

# SMART GROWTH IN MARYLAND: LOOKING FORWARD AND LOOKING BACK

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## I. INTRODUCTION

Spring of 2007 will mark the 10th anniversary of the passage of Maryland's Smart Growth and Neighborhood Conservation Initiative; an effort designed to discourage sprawl development, foster more compact communities, protect the best remaining farms and open space in the state, and save taxpayers from the growing cost of providing services and infrastructure to serve far-flung development.<sup>1</sup> Al-

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1. MD. CODE ANN., STATE FIN. & PROC. §§ 5-7B-01 to -10 (LexisNexis 2006); Exec. Order No. 01.01.1998.04, Smart Growth and Neighborhood Conservation Policy,

most before its various provisions took effect in 1997 and 1998, the Maryland initiative generated interest and acclaim across the country. It received numerous awards and became the principal legacy of the program's primary architect, former Governor Parris N. Glendening. Governors in other states, such as New Jersey, Colorado and Massachusetts, instituted their own "smart growth" proposals, often modeled after portions of the Maryland program.<sup>2</sup> Even the popularity and wide usage of the now omnipresent phrase "smart growth" can be attributed in large part to the Maryland program.

But, what has been the effect of Maryland's Smart Growth program? Looking at it some ten years later, has it worked? Did it accomplish what it was designed to do? What have been the strengths and weaknesses of the Maryland approach, and how can lessons from the Maryland experience be used to offer a new set of policymakers in Maryland, as well as elsewhere in the nation, practical suggestions on how to make smart growth smarter?

## II. BRIEF HISTORY OF THE MARYLAND SMART GROWTH PROGRAM

Maryland's Smart Growth and Neighborhood Conservation Initiative was built on the foundation of more than sixty years of land use law, regulation, and state planning assistance in Maryland. The state planning law, first enacted in the 1930s, was designed to strengthen centralized coordination of planning within the executive branch, establish long range goals, and aid local jurisdictions in their pursuit of planning responsibilities delegated to them by state enabling legislation. Over the ensuing decades, but particularly beginning in the 1960s, the Maryland General Assembly and various Maryland governors proposed and enacted a series of land use laws, most of them designed to better protect Maryland's environment. These laws were developed to help the state acquire parkland, protect forests and wetlands, reduce soil erosion, save farmland, and regulate stormwater runoff. The State Planning Act in 1974 even gave the state authority to intervene in local land use matters, although it was a power rarely used thereafter. At the same time, the General Assembly authorized the Department of Planning to develop a state development plan, but while pieces of such a plan have subsequently been created, an overall plan has never been completed.

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(Jan. 23, 1998) *available at* <http://www.dnr.state.md.us/education/growfrom-here/LESSON15/MDP/EXECORDER.HTM>.

2. JOHN MELVIN DEGROVE, *PLANNING POLICY AND POLITICS: SMART GROWTH AND THE STATES* (2005).

In 1991, prompted by the creation of a new regional compact with Virginia, Pennsylvania, the District of Columbia, and the U.S. Environmental Protection Agency to protect and restore the Chesapeake Bay, a state commission proposed that the state government in Maryland assume substantially stronger authority over what traditionally had been local land use decisions.<sup>3</sup> The sweeping proposal called for local governments to designate land in their jurisdictions in four categories: developed areas, growth areas, sensitive areas, and rural and resource areas. The commission also recommended that the state establish specified permitted densities and performance standards within the growth, developed and rural resource areas, and require local governments to inventory their environmentally sensitive areas and develop protection programs. Finally, the commission proposed that the state be given approval authority over local plans; a proposal that would be valid for only three years. It was a bold proposal to shift the balance of power over land use control in Maryland from the local level to the state—too bold, it turned out, to get the votes necessary for passage in the legislature.

The following year, Governor William Donald Schaefer proposed, and the legislature passed, a scaled back version of the 1991 proposal.<sup>4</sup> Perhaps the most important provision of the Economic Growth, Resource Protection and Planning Act of 1992 was the formal establishment of seven “visions” for development in Maryland and a requirement that local governments revise their comprehensive plans in accordance with these visions to guide policymakers in deciding where and how future development should occur.<sup>5</sup> These visions, plus an eighth that was added later, were phrased as broad statements of principle:

1. Development is concentrated in suitable areas.
2. Sensitive areas are protected.
3. In rural areas, growth is directed to existing population centers and resource areas are protected.
4. Stewardship of the Chesapeake Bay and the land is a universal ethic.

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3. 1983 Chesapeake Bay Agreement, Dec. 9, 1983, *available at* <http://www.chesapeakebay.net/pubs/1983ChesapeakeBayAgreement.pdf>.

4. MD. ANN. CODE art. 66B, §§ 1.00–1.03 (2003).

5. MD. CODE ANN., STATE FIN. & PROC. § 5-7A-01 (LexisNexis 2006); MD. ANN. CODE art. 66B, § 1.01 (2003).

5. Conservation of resources, including a reduction in resource consumption, is practiced.
6. To assure the achievement of items (1) through (5) [above], economic growth is encouraged and regulatory mechanisms are streamlined.
7. Adequate public facilities and infrastructure under the control of the county or municipal corporation are available or planned in areas where growth is to occur.
8. Funding mechanisms are addressed to achieve these visions.<sup>6</sup>

The '92 Growth Act also specifically identified four types of "sensitive areas" for special protection: streams and stream buffers, 100-year floodplains, habitats for endangered species, and steep slopes. But it was left to local governments to draft plans to protect these and other sensitive areas.<sup>7</sup> While the '92 Growth Act did not accomplish nearly as much as proponents of stronger state authority over land use had hoped, it did serve as the foundation for a bigger, broader land use reform five years later to assure that state spending was consistent with land use policies established in the 1992 legislation—the Smart Growth and Neighborhood Conservation Initiative.<sup>8</sup>

Maryland's Smart Growth program was developed between spring and early winter 1996 and introduced as legislative and budgetary initiatives in the 1997 session of the Maryland General Assembly. The initial Smart Growth package included five bills and one budgetary proposal. The bills were the Smart Growth Areas Act,<sup>9</sup> the

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6. *Id.*; see generally James R. Cohen, *Maryland's "Smart Growth": Using Incentives to Combat Sprawl*, in *URBAN SPRAWL: CAUSES, CONSEQUENCES AND POLICY RESPONSES* 293, 298–301 (Gregory D. Squires ed., 2002).

7. The Growth Act also required local plans to contain recommendations that: encourage streamlined review of development applications within areas designated for growth; encourage the use of flexible development regulations to promote innovative and cost-saving site design and protect the environment; use innovative techniques to foster economic development in areas designated for growth; and encourage more widespread use of flexible development standards. Finally, the Growth Act created a seventeen-member advisory commission to monitor the progress made in implementing the Growth Act, explore new solutions, and report annually to the Governor and the General Assembly. Seats on the Growth Commission were designated to represent the full array of land use stakeholders: business, finance, agriculture, forestry, environmental, civic associations, planning, real estate development interests, counties and municipal governments, and the General Assembly. John W. Frece, *Twenty Lessons from Maryland's Smart Growth Initiative*, 6 *VT. J. ENVTL. L.* 13 (2005).

