Transferable Development Rights: Transfer Zone Selection

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Transferable development rights (TDRs) continue to grow in popularity as a land use planning tool. Local governments often seize upon the concept as a way to encourage "smart density,"[1] preserve open space, and limit sprawling or leapfrog development. This type of planning requires the identification and delineation of zones for preservation, often called "sending areas," and zones for development, called "receiving areas."[2] The identification of sending and receiving areas is just as political as any other phase of comprehensive planning and thus a subject of legislative discretion, but the exact delineation of these areas can present legal problems for local governing authorities much like other types of zoning decisions that are eventually found to violate the rights of landowners. Although drawing TDR zones implicates

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[1] Erick Linsk, Case Note, Property — Hole in One for Land Use Control: Endorsing the Dominance of Comprehensive Plans — Mendota Golf, LLP v. City of Mendota Heights, 33 Wm. Mitchell L. Rev. 627, 633 (2007); James E. Holloway & Donald C. Guy, Smart Growth and Limits on Government Powers: Effecting Nature, Markets, and the Quality of Life Under the Takings and Other Provisions, 9 Dick. J. Env. L. Pol. 421 (2001).

[2] Lauren A. Beetle, Note, Are Transferable Development Rights a Viable Solution to New Jersey's Land Use Problems?: An Evaluation of TDR Programs within the Garden State, 34 Rutgers L. J. 513 (2003); James E. Holloway & Donald C. Guy, The Utility and Validity of TDRs Under the Takings Clause and the Role of TDRs In the Takings Equation Under Legal Theory, 11 Penn St. Envtl. L. Rev. 45 (2002); James T.B. Tripp &Daniel J. Dudek, Environmental Law Symposium: Speeches and Comments: Institutional Guidelines for Designing Successful Transferable Rights Programs, 6 Yale J. on Reg. 369 (1989).

traditional zoning problems, the nature of transferable rights presents additional issues as well as an interplay with those traditional issues which must be managed conscientiously by planning officials. This paper will explore this mix of issues and provide guidance on establishing boundaries for sending and receiving areas for transferable development rights in Georgia communities.

I. Introduction to transferable development rights

Transferable development rights depend on the concept of severing the right to improve real property from the right to own and possess it. A development right is taken away from one parcel of land in order to be put in use on another parcel. The sending parcel may be legally restricted from further development, and the receiving parcel will be allowed more intense development or use than it could have had under the previous state of regulation.[3] This concept is applied in a great variety of programs, and when used for conservation purposes its methods overlap with other planning tools such as conservation easements and purchase of development rights (PDR) programs.[4] A TDR program could allow transfers to nearby parcels, maybe only for the benefit of a common landowner,[5] but conservation programs often allow the rights to be transferred far away to parcels outside of the conservation area to benefit other landowners. Rights transfers have been used to conserve agricultural land, sensitive natural environments,

[3] Tripp & Dudek, *supra* note 2.

[4] Theodore A. Feitshans, PDRs and TDRs: Land Preservation Tools in a Universe of Voluntary and Compulsory Land Use Planning Tools, 7 Drake J. Agric. L. 305 (2002).

[5] Corrigan v. City of Scottsdale, 720 P.2d 513 (Ariz. 1986)(regulation allowed landowner to transfer rights from one part of her property in a conservation area to another part of the same property).

general green space, historic sites, and affordable housing.[6] TDR programs are set up as part of part of an existing regulatory scheme with some type of zoning so that there are background limits to be modified by the transfer of rights.[7]

