic extent of MARTP. In order to achieve the maximum possible equity between the diverse and expansive TDR program area, the 28 county Metropolitan Statistical Area (MSA) will be split into 5 sub-regional districts. These districts will work independently in enacting the TDR Program, but will be linked in key areas discussed later in this paper.

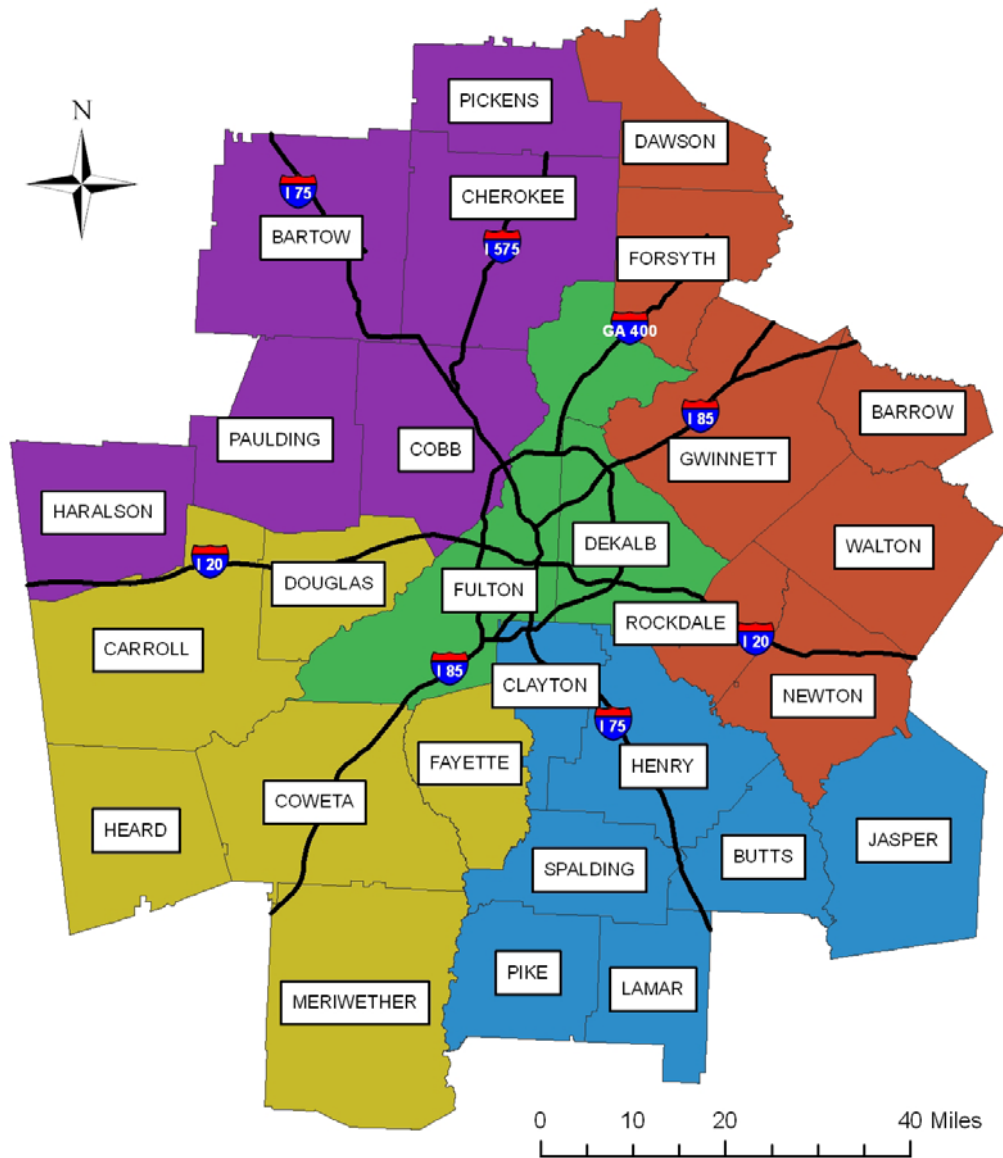


Figure 3: 28-County Metropolitan Area Participating in the TDR Program

The MSA is divided into five districts for several key reasons:

- Equity concerns
- Maintenance of home rule
- Removal of Atlanta mandates
- Encouragement of ingenuity and creativity

3.2.1 Equity Concerns

The value of land from one county to another can vary drastically in the Atlanta MSA. By dividing the MSA into distinct geographic districts, the grouped counties maintain a higher degree of homogeneity among land values.