8. MD. CODE ANN., STATE FIN. & PROC. §§ 5-7B-01 to -10 (LexisNexis 2006).

9. *Id.*

Rural Legacy Program,<sup>10</sup> the Brownfields Voluntary Cleanup and Revitalization Program,<sup>11</sup> the Job Creation Tax Credit Act of 1997,<sup>12</sup> and the Maryland Right-to-Farm Bill.<sup>13</sup> A sixth component was introduced as a budget program: a pilot Live Near Your Work program in which the state, local governments, and participating employers would provide stipends of \$1,000 each, \$3,000 total, to homebuyers who purchased homes in certain designated revitalization areas.<sup>14</sup>

Although there were five pieces of legislation in that initial package, the thrust of Maryland's new growth management effort was really embodied in only two—the Smart Growth Areas Act<sup>15</sup> and the Rural Legacy Program.<sup>16</sup> Together, they represented Governor Glendening's "inside/outside" strategy to encourage growth and revitalization *inside* existing cities and towns where development was already present; and, simultaneously, to identify and protect the best farmland, forests and other natural areas *outside* the urban envelope that should be protected from encroaching development. All the other programs that first year that were grouped under the state's smart growth banner, as well as those that were added in succeeding years, were harnessed in one way or another to support those two principal approaches.

Clearly the centerpiece of Maryland's Smart Growth initiative was the Smart Growth Areas Act.<sup>17</sup> It was through this legislation that Maryland restricted where the state government could spend money in support of growth to certain geographic areas. Glendening's theory was that the state could influence development decisions by restricting state spending on growth to certain areas of the state and generally prohibiting it outside of those areas. The smart growth law created geographic areas called "Priority Funding Areas" (PFAs) to which state funding for growth would be restricted.<sup>18</sup> These areas included all of the state's incorporated municipalities (154 municipalities at the time; 157 today), the already heavily developed areas inside the circumferential highways around Baltimore and the Maryland suburbs of Washington, D.C., and other areas designated by the state's twenty-three counties that met specific state criteria. The

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10. MD. CODE ANN., NAT. RES. §§ 5-9A-01 to -10 (LexisNexis 2005).

11. MD. ANN. CODE art. 41, § 14-805 (2003).

12. MD. ANN. CODE art. 83A, § 5-1101 (2003 & Supp. 2006).

13. The Maryland Right-to-Farm Bill was never enacted. H.R. 491, 1997 Gen. Assem., Reg. Sess. (Md. 1997).

14. MD. CODE ANN., HOUS. & CMTY. DEV. § 4-215 (LexisNexis 2006).

15. MD. CODE ANN., STATE FIN. & PROC. §§ 5-7B-01 to -10 (LexisNexis 2006).

16. MD. CODE ANN., NAT. RES. §§ 5-9A-01 to -10 (LexisNexis 2005).

17. MD. CODE ANN., STATE FIN. & PROC. §§ 5-7B-01 to -10 (LexisNexis 2006).

18. *Id.* § 5-7B-01.

counties were given until October 1, 1998, to map their Priority Funding Areas and submit their plan to the state Department of Planning for review and comment.

A long list of other state programs, some that predated Smart Growth and others that were created in subsequent years as a result of the Smart Growth initiative, were grouped together to support the PFA concept by making it easier and more profitable, or less costly, to develop inside a PFA than outside. Glendening felt that this less regulatory approach—carrots rather than sticks—would be more politically appealing, and undoubtedly was one of the reasons the Maryland initiative gained so much attention from outside the state. He also felt the state could lead by example by not continuing to subsidize sprawl development. The goal was to use the power of the state budget as an incentive for smarter growth. State programs were geared either to support development within the PFAs or to protect undeveloped land outside the PFAs.

Throughout his two terms in office, Glendening did what he could to institutionalize the state's Smart Growth agenda. He issued executive orders establishing a Smart Growth policy for his administration, the Smart Growth legislation was codified in state law, and, to the extent possible, he changed the way state agencies routinely responded to issues related to growth and development. His administration even attempted to influence thinking on growth issues with young people, holding environmental summits for high school students and developing a series of Smart Growth lesson plans that high school teachers could use.<sup>19</sup>

Whatever momentum the Smart Growth program developed, however, slowed dramatically with the upset election of Robert L. Ehrlich, Jr., as governor in 2002. As the first Republican governor of Maryland in thirty-four years, Governor Ehrlich had a skeptical view of Smart Growth, a program that was so closely identified with his predecessor. Whereas Governor Glendening's approach to land use issues had been informed by nearly a quarter-century of experience at the county and municipal government level, Governor Ehrlich had never before been in a position in which he had to confront land use issues. Perhaps most importantly, Governor Ehrlich faced a budget shortfall his first three years in office that prompted him to sharply reduce or eliminate funding for many of the state programs that had been used as the incentives for the incentive-based Smart Growth program. Land conservation programs were hit particularly hard:

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19. STATE OF MARYLAND, WHERE DO WE GO FROM HERE?, A TEACHER'S RESOURCE GUIDE ON GROWTH AND ITS IMPACTS IN MARYLAND, <http://www.dnr.state.md.us/education/growfromhere/Home.htm> (last visited Feb. 10, 2007).

funding for Rural Legacy declined to about one-fifth of its former levels; Program Open Space funds were diverted to balance the state's general treasury budget; and GreenPrint,<sup>20</sup> a program based on an inventory of the state's most important ecological areas, was zeroed out. Other programs, such as a popular "streetscaping" program at the Department of Transportation called Neighborhood Conservation and a separate housing-assistance program called Live Near Your Work were simply zeroed out in the budget.

Governor Ehrlich also dismantled the Governor's Office of Smart Growth, the first gubernatorial-level office of its kind in the nation. Finally, unlike Governor Glendening, Governor Ehrlich never used the "bully pulpit" of his office to encourage smarter growth at the local level, philosophically believing that the state should not involve itself in local land use decisions.

In November 2006, Governor Ehrlich was defeated in his bid for re-election by Martin O'Malley, the mayor of Baltimore. As part of his campaign, Mayor O'Malley criticized Governor Ehrlich for de-emphasizing smart growth and pledged to restart the stalled program, if elected. Although he provided few details about what that might mean, he made several general campaign promises:

To "set a goal of preserving more land each year than is consumed by development."<sup>21</sup>

To fully fund each year the state's parkland acquisition program, Program Open Space.<sup>22</sup>

To "re-establish the Office of Smart Growth, with a new emphasis on creating a genuine partnership with municipalities and counties on how best to plan for and manage the growth that is coming to Maryland. And bring a stronger focus to encouraging growth in older communities—where we have infrastructure and public support for redevelopment."<sup>23</sup>

To "increase technical and financial assistance to local gov-

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20. STATE OF MARYLAND, MARYLAND'S GREENPRINT PROGRAM (2003) [hereinafter GREENPRINT PROGRAM], <http://www.dnr.state.md.us/greenways/greenprint>.

21. Martin O'Malley, Governor of Md., Address to the League of Conservation Voters in Annapolis, Md. (Sept. 19, 2006), (transcript available at <http://www.martinomalley.com/speeches/1004/address-to-the-league-of-conservation-voters>).

22. *Id.*

23. *Id.*

ernments to help them plan for growth.”<sup>24</sup>

To “invest in transit and telecommuting.”<sup>25</sup>

Maryland faces daunting challenges in the decades to come. Already the fifth most densely populated state in the nation, Maryland’s population is projected to increase from “approximately 5.5 million to 7 million by 2030.”<sup>26</sup> “That increase of 1.5 million residents would mean another 580,000 households and 810,000 new jobs locating in the state by 2030.”<sup>27</sup> Residential development in the three southern Maryland counties of Calvert, Charles and St. Mary’s is expected to explode by 80% by 2030. The population of the nine counties on Maryland’s historically rural, farm-laden Eastern Shore grew by greater than sixteen percent between 1990 and 2004 and is projected to grow by another 19.5% by 2030.<sup>28</sup> Government officials on the upper Eastern Shore and in central Maryland are bracing for a projected influx of 28,000 households and 45,000 high salary jobs as a result of a shift in military jobs to Maryland under the federal Base Realignment and Closure (BRAC) program.<sup>29</sup>

With the Smart Growth program about to turn ten years old, with a new Governor and newly elected General Assembly having just taken office, and with growth and development escalating in almost every part of the state, it seems a propitious time to assess the program and discuss what could be done to set it on a productive new course for the future. To do this, we will first discuss what we see as five major challenges with the current Smart Growth initiative and then follow with a series of recommendations about what the new governor and legislature could do to make smart growth smarter.

