

***THE FEASIBILITY OF A
TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM
FOR
ATHENS-CLARKE COUNTY, GEORGIA***

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I. Executive Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

II. TDR Background and Basics¹

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

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

TDRs in Georgia

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

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

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

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

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

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

A. Basic Features of TDR Programs

The act of transferring development rights requires four elements:

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

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

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

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

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

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

B. TDR Banks

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

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

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

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

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

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

C. Public Involvement

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

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

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

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

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

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

1. SUCCESS STORIES

Chattahoochee Hill Country, Fulton County, Georgia

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

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

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

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

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

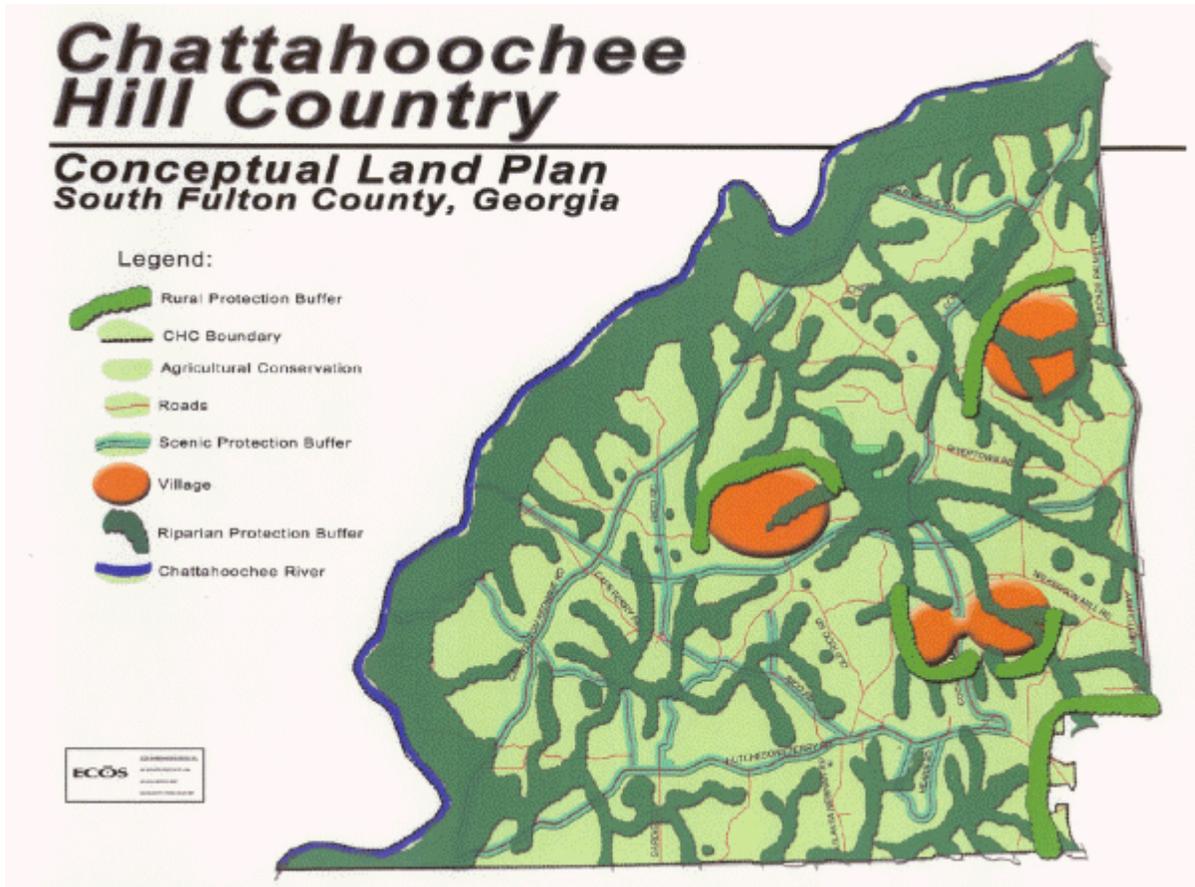


Figure 1. Envisioned distribution of development and preserved land under the TDR program.

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

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

Montgomery County, Maryland

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

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

Dade County, Florida

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

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

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

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

2. WARNINGS

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

Caroline County, Maryland

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

San Marcos, Texas

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

St. Mary's County, Maryland

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

3. LESSONS LEARNED

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

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

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

Possibilities for Inter-Governmental TDR Programs

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

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

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

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

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

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

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

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

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

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

Purpose and Intent

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

¹¹ See O.C.G.A. §§ 36-66A-1 and -2.

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

¹³ O.C.G.A. § 36-66A-1(1).

¹⁴ O.C.G.A. § 36-66A-1(7).

¹⁵ O.C.G.A. § 36-66A-2(c).

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

Applicability and Conflict

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

Definitions

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

Sending and Receiving Areas

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

Eligibility

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

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

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

Certification of TDRs/Application process

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

Calculation method for sending areas/Issuance of TDR certificates

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

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

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

Appeal of calculation

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

Drafters of the ordinance should also be mindful of the State of Georgia's Zoning Procedures Law (ZPL).¹⁶ This statute gives discretion to local governments to structure their appeals process for zoning decisions, and TDR ordinances and appeals thereunder are likely to be considered a zoning decision. Therefore, the ZPL and any local procedures established under the Law should be followed for any decision on TDRs.

Calculation method for receiving areas

This is the calculation method for determining the number of TDRs that developers in the receiving areas must purchase to achieve their desired density. For example, in the case of Fulton County, there is only one type of receiving zone, with two types of development, commercial and residential, so only two calculation methods are needed. For TDR programs transferring density into several types of receiving areas with varied types of development, more calculation methods will be needed.

Recording TDR Transactions

In order for TDR transactions to be effective legally, the documents related to the transfer must be properly recorded with the government department in charge of land records (usually the county clerk's office). Also, the ordinance should track the county requirements for recording documents in a property's chain of title. The clerk's office should be consulted when drafting these provisions.

Deed of Transfer

The Deed of Transfer is similar to the deed used in a fee simple transfer of property rights. The Deed of Transfer effectuates the conveyance of the TDRs from the landowner to the buyer, and is recorded in the chain of title for the sending property. This notifies the public, government departments and all potential purchasers of the sending land that the TDRs have been removed.

Conservation Easements

A conservation easement preserves the sending property in perpetuity. The conservation easement should prohibit any future development of the land, while maintaining the ability to use it for appropriate agriculture or other open space purposes. The ordinance should require that each easement meet the requirements of the Georgia Uniform Conservation Easement Act, and should require that prohibitions against development bind all current and future owners of sending area parcels. The county attorney's office might develop a model conservation easement and require it be used to fulfill the requirements of this section. However, this is a policy decision to be made in each community, and depends in part on the resources of the county attorney. Regardless, each landowner should be advised by the department administering the TDR program to obtain independent legal counsel for completion of the easement form and deed, and recording of these documents. The county attorney's job is to protect the interests of the county, and it would be a conflict of interest for him or her to advise individual landowners in these matters.