The right to build on land is economically valuable, so a successful transferable development rights program will commodify that particular right and establish a tradeable value. The purchase price must satisfy the owner of the sending parcel for the right she has released, and the owner of the receiving parcel who is purchasing the right must feel that the price reflects the value of what she is gaining. If the right is removed from a parcel but held without being applied to another parcel, it should maintain an ascertainable value like any other asset. If the right is condemned by the government, the purchase price should serve as "just compensation" under the Fifth Amendment. Some TDR programs establish a government-run "bank" to facilitate the market for these rights; without a middleman, willing buyers and sellers in such a limited and specialized market would have trouble finding each other. A TDR bank may even be used to condemn development rights in a conservation area and hold them into the future when a purchaser may want to use those rights in a development zone.[8] In at least one program where a TDR bank is not used, in the Tahoe Regional Planning Agency's jurisdiction across California and Nevada, a landowner bringing suit claimed the TDR credit assigned to her had no certain value and could not compensate for the prohibition on improving her lot.[9]

Unless the receiving area prohibits any construction on a parcel without the purchase of

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[6] Feitshans, *supra* note 4.

[7] Tripp & Dudek, *supra* note 2.

[8] *See generally* Sarah J. Stevenson, Note, Banking on TDRs: The Government's Role as Banker of Transferable Development Rights, 73 N.Y.U. L. Rev. 1329 (1998).

[9] Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997).

transferable rights, a TDR requires the right to build to undergo another conceptual transformation in the application to the receiving parcel. The very right to build anything at all on the sending parcel must convert into valuable additional rights on a receiving parcel that already has the right to build something. The new right allows a more intensive use beyond the standard regulations that apply to the receiving parcel before the use of TDRs.[10] This could translate into greater lot coverage, additional height, a higher floor-area ratio, or higher residential density.[11]

II. Frequent problems with TDRs

Certain problems with transferable development rights have been addressed extensively in the law reviews. Determining the value of a transferable right is often an initial problem, and the landowner who finds himself unable to build but promised some kind of vague right that can only be sold on a market with no established marketplace often lodges claims against the government.[12] Governments intend for the transferability of a development right to allow the owner to keep economic use of his land without actually being able to build on it; the restriction can be placed on the land either without legally taking the land or else providing compensation

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[10] *See. e.g.*, Olson v. Town of Cottage Grove, 727 N.W.2d 373 (Wis. Ct. App. 2006)(unpublished opinion discussing town ordinance providing for additional development rights in TDR receiving areas).

[11] Feitshans, *supra* note 4.

[12] *See* Richard J. Lazarus, Essay, Litigating Suitum v. Tahoe Regional Planning Agency in the United States Supreme Court, 12 J. Land Use & Envtl. Law 179 (1997); *see, e.g.*, Corrigan v. City of Scottsdale, 720 P.2d 513 (Ariz. 1986); Glisson v. Alachua County, 558 So.2d 1030 (Fla. Dist. Ct. App. 1990).

with the transferable right rather than money.[13] This right is not tangible, though, if the owner does not know how to find buyers or cannot get an appraisal. The establishment of a TDR bank does much to facilitate a market and reify the government's promise of value. A bank can be used to facilitate just private transactions, or it can be used to purchase development rights up front through condemnation.[14]

Many articles have extensively analyzed the TDR mechanism in the light of takings law, and takings claims are usually made in lawsuits against governments by landowners unhappy with restrictions on their parcels under these programs. In *Suitum v. Tahoe Regional Planning Agency*,[15] the United States Supreme Court carefully sidestepped the takings issue raised by a landowner given a transferable right, but even seemed enough to bolster the legitimacy of TDR programs. In *Suitum*, the landowner had no centralized marketplace to help her sell her development right or determine its value before offering it, and the Tahoe Regional Planning merely granted her the right without purchasing it, but since she did not try to sell it the Court found there were insufficient facts to substantiate a taking.

The issue of local authority to establish a TDR program has also been addressed, and it is often a question raised in suits by landowners.[16] The creation of a transferable right and the

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[13] R.S. Radford, Comment, Takings and Transferable Development Rights in the Supreme Court: The Constitutional Status of TDRs in the Aftermath of Suitum, 28 Stetson L. Rev. 685 (1999).

[14] Stevenson, *supra* note 8.

[15] *Supra* note 9.