### III. FIVE MAJOR CHALLENGES

Maryland’s Smart Growth program has won numerous awards. In 2000, for example, Harvard University, the Ford Foundation, and the Center for Excellence in Government jointly proclaimed Maryland’s anti-sprawl program to be one of the ten most innovative new

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24. *Id.*

25. *Id.*

26. JOHN W. FRECE, NAT’L CTR. FOR SMART GROWTH RESEARCH AND EDUCATION, TODAY’S VISION TOMORROW’S REALITY: SUMMARY REPORT OF THE “REALITY CHECK PLUS” GROWTH VISIONING EXERCISES 5 (2006), available at <http://www.realitycheckmaryland.org/files/pdf/TVTR-Final.pdf>.

27. *Id.*

28. *Id.* at 19–21.

29. *Id.* at 29–30.



government programs in the nation.<sup>30</sup> Other awards—from the American Society of Landscape Architects, from the Congress for the New Urbanism, and from the World Wildlife Fund, among others—drew national attention to the Maryland experiment. These awards were bestowed before Maryland officials had even had much time to implement its provisions. This string of accolades was, in part, testament to the pent up desire among environmentalists, urban planners and others for state governments to step up their involvement in local land use decisions and growing concern about the detrimental effects of sprawl development. It also recognized Maryland's effort to shift the debate from "no growth" to "smart growth," that is, from opposing growth to trying to find a way to accommodate it; and, to Maryland's novel notion that growth could somehow be managed by state government using its financial support for development in certain specified areas, but not in others—an incentive-based approach rather than a more traditional regulatory approach.

Now, however, nearly ten years have elapsed since the Smart Growth initiative was enacted and the results, or the lack thereof, are becoming increasingly clear. A visitor to Maryland who had not been in the state since before the Smart Growth laws were enacted would be hard-pressed to observe substantial change on the ground. There are many anecdotal examples of urban redevelopment projects that might not have occurred without the financial and rhetorical support of the state's smart growth effort; and there are thousands of acres of farmland and other undeveloped natural areas in the state that have been permanently protected as a result of the Rural Legacy Program or its sister conservation programs. However, most local governments throughout the state continue to approve development outside of the Priority Funding Areas designated as a result of the Smart Growth law,<sup>31</sup> and even the successful attempts to purchase development rights on rural lands have not substantially decreased the threat of sprawling development on Maryland's remaining open space.

Research regarding elements of the Maryland program, discussions and interviews with policymakers, responses from a series of growth visioning exercises held around the state in 2006, and comparisons with similar efforts in other states point out five major chal-

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30. Press Release, The Ash Inst. for Democratic Governance and Innovation, Smart Growth Initiative Receives Innovations in Am. Gov't Award (2000), available at [http://www.ashinstitute.harvard.edu/Ash/pr\\_2000w\\_smartgrowth.htm](http://www.ashinstitute.harvard.edu/Ash/pr_2000w_smartgrowth.htm).

31. Qing Shen & Feng Zhang, *Land-Use Changes in a Pr-Smart Growth State: Maryland, USA*, ENV'T & PLANNING A, 4 (forthcoming 2007), available at [http://www.smartgrowth.umd.edu/research/pdf/ShenZhang\\_MDLandUseChange\\_121305.pdf](http://www.smartgrowth.umd.edu/research/pdf/ShenZhang_MDLandUseChange_121305.pdf).

lenges for the Maryland Smart Growth initiative. We will briefly summarize each of the five major challenges before discussing each one in more detail.

1. **PRAGMATIC BALANCE:** Many of Maryland's original land use management efforts were inspired by a desire to protect the state's environment from the effects of encroaching development and to concentrate growth in designated urban areas. If there was a bias in these laws, it was generally in favor of conservation over development.

2. **URBAN CONTAINMENT:** The most important element of the Smart Growth program, the establishment of "Priority Funding Areas" as the geographical focus for state funding for growth, has proven to be an inherently weak urban containment tool.

3. **INFRASTRUCTURE FINANCE:** The Smart Growth program envisions more compact development within existing towns and cities, but provides too little financial support at the state level and is too lax in requiring local governments to provide infrastructure in designated growth areas rather than deflecting growth elsewhere.

4. **LAND CONSERVATION:** While Maryland has ranked as a national leader in efforts to protect farms and other natural resource lands from development, these efforts have often been fragmented, unsupported by local zoning and incapable on their own of protecting rural areas from sprawl.

5. **STATUTORY FRAMEWORK:** The Smart Growth program has never been integrated with existing planning and land use law into a coherent framework for managing growth, was created without a set of specific program goals, and lacks any system measuring or monitoring the program's progress.

#### A. Pragmatic Balance

Marylanders appear to be increasingly anti-growth, or at least in favor of efforts to slow the rate of growth. This has become evident in the rejection by voters of progrowth candidates and the proliferation of NIMBY ("Not in My Back Yard") organizations. Consequently, land preservation programs have proven to be much more popular than programs that encourage development and redevelopment within existing communities. Land preservation programs generally involve a straightforward process in which funds are made available to purchase land or development rights on land. Parcels meeting stipulated criteria are then targeted, landowners willing to participate are identified, and the transactions are executed. In most cases in Maryland, when development rights are purchased, they are then extinguished rather than traded or sold for use elsewhere in the state as a commod-

ity of value, although there are some functioning Transferable Development Rights (TDR) programs. After such a process, land trusts or other sponsoring organizations are happy, environmental groups are happy, often agricultural or other resource based industries, such as forestry, are happy, and usually neighboring communities are happy that valuable and scenic land has been protected forever from future development.

Developers, home builders, and affordable housing advocates, however, are not necessarily so pleased. Such protection makes unavailable land that might otherwise have been suitable for new development, often driving up the cost of remaining raw land close to or inside existing communities, prompting builders to leapfrog protected lands to develop in formerly rural areas even farther from existing communities, or both. This, in turn, fragments remaining rural areas, degrades more watersheds, requires more taxpayer expenditures on roads, schools and other infrastructure, and creates more long distance driving with attendant problems with traffic congestion and air emissions.

This inability, if not unwillingness, of local governments to plan for future residential needs highlights a fundamental shortcoming of Maryland planning law: Maryland counties are not required to include a specific plan for housing within their comprehensive plans; are not required to acknowledge the state's shortage of so-called "workforce" housing that is affordable to citizens of lower incomes; are not required to accept responsibility for providing a "fair share" of that housing; nor even required to perform regular, adequate inventories of the county's capacity to accommodate the growth it is projected to receive.

The "inside" components of the Maryland approach are expressed in Vision 6, which states that "economic growth is encouraged and regulatory mechanisms are streamlined,"<sup>32</sup> and was supported by a number of additional incentive-based instruments. These include the Brownfields Voluntary Cleanup and Redevelopment Act,<sup>33</sup> the Live Near Your Work Program,<sup>34</sup> the Neighborhood Conservation Program, the Historic Preservation Tax Credit, the Job Creation Tax Credit,<sup>35</sup> and most recently under Governor Ehrlich, the Priority Places Program. Each of these programs has symbolic value but never had large budgets. Hence, their impact was always small at best.

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32. MD. ANN. CODE art. 66B, § 1.01(6) (2003).

