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## Urban Sprawl: Florida's and Maryland's Approaches

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# URBAN SPRAWL: FLORIDA'S AND MARYLAND'S APPROACHES

J. CELESTE SAKOWICZ\*

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## I. INTRODUCTION

Sprawl is "low-density development on the edges of cities and towns that is poorly planned, land-consumptive, automobile-dependent, [and] designed without regard to its surroundings."<sup>1</sup> The effects of metropolitan expansion impact almost every person on a daily basis. The five-mile commute to work that takes an hour is a result of insufficient infrastructure to accommodate the traffic volume. Students attend schools in trailers because state funding for institutional expansion cannot maintain pace with development. Conversely, expansion is alleged to possess many positive aspects, such as reducing unemployment, increasing productivity, and improving economic outputs. States have enacted various approaches to accommodate the competing positive and negative factors. In the 1980s, the policies became known as "growth management." The premise is to promote growth in controlled or guided patterns. Growth management plans are constantly amended to adapt to evolving environments and reacting to the unintended consequences created by their unforeseen loopholes. Currently, "smart growth" is the response to deficiencies in previously existing planning strategies.

Akin to other states' programs, Florida's Growth Management Act of 1985 is blemished with shortcomings. The legislature must contemplate alternative planning options to amend these problems and prevent their reoccurrence in the undeveloped areas of Florida, such as the Panhandle and the outlying areas of major metropolitan centers. The original intent was for the state to oversee adoption and implementation of the local government comprehensive plans; however, oversight has become a 'rubberstamping' process. In 1997, by contrast, Maryland enacted an innovative smart growth plan that ties funding for growth related projects directly to the State's budget. The focus of this paper is whether Maryland's plan is successful, and if so, whether it can be applied to remedy some of the shortcomings of Florida's legislation.

Part I will summarize the general background information about characteristics, causes, and negative impacts of urban sprawl. A few of the problems associated with urban sprawl include consuming agricultural land, increasing cost of metropolitan infrastructure, creating traffic problems, increasing property taxes

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1. Robert H. Freilich, *To Sprawl or Not to Sprawl: Solutions for Dealing with America's Most Lethal Disease in Urbanized, Urbanizing, and Rural/Agricultural Area*, in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 4-3 (Carol J. Holgren ed., 1999) (quoting Richard Moe, President of National Trust for Historic Preservation) [hereinafter Freilich, *Sprawl*]; see also FLA. ADMIN. CODE R. 9J-5.003(134) (2003).

for older development to pay for the new construction, and generating additional arrears for cities and counties to fund infrastructure.<sup>2</sup> Transportation is a main factor contributing to sprawl because highways and interstates create a web that must be traveled to get from the suburbs to employment within the urban city center.<sup>3</sup>

Part II will discuss the history and progression of land use techniques, including the Standard Zoning Enabling Act (hereinafter "SZE"), growth management, and smart growth. Traditional zoning emerged in the late nineteenth century but did not gain nationwide acceptance until the early twentieth century with the passage of the SZE and the validation of zoning by the United State Supreme Court. Over the past century, people's concerns over balancing development with environmental and social concerns have mutated. In the 1950s, environmental awareness and protection concerns began an upward trend that peaked in the 1970s. It was this movement that fostered the development of modern growth management programs. Initial growth management programs did not address the development system as a whole, but as separate entities. The current land use label, "smart growth," emerged during the past decade to accommodate citizens and politicians who were concerned with balancing the complete spectrum ranging from environmental concerns to funding infrastructure improvement to accommodating affordable housing.

Part III will examine Florida's current growth management plan and its deficiencies. If promulgated today, Florida's Growth Management Act of 1985 (hereinafter "GMA") would be labeled "smart growth."<sup>4</sup> The goals, plans, policies, and rules were designed to accommodate and manage anticipated growth and development and "to manage it in an environmentally responsible manner."<sup>5</sup> GMA requires that adequate public facilities and services are in place when new development obtains its certificate of occupancy.<sup>6</sup> Although the GMA was a groundbreaking piece of legislation, it contains several loopholes and inconsistencies that render it ineffective. The transportation concurrency management system (hereinafter "TCMS") fails to reduce sprawl because the comprehensive planning process lacks vertical, horizontal, and

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2. See Freilich, *supra* note 1, at 4-4 - 4-5; <http://www.sierraclub.org/sprawl/report99> (last visited Feb. 1, 2004).