3.2.2 Maintenance of Home Rule

Dividing the MSA into districts keeps a higher degree of home rule in place. Instead of having a program enacted across all 28 counties, this method allows for easier communication within any one region and makes it easier for each one to work together towards a common goal because fewer municipalities are involved. When each district achieves its goal, the region as a whole is able to achieve the collective vision.

3.2.3 Removal of Atlanta Mandates

While the importance of Atlanta as the central hub of the region can not be overlooked, the emphasis of the Regional TDR Program is to encourage smart growth across the entire region, not just in the city proper. The enhancement of regional planning and the preservation of greenspace and farmland help to improve the quality of life of everyone in the region, not just the residents of Atlanta proper. By breaking the program into districts, we allow individual counties and municipalities outside Atlanta to devise their own strategies and act independently amongst other areas in similar situations and with comparable populations and development patterns.

3.2.4 Encouragement of Ingenuity and Creativity

By breaking the MSA up into regions we are essentially allowing five unique, distinct-clusters of governments to experiment within a flexible framework to implement the

TDR Program. This allows the districts flexibility in both implementation and program design. Ideas can then spread across the districts and improved efficiency and standards can be extracted as a result.

Figure 4 shows the proposed districts of MARTP. Table 2 provides a list of the counties in each region.

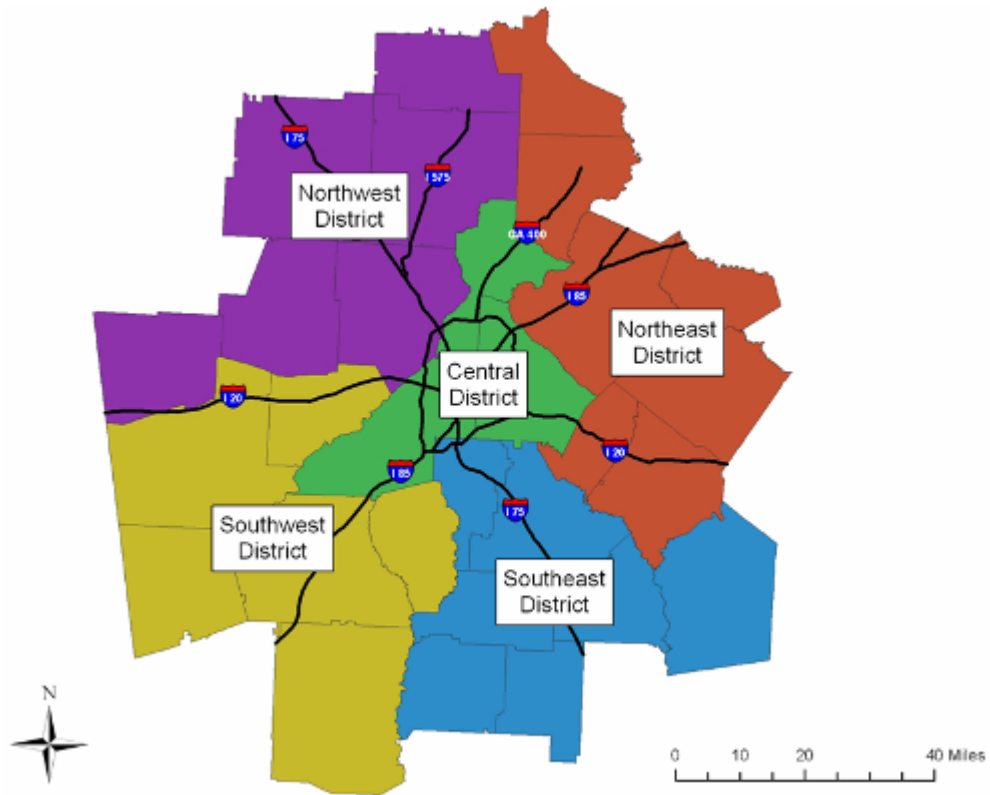


Figure 4: TDR Districts

Table 2: TDR Districts and Counties Contained Therein

Central	Northeast	Northwest	Southeast	Southwest
DeKalb	Barrow	Bartow	Butts	Carroll
Fulton	Dawson	Cherokee	Clayton	Coweta
	Forsyth	Cobb	Henry	Douglas
	Gwinnett	Haralson	Jasper	Fayette
	Newton	Paulding	Lamar	Heard
	Rockdale	Pickens	Pike	Meriwether
	Walton		Spalding	

The Central District is comprised of only two counties, Fulton and DeKalb, while the rest of the districts have six or seven counties each. This measure reflects the difference in current development patterns already existing in the Central District compared to the others. Moreover, the existence of the Chattahoochee Hill Country in Fulton County as a primary sending area separates this region from the others because land has already been set aside for this function by local decision-making in the past.

