

DATE: November 2, 2016

RE: Scope of MARTA's Authority to Use Funds for Affordable Housing Programs

Question Presented

What is the scope of eligible purposes for which MARTA can use its funds, and can those funds be used for various affordable housing programs?

Short Answer

MARTA can engage in activities that support its transit service if those activities increase revenue, ridership, or improve the safety and convenience of its riders.

Analysis

The Metropolitan Atlanta Rapid Transit Authority's ("MARTA" or "the Authority") ability to pursue various activities is governed both by the Georgia constitutional provision which created the entity and the statute enacted by the Georgia General Assembly to implement the constitutional provision.

An amendment to the Georgia Constitution was adopted which created MARTA as a governmental entity. That constitutional provision provides MARTA with legal authority for "the acquisition, establishment, operation or administration of a system of public transportation of passengers for hire within the metropolitan area," declaring it "an essential governmental function and a public purpose...." Art. XVII, Sec. I, Par. I of the Ga. Const. of 1945. This constitutional provision "shall be liberally construed to effectuate its purpose...." and MARTA is granted "such other powers as may be necessary or convenient for the accomplishment of the aforesaid function and purpose." Art. XVII, Sec. I, Par. V and II of the Ga. Const. of 1945.

MARTA's legal authority is further clarified though the MARTA Act and those statutory powers are to be interpreted narrowly. MARTA can only exercise "those powers such as are expressly given or are necessarily implied from express grant of other powers, and if there is a reasonable doubt of the existence of a particular power, this doubt is to be resolved in the negative." Local Div. 732, Amalgamated Transit Union v. MARTA, 253 Ga. 219, 222 (1984).

Thus, to determine MARTA's ability to undertake affordable housing programs one must turn to the language of the MARTA Act.

MARTA was created to operate a rapid transit system and is granted "all powers necessary or convenient to accomplish" this purpose. MARTA Act §§ 7 and 8.¹ Further, this authority extends beyond operation of the vehicles; the Act includes all "facilities necessary thereto and other facilities for the comfort, safety, and convenience of its passengers." MARTA Act §2(i). Therefore, the two relevant questions are what is necessary for operation of a rapid transit system and what is a facility for the "comfort, safety, and convenience" of MARTA passengers.

This question was litigated and resolved (to a degree) in the case Garden Hills Civic Assn v. MARTA, 273 Ga. 280 (2000). In Garden Hills, the Supreme Court of Georgia considered whether MARTA could enter into a long term lease for the development of surplus property around the Lindbergh Station. This deal would require an additional \$40 million in MARTA funds for the real estate development project. The Supreme Court found that the lease and MARTA's use of funds for the project were within its statutory and constitutional authorization. The Court reasoned that:

MARTA is vested with broad discretion to address whether the factors of cost, convenience and safety should be weighed in favor of the patrons of the system. The use of MARTA's funds to increase the value of its property for the benefit of its ridership is an expenditure in furtherance of a valid public purpose.

Garden Hills 273 Ga. at 284 (internal citations and quotations omitted). The Court further noted that leasing and developing the property was a valid public purpose because it would "enhance the over-all value of the property itself and improve the utilization of the rapid transit station." Id. In short, the Georgia Supreme Court sanctioned the use of MARTA funds for purposes which would improve ridership or revenue.²

¹ The MARTA Act was adopted as local legislation and is not codified in the Georgia Code. Instead, it can be found at Ga. L. 1965 p. 2243 et seq.

² The Court also rejected the argument that the development was unlawful because MARTA cannot "engage in an independent enterprise of the type usually pursued by private individuals." There is some law to support this contention, prohibiting state entities from using their power (either in the form of taxation or eminent domain) to engage in substantial competition with

Application of Law to Potential Affordable Housing Programs

As set forth above, the two guidelines for the proper use of MARTA funds which can be discerned from the statute and case law are: (i) whether the proposed use improves “comfort, safety, and convenience” of MARTA passengers; and (ii) whether it increases revenue or ridership for the Authority. The interpretation of these guidelines is limited by the fact that MARTA’s powers are limited to those “expressly given or [] necessarily implied” from the MARTA Act. Local Div. 732, Amalgamated Transit Union v. MARTA, 253 Ga. 219, 222 (1984). “[I]f there is a reasonable doubt of the existence of a particular power, this doubt is to be resolved in the negative.” Id. (emphasis added).

The following affordable housing strategies have been proposed for funding with receipts from the MARTA sales tax:

- I. Subsidize affordable housing units at multifamily, transit oriented developments owned by MARTA;
- II. Funding for land acquisition, development, and financing of affordable housing near transit stations on property not owned by MARTA;
- III. Funding for rehabilitation, weatherization, and preventative repair of older homes near transit stations but not owned by MARTA stations;
- IV. Funding for community engagement efforts around transit investments;
- V. Funding for community organizations to engage in public art, community clean up, and mentorship programs.