[16] Matthew P. Garvey, Note, When Political Muscle is Enough: The Case for Limited Judicial Review of Long Distance Transfers of Development Rights, 11 N.Y.U. Envtl. L.J. 798 (2003); David W. Owens, Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina, 35 Wake Forest L. Rev. 671 (2000).

prohibitions placed on parcels go beyond traditional zoning mechanisms, so it is not clear if a county of municipality has the authority to do this when there is no enabling legislation at the state level. Many states have passed enabling acts, but even when local governments have recognized authority to use TDR programs landowners may still challenge that the local government has transgressed its limits with a particular TDR ordinance or otherwise abused its authority.[17] Some programs are actually administered at the state or interstate level and facilitated by state or federal legislation; the Tahoe Regional Planning Agency covers territory in California and Nevada to protect environmental resources around Lake Tahoe and is authorized by federal legislation allowing an interstate compact,[18] and a state program in New Jersey is aimed at environmental conservation in the state's Pine Barrens region.[19]

This paper attempts to understand the legal issues implicated by a local government drawing its boundaries for sending and receiving zones in a transferable development rights program. The major challenge is indeed a political one since the purpose of these zones is for a community to express its complex vision for the future as part of a comprehensive plan. A community selects areas that it wants to preserve and other areas in which it wants development, and this sort of plan is only made through a series of political choices that could be made in a great variety of ways. Once the community expresses its desires for certain kinds of conservation and development areas, though, the governing authority must ensure that the enactment of the new zones maintain a rational connection to the purposes of the planning power without

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[17] *See, e.g.*, Crystal Forest Assocs. v. Buckingham Twp. Supervisors, 872 A.2d 206 (Pa. Commw. Ct. 2005); Glisson v. Alachua County, 558 So.2d 1030 (Fla. Dist. Ct. App. 1990).

[18] Pub. L. 91-148, 83 Stat. 360 (1969).

[19] N.J. Stat. Ann. § 13:18A-1 (West 2003).

violating the rights of individual landowners.[20]

So drawing boundaries for the sending and receiving areas in TDR programs actually implicates the same concerns that arise when drawing any new district under a traditional zoning scheme, but the context is a little different, and there are unique concerns that arise, too. When a receiving area is designated, it allows for potentially more intensive uses than before,[21] so the designation is much like any other zoning decision that can bring new, more intensive uses into a district. Neighboring landowners might file suit against the local government and challenge the validity of the new zoning decision in the same manner used against decisions not involving TDRs, as discussed below. These challenges may cite constitutional theories such as substantive due process and equal protection, or they could be based on zoning theories such as illegal spot zoning.

The first conceptual problem that is special TDRs arises with the rational basis of the zoning power itself. Zoning is intended to place reasonable limits on land use in order to limit potential nuisance[22] and provide reciprocal benefits to landowners;[23] these limits are also aimed at public safety measures[24] and preventing new development from straining public resources.[25] If landowners in a certain area are simply allowed to buy the right to intensify their use beyond the existing regulations then these zoning benefits could be lost, and that would undermine the

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[20] Garvey, *supra* note 16.

[21] Beetle, *supra* note 2.

[22] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[23] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[24] Village of Euclid, 272 U.S. 365.

[25] U.S. Department of Commerce, Standard State Zoning Enabling Act § 3 (1926), reprinted in 8 Zoning and Land Use Controls § 53.01 [1] (P. Rohan and E. Kelly eds. 1997).

reason for exercising the zoning power in the first place.[26] This is the basic logical problem raised by establishing TDR zones, and it should frame the thought process that planners use when drawing zone boundaries. Fortunately, it turns out to be mostly a non-issue. Local governments plan these zones with at least some care, and courts give a lot of deference to zoning decisions made under comprehensive plans.[27]

The nexus between the sending and receiving areas must be designed appropriately to serve the purpose of the transferable rights program.[28] This means that the benefits realized to the community in the sending area should not be outweighed by the effect of development in the receiving area. A TDR ordinance could even tie the conservation character of the two areas together by requiring rights to be purchased in order to allow any development at all in the receiving area, though it would seem that this is an additional layer of prohibition which would require special justification. The distance between the two areas is a major factor in maintaining a close nexus between them.[29] They are likely to be kept within the boundaries of a local government or a planning authority so that the conservation benefits are realized within the same community.[30] The most straightforward example is a community preventing sprawl development in sending areas but encouraging beneficial development within the established urban boundaries; it would make less sense to transfer rights to a different community.