3.3 TDR Implementation Strategy

The plan for MARTP envisions the passage of a state law mandating that each county and municipality in the MSA participate in this TDR program. Such a top-down mandate could be legally possible under the right circumstances. This topic is discussed below in Section 4 of this paper.

Within each district, each county will be required to set aside a certain percentage of its land as sending areas for TDRs. This percentage will be set between five and ten percent of the total land or wetland surface area of the county. An equal quantity of land will

then be designated as receiving areas by the county. In the event that applied density bonuses do not transfer one-to-one from rural to urban locations, a scale factor should be applied and the amount of receiving land reduced by that proportion. For example, 4 acres worth of sending rights may be applied to increase density by an equal amount on one acre of urban property. In this situation, the scale factor from sending to receiving would be equal to four, and the amount of receiving land in such a county should be four times less than sending land. Each county can establish parameters based on their desired density increases in receiving areas. These sending/receiving values will then need to be approved by the regional TDR bank, outlined in Section 3.4 of this document. Sending and receiving area percentages should be equal, with scale factors on receiving zones when applicable. Counties that offer more land for sending can also designate more receiving zones, and the potential benefits of tax revenue from increased density in logical locations.

The method by which each individual county acquires sending land is up to their municipality and county governments. Possible strategies could include down zoning sending and up zoning receiving regions to make them compatible for preservation or development, respectively. This strategy runs into equity and fairness issues with down zoning, and some counties may wish to just flat out purchase tracks of land to meet appropriate sending capacity from land owners, and oversee the TDR program directly, as opposed to leaving the market and land owners to manage it.

The primary receiving areas will be within the more urban municipalities of the counties, while rural, undeveloped tracts should comprise most of the sending areas. This will require communication and compromise between county and municipality governments

within each county in each district. Receiving areas can be amended over time as new transportation corridors and development patterns within a county shift. However, areas designated as sending zones will not be allowed to change, as protective covenants are placed on them when their rights are transferred. If a county develops all land set aside as receiving and wishes to designate more regions as receiving, they must then designate equal amounts of land as sending zones to maintain a balance.

3.4 TDR Bank

Each district will operate its own TDR Bank. These banks will be granted an initial, and continuing, amount of money from the state to purchase development rights from sending zones within their district. The purpose of this bank is to purchase and hold the credits from sold sending zones until they are bought by developers in receiving areas. Credits are freely passed and can be applied anywhere within a district. Prices for credits will be set at fair market rate for development in the district.

If down zoning is used by a county to establish sending areas, the individual land owners reserve the privilege to sell the development rights of their land, or to hold on to them indefinitely. If sending areas are purchased directly by a county, a plan to sell the credits over time should be enacted to avoid supply and demand issues with a potential flood of credits to a bank.

In the event that development rights are not purchased within a region in a timely manner, then after five years they can be offered to other districts that have more demand based on a lottery. These credits will be purchased at the going fair market rate of the district receiving them. Surplus funds will be kept within the sending TDR Bank and can

be used for the purchase of more development rights, or the development of amenities within the receiving zones within the district. As discussed in Section 2.2.3, amenities are improvements designed to mitigate the potential negative side effects of increased density in a region. These benefits can include, but are not limited to streetscape improvements, parks, transportation improvements, landscaping, etc.

4 Georgia Specific Legal Problems

Based on the Georgia Constitution of 1983, the power to zone is completely optional and at the discretion of the governing authority of each county and each municipality: “*The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning.*”² This so called Home Rule allows zoning and planning decisions to be made at the local level, but the Georgia Constitution reserves the right for the General Assembly to establish procedural laws for uniform application of the zoning power: “*This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power.*”³ As a result, the state has adopted the Zoning Procedures Law, which local governments are required to follow.⁴ However, since zoning is discretionary, over one-third of the counties in Georgia do not have any zoning regulations at all.

The Home Rule nature of the grant of power, coupled with the complete absence of zoning in a third of the state present sizeable obstacle to establishing any statewide or regional land use controls in Georgia, including a regional TDR program. Based on the language of the 1983 Constitution, most believe that top down mandates with respect to

² See Ga. Const. of 1983, Art. 9, § 2, ¶ 4.