33. MD. ANN. CODE art. 41, § 14-805 (2003).

34. MD CODE ANN., HOUS. & CMTY. DEV. § 4-215 (LexisNexis 2006).

35. MD. ANN. CODE art. 83A, §§ 5-1101 to -1103 (2003 & Supp. 2006).

The imbalance in the Maryland program can only be understood in its economic and political context. Like every other state, Maryland has suffered economic cycles. However, compared with other states those cycles have been mild, and the last two decades have been periods of nearly consistent growth. With this growth has come growing pains: overcrowded schools, congested highways, farmland and forest loss, and polluted waterways. Thus, the popular support for Smart Growth in Maryland largely comes from the Baltimore and Washington suburbs, and now the Eastern Shore, where the primary problem is excessive growth. Only in economically depressed parts of western Maryland is there much concern that Smart Growth might have adverse effects on the economy. Thus, unlike in Oregon, for example, where periodic and severe economic cycles kept pressure on the land use program to foster both conservation and development, state land use policy in Maryland has largely served to strengthen local government tendencies to stop, slow, or repel growth precisely in the areas designated for growth in local plans.

In short, state government in Maryland has delegated to local governments authority over land use decisions, but local governments are either incapable or unwilling to respond to larger statewide or even regional development needs. There is no mechanism in place to require local governments in Maryland to meet the challenges of providing housing for citizens of all income levels, assuring that sufficient housing of all kinds is produced to meet their projected population growth, or to try to better plan residential development in proximity to jobs or vice versa.

### B. Urban Containment

Unlike some other states that have adopted significant land use reforms, Maryland does not employ urban growth boundaries (UGBs).<sup>36</sup> Instead it has created "Priority Funding Areas" (PFAs).<sup>37</sup> The concept of PFAs is simple: PFAs are a way for the state to target state spending toward existing communities or other locally designated areas. Local governments, in turn, must identify where they intend urban development to take place, or where it has already taken place, and where it wants the state to provide financial support for such development in the future.<sup>38</sup> Such an incentive approach to urban containment does not force local governments to restrict development inside PFAs, but if they choose to allow development outside

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36. OR. REV. STAT. ANN. § 197.298 (2001).

37. MD. CODE ANN., STATE FIN. & PROC. § 5-7B-02 (LexisNexis 2006).

38. *Id.* § 5-7B-03.

of PFAs, any required infrastructure would have to be financed entirely with private or local government funds.<sup>39</sup>

The concept of PFAs has considerable political appeal and can be credited for many of the accolades the Smart Growth program received when it was created. PFAs represent only a minimal intrusion into the land use powers of local governments. Local governments must identify PFAs in accordance with state guidelines, but PFAs need not constrict local planning or urban development. The presumption is that the state can use its power of the purse to encourage development in specifically defined areas and, conversely, by withholding such funding, discourage it elsewhere.<sup>40</sup>

PFAs automatically include (a) [the state's 157 incorporated] municipalities; (b) areas designated by the Department of Housing and Community Development (DHCD) for revitalization; (c) an enterprise zone as designated under the state or by the federal government; and (d) areas of the state located between Interstate 495 and Washington, D.C., or between Interstate 695 and Baltimore City.<sup>41</sup>

Additional areas that qualify for inclusion in a PFA include:

(a) a community existing prior to 1997 [the year the legislation was enacted] that is located within a locally-designated growth area, served by a public/community sewer *or* water system, and has an allowed, average residential density of  $\geq 2.0$  units per acre; (b) an area outside the developed portion of an existing community, if the area has a permitted, average build-out density of  $\geq 3.5$  units [per] acre; and (c) a currently undeveloped area that is within a county-designated growth area, is scheduled for public water and sewer service, and has a permitted residential density of  $\geq 3.5$  units per acre.<sup>42</sup>

During the debate over the rules that govern PFAs there was considerable concern about the density threshold.<sup>43</sup> The original version of the PFA bill as introduced would have set the density threshold at five units per acre, but was amended to 3.5 units per acre.<sup>44</sup>

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39. Cohen, *supra* note 6, at 303–304.

40. *Id.* at 302.

41. *Id.* That is, (d) refers to the areas inside the Maryland portion of the beltways that surround Washington, D.C., and all of the area inside the one around Baltimore.

42. *Id.* at 302–03.

43. *Id.* at 304.

44. *Id.*; see also MD. CODE ANN., STATE FIN. & PROC. § 5-7B-03(d)(3)(i)(1) (LexisNexis 2006).

This lower level of density was essentially the same as the average density of the “new town” of Columbia, Maryland, a standard pushed by the Maryland Association of Counties, which had strongly opposed the higher 5 units per acre minimum. The smart growth advocacy organization 1000 Friends of Maryland argued that the 3.5 units per acre threshold was too low, especially since actual densities are often far below zoned densities, but to no avail.<sup>45</sup>

Also within the original legislation was a provision that would have required county governments to submit their Priority Funding Area plans to the state’s Office of Planning to determine if they were consistent with the requirements and goals of the legislation. Implicit was the perception that Office of Planning approval of local PFA plans would be required. That clearly represented more authority than the counties wanted the state to have. Again, the county lobbyists worked to whittle back the state’s authority. By the time they were through, the legislation allowed the Office of Planning to “comment” on PFA plans, but denied the state veto authority.<sup>46</sup>

The law required local governments to submit to the Maryland Department of Planning (MDP) maps of PFAs, in digital or paper form, by October 1, 1998—a full year after the Smart Growth Areas Act officially took effect.<sup>47</sup> As of that deadline, the state was precluded from spending money on growth projects outside of designated PFAs.<sup>48</sup> County PFA plans were subsequently reviewed as they were submitted and, if appropriate, MDP comments were made.<sup>49</sup>

PFAs cover much of the already heavily developed Baltimore-Washington corridor, essentially tracking the beltways around the two cities, the Interstate 270 corridor from through Montgomery County northwest toward Frederick, and the Interstate 95 corridor that extends from Washington, D.C., northeast through Maryland toward Wilmington, Delaware.<sup>50</sup> The other largest PFAs are around the cities of Frederick, Hagerstown, Salisbury and Waldorf.<sup>51</sup> In addition, there are many smaller PFAs, starting with cities such as Easton,

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45. Cohen, *supra* note 6, at 304.

46. JOHN W. FRECE, *SPRAWL AND POLITICS: THE STORY OF SMART GROWTH IN MARYLAND* (forthcoming 2007).

47. MARYLAND OFFICE OF PLANNING, *MANAGING MARYLAND’S GROWTH MODELS AND GUIDELINES, SMART GROWTH: DESIGNATING PRIORITY FUNDING AREAS 1*, 39-44 (1997) (citing MD. CODE ANN., STATE FIN. & PROC. § 5-7B-03, -08, -08(c)), available at <http://www.mdp.state.md.us/smartgrowth/pdf/PFA.PDF>.

48. MD. CODE ANN., STATE FIN. & PROC. § 5-7B-04(a) (LexisNexis 2006).

49. *Id.* § 5-7B-09(b).

50. MARYLAND DEPARTMENT OF PLANNING, *STATE-WIDE PRIORITY FUNDING AREAS* (2004), available at [http://www.mdp.state.md.us/pfamap\\_large.htm](http://www.mdp.state.md.us/pfamap_large.htm) (illustrating, via a color-coded map, the combined PFAs of every local jurisdiction).