Sufficiency of Documents

Some ordinances require an attorney-opinion letter certifying the sufficiency of the TDR Deed and conservation easement. Having legally sufficient documents is essential to transferring the

¹⁶ O.C.G.A. § 36-66-1 *et seq.*

TDRs and permanently protecting the sending land. Having an attorney issue an opinion letter attesting that the documents have been properly executed and are sufficiently binding ensures those purposes are served. Similar letters are often required by lenders in real estate transactions and should be readily obtainable for a reasonable fee.

Recordation on Receiving Property

As discussed above, under state law there must be a procedure for “affixing” TDRs to a receiving property. This can be achieved by requiring a statement that TDRs have been transferred, and the serial numbers of the TDRs have been recorded on the receiving plat.

TDR Bank

As previously discussed, a TDR bank is usually a governmental or non-profit entity created to encourage the exchange of development rights by purchasing these rights from landowners and selling them to developers. The bank may also be given authority to preserve land by purchasing and holding TDRs for any length of time. The ordinance may contain specific criteria to guide the bank in making these purchase decisions.

The most common form of governance for a TDR bank is a bank board. If the TDR program is publicly run, the bank board may be appointed by the County Commission and be given the power to manage and operate the TDR bank. Members might include those experienced in banking or financial institutions, private landowners, representatives of conservation organizations, and representatives of the development industry. The bank board should be provided with professional staff support in order to achieve the bank’s purposes.

The bank board should be authorized by the ordinance to perform both specific and general acts related to running the bank. This section should grant powers to contract for services, receive funding, purchase, receive, sell, and hold TDRs, and to purchase property outright if necessary, and other acts both necessary and convenient to the operation of the bank.

Registry of TDRs

An important tool in a TDR market is a central clearinghouse with information about all available TDRs and previous TDR transactions. This allows landowners, developers, conservation organizations, and investors to quickly locate available TDRs, and also to obtain information about previous transfers for market comparison purposes. If a TDR bank is established, the bank is in an excellent position to act as this Registry. If not, the ordinance should direct the county to establish the clearinghouse. (Also, it is a good idea to request that local real estate professionals list available TDRs in their Multiple Listing Service, to facilitate exchanges.)

There are many potential provisions in a TDR ordinance, and careful thought must be given to each one. Consultation with knowledgeable attorneys, including the county attorney, in developing the ordinance is extremely helpful in ensuring all the legal requirements are met. The focus should be on creating the appropriate level of regulation to serve the community’s vision to protect land and its economic value.

III. Feasibility Study of A TDR Program for Athens-Clarke County

A. Legal Analysis

Federal and State Law

There is clear authority under US Constitutional law and Georgia law for local governments to create TDR ordinances. TDR programs were given federal approval by the United States Supreme Court in Penn Central Transportation Co. v. New York City¹⁷ In that case, involving New York City's Landscape Preservation Law, the plaintiffs argued that denial of permission to use the air rights over Grand Central Station to build an office tower was a taking of their private property under the Fifth Amendment of the US Constitution, despite the fact that they could transfer the air rights to nearby properties through a TDR program.¹⁸ The Court in this case did not find that TDRs are necessarily "just compensation" for a taking, if one occurs. However, it did find the ordinance constitutional, and that the TDRs mitigated the financial burden on the plaintiffs and must be considered when considering the impact of the regulation in determining whether a taking has occurred. (The takings issue is discussed further below.)

Also, as previously discussed, the Georgia legislature has clearly given authority to local governments to create TDR programs. Therefore, the Athens-Clarke County Commission has clear authority under federal and state law to pass a TDR ordinance.

Comprehensive Land Use Plan

The concept of TDRs is also mentioned in the Athens-Clarke County 1999 Comprehensive Plan. In Chapter Eight, "Guiding Principles, Objectives, Strategies, and Policies," one of the guiding land use principles is, "To enact land use policies that avoid urban sprawl," and an accompanying guiding strategy and policy is to, "Create incentives for agricultural areas on the periphery of the urban area to remain as productive agricultural lands by using techniques such as transfer of development rights, conservation easements, and open space subdivisions." It should be noted that if ACC decides to use TDRs to preserve natural, historic or other resources as well, the Comprehensive Plan should be amended to support those goals.

Zoning

Due to the intent of the 1999 Comprehensive Plan for ACC to adopt a TDR ordinance, the Zoning Code itself has a reserved section for TDRs. During the time that the Comprehensive Plan and the updated Zoning Code were being drafted, it was thought that some of the increased density allowed in the Zoning Code would be obtained through a TDR program. When that TDR program did not become a part of the Zoning Code, there was some fear that all the additional density developers might want had been "given away" and that there no longer remained sufficient demand to support a TDR program.

However, as the economic analysis section of this document shows, developers are still interested in density bonuses, and also in other rule relaxations that could be obtained through

¹⁷ 438 U.S. 104 (1978).

¹⁸ The Fifth Amendment requires, in part, that no "private property be taken for public use without just compensation."

TDR. Therefore, there may be enough density demand on top of what is allowed under existing zoning to support a TDR program.

To meet state and local procedural requirements under the Zoning Procedures Law,¹⁹ if a TDR program is passed, the Zoning Code should be amended to state the additional level of density that can be obtained through TDRs in each applicable zone. The same is true of any rule relaxations. Also, as previously mentioned, the TDR program would itself be a zoning decision, as defined in O.C.G.A. § 36-66-3(4), and so ZPL procedures should be followed in its passage as well. All of these changes could likely be included and passed in one legislative package.

From a practical perspective, and as discussed above, a key component of a successful TDR program is that TDRs are the only way to achieve increased density in the designated receiving zones. If county zoning bodies grant re-zonings or allow increases in density through other means, it will significantly diminish the motivation of developers to use the TDR program. This should be seriously considered when implementing TDRs.

Takings Issues

As discussed above, in the Penn Central case the US Supreme Court has upheld TDRs as a valid land use tool, and as potential mitigation for the economic detriment experienced by a property owner due to restrictions on the ability to develop his or her property.²⁰ Under Penn Central, the factors to be taken into consideration when determining whether a taking has occurred are the economic impact of the regulation on the landowner, particularly the degree to which the regulation interferes with distinct investment-backed expectations, and the extent to which the regulations clearly advance legitimate governmental interests.²¹ TDRs would be considered as the court weights the economic impacts.