³ See *id.*

⁴ See O.C.G.A. Title 36, Chapter 66

planning and zoning can only be procedural laws, so the generally accepted belief is that the General Assembly could not compel participation of individual local governments in regional land use planning unless it could find a way to arrange it on a procedural basis.

However, an overlooked section of the Constitution allows the General Assembly to pass legislation to protect certain sensitive regions of the state:

[T]he General Assembly shall have the power to provide by law for: . . .

Restrictions upon land use in order to protect and preserve the natural resources, environment, and vital areas of this state.⁵

This so called Vital Areas Protection Clause gives the legislature the power to impose restrictions on local governments with regards to sensitive environmental areas, as well as any areas it deems “vital.” If it chose to do so, the General Assembly could possibly characterize the Atlanta MSA as a vital area and pass legislation to protect it through the implementation of a regional TDR program such as MARTP proposed above. This makes sense, especially in light of the loss of certain rural and agricultural areas that are increasingly engulfed by Atlanta's sprawl. While this may seem to fly in the face of Home Rule, at least one prominent law professor seems to think that the Constitution allows this interpretation to pass muster.

Nowhere in the constitution is there a prohibition of the state's power to enact general land use laws. Similarly, the court, in modern cases, has not articulated any public policy arguments to support such a conclusion. Therefore, the perception that the state is powerless to act to regulate land use in Georgia lacks adequate support⁶

⁵ See Ga. Const. of 1983, Art. 3, § 6, ¶ 2(a)(1)

⁶ See James Bross, “Smart Growth in Georgia: Micro-Smart And Macro-Stupid,” 35 Wake Forest L. Rev.609.

In fact, there has already been a statute passed under the Vital Areas Protection Clause which gives the State the ability to oversee local land use control. The Metropolitan River Protection Act was passed in 1973 to protect the water quality of Georgia's streams and rivers. The legislative purpose was:

to provide a method whereby political subdivisions in certain metropolitan areas can utilize the police power of the state, in accordance with a comprehensive plan, to protect consistently the water quality of any major stream, the public water supplies of such political subdivision and of the area, recreational values of the major stream, and private property rights of landowners; to prevent activities which contribute to floods and flood damage; to control erosion, siltation, and intensity of development; to provide for the location and design of land uses in such a way as to minimize the adverse impact of development on the major stream and flood plains; and to provide for comprehensive planning for the stream corridor in such areas.⁷

This top down mandate requires local governments to adhere to the land use management provisions under the act with respect to stream and river protection. If a local government fails to adhere to the provisions, the statute authorizes state enforcement to step in and uphold them.⁸

This statute has already survived judicial scrutiny by way of two constitutional attacks on the program. In *Pope v. City of Atlanta*, a landowner who wished to construct a tennis court was issued a stop work order because she was in violation of the River Act, due to the impervious structure of the court being partially within the flood plain and within 150 feet of the river. The landowner sought a declaratory judgment that the River Act was unconstitutional. The Georgia Supreme Court balanced the state's interest in preventing flooding, halting land erosion, and protecting the water supply against the landowner's interest in constructing her tennis court, and found the state's interest weighed heavier in

⁷ See O.C.G.A. § 12-5-442

⁸ See Ga. Code Ann. § 12-5-440 (1998)

the balance. The Court upheld the constitutionality of the act, finding that the state had engaged in valid land use regulation and had not appropriated the landowner's land for public use without compensation.⁹

Likewise, in *Threatt v. Fulton County*, the Georgia Supreme Court found the Metropolitan River Act valid against a slew of state and federal constitutional challenges. Threatt and other neighbors challenged the condemnation of sewer across tracts of land adjoining the Chattahoochee River. The actions were consolidated and during the proceedings, the condemnees asserted the Metropolitan River Protection Act was without constitutional authority as well as a de facto taking without just compensation. Once again the court upheld the validity of the statute including its constitutional foundation.¹⁰

New Jersey has adopted similar legislation that protects environmentally sensitive areas by using a top down mandate in a Home Rule state. That program, however, utilizes TDRs to protect the 1,000,000 acres of pine-oak forest known as the Pinelands [see Section 2.3]. The 7 counties and 52 municipalities in the Pinelands area are required by law to modify their master plans and zoning ordinances to comply with the Pinelands Plan.¹¹ If they fail to do so, the Pinelands Commission may assume responsibility for a community's entire land use decisions. The Commission also has the authority to review all of the development approvals that individual communities grant.¹² The program was