3. See Freilich, *supra* note 1, at 4-4.

4. James C. Nicholas & Ruth L. Steiner, *Growth Management and Smart Growth in Florida*, 35 WAKE FOREST L. REV. 645, 658 (2000).

5. *Id.*

6. FL. STAT. § 163.3180(1)(a) (2003).

internal consistency.<sup>7</sup> Vertical consistency (local, regional, and state agencies) is deficient because the plan has not been updated significantly for a seventeen year period, state agencies continue to develop inconsistently with planning goals of reducing sprawl, and the State fails to fund infrastructure backlog. Horizontal consistency is wanting because of a lack of regional coordination and enforcement.<sup>8</sup> Furthermore, funding for the state plan is inadequate.<sup>9</sup>

Part IV will explore Maryland's newest legislation, its purposes and goals, and how effective the legislation has been at achieving its goals. The crux of the Maryland's gubernatorial administration's 1997 legislation package was the Smart Growth and Neighborhood Conservation Initiative (hereinafter "Maryland Smart Growth").<sup>10</sup> The government's intent is to curb destructive growth patterns "by limiting public investment to projects consistent with sound growth management."<sup>11</sup> The underlying theme is that the remedy to stay the progress of urban sprawl is to influence development decisions with economic incentives, rather than regulations.<sup>12</sup> The goals of Maryland's Smart Growth are: to preserve the state's natural resources; to direct resources to support existing communities and neighborhoods; and to save taxpayers money by avoiding unnecessary costs of building duplicate infrastructure.<sup>13</sup>

Maryland's planning framework utilizes state programs to influence local actions and provides tools to local governments.<sup>14</sup> The main component of the initiative is the Priority Funding Area (hereinafter "PFA"). The only growth related projects eligible for state funding are ones within a PFA designated by the legislature or a county, or that satisfy the stringent statutory requirements for an exception and are approved by the Board of Public Works.<sup>15</sup> Beyond subsidy incentives, other programs include the Rural

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7. Ruth L. Steiner, *Florida's Transportation Concurrency: Are the Current Tools Adequate to Meet the Need for Coordinated Land Use and Transportation Planning?*, 12. J.L. & PUB. POL'Y 269, 270-71 (2001).

8. *Id.* at 271.

9. See Nicholas, *supra* note 4, at 658.

10. Parris N. Glendening, *Smart Growth: Maryland's Innovative Answer to Sprawl*, 10 B.U. PUB. INT. L.J. 416, 418 (2001) [hereinafter Glendening, *Smart Growth*].

11. *Id.*

12. *Id.* at 420.

13. *Id.* at 421.

14. Brian W. Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century: The Emerging Influence of Smart Growth and Livable Communities*, 32 URB. LAW. 181, 192-93 (2000).

15. MD. CODE ANN., [STATE FIN. & PROC.] § 5-7B-04(a) (2003).

Legacy Program,<sup>16</sup> the Brownfields Program,<sup>17</sup> the Creation Tax Credit Act,<sup>18</sup> and the Live Near Your Work Program.<sup>19</sup>

The theoretical concepts of Maryland's Smart Growth have earned it accolades in the public sector. Harvard University's John F. Kennedy School of Government and Ford Foundation awarded Maryland's program the Innovations in American Government Award.<sup>20</sup> The plan appears to adequately address one of the major problems encountered by other growth management/smart growth plans: funding. This section will evaluate its actual effectiveness as applied to real situations and unforeseen or unaddressed issues that have arisen.

Part V will consider the application of Maryland's strategy to replace existing Florida planning guidelines and will make possible recommendations for Florida's future planning. First, the foundation for applying Maryland's PFA system to Florida's transportation decisions will be laid by exploring the similarities between the states' government structures and oversight of land use decisions. Next, the effect of the proposal of Florida's transportation budget decisions will be assessed since Maryland's program revolves around budget allocations. Finally, the section will appraise the impediments to implementation.