A related issue is whether TDRs would be adequate compensation if a court determined that a taking did occur. In the more recent Suitum²² case, Justice Scalia argued that they would not be, and even further, claimed that TDRs are relevant only to the *compensation* side of the takings analysis. However, Scalia's opinion was a concurrence that did not attract a majority of the court.²³ Justice Scalia also approves of TDRs "in mitigating the economic loss suffered by an individual whose property use is restricted...but not so substantially as to produce a...taking."²⁴

The Georgia takings standard is slightly different than the federal analysis. The standard applied to so-called "regulatory takings" in the zoning context balances the "significant detriment" to the

¹⁹ O.C.G.A. § 36-66-1 *et seq.*

²⁰ "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burden the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of the regulation." 438 U.S. 104, 137.

²¹ Penn Central Transportation Co. v. New York City, 438 US 104 (1978).

²² Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997).

²³ "We do not decide whether or not *these* TDRs may be considered in deciding...whether there has been a taking, as opposed to the issue of whether just compensation has been afforded for such a taking." 520 U.S. at 728 (emphasis added).

²⁴ Id. at 749-50.

property owner against the public interest served by the challenged regulation.²⁵ Georgia has no case law on how TDRs might play into a takings analysis.

The takings doctrine is not relevant under what is commonly known as a “voluntary” TDR program, where landowners can develop either on their own land or by transferring the same amount of density to a receiving property. It is much more relevant in cases where, for example, the sending area is “downzoned” to a lower density but landowners are allowed to transfer TDRs as compensation for the loss of development potential. It is also important to remember that land use restrictions, including “downzoning,” are not per se takings under either the U.S. or Georgia Constitutions. Instead, as noted above, the impact on the property owner must be balanced with the public interest in land conservation, agricultural or historic preservation, etc.²⁶ As long as the public purpose is reasonable and there is not a total deprivation of all economic use of the property, nor a significant detriment to the landowner, the regulation will not be found to be a taking.

Property Tax Treatment

Landowners, developers, and tax assessors’ offices are generally quite interested in the property tax treatment of TDRs. Under the state TDR enabling statute, the value of TDRs remain attached to the sending property until the TDR is registered as a distinct property interest with the local tax assessor’s office, or it is used at a receiving site and is attached thereto. This means that the tax liability travels with the TDR from sending area owner to holder to ultimate user. Also, particular treatment of the sending parcel is mandated upon the placement of the conservation easement, under the Uniform Conservation Easement Act.²⁷ This Act requires that recording of the easement serves as notice to the tax assessor’s office that there should be a reevaluation of the property to reflect the existence of the easement. It does not mandate the outcome of the reassessment, however.

²⁵ Gradous v. Richmond County, 256 Ga. 469 (1986).

²⁶ See, e.g. Penn Central, *supra* note 1, Parking Ass’n of Georgia, Inc. v. City of Atlanta 450 S.E.2d 200 (Ga. 1994).

²⁷ O.C.G.A. § 44-10-8.

B. Identification of Potential Sending Areas

TDR programs are used throughout the United States to protect environmentally significant areas. In fact, most of the TDR programs in place have environmental protection as the primary goal.²⁸ Municipalities have used TDRs to protect specific environmental attributes, such as bluffs (Portland, Oregon), lowland areas (Bernards Township, New Jersey) or to provide new parks and conservation areas (Williston, Vermont).

Municipalities have also used TDRs to protect a broad geographic area, constituting multiple environmental goals. In Collier County, Florida, over 80% of the county's land area is designated as a sending area to control growth and preserve wetlands, coastal islands and other ecologically significant areas. In St. Petersburg, Florida, marshes, deciduous forests, pine woods, mangrove swamps, hammocks, beaches, floodplains and other areas are all protected through a TDR program.²⁹

In addition, TDRs has been used to provide economic relief to landowners whose property has been restricted through land use controls or environmental ordinances. Everett, Washington, Largo, Florida and Greenville, South Carolina have all used a TDR program for this purpose³⁰.

This section of the report will assess the potential environmental benefits of a TDR program in Athens-Clarke County, including the identification of possible sending areas with various environmental, agricultural and historical benefits; the ability of existing or planned infrastructure to support potential receiving areas; the congruence of sending and receiving areas with existing land uses; and the zoning implications of TDRs.

Finding the Sending Areas

An assessment of Athens-Clarke County was completed using GIS to identify the parcels that were best suited for use as sending areas. Possible sending areas contained five zoning and two future land use categories, as mapped on the Official Athens-Clarke County Zoning and Future Land Use Maps. The zoning categories included: Commercial-Rural, Agriculture Residential, Employment-Industrial, Employment-Office and Industrial. The future land use categories included Rural and Corridor Residential. These seven categories were considered as potential sending areas because of their predominately rural character, the low density development allowed by right, or the environmental protection purpose of the category as defined in Athens-Clarke County's Comprehensive Land Use Plan.

In order to calculate and map the extent of the potential sending area, governmental land and properties that are part of a residential subdivision were excluded. The primary purpose of a TDR program with land protection goals is to guard designated areas from development. Therefore, governmental land that is already protected from development, such as Sandy Creek Nature Center, was not included in the sending area. Properties that are part of a subdivision are generally designed for residential housing and are also excluded from this analysis.

²⁸ Pruetz, Rick, 1997. *Saved by Development. Preserving Environmental Areas, Farmland and Historic Landmarks with Transfer of Development Rights.* Arje Press. Burbank, California.

²⁹ Pruetz, *ibid.*

³⁰ Pruetz, *ibid.*

Over 14,000 acres of undeveloped land are located within this potential sending area. There are also over 1,100 undeveloped parcels in this area, ranging in size from less than one acre to quite large. Aggregations of large undeveloped parcels are located in the northwestern corner of the county near the Middle Oconee River and Big Bear Road, and in the eastern part of the county, between Morton Road and Lexington and Old Lexington Road.

Underdeveloped parcels, or parcels that have not maximized the development density allowed by right, are also good candidates for sending areas. Although these parcels are partially developed, many of them contain such a large area of undeveloped land that their conservation values are still intact. There are over 15,000 acres that are currently underdeveloped within the potential sending area. The greatest aggregation of underdeveloped parcels is in the eastern part of the county, east of Morton Road to the county boundary line.

With over 1,900 parcels and 30,000 acres of land either undeveloped or underdeveloped in the proposed sending area, Athens-Clarke County has enough land qualifying for protection to sustain a TDR program for many years. As only 964 acres or 1.2% of the county is protected greenspace,³¹ a TDR program would significantly increase the amount of greenspace and help meet the goals outlined in the county's Community Greenspace Plan and Greenway Network Plan.

1. UNREGULATED ENVIRONMENTALLY SIGNIFICANT AREAS

A complete environmental assessment of the sending area was completed using GIS. The principal environmental areas assessed for this project that are not protected through regulations include steep slopes, habitat with known occurrences of rare species, and properties with natural forest covers. These environmental areas were located and mapped throughout the potential sending area.