I will now discuss the sorts of traditional zoning validity problems that could arise from

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[26] Garvey, *supra* note 16.

[27] Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law, § 2.13 (2003).

[28] Garvey, *supra* note 16.

[29] *Id.*

[30] *Id.*

drawing new districts in a TDR program as noted above, and then I will explore the unique legal issues in more detail.

III. Traditional zoning validity problems

Land use planners should be aware that drawing districts for sending and receiving areas in transferable development rights programs is much like establishing or changing district boundaries in a traditional Euclidean zoning scheme. A major consideration is that districts should be established according to a comprehensive plan, meaning that boundaries and regulations should not be set arbitrarily.[31] The regulations in these districts should have a rational basis serving the purposes of zoning.[32] Arbitrary decisions might be challenged as a violation of substantive due process.[33] This kind of violation tends to be directed at a particular parcel rather than a particular person.[34] Equal protection violations are found in zoning decisions aimed at specific persons.[35] Although this cause of action usually requires showing an injury directed at a specific class of persons in need of protection, it has been expanded to some cases where a landowner is treated differently from his neighbors by a zoning decision without a supportable reason and with some type of bad faith.[36]

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[31] Standard State Zoning Enabling Act § 3 (1926), *supra* note 25.

[32] *See* Village of Euclid, 272 U.S. 365.

[33] Juergensmeyer & Roberts, *supra* note 27, § 10.12.

[34] Daniel R. Mandelker et al, Planning and Control of Land Development: Cases and Materials 184 (6th ed. 2005).

[35] *Id.*

[36] Juergensmeyer & Roberts, *supra* note 27, § 10.14.

Spot zoning is a descriptive term that describes an improper rezoning of a single parcel or small area, usually for a more intensive use to the detriment of the neighbors.[37] Neighbors bring this kind of claim when such a rezoning seems to reflect private interests rather than a comprehensive plan, and the local authority should consider the effect on the comprehensive plan when considering rezoning a small area.[38] It can involve the arbitrariness or discrimination issues related to substantive due process or equal protection problems.[39] Reverse spot zoning describes this kind of rezoning when done to lower the intensity of permitted uses, and the owner of this downzoned parcel is likely the party to complain.[40]

Some jurisdictions enforce a uniformity requirement for zoning districts.[41] This is based on language in the Standard State Zoning Enabling Act which says, "All such regulations [on buildings and land use] shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts."[42] This requirement may prevent a local government from establishing overlay districts or varying land use rights within a subsection of a district designated with a certain zoning classification.[43] Having two sets of rules within one district would violate uniformity. This requirement is usually not read with such literal formalism, though, so many states do allow such in-district variations

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[37] *Id.*, § 5.10.

[38] Kuehne v. Town of East Hartford, 72 A.2d 474 (Conn. 1950).

[39] Juergensmeyer & Roberts, *supra* note 27, § 5.10.

[40] *Id.*

[41] *Id. at* § 5.13.

[42] Standard State Zoning Enabling Act § 2, *supra* note 25.

[43] Juergensmeyer & Roberts, *supra* note 27, § 5.13.

made on a reasonable basis.[44]

Zoning for fiscal reasons can be a problem in many jurisdictions.[45] Challenges to zoning ordinances might succeed if it is shown that the government is restricting development only to stop a growing demand for services that impacts the local budget by using more tax revenue.[46] Challenges to decisions allowing more intensive uses in an area might also succeed if it is shown that the decision was made solely to bring in more tax revenue without balanced consideration of the negative effects.[47] The fiscal concern often implicates problems with exclusionary zoning as well.[48] Many local governments try to defray the effect on tax revenue with impact fees and exactions,[49] but these issues may be unrelated to development rights purchases except to the extent that local governments anticipate revenue through rights banks beyond the cost of the TDR administration.