Part VI will conclude with a discussion of whether Florida should consider adopting the PFA system. Generally, the success or failure of the Maryland Smart Growth Initiatives is unsubstantiated. Although in theory the program appears promising, without empirical data, investing in an alternative land use program appears rash at this point in time.

## II. URBAN SPRAWL

Sprawl is identified as a land use pattern of sporadic, inconsistent development that occurs away from the center of a metropolis. Although there is not an agreed upon definition, the land use pattern and its causes are well known. Two factions exist: persons that desire and attempt to regulate and reduce it, and persons that assert it is not a reason for concern.

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16. MD. CODE ANN., [NAT. RES.] § 5-9A-01 (2003).

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

18. MD. ANN. CODE art. 83, § 5-1101 (2003).

19. This program is implemented by the Maryland Housing and Community Development. See MD ANN. CODE art. 83A, § 5-1101 (2003).

20. Innovations in American Government Awards, at <http://www.innovations.harvard.edu> (last visited Feb. 1, 2004).

### A. Description

For the past half-century, sprawl has constituted the dominate growth pattern for nearly all metropolitan areas in the United States and consumed land at a more rapid pace than the population growth in many cities in the country.<sup>21</sup> Suburban populations today represent more than 60 percent of metropolitan populations and are expected to continue to increase.<sup>22</sup> Generally, sprawl is the relocation of resources from a well-developed and concentrated area in a city center and its immediately surrounding region to a scattered area of traditionally undeveloped or scarcely developed land.<sup>23</sup> Although the definition of sprawl is not uniformly established,<sup>24</sup> it is described as:

A term of art employed to describe the uncontrolled development of land situated on the outskirts of America's major cities. It refers to unfettered form of urban expansion which is characterized by the initial nonuniform [sic] improvement of isolated and scattered parcels of land located on the fringes of suburbia, followed by gradual urbanization of the intervening developed areas.<sup>25</sup>

Sprawl includes both residential and nonresidential land use development that expands outward in a noncontiguous pattern.<sup>26</sup> Residential development includes primarily single-family housing and a significant number of units scattered randomly in outlying areas beyond the reaches of urban infrastructure. Non-residential development consists of shopping centers, strip-malls along arterial roads, industrial and office parks, free standing industrial and office buildings, schools, and other public buildings.<sup>27</sup> A car-dependent citizenry develops because public transportation is inadequate to access the suburban developments.<sup>28</sup>

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21. Robert D. Bullard et al., *The Costs and Consequences of Suburban Sprawl*, 17 GA. ST. U. L. REV. 935, 937 (2001) (describing characteristics, causes, and costs of sprawl).

22. Francesca Ortiz, *Biodiversity, the City, and Sprawl*, 82 B.U. L. REV. 145, 146 (2003) (elaborating on land consumption caused by sprawl and its effect on biodiversity).

23. Rose A. Kob, *Riding the Momentum of Smart Growth: The Promise of Eco-Development and Environmental Democracy*, 14 TUL. ENVTL. L.J. 139, 145 (2000).

24. See Bullard, *supra* note 21, at 936.

25. DAVID L. CALLIES ET AL., LAND USE 597 (3d ed. 1999).

26. Janet Kealy, Comment, *The Hudson River Valley: A Natural Resource Threatened by Sprawl*, 7 ALB. L. ENVTL. OUTLOOK 154, 163 (2002). Noncontiguous development is also called leapfrogging; Bullard, *supra* note 21, at 937.

27. The Costs of Sprawl — Revisited, TCRP Report 39, Transportation Research Board, National Research Council (1998).

28. Bullard, *supra* note 21, at 937.

*B. Causes of Sprawl*

The causes of American sprawl derive from “a complex result of market and economic forces, social factors . . . and government policies.”<sup>29</sup> There are seven main causes of sprawl:

- 1) The American Dream of desiring less expensive housing on larger lots, improved schools, and less crime on the streets;
- 2) Companies in quest of lower taxes, skilled workers, and developable tracts of land that are less expensive;
- 3) Workers moving where the jobs are located and changing job locations more often;
- 4) Wholesale entry of women into the workforce and spouses traveling in different directions;
- 5) Local zoning and [the] federal interstate highway system;
- 6) Americans’ increasing love affair[s] with their cars; and
- 7) Americans’ dislike of density.<sup>30</sup>