Steep slopes are sensitive natural areas because they are highly erodible and provide a scenic backdrop to the county. These areas were defined as land with at least a 25% slope, or greater than 1 foot vertical rise for every 4 foot horizontal run. Over 1,100 parcels in the sending area contained steep slopes and these parcels exceeded 27,000 acres collectively. Steep slopes are found in a diffuse pattern throughout the county.

TDR programs have also been used to protect important habitat for rare species. Data showing the approximate location of special concern species, or rare plants and animals tracked by the Georgia Department of Natural Resources, were included in this study. Only four animals protected in Georgia are observed in Athens-Clarke County: the Gray and the Southeastern Myotis (bats), the Altamaha Shiner (fish), and the Ocmulgee Shiner (fish).³² There are also

³¹ Athens-Clarke County Planning Department, 2001. *Athens-Clarke-Community Greenspace Plan*. Final Draft. In support of the Athens-Clarke Community Greenspace Program, Phase I.

³² Georgia Department of Natural Resources. 1999. *Protected Animals of Georgia*. Wildlife Resources Division. Nongame Wildlife-Natural Heritage Section.

seven special concern plants that are located in the county.³³ However, only one parcel in the potential sending area is known to provide habitat for one of these plants or animals. Therefore, a TDR program should focus on more than just special concern species habitat.

Using TDR to protect the tree canopy may be the most equitable and simplest approach. Athens-Clarke County is located in the Piedmont physiographic province, a region of the country with natural land covers predominately characterized by mixed pine and hardwood trees. Approximately 53% of Athens-Clarke County is composed of natural forest covers.³⁴ This tree canopy provides wildlife habitat, reduces air and water pollution, maintains seasonal air temperatures, protects soil, is scenic and contributes to the county's high quality of life and local economy. Over 29,000 acres of the potential sending area contain natural forest cover, including over 1,500 parcels.

These environmentally significant areas were distilled into the tracts that have a predominance of natural forest cover, steep slopes or habitat for special concern species. Over 480 parcels and 10,700 acres of the sending area meet these criteria. These tracts would be the most significant environmental protection priorities based upon the criteria used for this study.

2. REGULATED ENVIRONMENTALLY SIGNIFICANT AREAS

Wetlands and riparian (stream side) areas are environmentally significant and protected through regulation. The federal Clean Water Act restricts the filling of wetlands. State laws, including Georgia's Erosion and Sedimentation Control Act and Mountain and River Corridor Protection Act, restrict development within riparian areas. Athens-Clarke County also has a Protected Environmental Areas ordinance, which restricts development within the riparian areas of perennial streams³⁵. TDR can be used to provide economic relief for landowners whose property is encumbered by these restrictions.

These restrictions apply to these areas throughout the county; therefore, their location and extent were assessed at this geographic scale. Approximately 2,900 acres of wetlands are located in Athens-Clarke County. Using GIS, perennial streams were located and seventy-five foot stream buffers were calculated along them, in accordance with Athens-Clarke County's Protected Environmental Areas ordinance. Approximately 4,300 acres of riparian area are protected through this regulation³⁶. Finally, the rivers that qualify under the Mountain and River Corridor Protection Act were located and 100 foot stream buffers were calculated along them, per this regulation. The Mountain and River Corridor Protection Act translates into an estimated 940 acres of protected land in Athens-Clarke County.

Therefore, the amount of environmentally significant land located in the county that is currently protected by regulation exceeds 8,000 acres. These acres could also be used as sending area.

³³ Georgia Department of Natural Resources. 2002. Wildlife Resources Division. Nongame Wildlife-Natural Heritage Section.

³⁴ Athens-Clarke County Community Tree Council, 2000. Untitled report.

³⁵ After this analysis was completed, Athens-Clarke County revised its Protected Environmental Areas ordinance to extend 75-foot riparian buffer protection to intermittent streams as well.

³⁶ The actual acreage is probably slightly greater than this figure due to the recent change in the ordinance noted above.

This approach would expand the sending area throughout the county and incorporate more landowners. It would also permanently protect these areas, as regulatory controls can always change with new political leadership or community goals. Since regulation restricts the development of these areas, they essentially have no development rights available. The TDR program will need to account for this and assign credits to these areas if they are to be included as sending areas.

3. AGRICULTURALLY SIGNIFICANT AREAS

Farmland protection represents the second largest category of TDR programs in the United States, with at least 16 programs exclusively focused on farmland and another 17 programs focused on both environmental and farmland protection.³⁷ While many Athens-Clarke County residents may not think there is much farmland or production agriculture left in the county, farmland still composes a significant section of the landscape, especially in the northeastern and eastern part of the county.

In Athens-Clarke County in 2001, there were over 180 Conservation Use Value Assessment (CUVA) covenants – voluntary agreements between the State and a landowner to maintain farm or forest land for 10 years. These farmers may be interested in a permanent agreement, such as selling development rights through a TDR program, if it were available. However, the legality of participating in the CUVA and TDR programs simultaneously still needs to be assessed at the State level.³⁸

Over 1,100 parcels contain agriculture land cover in the potential sending area, translating to over 23,000 acres of land. These parcels contain farm or pasture land, but do not incorporate high quality soils, an eligibility requirement for many federal farmland protection programs. If a TDR program is to be used for the protection of farmland, it should be consistent with these federal programs and account for prime soils.

Prime soil associations were defined specifically for this project in order to incorporate Natural Resource Conservation Service data on the presence of soils most suitable for farming. The prime soil associations for Athens-Clarke County include: Appling-Cecil, Cecil, Davidson-Cecil and Congaree-Chewacla-Alluvial. A parcel with a predominance of these soils and agriculture land cover was considered prime farmland for this study. Over 240 parcels and 3,300 acres in the potential sending area met these qualifications.

By combining prime farmland acreage and the land under CUVA covenants, there are over 10,000 agricultural acres in Athens-Clarke County that could serve as key sending areas in a TDR program that aspires to protect farmland.

³⁷ Pruetz, 1997, op cit.

³⁸ Advisory Council for the Georgia Land Conservation Partnership, 2004. Georgia Land Conservation Partnership Plan. A Report to Governor Sonny Perdue.

4. HISTORIC AND CULTURALLY SIGNIFICANT AREAS

The protection of historic landmarks is the third most common purpose of TDR programs across the country (Pruetz, 1997). The first TDR program in Georgia was designed to protect historic and culturally significant buildings in downtown Atlanta. The program has been met with minimal success; only one transfer has been made to date.³⁹

TDR programs that focus on historical sites generally do not involve as many transfers, in part because there are few historic sites eligible as sending properties and the credits have to be used in very specific locations, sometimes even within the same street block. This probably would not be the case with a TDR program in Athens-Clarke County that is designed to protect historic or culturally significant areas.