IV. Unique zoning issues for transferable development rights programs

This paper is more than an overview of ways to test the validity of zoning, of course. Traditional zoning validity problems should be considered in the context of TDRs, and unique considerations arise, too. Traditional zoning places limits on property owners' rights, and flexible zoning methods allow owners to bargain with government over those limits, but

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[44] *Id.*

[45] 1 Rathkopf's The Law of Zoning and Planning § 2:21 (4th ed. 2007).

[46] *Id.*

[47] *Id.*

[48] *See, e.g.*, S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975)

[49] Juergensmeyer & Roberts, *supra* note 27, § 9.8.

transferable rights provide for the connection of private interests across zoning districts. The significance is that these private interests must be protected along with the public interests of the neighbors and the community as a whole.

The first private right potentially infringed is the value of the land restricted in a sending area. If the transferable right is supposed to compensate the landowner for a taking or provide a substitute property right to avoid a taking,[50] then the value of that TDR needs to closely approximate the market value actually lost on the restricted parcel. If a vacant parcel is restricted from having any improvements made, then the TDR value should reflect the previous value of the whole parcel.[51] If partial restrictions are enacted to create the sending area, such as a reduction of density or lot coverage, then the TDR should reflect the difference between the previous higher value and the new lower value.[52] However, in the latter case it should not be forgotten that governments may find justification for downzoning without compensation anyway, based on the traditional zoning power and the rationality of its comprehensive plan. In the context of agricultural preservation, there is even a case for the proposition that restricting land to agricultural rather than residential use preserves value for the owner, despite the common notion that agricultural land is much less valuable than residential property.[53]

As for the receiving areas, local authorities could be tempted with the prospect of downzoning in order to encourage the purchase and use of TDRs.[54] Doing so would certainly

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[50] *See* W.J.F. Realty Corp. v. New York, 672 N.Y.S.2d 1007 (N.Y. Sup. Ct. 1998)(discussing these two possibilities.)

[51] *See generally* Stevenson, *supra* note 8.

[52] *Id.*

[53] Mark W. Cordes, Fairness and Farmland Preservation, 20 J. Land Use & Envtl. Law 371 (2005).

[54] Keith Aoki et al., Trading Spaces: Measure 37, MacPherson v. Department of Administrative Services,

help the value of the TDRs and ensure that sending landowners would get better compensation, but this could undermine the rational basis of the zoning scheme since the preexisting land use restrictions had been judged within the comprehensive plan to be appropriate to preserve health, safety, and welfare.[55] Requiring landowners to buy back rights that they previously thought they owned outright could be construed as a taking, and the funds benefitting sending landowners could even be understood as illegal gratuities[56] or at least an improper redistribution of private property interests. The private interests of both sides of the transfer have to be carefully balanced.

The nexus between the sending and receiving areas should be close enough to rationally serve planning policy and survive legal challenges.[57] Under the analysis of reciprocal benefits that often figures in zoning, the physical distance between the areas should be close enough so that the residents of receiving areas or their neighbors negatively affected by more intensive development can still take advantage of a nearby preservation benefit.[58] Since developers in receiving areas are allowed to buy their way out of the background regulations, there is some argument that maintaining a nearby benefit preserves the original rationality of the regulatory limits. There should also be a connection between the type of rights restricted in sending areas and the type of rights allowed to be expanded in the receiving areas.[59] If zoning is to be a system that fairly distributes benefits and burdens, the comprehensive plan should encompass both areas

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and Transferable Development Rights as a Path Out of Deadlock, 20 J. Envtl. L. & Litig. 273 (2005).

[55] *Id.*; Garvey, *supra* note 16.

[56] *See, e.g.*, Ga. Const. art. III, § VI, par. VI.

[57] Garvey, *supra* note 16.