These specific programs are not directly addressed in the statute nor have they been considered by the courts. However, these programs can be divided into three categories based on the relative strength of the argument that they can be funded with MARTA funds.

private businesses. Woodard v. Smith, 254 Ga. 39, 40 (1985); Beazley v. Dekalb County, 210 Ga. 41 (1953). However, the Garden Hills court rejected this contention with respect to the Lindbergh development. Given the dearth of private competition in the market to provide affordable housing, such an argument seems unlikely to be a concern here.

There is strong support for funding Programs I (MARTA owned affordable housing) and IV (community engagement around transit projects) with MARTA funds. The Garden Hills case provides clear support that MARTA can engage in real estate development activities that support transit but does not directly address whether the Authority can set aside a portion of that development for affordable housing. However, Garden Hills makes clear that MARTA has broad discretion to determine how to strike the appropriate balance between ridership and revenue, and the scope of an affordable housing subsidy would fall squarely within this discretion. Likewise, robust community engagement around the MARTA system and potential expansion projects is an essential part of project delivery and ensuring that the projects serve the needs and convenience of its riders. In fact, public engagement is normally a legal requirement if a project seeks federal funds.

In contrast, the law provides little support for funding Programs III (energy efficiency grants) and V (community improvement grants).³ Neither program would improve the quality of transit service; neither program would directly improve the comfort, convenience, or safety of MARTA riders; neither program would generate revenue for MARTA or improve the value of the Authority's assets; and any putative increase in ridership seems tenuous and speculative. Although these programs may be perfectly worthy purposes, they are not proper uses of MARTA funds.

The legality of Program II (subsidy for private developments) is the least clear. The Garden Hills case was decided based on facts in which MARTA owned the property slated for development. This program would differ in that MARTA funds would be used to subsidize affordable housing at privately owned developments. This scenario not only removes one the justifications relied on in Garden Hills – generating revenue – but would actually cost the Authority money through the subsidy. An argument can be made that such a MARTA investment is legally permissible, even in the absence of increased revenue, if the development presents compelling ridership and rider convenience justifications. Such justifications might include immediate proximity to a transit station, reduced parking availability, and transit incentives like

³ For purposes of this memorandum, these activities are assumed to occur in the areas surrounding transit stations but not on the actual station property. MARTA clearly has legal authority to engage in maintenance and commission public art efforts on the station property itself.

a station shuttle and subsidized transit passes for residents. However, relying solely on ridership and rider convenience without the revenue justification requires a more expansive view of MARTA's powers than sanctioned in Garden Hills. This position has never been tested in court, so even the most narrowly tailored program with the most compelling ridership benefits risks a legal challenge.

Order of Expenditure of New Funds

Senate Bill 369, which created the opportunity for the upcoming MARTA referendum, also added new language regarding how funds from the referendum are to be spent. The statute now provides:

All of the proceeds derived from the additional tax provided for by this Code section shall be first allocated for payment of the cost of the rapid transit projects incorporated in such contract, except as otherwise provided by the terms of such rapid transit contract, and thereafter, upon completion and payment of such rapid transit projects, as provided for in such contract and this Code section.

O.C.G.A. § 32-9-13(e) (emphasis added). Thus, the new tax receipts must first be used for projects in the rapid transit contract. Only in the unlikely event that all of those projects are built can the funds be used for projects not in the contract. Therefore, if funds raised through this referendum are to be used for affordable housing programs, those programs must be part of a project in the rapid transit contract (like a transit oriented development built as part of a new station) or must be included as a separate item in the contract. Otherwise, funds cannot be applied toward the affordable housing program until all of the projects in the contract are complete.⁴

Conclusion

It is clear that MARTA funds can be used for broader, transit-supportive efforts provided that those programs increase revenue, ridership, or the safety and convenience of MARTA riders. It is also clear that MARTA funds cannot be used for programs which fail to serve these goals. The extent to which a given program serves these goals and the extent to which the law requires alignment with the goals are likely to be a subject of uncertainty and debate. An aggressive

⁴ An affordable housing program could be added to the rapid transit contract as part of the contract amendment required by the referendum, or as part of a subsequent amendment. The MARTA rapid transit contract has been amended over a dozen times since its inception.

interpretation of these standards and thin factual support will render a program subject to legal challenge. Narrowly tailoring a program and thoroughly documenting the strength of a program's link to appropriate transit-supportive goals will render the program more legally defensible under challenge.