51. *Id.*

Cambridge, Westminster, the Solomons-Leonardtown area near the Patuxent Naval Air Station, and the Oakland-Deep Creek area.<sup>52</sup> A closer inspection, however, shows tiny PFAs in all parts of the state, usually representing small municipalities or areas served by water and sewer designated as PFAs by counties.<sup>53</sup>

The irregular shape of PFAs in Montgomery County, a suburb of Washington, D.C., largely reflects existing development patterns shaped by longstanding plans based on the concept of preservation wedges and development corridors. Similarly, the PFA in Baltimore County, the county that almost surrounds the city of Baltimore and extends northward to the Pennsylvania line, reflects that development below, and preservation above, that jurisdiction's longstanding Urban-Rural Demarcation Line.<sup>54</sup>

### C. Priority Funding Area Issues:

The success of Maryland's Priority Funding Area program as a growth containment instrument suffered from at least nine specific problems:

1. Location – Because of the way PFAs were defined in state law, they included areas that were never intended by county governments to be growth areas. These include, for example, areas served by public sewer only because extension of sewer was needed as a remedy for failing septic systems. In other locales, areas served by water and sewer but which have largely been abandoned as growth areas during the last half century still qualified as PFAs even though they might no longer be considered as optimal growth areas.

2. Size and shape – Similarly, the way PFAs were defined in state law resulted in PFAs of widely ranging size and shape. This twin effect detracts from the ability of PFAs to foster efficient patterns of urban growth. Instead, in some cases it permits what might be considered “urban sprawl” within the PFA itself. Because most PFAs assume the same shape as municipal boundaries or, in some instances, follow the routes of roads or sewer and water lines, their shapes often resemble splattered paint. This is more than a matter of cartographic aesthetics; rather, it often signals an inefficient pattern for growth that renders the provision of public services or infrastructure that much harder or more costly.

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52. *Id.*

53. *Id.*

54. 1000 FRIENDS OF MARYLAND, SMART GROWTH: HOW IS YOUR COUNTY DOING? A REPORT ON THE BALTIMORE METROPOLITAN REGION 5 (2001), *available at* <http://www.friendsofmd.org/data/smartgrowth.pdf>.

The other striking feature about the shape of PFAs is their high degree of discontinuity, especially in the exurban and rural counties such as Frederick County.<sup>55</sup> Part of the reason for the splattered-paint configuration of the PFAs in Frederick County is the previous discontinuous development patterns in the exurbs of the city of Frederick and in rural hamlets. Another part of the reason is that PFAs were allowed to include existing “communities” with sewer and/or water service. A third reason is that the rules that govern the delineation of PFAs are silent with respect to urban form or the relationship between urban form and the efficient provision of infrastructure.<sup>56</sup> That is, there is no provision in the PFA requirements that local governments should consider the relationship between urban growth and the efficient provision of infrastructure.

PFAs were required to be large enough to accommodate a county’s twenty-year growth projections, but the Maryland Department of Planning could not veto plans that contained overly large PFAs.<sup>57</sup> The best state planners could do under the law was to “comment” on areas within PFA plans they felt exceeded this twenty-year requirement. Under Governor Glendening, state agencies were informally directed not to provide funding for growth projects within PFA “comment areas,” treating them as if they were the restricted areas outside of PFAs. Agencies continued to make this subtle but important distinction after Glendening.<sup>58</sup>

Subsequent studies provide some insight into the question of PFA size.<sup>59</sup> Not surprisingly, the results of these studies suggest that development capacity inside PFAs varies widely. According to Sohn, development capacity within PFAs varies from less than ten years to over thirty years of anticipated growth.<sup>60</sup> For the fifteen counties in the Baltimore-Washington region, the center estimated that there was enough development capacity inside PFAs for approximately fifteen years, and enough development capacity outside PFAs indefinitely.<sup>61</sup>

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55. MARYLAND DEPARTMENT OF PLANNING, *FREDERICK COUNTY PRIORITY FUNDING AREAS* (2001), available at <http://www.mdp.state.md.us/localplan/fred/Fred.pdf> (illustrating, via a color-coded map, the degree of discontinuity of the PFAs in Frederick County).

56. MD. CODE ANN., STATE FIN. & PROC. § 5-7B-03 (LexisNexis 2006).

57. Gerrit J. Knaap & Lewis D. Hopkins, *The Inventory Approach to Urban Growth Boundaries*, 67 *J. Am. Plan. Ass’n* 314, 314–26 (2001).

58. FRECE, *supra* note 46.

59. Jungyul Sohn et al., *Developable Land Supplies and the Price of Single Family Housing*, at the 50th Annual N. Am. Meetings of the Reg’l Sci. Ass’n Int’l (Nov. 20, 2003).

60. *Id.*

61. *Id.*



3. PFA Criteria – The essential criteria used to define PFAs were developed for reasons somewhat different than simply the desire to constrain all growth to certain areas. First and foremost, the PFA plan had to pass political muster, which meant the criteria had to be developed in a way that would preserve local decision-making authority. Second, the focus was primarily on where the state should restrict its funding for growth-related projects in an effort to influence development decisions. Municipalities and already heavily developed areas inside the two beltways were obvious starting points. But some Maryland counties have no municipalities and many have only a few.<sup>62</sup> Therefore, counties had to be given other ways of designating PFAs, so the debate focused on areas already served (or planned to be served) by sewer and water and some standard for minimum residential densities. Again, the result was largely the result of political compromise.

A recent analysis of the performance of PFAs by the Maryland Department of Planning shows that over the fifteen year period between 1990 and 2004, the average amount of land consumed for every new housing unit built was three-quarters of an acre.<sup>63</sup> Under closer inspection, however, it becomes clear that the highest rate of land consumption is occurring outside of PFAs. According to MDP, “[a]pproximately one-fourth of all households are consuming three-fourths of all the land, [and t]he average lot size outside of PFAs is over 8.5 times as large as the average lot size inside of PFAs.”<sup>64</sup> The analysis also concludes that “[t]he percent of residential parcels developed outside of PFAs tends to be highest in the more rural jurisdictions.”<sup>65</sup> MDP found, for example, that ninety-two percent of the land consumed in Cecil County over the past fifteen years was outside of PFAs; nearly eighty-eight percent in both St. Mary’s County and Charles County; and eighty-four percent in Queen Anne’s County.<sup>66</sup>

4. Relationship to Local Plans – As the PFA concept was created in state law, it was never explicitly linked to existing local comprehensive plans or zoning. As a result, implementation of the PFA statute has been more in parallel with other state planning requirements rather than integrated with them. Howard County, one of the

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62. STATE OF MARYLAND, MUNICIPALITIES (BY COUNTY), <http://aomol.net/msa/mdmanual/01glance/html/munic.html> (last visited Feb. 10, 2007).

63. MARYLAND DEPARTMENT OF PLANNING, PFAS AND RESIDENTIAL SINGLE-FAMILY DEVELOPMENT IN MARYLAND 1990–2004, 1, *available at* [http://www.mdp.state.md.us/msdc/PFA/Resid\\_Growth/residentialDevpSummary\\_2004.pdf](http://www.mdp.state.md.us/msdc/PFA/Resid_Growth/residentialDevpSummary_2004.pdf).

64. *Id.*

65. *Id.* at 3.

66. *Id.*

first counties to designate its PFA, simply said the growth area in its comprehensive plan, which constitutes most of the eastern third of the county, would also be its PFA. But most other counties drew PFA boundaries that differed in some way from the growth areas designated in the comprehensive plans. Only one county, predominantly rural Caroline County on the Eastern Shore, decided not to designate any PFAs in addition to the county's existing municipalities.

Because PFAs are essentially instruments that guide state spending, there is no requirement that PFAs be included in local comprehensive plans.<sup>67</sup> Some ten years after they were constructed and submitted by every local government, the comprehensive plans of many cities and counties make no references to PFAs at all. Put another way, PFAs have no bearing on local land use decision-making. Decisions on zoning and subdivisions must refer back to the basic local enabling legislation and the local comprehensive plan.