Athens-Clarke County has over 50 national historic districts or sites, 12 local historic districts and 40 historic landmarks.⁴⁰ With over 100 historic areas, a moderate number of TDR credits could be produced by focusing on historic sites as the sending area. However, many more TDR credits could be produced by incorporating environmental or agricultural areas.

In addition, most TDR programs that focus on protecting historic areas are designed for large cities, including Atlanta, Georgia; New Orleans, Louisiana; San Francisco and San Diego, California; and New York, New York. These cities use TDR to avoid the redevelopment of historic sites into more economically viable projects like apartments or office towers. In fact, the first TDR program in the United States, created by New York's Landmarks Preservation Law of 1968, prevented the development of an office tower above the historic Grand Central Station.

This type of TDR program would probably not work in the small town of Athens, Georgia, because most of the development is occurring in the suburbs where the preferred development density is low and an abundant amount of available land exists. In order to generate enough TDR credits to effectively direct growth into preferred areas of the county, to sustain the program for many years and protect the area of the county that is under the greatest development pressure, a TDR program in Athens-Clarke County needs to be comprehensive and direct credits from environmental and agricultural areas as well.

5. INFRASTRUCTURE AVAILABILITY

The primary purpose of a TDR program is to protect community assets, such as environmental, agricultural or historical areas, from development. Severing the development right(s) from a property ensures that it will be maintained in its current state forever. If this program is successful and large sections of the county are protected as rural land or greenspace, the unified government of Athens-Clarke County could save millions of dollars in its cost of community services.

³⁹ Pruetz, 1997, op cit.

⁴⁰ Athens-Clarke County Planning Department, undated. GIS data provided by the Athens-Clarke County Planning Department.

A local government's cost for services such as public water and sewer, roads, police and fire protection, and schools are higher when development is scattered across the landscape. For example, the revenue generated from development in communities in Florida with scattered development patterns could not cover the costs of its road construction and maintenance.⁴¹

In order to avoid these budget shortfalls, a fiscally responsible government should provide incentives for growth to occur in a compact fashion, where public infrastructure and land are used more efficiently and at a lower cost. TDR can assist in reducing public costs by shifting development to the parts of the county with the infrastructure available to absorb it.

Athens-Clarke County has the public infrastructure to support additional development, and has dedicated \$65 million of the SPLOST 2005 budget to maintain and develop additional community services such as a new fire station, solid waste facility and public water system.⁴² These additional community services along with the newly opened Bear Creek reservoir ensure that Athens-Clarke County has the infrastructure available to support a TDR program.

A summary of the potential land areas that could be included in sending areas depending on the goals of a TDR program is displayed in the table below. Acreage and parcel figures are approximate and many lands fit into multiple categories so that the sum of different categories may be much smaller than it might appear.

Table 1. Summarization of Land for Potential Sending Areas

Category of Land	Acres	Parcels
Undeveloped	14,591	1,145
Underdeveloped	15,817	775
Total potential sending areas	30,408	1,920
Current protected lands	964	
Steep slopes	27,156	1,113
Tree cover	29,626	1,571
Predominant environmental concerns	10,726	486
Wetlands	2,992	
Riparian areas	4,352	
Mountain & River Corridor Protection Act lands	942	
Farmland	23,882	1,183
Prime farmland	3,363	246
Conservation Use Value Act (CUVA) farmlands	7,346	182
Prime + CUVA farmland	10,709	428

⁴¹ Duncan, James and Associates. 1989. *The Search for Efficient Urban Growth Patterns: A Study of the Fiscal Impacts of Development in Florida*. Presented to the Governor's Task Force on Urban Growth Patterns and the Florida Department of Community Affairs.

⁴² Athens-Clarke County Mayor and Commission, 2004. SPLOST 2005 Project Listing - As Approved 8/3/2004. SPLOST package will be voted upon in a referendum on November 2, 2004.

C. The Economic Issues of a TDR Program in Athens-Clarke County

Even a TDR program that is well-designed from a technical aspect will not be successful if the economics of the program do not provide an incentive for both buyers and sellers to voluntarily participate in the program. Landowners in the sending area will receive TDRs, but no land can be preserved unless these landowners willingly sell those TDRs. These TDRs cannot be sold unless somebody buys them. Developers will only be willing to buy the TDRs if the benefit of having the TDR exceeds the purchase price.

Thus, the program must be designed so that the TDR is worth more to the developer than the seller (landowner) could make by selling their land for development. Because the program is completely voluntary, the economic incentives should be strong in order to ensure a well-functioning market and to maximize the number of acres preserved.

Supply Side Issues (Value to the Sellers)

To analyze the economic value of undeveloped land in Athens-Clarke County three approaches were utilized. First, the county property tax records were examined for land values of undeveloped tracts. This led to an average of roughly \$7,000 per acre although there is considerable variation based on location and site characteristics. The second approach was to gather several developers and site engineers for a panel discussion. These local experts confirmed that this is a reasonable ballpark estimate of bare land values before site preparation and utility installation work begins. Finally, a recently completed state-wide survey of land owners suggested that North Georgia land owners are willing to sell their development rights for slightly under \$6,000 per acre so that the land will be permanently protected from development.⁴³

Together, these approaches confirm that for land owners to voluntarily sell their TDRs and achieve the community's land preservation goals, land owners should be able to negotiate a price in the range of \$6-8,000 per acre of land preserved.

Demand Side Issues and the Developer Value of TDRs (Value to the Buyers)

TDRs are purchased by developers in order to receive a benefit as part of a project they are building in a receiving zone. These benefits can range from allowing additional density (more units per acre) to waiving certain design requirements, or to allowing innovative mixed-use projects. Because the developers are also participating voluntarily, the benefit received through the TDR program must clearly exceed the economic costs of acquiring the necessary TDRs or developers will operate under the existing rules of zoning and permitting.

In particular, local developers contacted by the committee were interested in standard density bonuses of more multifamily or single family units per acre in exchange for purchasing TDRs and in more flexible rules for residential development as part of mixed use developments (separation of uses, smaller set-backs, increased height limits, etc.).

⁴³ Bethany Lavigno, Jeffrey Dorfman, Barry Barnett, and John Bergstrom. Farmland Preservation in Georgia: Three Possible Roads to Success (Athens, GA: UGA Dept. Ag. & Applied Economics, May 10, 2004)

A reasonable guide for multifamily development is that each additional unit is worth approximately \$6,000. Thus, each acre of preserved land represented by a TDR might be worth 1.5-2 additional multifamily units to ensure that the value to the developer exceeds the value to the land owner. Single family units bring higher profit per unit to developers. Each acre of preserved land represented by a TDR might be worth 0.5 additional single family units.