⁹ See *Pope v. City of Atlanta*, 242 Ga. 331

¹⁰ See 266 Ga. 466

¹¹ See N.J. Pinelands Protection Act, N.J. STAT. ANN. § 13:18A-12 (West Supp. 1988); N.J. ADMIN. CODE §§ 7:50-3:30 to 3.45 (1988) (certification of municipal plans); N.J. ADMIN. CODE §§ 7.50-3.11 to 3.20 (1988) (certification of county plans)

¹² See N.J. STAT. ANN. 13:18A-12(c)

built utilizing both state and federal enabling statutes,¹³ and has survived a number of legal attacks.¹⁴

This framework has been successful in forcing participation in a multi-jurisdiction TDR program in New Jersey. A similar system in Georgia could be authorized under the Vital Areas Protection Clause in the Georgia Constitution without the use of a constitutional amendment to change the present Home Rule nature of the zoning power.

The main problems with such a plan would be getting such a law drafted and passed in the General Assembly, as well as the costs of protracted litigation to defend against the legal attacks that predictably would ensue. The judiciary may well reject the argument that a top down mandate for a regional TDR program is constitutionally authorized by the Vital Areas Protection Clause, no matter how enthusiastic the legislature or proponents of the program may be.

5 Metropolitan Atlanta Regional TDR Program: Vulnerable As Applied?

Assuming that a program as revolutionary as the plan outlined in this paper could pass the Georgia General Assembly, be put into action, and survive facial challenges, the program would most likely still face constitutional challenges as applied to individual

¹³ See 16 U.S.C. § 471i (1982); N.J. Pinelands Protection Act, N.J. STAT. ANN. §§ 13:18A-1 to -49 (West Supp. 1988).

¹⁴ See *Hovsons, Inc. v. Secretary of Interior*, 519 F. Supp. 434 (D.N.J. 1981), aff'd, 711 F.2d 1208 (3d

Cir. 1983) (Pinelands TDR violates neither takings clause nor National Environmental Policy Act's environmental impact statement requirement; *Matlack v. Burlington County Bd. of Chosen Freeholders*, 191 N.J. Super. 236, 466 A.2d 83 (Law Div. 1982), (upholding Burlington County's PDC exchange program); Cf. *Centex Homes v. East Windsor*, 101 N.J. 209, 501 A.2d 893 (1985) (mem.) (dismissing as moot an unpublished appellate division decision holding that municipality outside of Pinelands lacked implicit authority to implement TDR program under New Jersey Municipal Land Use Law, N.J. STAT. ANN. §§ 44:55D-1 to -112 (West Supp. 1988)).

land owners. These challenges would differ in nature depending on whether the challenging landowners hold property in the sending or receiving areas.

5.1 Takings Analysis: Sending Site Challenges

The primary vehicle for sending site owners to challenge the MARTP would be a takings claim. The Fifth Amendment to the United States Constitution guarantees that private property may not be taken for public use without just compensation.¹⁵ The Amendment was intended originally only to protect private property from actual physical appropriation by government,¹⁶ and that protection was balanced by the government's authority under the police power, to regulate for the health, safety, morals and general welfare of the public.¹⁷ However, over the years the modern interpretation of Fifth Amendment protections for property rights has expanded to include the idea that a regulation that "goes too far" will be considered an unconstitutional taking as applied to the landowner when that regulation substantially denies all economically beneficial use to the owner of the restricted property.¹⁸

The idea behind this extension of Fifth Amendment protection is to prevent government from surreptitiously avoiding payment of just compensation to owners and in effect take property through burdensome regulation. That is, interpreting the Fifth Amendment in this way is meant to protect property owners from being subject to the use of eminent domain characterized as some other legitimate use of the police power, and it is this aspect of the amendment that is particularly applicable to TDR programs. Land owners

¹⁵ U.S. Const., Amendment V.

¹⁶ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158

¹⁷ *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926).