The largest relocation movement to the suburbs occurred concomitantly with the post-World War II baby boom.<sup>31</sup> Increased city populations and availability of federally backed government mortgages aided the ability to seek the American dream and relocate.<sup>32</sup> Highway expansion granted access to inexpensive land and reduced commuting time to inner city and neighboring suburb employment.<sup>33</sup> Lastly, developing lands for low-density, single-family residential use that was strictly separated from

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29. Gus Bauman, *Smart Growth – Development, Environment, and Land Use*, 2 ALI-ABA Course of Study Materials SF08, 597 (2000). For a general discussion of sprawl, see Freilich, *Sprawl*, *supra* note 1.

30. *See id.* at 598.

31. Ortiz, *supra* note 22, at 146.

32. *See id.* For further discussion of people migrating out of metropolitan areas, see Jason C. Rylander, *The Emerging Federal Role in Growth Management*, 15 J. LAND USE & ENVTL. L. 277, 280-82 (2000).

33. *See Ortiz, supra* note 22, at 146.



nonresidential uses became easier with favorable zoning laws and subdivision regulations in outlying lands.<sup>34</sup>

New municipalities in the suburbs developed in a fragmented manner because of the existing land use policies that lacked relevance to modern development.<sup>35</sup> The populations that relocated to suburbs were governed by a land use policy that consisted of: tax law that originated in Colonial times, nineteenth century municipal incorporation law, and zoning laws enacted at the turn of the century in response to industrialization.<sup>36</sup> Nineteenth century incorporation laws allowed small, fiscally weak, inefficient municipalities to surround the main metropolitan by the dozens, and sometimes hundreds. The Colonial property tax system designed to finance public services in a predominantly agrarian system left twentieth century municipalities with a financial structure that depended on real estate values that could be easily increased by converting open land to development. In addition to the aforementioned weak zoning laws, the government sponsored fringe biased subsidy programs that promoted growth far from the center of the municipality.<sup>37</sup>

The drafters of incorporation laws in the nineteenth century did not, and probably could not, foresee the future use of the laws. New cities were formed "by proposing city boundaries, collecting signatures on petitions, and arranging incorporation elections."<sup>38</sup> Cities were formed to avert central cities from annexing and taxing the unincorporated areas, subjecting the landowners to high costs and high tax rates, and zoning at their whim. By 1990, the typical metropolitan area consisted of a central metropolis surrounded by several rings of suburban government and seemingly countless municipal governments.<sup>39</sup>

Once sprawl relocated significant fractions of the tax base, the metropolitan fragments that remained became financially weak and unable to efficiently provide public services. These municipalities were left with a "Catch 22" per se: by leaving tax rates at their current level, the quality of services deteriorated and encouraged

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34. See *id.* (discussing highway expansion as a factor that contributes to suburban living and urban sprawl).

35. Henry R. Richmond, *2001 Gallican Conference: Sprawl and Its Enemies: Why the Enemies are Losing*, 34 CONN. L. REV. 539, 554 (2002).

36. *Id.* (identifying outdated land use policies as impediments to reducing sprawl).

37. *Id.* at 554-60 (explaining how social changes were conducive to sprawling development); see also Timothy J. Dowling, *Point/Counterpoint: Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873, 880-81 (2000).

38. See Richmond, *supra* note 35, at 555.

39. See *id.* at 555-58 (discussing how incorporation laws fragmented the United States and providing a description of the population distribution in the 1910s and in the 1990s).

businesses to relocate or by raising taxes to improve services, which also repels investment and encourages relocation. In other words, "higher" rates push private investments out to fringe jurisdictions, just as low rates at the fringe pull benefits out.<sup>40</sup>

Additionally, federal and state expenditures subsidize the very highways and other main roadways that connect the sprawling development pattern.<sup>41</sup> By decreasing the cost of highway construction and repair, federal and state expenditures promote increased infrastructure expansion and extend the pool of property that is accessible to develop.<sup>42</sup> Substantial transportation funding is derived from state and local taxes and federal funds.<sup>43</sup>