Computing what rule relaxations might be awarded for purchasing TDRs is more complicated and will be deferred to after the completion of this feasibility study. Certainly such trade-offs similar to separation of commercial and residential development within a mixed-use development could be based on the number of units allowed to be separated for each acre of land preserved. Similarly, a rule could be constructed for the number of units allowed above a height restriction per TDR purchased.

Projected Market Size and Zoning Issues

The process of estimating the value of TDRs and deciding the development bonus awarded to the TDR buyer is complicated somewhat by different zoning within the likely sending zones. Traditionally, TDRs are awarded in a ratio of 1 per developable lot. Under such a program, an owner of a 100 acre undeveloped tract zoned one unit per acre for single family housing would receive 100 TDRs while the owner of a 100 acre undeveloped tract zoned one unit per ten acres would receive only 10 TDRs. TDRs that are awarded at different rates are likely to be valued differently by the landowner, making it more difficult to accurately predict at what price land owners will be willing to sell the TDRs. A landowner whose TDR represents a larger lot will demand a higher selling price since larger building lots are worth more money to developers. This will tend to lead to land preservation occurring first in areas with lower potential development potential. This may be considered a positive aspect (particularly to those interested in farmland preservation) given that such land is likely to be in more rural areas of the county. This issue will need to be addressed carefully in designing the program.

It might be more advantageous to award TDRs on an acreage basis, particularly within zoning categories. For example, in the AR (Agricultural Residential) zone, TDRs might be awarded at a rate of 1 per 1 acre rather than 1 per 10 acres (the underlying zoning) in order to keep the transaction size and development bonus to more manageable size. Using smaller units will help the program function more smoothly, allowing smaller-scale developers to participate.

The demand for TDRs in Athens-Clarke County is clearly related to the level of building permits issued in the county. Single family permits have been running slightly below 800 per year and have been fairly steady for the past three years. There are also duplexes, apartments, and commercial properties developed each year in more variable numbers. If all projects were developed using TDRs at a rate of one TDR per residential unit built, the number of TDRs purchased would almost certainly exceed 1000 per year. Clearly some projects will not involve TDRs as some developers will not desire the extra density or other advantages at the market cost of the TDRs. However, if the program is properly designed most projects should be developed using TDRs. The ACC Planning Department believes that most developers desire more density and that a high percentage of projects will be done with TDRs if the program is properly designed. Thus, a reasonable estimate is in the range of 600-800 TDRs purchased per year.

If TDRs were issued in the AR zone at a rate of 1 TDR per 10 acres (the amount of residential development allowed under baseline zoning), the total number of TDRs in the AR would be between 750 and 890 depending on precise program rules. This is clearly not enough supply to run a TDR program for very long. Further, these AR landowners are unlikely to sell their TDRs if the bonuses are designed to have a value to developers in the \$8-10,000 range. Thus, it would make more sense to issue TDRs at a rate of 1 TDR per 1 acre to keep the price per TDR down and encourage participation in the process both by sellers and buyers.

It will be important if TDRs are issued at rates above the baseline zoning (as recommended here) to ensure that land preservation goals are still accomplished. That is, if land zoned for 1 house per 10 acres is awarded 1 TDR per acre, the TDR ordinance must be written to ensure that a land owner who sells some of his/her TDRs gives up the right to develop the land. For example, a land owner with a 10 acre tract zoned to allow 1 house is awarded 10 TDRs and sells 5 while holding 5 for a later sale at a hopefully higher price. Clearly, this land owner should no longer be able to develop his/her land, even though the land owner still owns 5 TDRs. Thus, a mechanism would need to be designed that ensures that the TDRs were “bundled” somehow when issued to ensure that they are paired with each underlying development right. As soon as the land owner sold any of the TDRs for a particular bundle, the underlying development right would be foregone and an easement recorded to prevent any future development. This can be accomplished under current enabling legislation and simply will take a little extra care in drafting the local ordinance.

If TDRs are issued to landowners in the C-R and E-O (Commercial-Rural and Employment-Office) zones based on the development potential of these zones, these landowners will dominate the program, holding over 85% of the total TDRs. Thus, these categories would need to be excluded from the sending area (or awarded TDRs at lower rates) if the program is to succeed in preserving a meaningful amount of farmland.

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

Table 2. Potential Supply of TDRs from Different Land Types

Sending Area Land Type	Award Rate (TDRs : Acres)	Supply of TDRs	Years Supply
AR land, 10+ acre parcels	1 : 10	754	< 1
AR land, 10+ acre parcels	1 : 1	17,731	20 +
Regulated environmental	1 : 10	690	< 1
Nonregulated environmental	1 : 1	10,726	13
Commercial rural	16 : 1	8,285	10
Total of all possible lands	Various (1 : 1 for AR land)	32,867	40 +

Different possible land types that can generate TDRs and are likely to be designated as sending areas are summarized in Table 2 above. Using farmland in parcel sizes of a minimum of 10 acres, if TDRs are awarded at the rate of 1 TDR per 10 acres (the current underlying zoning), the table shows that the supply of TDRs would be approximately 750, which would last for about one year. However, using the same land base but awarding TDRs at a rate of 1 per 1 acre, over 17,000 TDRs would be created, enough to keep the program operating for up to 20 years, depending on how many land owners choose to sell their TDRs. In table 2, regulated environmental lands are wetlands and stream buffers that are not currently buildable. Nonregulated environmental lands are those with tree cover and steep slopes that make them worth preserving; these lands are currently buildable with proper site design and planning.

Housing Issues

According to the Athens-Clarke County Housing and Economic Development Department’s Housing Report, 11,434 additional units of housing will be needed by 2020 in Athens-Clarke County. The current breakdown of housing ownership in the county is 57% renter-occupied, 43% owner-occupied. If this trend continues, 6,517 new rental units will be needed. Given enrollment caps at The University of Georgia and the stated intention of UGA to build more campus housing, the actual number of rental units needed is likely to be somewhat lower than a continuation of the trend.

Currently 78% of the rental units in the county are in multi-family developments. This is likely to continue or even accelerate as the stock of rental single-family houses is not likely to increase in pace with that of multi-family units. Thus, slightly less than 5,000 new multi-family rental units are estimated to be necessary to fulfill demand in that market segment.

These figures suggest that the multi-family development market will be able to absorb a considerable share of the TDRs issued. If the extra density allowed under the TDR program helps encourage building in this market segment, which should be a benefit in keeping supply and demand in equilibrium.