5. Public Involvement in PFA Decisions – The Priority Funding Areas Act failed to stipulate any process that local governments should or must follow as they establish PFAs for their jurisdiction.<sup>68</sup> There is no requirement for public hearings on PFA boundaries or even distribution to the public of plans for the PFA designation.<sup>69</sup> “[O]nce a jurisdiction creates its PFA, there is nothing preventing it from changing the boundaries of the PFA anytime it [wishes], as long as the new PFA meets the minimum state criteria.”<sup>70</sup>

6. Size and Importance of Incentives – For some development projects, state financial support is unquestionably critical. Many redevelopment projects in the city of Baltimore, for example, probably would not have occurred, or could not have obtained private financing, were it not for the availability of generous Historic Preservation Tax Credits.<sup>71</sup> But the size of other financial incentives, such as the amount the state was willing to invest in redevelopment of former brownfield sites, was often insufficient to attract the level of development the state sought.<sup>72</sup> The size and relative importance of state financial incentives, therefore, goes to the crux of whether an incentive-based program is sufficient to change development behavior, constrain growth to certain identified areas, and curtail sprawl. While hundreds

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67. See Frece, *supra* note 7.

68. MD. CODE ANN., STATE FIN. & PROC. § 5-7B-03 (LexisNexis 2006).

69. PFA criteria, however, refer both to comprehensive plans and local sewer and water plans, both of which have public hearing requirements of their own.

70. Frece, *supra* note 7, at 128.

71. See BALTIMORE COMMISSION FOR HISTORICAL & ARCHITECTURAL PRESERVATION, HISTORIC RESTORATION AND REHABILITATION TAX CREDIT: A TAX INCENTIVE FOR HISTORIC LANDMARKS AND DISTRICTS, <http://www.ci.baltimore.md.us/government/historic/taxcredit.html> (last visited Feb. 10, 2007).

72. Frece, *supra* note 7, at 129–30.

of millions of dollars were appropriated for natural resource and farmland preservation, the program's urban-focused incentives never received a similar huge infusion of new money. This issue, of course, is exacerbated during down cycles of the economy when it is difficult or impossible for the state to maintain funding for the incentive programs that are at the heart of the Smart Growth effort.<sup>73</sup>

7. Gubernatorial Support – Moreover, the availability and strength of specific incentives depends in large part on support from Maryland's governor, who has enormous budgetary authority, and somewhat less so on support from the General Assembly.<sup>74</sup> The adequacy of these incentives, moreover, does not currently benefit from research or the collection of data that can demonstrate their relative effectiveness.

8. No Penalty for Non-Compliance – While the Smart Growth law requires that the underlying zoning for new residential development within PFAs must be a minimum density of 3.5 units per acre, the densities actually achieved are almost always lower than those permitted. There is no formal mechanism to determine if this threshold is being met and no penalty for jurisdictions that fail to do so. Without monitoring or consequences, it is possible that the PFA standards are being ignored in some jurisdictions.

9. PFAs and Build-Out – Perhaps more troublesome than the question of existing development capacity within PFAs is the issue of development capacity in the future. Howard County, for example, says it has only enough capacity to accommodate growth until 2017. At that date, Howard County has no plans—or obligation—to expand capacity. Other Maryland counties, such as Calvert, similarly intend to allow only a certain amount of additional growth before they stop it for good.

#### D. Infrastructure Finance

The seventh "Vision", which was added in 2000 to the earlier "Visions" enacted as part of the '92 Growth Act, states that "[a]dequate public facilities and infrastructure under the control of the county or municipal corporation are available or planned in areas where growth is to occur."<sup>75</sup> This vision is supported by state legislation that enables local governments to establish Adequate Public Facilities Ordinances (APFOs). Such ordinances enable local governments to stop development from occurring in locations where public facilities are deemed

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73. *Id.* at 126.

74. *Id.*

75. MD. ANN. CODE art. 66B, § 1.01(7) (2003).

inadequate. “Thirteen counties and twelve incorporated municipalities in Maryland have enacted ordinances designed to assure that infrastructure necessary to support proposed new development is built concurrently with, or prior to, that new development.”<sup>76</sup>

The logic of APFOs is sound, but its implementation has been problematic. According to the National Center for Smart Growth, APFOs in Maryland have produced inconsistent standards, inappropriate use, and unintended consequences.<sup>77</sup> Specifically, the Center found that standards for adequacy varied extensively across jurisdictions and over time, that APFOs were not closely linked to capital improvement decision-making, and that moratoria under APFOs deflected an estimated ten percent of the growth from 1995 to 1997 in selected counties to areas outside of PFAs.<sup>78</sup> In general, APFOs were found to be useful tools for stopping growth where facilities were not deemed to be adequate, but they were not found to be successful at assuring that investments in infrastructure were forthcoming in places where growth was deemed to be desired. In short, while the concept behind APFOs makes sense, in practice the result has in some ways been counterproductive.

The state of Maryland provides substantial funds for a variety of infrastructure, including public schools, state roads, sidewalks, transit services, and water and wastewater facilities. The availability or use of these funds, however, is rarely restricted to growth areas as designated in local government plans or prioritized to areas where development has been temporarily halted because adequate public facilities are not in place. Moreover, many Maryland citizens appear to believe that if the state’s growth policy is to require higher density development within already urbanized areas, then the state has an obligation to provide more funding for the infrastructure necessary to support such development. This view was expressed by many of the 850 participants in the set of growth visioning exercises held in Maryland in May and June 2006 called Reality Check *Plus*. “The state government, Reality Check participants seemed to uniformly agree, has an obligation to provide the funding necessary to build the infrastructure—roads, schools, sewers and water lines—that will be necessary to support well-planned, compact growth.”<sup>79</sup>

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76. THE NAT’L CTR. FOR SMART GROWTH RESEARCH AND EDUC., ADEQUATE PUBLIC FACILITIES ORDINANCES IN MARYLAND: INAPPROPRIATE USE, INCONSISTENT STANDARDS, UNINTENDED CONSEQUENCES 3 (2006), *available at* [http://www.smartgrowth.umd.edu/research/pdf/NCSG\\_APFOMaryland\\_041906.pdf](http://www.smartgrowth.umd.edu/research/pdf/NCSG_APFOMaryland_041906.pdf).

77. *Id.* at 3–4.

78. *Id.* at 20.

79. FRECE, *supra* note 26, at 3.

## E. Land Conservation

Maryland has a long history of establishing programs to protect the state's farms, forests, and other natural resources from the threat of development. Oldest among the land conservation efforts is Program Open Space, created in 1969 as the state's parkland acquisition program.<sup>80</sup> Program Open Space is funded by allocating "a percentage of the state real estate transfer tax . . . into a special fund" dedicated for exclusive use for parkland acquisition and development.<sup>81</sup> More than 5,000 parks and conservation areas have been set aside under this program since its inception.<sup>82</sup>

The Maryland Agricultural Land Preservation Foundation (MALPF) was established in 1977 specifically to protect Maryland farms. Through "the end of the 2006 fiscal year, MALPF [had] helped landowners permanently protect from development more than 250,000 acres on approximately 2,000 farms" spread through all of Maryland's twenty-three counties.<sup>83</sup> "[T]he Foundation manages a public investment of more than \$333 million in permanently preserved land."<sup>84</sup>

As successful as these two programs have been, neither focused on protecting land as part of a larger scale conservation effort. Farms participating in the agricultural land preservation program in particular were often protected without regard to their relation to each other or to other protected lands or broader land conservation goals. If a farm was eligible for protection, its value as part of meeting a larger conservation goal was rarely, if ever, invoked. Parkland acquisition often worked in a similar way.