[58] *Id.*

[59] *Id.*

and justify how rights are being taken from one place and applied to another.[60] Simply compensating owners in a sending area may not be a valid use of planning authority, or else the sending area should be viewed should be viewed as a condemnation area rather than a regulatory district within a land use plan.

The conversion that the rights can undergo through the transfer process warrants extensive consideration by planners. The planning nexus is important, but the types of rights sold away and bargained for also affect the value of what is being transferred.[61] TDR programs are prone to suffer from the dissatisfaction of sending area landowners from being unable to sell their rights[62] or only being able to sell them for a low price,[63] so their rights should be valuable enough to motivate them to offer them for sale. In the receiving area, developers have to realize a benefit from purchasing rights and be incentivized to purchase them.[64] The program should encourage successful private bargaining or at least allow the results of the exchanges to approximate such. The rights to be applied in the receiving area should be appropriate for the type of development to be encouraged and actually in demand by the market, whether they are increases in density, maximum number of floors, lot coverage area, or floor-area ratio.[65] In other words, the rights to be applied in the receiving area should be useful to the kinds of uses that market forces will bring to the area. The landowners on each end of the deal will also expect overall fairness of the transfers through the program with the rights being transferred away

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[60] *Id.*

[61] *See generally* Stevenson, *supra* note 8.

[62] *See, e.g.*, Suitum,520 U.S. 725.

[63] *See, e.g.*, Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y. 1976).

[64] *See generally* Stevenson, *supra* note 8.

[65] Garvey, *supra* note 16.

approximating the value of rights applied in the receiving area. A program for environmental preservation might provide for foot-for-foot transfers of lot coverage,[66] but in many cases the programs' purposes are better served by applying rights which are different in kind from those sent away.[67]

V. General suggestions for TDR programs

In light of the legal issues raised by drawing district boundaries to aid conservation and development zones in transferable development rights program, a few suggestions become apparent for local planners. A lot of these problems can be avoided by carefully designing and managing the nexus between these sending and receiving areas,[68] though this is a complex process. Making sure that the value transferred across this nexus does not get distorted will do much to provide stable and adequate values for the transferrable rights. The planning goals should be considered at each of the end of the process so that the program will serve as an appropriate use of the local government's zoning power; there is a risk of undermining zoning's rational basis and not achieving its goals if planners only see the receiving areas as groups of owners who need to be compensated for having rights taken away.[69] The government should be able to justify the kinds of restrictions it places in sending areas and the kinds of additional rights available in receiving areas that neighbors may consider harmful.

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[66] Suitum, 520 U.S. 725 (discussing the lot coverage rights that could be directly transferred from a parcel in a Stream Environment Zone to another parcel).

[67] Garvey, *supra* note 16.

[68] *See* Garvey, *supra* note 16.

[69] *See id.*

A TDR bank or at least some kind of market facilitator is indispensable to support the monetary value of the development rights severed in the sending area, to reduce transaction costs and keep the transfers efficient enough to avoid harming the property rights enjoyed by senders or receivers, and to ultimately achieve the conservation and development goals in the comprehensive plan.[70] If a particular TDR program is designed only to operate in commercial districts with a limited number of properties and owners somehow situated to find each other easily to exchange rights,[71] there may be a smaller need for a rights bank, but the usual scheme with a preservation purpose and separate areas for sending and receiving rights involves different types of properties, often residential or agricultural.

To serve the ends of comprehensive planning, it actually may be useful to carefully draw boundaries for conservation and development without strict adherence to existing districts, which would intentionally violate literal uniformity of districts.[72] Carefully choosing the receiving areas in particular would help avoid detrimental effects of new intensive uses that may fall upon neighbors. Simply following existing district boundaries does not make much sense since those districts were planned with less intensive uses in mind. Overlaid receiving districts[73] may be particularly appropriate if the government chooses to encourage development of mixed uses along a corridor. If the jurisdiction follows the literal formalism of the Standard State Zoning Enabling Act and would find this type of boundary drawing to violate required uniformity across districts, then the local planners should consider devising new zoning classifications with an

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[70] *See* Stevenson, *supra* note 8.