¹⁸ *Mahon*, 260 U.S. 393, and [Lucas v. South Carolina Coastal Council](#), 505 U.S. 1003, 1017, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

in sending areas often seek to challenge TDR programs by making the argument that the restrictive zoning associated with the TDR program constitutes an unconstitutional use of police power meant to effectively take property for a public purpose, most often conservation, without compensating the property owners properly.¹⁹ It is an argument that has met with varying success.²⁰

5.2 TDRs in Relation to Takings: Residual Value or Post-taking Just Compensation?

Part of the reason for the variable success of such arguments in TDR takings cases is the question of where exactly TDRs fall within the takings calculation. The United States Supreme Court, although confronted with the issue on at least two occasions, first in deciding *Penn Central Transportation v. New York City*, 438 U.S. 104 (1978) and most recently in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), has not decided the issue.²¹ Instead both cases seem to indicate a different approach. The debated question is on which side of the taking calculation should TDRs be counted. Are they a part of the property's value or post-taking compensation?

In *Penn Central* Justice Brennan wrote of the TDRs offered in that case that “while these rights may well not have constituted ‘just compensation’ if a ‘taking’ had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed

¹⁹ See e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S.Ct. 1659, U.S.Nev. (1997); *Glisson v. Alachua County*, 558 So.2d 1030; and *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 720 P.2d 513.

²⁰ See e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98S.Ct. 2646, 57 L.Ed.2d 631 (1978)(historical preservation preventing development of airspace over landmark did not constitute a taking); *Glisson v. Alachua County*, 558 So.2d 1030 (1990)(county land use regulation aimed at conservation not facially unconstitutional); and *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 720 P.2d 513 (1986)(ordinance restricting development in a conservation area constituted an unconstitutional taking as applied and transferable density credits could stand as just compensation under Arizona Constitution).

²¹ Julian C. Juergensmeyer, James C. Nicholas, Brian D. Leebrick, “Transferable Development Rights and Alternatives After Suitum,” 30 Urb. Law. 441(1998).

and...are to be taken into account in considering the impact of the regulation.”²² This language suggests that the value of a TDR is a residual value associated with the land, and therefore, should be considered when deciding whether a taking has occurred due the land use restriction. This conceptualization of TDR is helpful for TDR program success. As discussed above, a taking can be found when a land use restriction denies the owner of all beneficial use of property. However, if the owner retains recognizable economic value in the form of transferable development rights, it becomes much more difficult to satisfy the destruction of all beneficial use standard associated with takings claims. As a result, TDR programs and the restrictive zoning necessary in sending sites to make them viable, are be more easily defended from takings claims under Justice Brennan's interpretation of TDRs in the takings calculus.

On the other hand, in *Suitum*, Justice Scalia’s concurring opinion suggested the opposite approach to understanding TDRs in the takings analysis. Scalia pointed out that

Putting TDRs on the taking...side of the equation...is a clever...device that seeks to take advantage of a peculiarity of our taking clause jurisprudence: Whereas once there is a taking, the Constitution requires just (i.e., full) compensation...a regulatory taking does not occur so long as the land retains substantial (albeit not its full) value.²³

The opinion indicates that TDRs should not be considered in the analysis of whether a compensable taking has occurred, but rather if a taking is found to have occurred, any TDRs associated with the taken property can possibly be counted toward achieving just compensation.²⁴ This approach is obviously less favorable to the success of conservation programs which use TDRs as a tool. Under Scalia’s *Suitum* understanding of TDRs, it

²² *Penn Central N. 5 supra*, at 137, quoted in Juergensmeyer, N. 7, *supra*.

²³ *Suitum N. 5, supra*, at 117 S.Ct. 1659, 1671, quoted in Juergensmeyer, N. 7, *supra*.

²⁴ Nicholas, James C., Julian C. Juergensmeyer, Brian D. Leebrick, “Transferable Development Rights and Alternatives After *Suitum*,”

would be much easier for as applied takings challenges to succeed with respect to TDR programs.

5.3 The Gulh Factors—Lower Hurdles for Challenging Zoning Restrictions as a Taking in Georgia

The basic issue in every takings case is the question of whether the land use restriction forming the subject of the litigation is a constitutional exercise of the police power.²⁵ At the heart of deciding this question under Georgia law is *Guhl v. Holcomb Bridge Corp.*, 238 Ga. 322, 232 S.E.2d 830 (1977). In that case, the owners of an 85-acre tract of undeveloped land sought rezoning of the property from single family residential to office-institutional challenging the single family residential classification as arbitrary, unreasonable and without relationship to the public, health, safety, morals or general welfare.²⁶ Although the case was not a takings case, the court in deciding *Guhl* set out the guidelines under which the constitutionality of zoning ordinances will be evaluated in Georgia.