To remedy this shortcoming, the Rural Legacy Program was created as part of the Smart Growth initiative in 1997.<sup>85</sup> The overarching purpose was to create a program that targeted large, contiguous tracts of undeveloped or relatively undeveloped land that was threatened by development but amenable to state-funded protection efforts.<sup>86</sup> Willing landowners and local sponsors, either local governments or often local land trusts, were invited to assemble proposals for the designation of

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80. MD. CODE ANN., NAT. RES. § 5-9A-01 (LexisNexis 2005).

81. MARYLAND DEPARTMENT OF NATURAL RESOURCES, PROGRAM OPEN SPACE, [http://www.dnr.state.md.us/rurallegacy/pos/pos\\_101.html](http://www.dnr.state.md.us/rurallegacy/pos/pos_101.html) (last visited Feb. 10, 2007).

82. *Id.*

83. MARYLAND DEPARTMENT OF AGRICULTURE, OVERVIEW OF THE MARYLAND AGRICULTURAL LAND PRESERVATION PROGRAM (2005), available at <http://www.malpf.info/overview.html>.

84. *Id.*

85. MD. CODE ANN., NAT. RES. § 5-9A-01 (LexisNexis 2005).

86. Cohen, *supra* note 6, at 306–08.

certain areas as Rural Legacy Areas. Once so designated, the sponsors could then seek funding for the purchase of property or, more likely, the development rights on property within the Rural Legacy Area.<sup>87</sup> To be declared a Rural Legacy Area, an area had to be judged by an appointed citizen group called the Rural Legacy Board to offer multiple resources such as prime agricultural soils, wildlife habitats, wetlands or other environmental features, protection for water reservoirs or buffers along streams and rivers, or the presence of cultural or historic characteristics, such as Civil War battlefields.<sup>88</sup> To fund this effort, the state would sell bonds or otherwise appropriate funds that then would be doled out on an annual basis for specific purchases within designated Rural Legacy Areas.<sup>89</sup>

About three years after creation of the Rural Legacy Program, the state created yet another land preservation program based on a scientific inventory of the most ecologically significant lands in the state.<sup>90</sup> This program, called GreenPrint, was designed to protect “hubs” of 300 acres or more of these environmentally sensitive lands as well as “corridors” that linked the hubs together. The governor and General Assembly appropriated funds specifically for this purpose.<sup>91</sup>

The state also created an entity called the Maryland Environmental Trust, the primary purpose of which was to accept easements on Maryland lands voluntarily donated by their owners, usually for tax purposes.<sup>92</sup> It represented another avenue to meet the state’s broader land preservation goals.

Together, these programs, coupled with local “purchase of development” or other land protection efforts, protected approximately 20% of Maryland’s 6.2 million acres. Despite the undisputed success of these programs, a recent study by the Maryland Department of Planning (MDP)<sup>93</sup> suggests that despite the expenditure of millions of dollars in public funds on these programs, many of these protected areas are still fragmented or otherwise adversely affected by sprawling development.

“A major reason is that key public policies and procedures are not mutually supportive,” the report states in its major conclusion, saying

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87. *Id.* at 306.

88. *Id.*

89. *Id.*

90. GREENPRINT PROGRAM, *supra* note 20.

91. *Id.*

92. STATE OF MARYLAND, MARYLAND ENVIRONMENTAL TRUST, <http://www.dnr.state.md.us/met/> (last visited Feb. 10, 2007).

93. JOSEPH TASSONE ET AL., MARYLAND DEP’T OF PLANNING, MAXIMIZING RETURN ON PUBLIC INVESTMENT IN MARYLAND’S RURAL LAND PRESERVATION PROGRAMS (2004), available at [http://agroecology.widgetworks.com/data/files/pdf/1106919683\\_9925.pdf](http://agroecology.widgetworks.com/data/files/pdf/1106919683_9925.pdf).

that the spread of subdivisions into rural areas combined with transportation improvements that, in turn, attract even more rural residential development have undercut the state's land protection success.<sup>94</sup>

As more Maryland residents move to rural areas, they increasingly demand bigger and faster highways to accommodate long distance commutes. This, in turn, makes those rural areas even more accessible to commuters and spurs additional development.

Not only are state transportation and land protection policies disconnected, but the MDP study concludes that local land use zoning is also disconnected from state land protection policies. This brings into question whether taxpayer funds used to protect farms, forests or other open space are being spent wisely if local zoning still permits the areas to be riddled with new development. The report states:

Where development pressure is high and zoning yields more than one residential lot per twenty-five acres, rural land is being heavily subdivided and developed, conservation expenditures notwithstanding. Public conservation goals for rural resources are being compromised and easement acquisition funds are insufficient to compete effectively with development, even when tens of millions of dollars have already been spent to preserve land in these locations.<sup>95</sup>

Maryland officials have long recognized there never will be enough money for the state to purchase all prime rural lands threatened by development. Therefore, state land preservation investments must be supported by strong local zoning and wiser decisions about related transportation projects.

#### F. Statutory Framework

At the time the Smart Growth initiative was being developed in 1996, Governor Glendening and his staff were thoroughly convinced of the seriousness of the state's development trends. The state planning office steadily rolled out a series of ominous numbers describing projections of new households in Maryland—the increase in lot sizes even as average household size was declining, the steady exodus from older developed areas, and so on.<sup>96</sup> Despite such a wealth of statistics, those who put the Smart Growth initiative together never tried to establish a set of specific goals for the program to reach. Few people asked, and

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94. *Id.* at ii.

95. *Id.* at iv.

96. Frece, *supra* note 7, at 122–23.

fewer still suggested, how the state would know if the Smart Growth initiative was successful. There were no benchmarks, no goals, no plans for measuring change.

Even today, almost ten years after the program's inception, no specific goals or specific measurable objectives exist and state agencies have taken only modest steps to try to determine if the Smart Growth instruments are having the desired effect or, in fact, any effect whatsoever. Moreover, the data required to make such measurements are often not centrally collected, are collected at various intervals, or are collected in different ways by different jurisdictions.

Nor were the new Smart Growth laws integrated into existing state planning law, either at their inception or subsequently. While Maryland has a long history of enacting land use law, these laws have tended to be added rather than integrated into a comprehensive or coherent structure. Such was the case with the Smart Growth initiative, which became part of the state code different from Article 66-B, which contains the bulk of the state's planning law.<sup>97</sup>

#### IV. POLICY RECOMMENDATIONS

The old cliché, "nothing is constant but change," is certainly apt for state land use policy, perhaps even more so for states that in some way become active in land use reform. The state of Maryland has a reputation as a leader in land use reform. But to maintain that reputation, to effectively address its own land use problems, and to serve as a model for other states, additional reforms are now required.

##### A. The Content and Role of Comprehensive Plans

There is no perfect way to organize a comprehensive plan. Plans come in many forms all with strengths and weaknesses. Further, there is value in variety, and some argue that greater uniformity of plans has perhaps greater costs than benefits. But if the state is going to mandate a set of elements local governments must include in plans, it should assure that those elements foster a balance of conservation and development. At present, Maryland's comprehensive plan requirements do not meet this test. Maryland currently requires local governments to include the following elements in their comprehensive plans:

A statement of goals and objectives, principles, policies, and standards, which shall serve as a guide for the development and economic and social well-being of the local jurisdiction;

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97. MD. ANN. CODE art. 66B, §§ 1.00–1.03 (2003).



A land use plan element . . . ;

A transportation plan element . . . ;

A community facilities plan element . . . ;

[A] mineral resources plan element . . . ;

A water resources plan element . . . ;

An element [that] contain[s] the planning commission's recommendations for land development regulations to implement the [comprehensive] plan . . . ;

Recommendations for the determination, identification and designation of areas within the county that are of critical State concern . . . ;

A sensitive areas element . . . ;

[A] municipal growth element required of municipal corporations only]. . . .<sup>98</sup>

The Growing Smart Legislative Guidebook, produced by the American Planning Association,<sup>99</sup> recommends elements to comprehensive plans that should be mandatory, mandatory with opt-out provisions, and optional, as follows:

Mandatory: Issues and Opportunities; Land Use; Transportation; Community Facilities; Housing; and, Program of Implementation.