[71] *See, e.g.*, Fisher v. Giuliani, 720 N.Y.S.2d 50 (N.Y. App. Div. 2001)(discussing transfer procedures established by the City of New York for the Manhattan Theater District).

[72] Juergensmeyer & Roberts, *supra* note 41.

[73] *See* Juergensmeyer & Roberts, *supra* note 27, § 4.21 (discussion of overlay zoning).

attached TDR status, and a comprehensive rezoning could be pursued to make TDRs available where they are needed since TDR districts could not be so easily drawn in. However, some communities choose to enact optional TDR measures broadly aimed at promoting preservation with receiving areas set coextensively with entire zoning districts.[74]

Planners should be particularly mindful of the classification and character of zones adjacent to where they want to draw transfer districts. This is necessary to avoid the plethora of traditional zoning validity problems such as violations of constitutional guarantees or illegal spot zoning. Limits on the additional rights available in receiving zones are necessary to avoid harming neighbors.

VI. Rights transfer zone boundaries in the courts

There appear to be no cases in which the boundaries of sending and receiving areas for transferable development rights programs are facially challenged. Landowners often challenge the restrictions in conservation areas as applied to their property under constitutional theories such as takings, due process, and equal protection. They often bring these challenges when they are denied permission to proceed with specific development projects.

Landowners often have property only partially blanketed by sending area restrictions, but it is common to challenge the restrictive program rather than the findings that drew boundaries in a particular way. In *Corrigan v. City of Scottsdale*,[75] the owner challenged restrictions when 80

[74] The Stop & Shop Supermarket Co. v. Windsory Planning & Zoning Comm'n, 1998 WL 951508 (Conn. Super. 1998)(unpublished opinion discussing local ordinance which allows transfers into any nonresidential zone).

[75] 720 P.2d 513 (Ariz. 1986).

percent of her property was designated a conservation area based on environmental features. There was a provision that may have allowed this line to be shifted slightly, but regardless she was allowed to transfer her preexisting development rights to unrestricted portion, and there was no net reduction in the dwellings she would have been allowed to build on her whole 4,800-acre parcel. However, since the restrictions were found to be a taking, and since the Arizona constitution required monetary compensation to be paid for takings, the owner was due an award for a temporary taking. In *Crystal Forest Associates v. Buckingham Township Supervisors*,[76] the owner of a mobile home park owned adjacent land in an agricultural district. He first made two challenges to the regulations that did not permit a mobile home park use on the adjacent land. The township revised its ordinance to allow a mobile home park on agricultural land if TDRs were purchased, but the owner challenged it as unreasonable based on more restrictive dimensions and open space requirements. This ordinance was upheld.

In *Glisson v. Alachua County*,[77] a facial challenge was made to the restrictions in an environmental conservation area, but no issue was made of its specific boundary lines. Initially the county ordinance would allow rights to be transferred from the conservation area to contiguous parcels, so the sending and receiving areas were contiguous and altogether only covered a small area. Later, a new ordinance provided for rights transfers to "urban clusters," none of which were in the immediate area. Although the restricted land would have been more valuable if intensive uses were allowed on it, this ordinance was determined valid under Florida law.

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[76] 872 A.2d 206 (Pa. Commw. Ct. 2005).

[77] 558 So.2d 1030 (Fla. Dist. Ct. App. 1990).

VII. Drawing sending and receiving zones in Georgia

Georgia recently adopted enabling legislation for transferable development rights in 1998, and there has been no long established use of this tool. O.C.G.A. §§ 36-66A-1 and 36-66A-2 allow cities and counties to establish TDR ordinances. The law specifically provides that the local governments may establish "sending areas" and "receiving areas" on maps,[78] and the general authority is that "the governing body of any municipality or county by ordinance may, in order to conserve and promote the public health, safety, and general welfare, establish procedures, methods, and standards for the transfer of development rights within its jurisdiction."[79] This is a broad grant of authority.