Since sending site challenges to the TDR program will most like take the form of as applied challenges to the restrictive zoning associated with the TDR program, it is paramount to understand the standards set by *Guhl* if we are to understand how a challenge to MARTP may play out in the Georgia Court system. Guhl Factors used in evaluating the constitutionality of zoning are:

- Existing uses and zoning of nearby property
- The suitability of the subject property for the zoned purpose

²⁵ David C. Kirk, “Legal Foundations of Planning and Zoning in Georgia,” presentation at Georgia State University College of Law, November 13, 2007.

²⁶ *Guhl v. Holcomb Bridge Corp.*, 238 Ga. 322, 323, 232 S.E.2d 830, 831 (1977).

- The length of time the property has been vacant as zoned, considered in the context of land development in the vicinity of the property
- Extent to which the destruction of property values of the challenger promotes the health, safety morals and general welfare of the public
- Extent to which property values are diminished by the particular zoning restrictions
- Relative gain to the public as compared to the hardship imposed upon the individual property owner.²⁷

As MARTP is envisioned, the local governments in the program will identify rural, agricultural, or other undeveloped land and use more restrictive zoning and TDRs to bring a halt to the Atlanta region's explosive sprawl by ensuring these lands remain relatively undeveloped while channeling more dense development into areas where it already exists. Because most of the land constituting the sending areas will probably already be zoned for agricultural or other low density zoning uses before implementation of MARTP, the first three factors listed above, should play little part in deciding takings challenges in sending areas.

The last three factors listed will bear much more on the issue of whether zoning in the sending area, as applied to a challenging sending site owner, is constitutional. If the statute creating the program is carefully written to express a clear, legitimate public purpose connected to protecting the public health and general welfare through land conservation, the first of these last three, promotion of health, safety and general welfare, could be easily found by a court. It is the final two factors which provide the most likely grounds for a successful land owner challenge.

²⁷ David C. Kirk, "Legal Foundations of Planning and Zoning in Georgia," presentation at Georgia State University College of Law, November 13, 2007 (paraphrasing *Guhl*).

In *Guhl*, the Georgia Supreme Court emphasized that for a taking to occur it would “not be necessary that the property be totally useless for the purpose classified...it suffices to void [the zoning regulation] that the damage to the owner is significant and is not justified by the benefit to the public.”²⁸ This is a somewhat lighter standard than the Federal standard.²⁹ Under the *Guhl* standard it is not necessary that the plaintiff demonstrate a complete destruction of economically viable uses, only that the destruction of the plaintiff’s property value is disproportionate to the gain the public receives from the zoning restriction.

5.4 Protection from Takings Claims

MARTP should do everything possible to ensure a high value for TDRs. This will not only help to prevent legal challenges, but help ensure the success of the program even if attacked. If TDR values are high, then it is more probable that most sending site owners will be satisfied with the value available to them through MARTP, and will have less incentive to spend their money on a lawsuit challenging the program. Second, TDRs that have a high economic value can help defend against takings challenges under Georgia law. High values associated with TDRs could lessen the burden put on the land owner due to the restrictive zoning which would benefit the program when the Court weighs the hardship to the property owner vs. the benefit to the community.

²⁸ *Guhl.*, 238 Ga. 322, 323.

²⁹ *Lucas*, N. 4, *supra*, at 505 U.S. 1003 (plaintiff must demonstrate a deprivation of all economically viable uses); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), cited in Julian Conrad Juergensmeyer and Thomas E. Roberts, *Land Use Planning and Development Regulation Law*, §10.6, 412. (2003) (a 93.7% diminution in value not sufficient decrease in value to assert a *Lucas* style categorical taking).

5.5 Receiving Area Challenges

Although, takings challenges will not ordinarily arise in the receiving area of a TDR program, the receiving areas are vulnerable to other legal challenges.³⁰ These challenges will primarily be due process claims. Under MARTP, cities and counties will identify areas toward which the development, not allowed in the sending areas, can be directed. These receiving areas will be zoned to allow higher density development if developers choose to purchase TDRs from the sending area. This is attractive to developers since higher density development projects are generally more profitable than lower density projects. Thus, if the zoning regulations are carefully constructed there will be a demand in receiving areas for TDRs. Creating demand for TDRs can be tricky to accomplish without exposing the program to legal challenges because the power to zone, as a portion of the police power, must be exercised according to a reasonableness standard.³¹

5.6 Due Process Concerns—Spot Zoning and Overdensification

If the comprehensive plan of a community previously set out a density determined appropriate for development in the receiving area prior to the enactment of MARTP, challengers may assert that 1) allowing developers to buy the right to exceed that appropriate density will result in “overdensification,” or 2) zoning the receiving area to a density lower than that of the prior density is strategic “spot zoning” that is only aimed at increasing demand for the TDR market.³² At the heart of either challenge is an assertion

³⁰ Keith Aoki, Kim Briscoe, and Ben Hovland, “Trading Spaces: Measure 37, MacPherson v. Department of Administrative Services, and Transferable Development Rights as a Path out of Deadlock,” 20 J. Envtl. L. & Litig. 273 (2005).