Furthermore, municipalities are able to zone broadly without regard to administrative, judicial, or political accountability because of the 1920s legislatures, which gave municipalities *carte blanche* zoning power.<sup>44</sup> Traditional zoning techniques are conducive to sprawling development patterns and are easily manipulated to zone fiscally.<sup>45</sup> Local land use and zoning practices tend to isolate types of land uses, particularly industrial and commercial uses; the concept of creating a new purely residential development isolated from all other uses is not consistent with traditional Euclidean zoning techniques that isolated land uses.<sup>46</sup> Furthermore, as America became more metropolitan and fragmented, municipal government became more suburban, inefficient, and costly.<sup>47</sup>

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40. See *id.* at 556 (describing the financial position that many municipalities and suburban areas encountered); see also Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?*, 21 WM. & MARY ENV'T L. & POLY. REV. 345, 345-55 (discussing present day reliance on property taxes to finance local services).

41. William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 68-69 (1999). For example, the Highway Trust Fund has fostered construction of various interstate and intrastate road segments. Highway Revenue Act of 1956, ch. 462, § 209, 70 Stat. 387, 390-4-1 (1956) (codified as amended at I.R.C. § 9503 (1994 & Supp. I 1995)). Other subsidies include: support for home mortgages, single family mortgages insurable in a government-backed securities market, accelerated depreciation, five-year amortization, and deductibility of passive real estate losses. Epstein, *supra* note 40, at 354-55. See also General Accounting Office, *GAO/RCED-99-87, Community Development: Extent of Federal Influence on "Urban Sprawl" is Unclear*, at 10, 41-44 (Apr. 1999) (discussing federal policies' and programs' influence on sprawling patterns of development and concluding that extent of influence is uncertain).

42. See Buzbee, *supra* note 41, at 68.

43. *Id.* at 69. For an in-depth discussion of transportation subsidies, see TIM LYNCH, *FLORIDA HIGH SPEED GROUND TRANSPORTATION ECONOMIC BENEFIT AND COST IMPACT RESTUDY & PUBLIC TRANSPORTATION FINANCING AND SUBSIDIES BY MODE IN THE UNITED STATES* (2002).

44. See Richmond, *supra* note 35, at 559-60 (discussing pressures that compelled suburban municipalities to adopt flexible zoning ordinances, describing the relaxed standard of review applied to local zoning decisions that are appealed to circuit courts).

45. See *id.* at 557.

46. See Buzbee, *supra* note 41, at 69.

47. See Richmond, *supra* note 35, at 557 (discussing increasing costs associated with

Municipalities became dependent on the property tax because they removed themselves from the central business district tax bases. To compensate for lost revenue, municipalities zoned open land for development to create assets the city could immediately tax.<sup>48</sup>

### *C. Negative Impacts of Sprawl*

"[A]s the population grows, the amount of land that is developed to meet that demand increases by five to ten times the rate of population growth."<sup>49</sup> In other words, to accommodate a ten percent increase in population, the surface area covered by development under sprawl patterns in metropolitan areas increases by 70-100 percent.<sup>50</sup> This translates into grid-locked roads, neglected and impoverished cities, suburban communities losing their identity, insufficient revenue to fund public services, and disappearing farmland, open space, and historic sites.<sup>51</sup>

Abandonment of the inner core is a descriptive phrase to describe some of the ills that impact the urban area that lost its resources to sprawl.<sup>52</sup> Older significant buildings that characterized neighborhoods are either destroyed or replaced with multiple unit housing to increase their revenue stream or left to decay and deteriorate while new lots are developed, destroying open space and increasing the demand on infrastructure.<sup>53</sup> The immediate result of developers choosing to divest, or invest elsewhere, impacts central city residents with deteriorating neighborhoods, thus driving property values drastically downward.<sup>54</sup> Decreased property values lead to a decreased tax base and therefore taxes are increased to pay for decreased revenue and social services. Concurrently with deteriorating housing, local employers and industries depart and open new manufacturing or service sector facilities, which results in unused or underutilized facilities. Frequently, facilities are never reoccupied because the previous owner caused contamination and

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sprawl).

48. *Id.* (describing the causes of dependence on property taxes).