Furthermore, local governments in Georgia have a broad authority to exercise land use authority. The state constitution provides: "The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power."[80] The statutory procedures which have been enacted have no special instructions on drawing district boundaries.[81] In the legislation which encourages local governments to enact comprehensive plans,[82] they are authorized to "develop, establish, and implement land use regulations which are consistent with the comprehensive plan of the

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[78] O.C.G.A. § 36-66A-2(c)(9)(West 2006).

[79] O.C.G.A. § 36-66A-2(a)(West 2006).

[80] Ga. Const. art. IX, § II, par. IV.

[81] O.C.G.A. §§ 36-66-1 et seq. (West 2006).

[82] O.C.G.A. § 36-70-1 et seq. (West 2006).

municipality or county."[83]

Although local governments have broad authority, moderate caution must be used in creating zoning ordinances to ensure their validity. *Guhl v. Holcomb Bridge Road Corp.*[84] establishes a number of factors adopted from persuasive authority.[85] The government must consider "(1) existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned considered in the context of land development in the area in the vicinity of the property."[86]

These factors are supported by Georgia's "substantive due process"[87] standard in zoning: "[Z]oning classification may only be justified if it bears a substantial relation to public health, safety, morality or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable."[88] Georgia also enforces the general equal protection standard calling for equal treatment of similarly situated landowners.[89]

As for other common factors in zoning validity, Georgia law does not have explicit

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[83] O.C.G.A. § 36-70-3(2) (West 2006).

[84] 232 S.E.2d 830 (Ga. 1977).

[85] LaSalle National Bank v. County of Cook, 208 N.E.2d 430 (Ill. App. Ct. 1965).

[86] 232 S.E.2d at 832.

[87] Barret v. Hamby, 219 S.E.2d 399, 403 (1975)(concurring opinion).

[88] *Id.* at 402.

[89] *See* Puckett v. Paulding County, 265 S.E.2d 579 (Ga. 1980).

language on district uniformity since it does not use the Standard State Zoning Enabling Act,[90] so sending and receiving areas could probably be established as overlay zones.[91] Georgia is already amenable to overlay zones in the traditional zoning context.[92] A claim of illegal "spot zoning"[93] should succeed if "fraud or corruption is shown or the rezoning power is being manifestly abused to the oppression of the neighbors,"[94] as the Georgia Supreme Court stated in *Cross v. Hall County*.[95] The court relied on *Cross* in another claim of spot zoning set forth by *Dunaway v. City of Marietta*.[96] Another version of something called "akin to spot zoning"[97] was found in *East Lands, Inc. v. Floyd County*[98] in which the county government zoned only two percent of its unincorporated area but not the rest. For fiscal zoning concerns, Georgia law does not provide that zoning decisions should be made for reasons of the local government's finances alone,[99] so there is no indication that planners can deviate from traditional zoning purposes.

In sum, planners in Georgia designing sending and receiving zones for transferable developments should take into account the traditional due process and equal protection concerns that go along with any zoning decision. Local governments have broad authority in designing

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[90] *Supra* note 25.

[91] *Supra* note 73.

[92] *See, e.g.*, Athens-Clarke County (Georgia) Code of Ordinances, §§ 9-12-1 et seq. (2006).

[93] Wyman v. Popham, 312 S.E.2d 795, 798 (Ga. 1984)(citing Cross v. Hall County, 235 S.E.2d 379 (Ga. 1977)).

[94] Cross v. Hall County, *supra* note 93, at 382.

[95] *Supra* note 93.

[96] 308 S.E.2d 823 (Ga. 1983).

[97] East Lands, Inc. v. Floyd County, 262 S.E.2d 51, 52 (Ga. 1979).

[98] *Supra* note 97.

[99] *Supra* note 80; *supra* note 82.

their TDR programs, so creative districts like overlays can be employed, but there are a number of factors from the *Guhl* case to bear in mind to avoid having an ordinance found arbitrary.