Housing Affordability

In Athens-Clarke County, 41% of all renter-occupied housing units are households living below the poverty level. If this ratio is held constant, approximately 2,000 of the 5,000 new multi-family units should be for people at or below the poverty level (affordable housing units). It is unlikely that a TDR program can do much to affect the level of affordable housing supplied in Athens-Clarke County, but if developers can buy TDRs for less than the profit from the additional unit(s) that they can then build, their costs are lowered by participating in the program. This should produce at least some downward impact on rental prices and encourage the building of more affordable housing. For example, building 3 units per acre instead of 2 might save \$3-5,000 per house in land cost for single-family homes in the \$100-130,000 price range. This cost savings would be mostly passed on to the homebuyer, increasing housing affordability.

The bonuses conferred by the TDRs can also be designed to have an impact on the supply of affordable housing. For example, instead of a TDR being worth one extra multi-family unit per acre, it could be worth two units if the units are “affordable,” according to a standard formula for computing the maximum rental rate for affordable housing. Developers would still be free to use the TDR to build one additional unit without any checks on the eventual rental rates, but might be tempted to build more affordable housing under such a program. Such approaches seem workable in abstract, but do present difficulties in enforcement to ensure that units built under such a program are rented or sold at or below agreed upon prices and remain “affordable” for the requisite time period. Similar ideas could be explored in the actual implementation of the TDR program if affordable housing is deemed an important goal of the TDR program.

There has been some concern that growth management programs in general can have adverse impacts on housing affordability. A recent book on this topic⁴⁴ compiled research by some of the most respected scholars in this area. The research appears to show that only exclusionary zoning type policies such as large minimum lot sizes have negative impacts on the affordability of housing in a community. Policies such as TDR programs do not generally help or hurt housing affordability.

Potential Impacts on Property Tax Collections

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

⁴⁴ Anthony Downs, ed., Growth Management and Affordable Housing: Do They Conflict? (Washington DC: Brookings Institution Press, 2004).

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

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

D. Assessment of Interest of AR Land Owners

No formal assessment of interest by Athens-Clarke County AR land owners was performed other than an informal meeting to brainstorm ideas for a TDR program with a few developers and AR land owners. The meeting came up with a number of ideas for ways to design the TDR program to increase its attractiveness to developers. Interest was expressed in increasing the flexibility within mixed use zoning categories. Suggestions included, for example, allowing commercial with office instead of residential development, or allowing physical separation of the commercial and residential components within the development. Increases in residential densities were also considered an attractive bonus, both within residential and mixed use zoning categories. Increasing the height limit in commercial mixed uses was also deemed attractive to developers.

As to the “size” of bonus necessary, all responses were based on the assumption that TDRs would sell for \$8,000-10,000 each. For single family detached housing, a density bonus of 0.5 extra units per TDR was deemed sufficient to attract developer participation. For multifamily housing, a bonus of 1.5-2.0 units per TDR was felt to be adequate.

Also, a statewide survey of agricultural land owners was recently completed assessing the land owners’ willingness to sell the development rights from their land (Lavigno, et al., 2004). This survey found that a large majority of land owners in North Georgia were willing to sell the development rights from their land for an average price of approximately \$5,900 per acre. Therefore, density bonuses for a TDR program in Athens-Clarke County should be designed to result in prices for the TDRs equal to at least \$6,000 per acre of development rights sold. This has been assumed in all discussion in this report and seems to match local land prices and expert opinions solicited from citizens as part of this study.

IV. Conclusions: Can Athens-Clarke County Support a Successful TDR Program?

This study has presented background information and many of the basic concepts necessary to operate a transferable development rights program in Athens-Clarke County. The feasibility of such a program has been examined from legal, environmental, and economic perspectives. The determination of this study is that a TDR program could be successful in Athens-Clarke County if it is properly defined, but the community and government officials will need to decide what the goals of such a program will be before it can be fully designed and a more precise prediction of program outcomes can be produced.

Potential sending areas include land zoned Agricultural Residential (AR), Commercial-Rural (C-R), Employment-Office (E-O), Employment-Industrial (E-I), and Industrial (I). In addition to these, lands that are environmentally sensitive and those containing historic properties are also candidates for sending areas. Not all these lands can be included in an operational plan without oversaturating the market and defeating some likely program goals. However, depending on the goals of the program, different subsets of the above land categories should be included in the sending areas that are selected.

Potential receiving areas include virtually all undeveloped or under-developed land with zoning that permits residential uses. Again, as with sending areas, not all of these lands are likely to be included in the receiving areas. If higher density in single-family residential neighborhoods does not fit with the community's wishes, those areas might be excluded from receiving zones. Some commercial rural zoned land may be excluded if preservation of corridors is important (this is discussed more below). Receiving areas will need to be carefully designed to ensure sufficient demand for the TDRs, to fit with the goals of the program, and to bring additional development only to those areas with infrastructure capable of handling the impacts of that growth.

Before either sending or receiving areas can be finalized, the goals of the TDR program must be clearly specified. Depending on the goals and their relative importance (assuming multiple goals), the sending and receiving areas, the rate TDRs are awarded to landowners, and the bonuses accruing to TDR purchases all must be customized to fit the goals. A set of possible goals for Athens-Clarke County and main program features that would help achieve those goals is listed below.

A. Setting Goals to Direct the TDR Program

To properly design a TDR program for Athens-Clarke County, the goals of the program must be clearly articulated. Depending on the goals, the sending areas, receiving areas, and density bonuses offered should vary. A series of goals that could be selected are listed here along with recommendations for how to tailor the program to accomplish each goal. More than one goal can be accomplished by a single TDR program, so policy makers can choose more than one goal from the following list.

Farmland, Timberland, and Open Space Preservation

If the main goal of the TDR program is farmland, timberland, and open space preservation, the sending area should be the AR zone. TDRs should be issued at a rate of 1 per 1 acre of land. The CR and EO zones should either be excluded from the sending areas or only issued TDRs at the same rate of 1 per 1 acre. The total supply would be in the range of 8,000 TDRs, likely enough to keep the program running for approximately a decade. Receiving areas could include commercial and residential zones, including CR zones, thereby allowing higher intensity commercial development in these areas.

Corridor Preservation

To accomplish corridor preservation, undeveloped land along major roads in the county outside of the bypass could be designated as sending areas and awarded TDRs at favorable rates. To still allow some commercial development along these corridors, receiving zones can be designated at nodes (e.g., major intersections) to allow high density commercial development at these sites. In combination, we could achieve sufficient commercial development along these corridors in a high quality manner while also preserving the rural character of these roads.

Environmental Protection

If an important goal is protection of environmentally sensitive areas, such land should be designated as sending areas. If TDRs are awarded at 1 per 10 acres, there would be 690 TDRs given to owners of these environmentally sensitive lands. Given that this land is either technically unbuildable at this point in time (due to regulations such as stream buffer requirements) or difficult and expensive to build on (perhaps due to steep slopes), land owners may prefer to sell their TDRs (leading to permanent land protection) than to hold the land in hopes of being allowed to develop the land at some point in the future under different regulations. Receiving areas can be selected by any criteria under this goal with the caveat that density or other bonuses should be selected so as to minimize environmental impacts in the receiving areas such as increased runoff due to impervious surface cover.