49. Kealy, *supra* note 26, at 166.

50. *Id.* The statistics cited in Ms. Kealy's article are derived from John R. Nolon's book, *Well Grounded: Using Local Land Use Authority to Achieve Smart Growth*, published by the Environmental Law Institute in 2001.

51. *Id.* (discussing general repercussions of sprawl).

52. See Buzbee, *supra* note 41, at 69-71 (illustrating the negative effects of sprawl on the metropolitan urban area that it surrounds).

53. Kealy, *supra* note 26, at 166-67.

54. Buzbee, *supra* note 41, at 69-70 (summarizing the chain of causation that results in decreasing property values).

the cost to clean the site overruns the benefit of redeveloping the site.<sup>55</sup>

The poor and minority communities that generally comprise the majority of urban city centers are egregiously affected by the local government development system.<sup>56</sup> Sprawl wastes infrastructure, land, people, and location advantages. Cities have deteriorated naturally with age and instead of developers seizing sites that need to be cleaned up, developers choose regions where they begin from nothing because it is less expensive and the liability risk is lower.<sup>57</sup> In addition, sprawl almost never includes plans for public transportation.<sup>58</sup> Minorities are twice denied disproportionately: first, with the removal of resources to rebuild their home and work communities and second with the denial of access to public transportation to obtain the resources that are now located far from the city center.<sup>59</sup>

Traffic congestion is an adverse impact of sprawl that nearly all persons on the road suffer. People who relocated to the suburbs commuted farther distances to go to work, shopping, run errands, visit friends and relatives, and similar activities. Although stores and businesses followed the massive amounts of the relocating population, distances between home and work and home and shopping increased. Furthermore, around the same time that the growth trend began to worsen traffic, the addition of women to the workforce doubled the quantity of automobiles on the roads. Additionally, congestion on the roads increased because the power and strength of the American economy reduced the unemployment rate, thereby increasing the number of persons commuting to work.<sup>60</sup>

Air pollution is inextricably linked to traffic congestion.<sup>61</sup> Although federal emission standards have decreased the pollutants created by automobiles, the increased mileage driven by the average American substantially outweighs the decrease.<sup>62</sup> The Federal Clean Air Act classifies cities as either "attainment" or "nonattainment" for ozone.<sup>63</sup> Many metropolitan areas are classified

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55. *Id.* at 70.

56. Kob, *supra* note 23, at 145-46 (expressing the plight of the residents that remain in the metropolitan core).

57. *Id.* Developers can seize upon lower property costs in outlying areas and avoid having to risk paying liability costs for contaminated lands. *See id.*

58. *Id.* at 146.

59. *Id.*

60. *See generally* Bauman, *supra* note 29.

61. Buzbee, *supra* note 41, at 71.

62. *Id.* at 71-72.

63. *Id.* at 72-73.

as nonattainment, meaning that the levels of ozone are too high for the applicable standards, and must follow stringent federal measures to seek attainment status. Automobiles are often the most significant contributor to the Clean Air Act's ozone attainment problem because automobiles produce carbon monoxide, which through a chemical process generates excess ozone and particulate matter. Beyond the issue of exceeding federal regulation requirements for air quality and risking federal moratoriums on construction, high levels of ozone and particulate matter pollution create substantial respiratory risks, especially to the elderly, young, and those suffering from respiratory illnesses.<sup>64</sup>

Traditional environmental harms are also caused by sprawl. As residential and business development overtakes the existing agricultural and green spaces, the aesthetic, environmental, and biodiversity benefits linked to undeveloped green space are lost forever. Water quality in nearby water sources is degraded as runoff from clearing, construction, and impervious surfaces increases polluted flow into natural streams, rivers, and lakes. The Clean Water Act requires federal or state governments to regulate "point sources" of permitted pollution, such as factories and publicly owned sewage treatment works, to maintain or stay below the total maximum daily load of pollution a river segment can environmentally endure without becoming impaired. Therefore, as development increases, producers of point source pollution must modify production or purchase other sources of pollution to keep the level within specified limits.<sup>65</sup>

The entire public sphere is declining due to urban sprawl, and Americans are reducing their involvement in the public life of their country.<sup>66</sup> Americans are moving into the suburbs and the private sphere that is "typically composed of gated communities, office parks, malls with private security, and high-speed highways."<sup>67</sup> "Most middle- and upper-class Americans have never...play[ed] in a public park, walk[ed] down a public street, or even join[ed] a public organization."<sup>68</sup> The lack of public space is a known cause of the degradation of the country's political culture and society.