Mandatory with Opt-out provisions: Economic Development; Critical and Sensitive Areas; and Natural Hazards.

Optional: Agriculture, Forest and Scenic Preservation; Human Services; Community Design; Historic Preservation; and Subplans, as needed.

To foster a greater programmatic balance, local governments in Maryland should be required to include housing and economic devel-

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98. MD. ANN. CODE art. 66B, § 3.05(a)(4) (2003).

99. AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (Stuart Meck ed., 2002).

opment elements in their comprehensive plans. These requirements would in principle force local governments to address the “inside” and “outside” strategies and facilitate greater balance between conservation and development. Both the housing and economic development elements should be based on sound information regarding residential and commercial development trends and on a thorough residential and employment capacity analysis.

Further, as required even before 1997, state spending of all forms must be consistent with local comprehensive plans. If PFAs were required to be included in local comprehensive plans, this requirement would achieve the same result as current PFA restrictions but would expand the restrictions to all forms of state spending, eliminate the inconsistency between local growth areas and PFAs, and establish the comprehensive plan as the primary vehicle for assuring consistency between state spending and local planning.

Finally, the Maryland Department of Planning should establish standards for presenting comprehensive plans and development regulations in geographic information system (GIS) formats, require local governments to submit this information in accordance with these standards, and ensure that information is widely accessible via the World Wide Web.

### B. Growth Areas

If the state is serious about containing growth, it should consider converting PFAs to Urban Growth Boundaries (UGBs) that clearly delineate areas where growth is allowed from those areas where it is allowed only by exception. Such UGBs should be drawn to contain capacity to accommodate fifteen to twenty-five years of anticipated residential and employment growth and reviewed at every plan re-submission cycle.<sup>100</sup>

If PFAs are not converted into UGBs, then new criteria should be established to better define PFAs so that they facilitate efficient and orderly growth. Moreover, new criteria should be established for extending or changing the boundaries of PFAs, including provisions for public participation in such decisions.

### C. Land Preservation

Because “[s]tate conservation goals for rural land and resources cannot be achieved through public expenditures for easement purchase without supportive zoning[.]”<sup>101</sup> the state should require coun-

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100. Knaap & Hopkins, *supra* note 57.

101. TASSONE, *supra* note 93, at v.

ties to impose more stringent agricultural and natural resource zoning outside of PFAs, especially in areas where the state has invested or intends to invest land preservation funds. Moreover, future expenditure of such funds should be made contingent upon such zoning protection being in place. Not all land outside PFAs, however, should be downzoned or designated for agricultural use. Some land immediately outside PFAs should be designated for future urban expansion and some should be designated for conservation, regardless of whether it is used for agriculture.

State transportation policy also must be revised to be more compatible with state land preservation goals and investment strategies; that is, transportation improvements should not be made that make lands protected under various state preservation programs more accessible to new development unless appropriate protection zoning is already in place. "Until that time, limit improvements to those necessary to ensure public safety and orderly traffic flow, without increasing capacity or design speeds."<sup>102</sup> A logical and coherent approach to transportation policy would be easier if the state had a statewide transportation plan. Restricting state spending on transportation outside PFAs only if they connect PFAs is silly at best and potentially counterproductive. Simple rules are no substitute for sound planning when dealing with large complex networks.

#### D. Infrastructure

The State of Maryland should create an infrastructure financing program for growth areas that would be used for infrastructure improvements within PFAs. All projects financed through this fund, including schools, must be within a PFA and be identified in the local government's Capital Improvement Plan. Moreover, a match from the local government would be required. Specific priority from the fund would be given to projects that . . . [r]emove APFO restrictions or other moratoria that stop or retard development within PFAs . . . ; and, . . . [i]nvolve the renovation or rehabilitation of existing infrastructure. The fund would be used to reward jurisdictions for measurable achievements to control sprawl and encourage Smart Growth.<sup>103</sup>

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102. *Id.* at vi.

103. THE NAT'L CTR. FOR SMART GROWTH RESEARCH AND EDUC., *supra* note 76, at 26-27.

The General Assembly should consider amending APFO enabling legislation to add the following local government powers: a) [p]ermit local governments to establish Special Tax Districts or TIF districts to raise funds for needed facilities; and b) [p]ermit local governments to establish other mechanisms, such as infrastructure funding “banking” programs, that accumulate developer contributions to be used to fund needed improvements.<sup>104</sup>

The General Assembly should also consider requiring local governments to: a) limit delays in development proposals within a PFA; b) waive APFO requirements on certain affordable housing, infill or revitalization projects within PFAs; and c) “[p]repare and publish a report every two years identifying facilities within PFAs that do not meet local APFO standards, and any improvements to those facilities that have been scheduled and/or proposed in the jurisdiction’s Capital Improvement Program.”<sup>105</sup>

The State needs to identify broad-base tax resources (for example, property, sales or income tax revenue) to provide the fiscal resources necessary to fund Adequate Public Facilities in growth areas. This will enable local governments to reduce their dependence on impact fees and the local property tax, thereby preventing new home buyers from bearing a disproportionate share of the costs of new infrastructure.<sup>106</sup>

#### E. Enhancing Coherence

The state should seek to integrate Smart Growth with planning. Maryland’s Smart Growth statutes place restrictions on state spending without embedding these restrictions in Maryland’s existing planning laws. The state should establish a set of goals and procedures for local land use plans. It should review those plans to ensure they conform further with other state goals. It should then restrict its own spending to be consistent with approved comprehensive plans.

The state should also establish a coherent set of goals and a statewide development plan. Progress towards those goals should be expressed through a quantifiable set of measures. Data on those measures should be accumulated and maintained on a regular basis by a non-partisan organization outside the control of the state admini-

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104. *Id.* at 26 (suggesting amendments to MD. ANN. CODE art. 66B (2003)).

105. *Id.*

106. *Id.* at 27.

stration. The National Center for Smart Growth Research and Education is a natural candidate for this task.

#### V. NATIONAL LESSONS FROM THE MARYLAND EXPERIENCE

Every state is different. No two states are alike in geography, climate, economy, culture, or political systems. Thus it is always wise to exercise caution in applying the lessons and experiences from one state to another. Still, for every state there are insights that can be gained by looking at the experience of another.

Maryland burst onto the land use scene in 1997 with a new set of initiatives and a catchy phrase. It garnered immediate accolades and was offered as a model for other states. To some extent this was well deserved. Maryland had found a way to promote a better form of development that imposed fewer regulations and hence was politically much more attractive than the approach taken previously by other states. With the benefit of hindsight some ten years later, however, some of the praise seems a bit excessive. Maryland deserved credit for a bold new experiment, but not for solving the problems the experiment was designed to address.

While the idea that the state should not underwrite urban sprawl remains a valid concept, the hope that the state budget could be used to curtail urban sprawl has not been fulfilled. The disappointment stems from a number of factors. First, sprawl has many causes, and the only effective way to address sprawl is through planning. Maryland's Smart Growth laws were never integrated into its planning laws. Second, many if not most of the funds that finance sprawl come from local and private sources. It is unlikely that the targeting or removal of state subsidies alone will ever have a significant effect on sprawl without complementary land use plans and regulations. Finally, the state budget remains largely under the control of the governor. If the control of sprawl is contingent on the administration of the state budget, then control of sprawl is overly contingent on support for this effort from the state administration.