Historic Preservation

If historic preservation is a goal of the program, TDRs should be awarded to historic properties at a rate designed to provide adequate funding for preservation purposes. Owners or the historic properties upon selling the TDR are required to preserve the property using agreed upon methods to some specified standard. There are 29 potential parcels and 361 acres that could fall under such a program goal, so the number of TDRs involved is not likely to be too large. This goal can likely exist alongside other goals without a significant impact on the success in achieving the other goals.

Affordable Housing

If affordable housing is chosen as a goal of the TDR program, density bonuses can be designed so that builders of affordable rental or owner-occupied housing units receive additional density in exchange for some enforceable mechanism to ensure the built housing is affordable under an agreed upon definition. Alternatively, the receiving areas could be restricted or concentrated in areas where affordable housing is more likely to be built. This goal would be achieved through design of the receiving areas and/or the density bonuses; thus, it would not interfere at all with the achievement of goals such as farmland preservation and environmental protection that focus on sending area designs. The difficulty involved in achieving this goal is enforcement; a suitable process will need to be designed to monitor compliance with the affordability requirements for whatever time period is specified by the program.

B. Regulatory/Operating Changes to Help the Program

For any TDR program to be successful two key components must be present. First, existing zoning must be such that developers have a demand for the bonus offered through purchases of TDRs. Whether the bonus is additional density or changes in conditions of use (set-backs, mixed uses, etc.), if developers do not feel they can earn additional profit by purchasing TDRs and using the benefits so gained in their developments, the program will not succeed. The second key component is that the TDR program must be the only way developers can obtain those benefits. That is, if the planning commission and county commission grant re-zonings, conditional use permits, variances, and other regulatory actions that grant developers equivalent benefits without the need to purchase TDRs, at least some developers will pursue the political route rather than participating in the TDR program.

A TDR program also can be used to increase design flexibility in mixed-use zones. Bonuses to TDR purchasers could be allowances to loosen the standard requirements in mixed-use zones. For example, currently residential development can be built above commercial space in several zoning categories. More mixed uses might occur if the uses could be separated within a parcel, with commercial in one area and residential development in another part of the same mixed use development. This goal would be achieved by designing the TDR program to allow separation of uses (or increases in height limits or other standards) as a possible “bonus” to the TDR purchaser. Thus, it does not interfere with those goals that are advanced through the design of sending areas. In fact, by increasing demand for TDRs, this goal would likely help to achieve other goals such as farmland preservation and environmental protection.

C. A TDR Bank?

A TDR bank is an agency set up to buy and sell TDRs. It can help to smooth the trading of TDRs, stabilize the price, and provide additional liquidity to the market for TDRs. Some TDR banks may stand ready to buy TDRs from any willing seller, but that is not a requirement.

It is very early to make a recommendation pro or con on a TDR bank for an Athens-Clarke County TDR program. The main benefit of a TDR bank is that its presence can speed land preservation by buying substantial numbers of TDRs shortly after initiation of the program, then more slowly selling them to balance the demand for the TDRs. Such a policy requires substantial funding, and carries no guarantee against large financial losses. In Athens-Clarke County, the demand for land in the AR zone is probably not strong enough following the recent down-zoning of this land to make urgent a bank to buy up the TDRs in order to protect the land from development. While some of this land will surely be developed even after the inception of a TDR program, enough TDRs should be demanded directly by developers to achieve land preservation at a satisfactory rate. Further, it is worth noting that if funding can be secured for a TDR bank, the money could just as easily be used to purchase the development rights permanently, thereby permanently protecting the land without need for (or in parallel to) a TDR program.

A new idea recently proposed that is worth considering is a type of reverse bank where developers can pay the county a fee in lieu of buying a TDR. The county would then use that money to purchase TDRs and retire them (since the developer has already received the bonus rights of the TDR that the county just purchased). This type of TDR bank has an advantage for developers in that they can receive the bonuses and benefits of participating in the TDR program without having to incur the transaction costs of finding and purchasing a TDR from a landowner. From the landowner perspective, most TDRs would be purchased by the local government (since paying the fee is easier for developers), so willing sellers will find it easy to locate a buyer (Athens-Clarke County). The fee which the county charges developers could be adjusted periodically to reflect market conditions and the price paid by the county for the landowners' TDRs could be either set (and periodically adjusted) or negotiated on a case by case basis. An additional benefit of this type of TDR bank is that the county can try to purchase TDRs from owners of the land that is most valuable in achieving their program goals, whereas developers will purchase TDRs from whichever landowner will sell for the lowest price. Thus, the efficiency of the program would likely be increased by the use of this new type of TDR bank.

D. Final Conclusions

A transferable development rights program in Athens-Clarke County is feasible and has a reasonable chance of being successful if it is properly designed. Given a community consensus on the goals of the program, appropriate sending and receiving areas can be defined that could contribute to achieving those community goals over the next 10 or 20 years.

TDR programs are not magic solutions to all a community's growth issues, nor do they achieve goals in a short timeframe. However, within the context of a well-designed long-range growth plan, a TDR program can help to achieve aims such as farmland, historic, and environmentally-sensitive area preservation and corridor management. In particular, Athens-Clarke County will soon begin preparations for its next long range comprehensive plan update (due to be completed in 2009), so the time is right for development and inclusion of a TDR program as one element of the future land use plan.

The next steps to take toward implementation of a TDR plan might be as follows:

1. Creation of a citizens' committee for public input.
2. Recommendations from the citizens' committee on the program goals.
3. Affirmation of those goals by the Commission.
4. Development of a TDR ordinance, and preliminary designation by the citizens' committee of the sending and receiving areas in keeping with the program goals.
5. Considerable opportunity for public input on the proposed program.
6. Refinement of a proposed program by the Athens-Clarke County Planning Department and the Athens-Clarke County Attorney.
7. Consideration and adoption of the program by the Commission.

Involving the community in the process of designing a TDR program is crucial so that support for the program exists and to ensure that landowners in the sending area and developers want to participate in the program. The design of this process is beyond the scope of this study, but involvement in the process by landowners in likely sending areas, developers, and representatives of other community groups interested in goals of the program (such as environmental protection and historic preservation) is a must to increase the probability of a successful program. Because TDR programs operate on a completely voluntary basis, if citizens do not believe in the goals and want to participate in the program, they will not.

If TDR holders want to sell because they perceive the benefit to themselves and the community and developers want to purchase TDRs because the bonuses designed are attractive to them, the program will be a success.