³¹ Jennifer Frankel, Past, Present and Future Challenges to Transferable Development Rights, 74 Wash. L. Rev. 825, 842 (1999).

³² Aoki, N. 16, *supra*, at 308.

that the regulations impose restrictions without a legitimate zoning purpose, lack a rational basis and therefore violate the developers' due process rights.³³

When a city or county identifies an "island" of land for either more intense or less intense zoning compared to the surrounding properties, it can be considered illegal "spot zoning."³⁴ The courts test "whether the law is rationally related to a legitimate government interest" to decide challenges to spot zoning.³⁵ However, when a zoning action is challenged, it is presumed valid because zoning is considered a legislative act and courts are hesitant to violate the separation of powers by substituting their judgment for that of a legislative body.³⁶ In Georgia, the standard of proof required to overcome this presumption of validity is very high.³⁷

If this presumption can be overcome, as with the takings analysis, Georgia courts will apply *Guhl* to determine the constitutionality of zoning regulations challenged as improper spot zoning. Counties may not engage freely in spot zoning,³⁸ and all zoning regulations must "bear a substantial relation to the health, safety, morality or general welfare" or else run the risk of being "set aside as arbitrary or unreasonable."³⁹

5.7 Exactions: The Need for an Essential Nexus

A related challenge to zoning may arise out of a claim that requiring the purchase of TDRs in order to increase density in the receiving area amounts to an illegal exaction.

³³ Aoki, N. 16, *supra*, at 308.

³⁴ Juergensmeyer, *supra* N. 15, at §5.10, 174.

³⁵ Anthony R. Arcaro, "Avoiding Constitutional Challenges to Farmland Preservation Legislation," 24 *Gonz. L. Rev.* 475 (1998).

³⁶ *Gradous v. Board of Comm'rs of Richmond County*, 256 Ga. 469 (1986).

³⁷ *Gulh.*, 238 Ga. 322, 323 (stating that the presumption of validity may be overcome only by clear and convincing evidence).

³⁸ [*East Lands, Inc. v Floyd County*, 244 Ga 761, 262 SE2d 51 \(1979\).](#)

³⁹ *Gulh.*, 238 Ga. 322, 323.

Under the Development Impact Fee Act (“DIFA”), in Georgia an exaction is defined as “a requirement attached to a development approval or other municipal or county action approving or authorizing a particular development project, including but not limited to a rezoning, which requirement compels the payment, dedication, or contribution of goods, services, land, or money as a condition of approval...and “[d]evelopment exactions for anything other than project improvements cannot be collected by municipalities or counties except as development impact fees...”⁴⁰ Development impact fees are defined as payment of money imposed upon development as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve new growth and development.”⁴¹ Since a local government's ability to charge exactions is strictly limited by this statute and purchase price for TDRs is not part of the authorized collection of exactions, if a challenging developer could successfully argue that the purchase of TDRs is equivalent to an exaction, then the requirement that a developer purchase TDRs to increase density could be found illegal under DIFA.

6 Winning as Applied Challenges

The best defense to the challenges that may arise with respect to the zoning restrictions in both sending and receiving zone, is carefully constructing the program in advance of those claims such that significant economic value for TDRs is created and put in place by thoughtfully designed legislation grounded in constitutionally sound principles.

⁴⁰ Ga. Code Ann., § 36-71-3.

⁴¹ *Id.*

7 Conclusion

The regional program for TDRs imagined in this paper, MARTP would have to surmount some very real obstacles before becoming a reality. The argument has been made here that such a program could be possible under the current Georgia Constitution without further amendment. But it has also been pointed out that the kind of law necessary to put MARTP in place is not likely to be passed by the Georgia General Assembly any time soon. The representatives in the Assembly represent the notions of their constituents, and until the people of Georgia who make up that constituency can be brought to understand the value of conservation and the tools that accomplish conservation, such as TDRs, then it is doubtful that a plan as ambitious as MARTP could be inaugurated for Atlanta.

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