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64. Buzbee, *supra* note 41, at 73.

65. *Id.* at 75.

66. Kob, *supra* note 23, at 147.

67. *Id.*

68. *Id.* (describing the general decline of the public sphere due to urban sprawl).

### D. Opposing Arguments

"Objections to sprawl are not universally shared."<sup>69</sup> Defenders of sprawl argue that government regulation will infringe property rights, threaten economic development, and curtail cherished freedoms.<sup>70</sup> The most prevalent argument is that "urban sprawl is the product of freely made choices and personal preferences."<sup>71</sup> Any attempt by the government to curb growth and alter people's behavior is an infringement on property rights and freedom. Americans have a right to choose where they want to live and travel. By choosing to live in large single-family homes away from neighbors and by choosing to travel by automobiles over mass transit, Americans have expressed their "vote in the marketplace."<sup>72</sup>

Peter Gordon and Harry Richardson argue that concerns about threatened farmland, escalating traffic congestion, and decreasing public transportation are an illusion.<sup>73</sup> Land used for farmland has been decreasing since the 1930s.<sup>74</sup> The commentators allege that traffic congestion is not increasing and even though commuters are traveling longer distances, they are driving at a higher speed.<sup>75</sup> Lastly, mass transit is in less demand because people prefer to drive cars out of convenience rather than necessity.<sup>76</sup>

Skeptics of land use controls directed at curbing sprawl assert that the United States Constitution, through the Takings Clause, will protect them where politics fail.<sup>77</sup> Property rights advocates maintain that the Fifth Amendment proscribes against takings without just compensation and that land belongs to the landowner

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69. Kob, *supra* note 23, at 149.

70. Hank Savitch, *Dreams and Realities: Coping with Urban Sprawl*, 19 VA. ENVTL. L.J. 333, 345 (2000).

71. Kob, *supra* note 23, at 149. Another argument suggests that sprawl is actually increasing air quality because levels of carbon monoxide, lead, and other pollutants have fallen as sprawl increased. See SAMUEL R. STALEY, *THE SPRAWLING OF AMERICA: IN DEFENSE OF THE DYNAMIC CITY* 14-17 (Reason Public Policy Institute Study No. 251, 1999).

72. Kob, *supra* note 23, at 148-49.

73. *Id.* at 149. But see Dowling, *supra* note 37, at 877-78 (2000) (arguing that the macro statistics referred to by opponents of sprawl controls dismiss the distinctions between quality of land being lost).

74. *Id.*

75. Peter Gordon & Harry W. Richardson, *Prove It: The Costs and Benefits of Urban Sprawl*, 16 BROOKINGS REV. 23, 23 (1998).

76. *Id.* at 24. For an in-depth discussion of people's preference for suburban living and therefore need for highway infrastructure, see generally Peter Samuel, *Transportation*, in MARYLAND 2002-2003: A GUIDE TO THE ISSUES 43 (2003).

77. Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859, 867-72 (discussing the author's point of view that land use controls that control sprawl are a taking). *Contra* Dowling, *supra* note 37, at 881-87 (arguing that smart growth is not a taking and that Supreme Court decisions support this viewpoint).

and not the government.<sup>78</sup> According to the property rights advocates, land use controls that hinder the use of land violate the Fifth Amendment because either (1) the regulation does not “substantially advance [a] legitimate state interest,”<sup>79</sup> (2) it eliminates all economically viable use of the landowner’s property,<sup>80</sup> or (3) there is not a “rough proportionality between the regulatory burden and the project impact.”<sup>81</sup>

### III. BACKGROUND OF LAND USE LAW

Traditional land use planning emerged in the early 1900s with the passage of the Standard Zoning Enabling Act (hereinafter “SZE”) and the United State Supreme Court’s decision in *Village of Euclid v. Amber Realty*, where the Court held zoning constitutional.<sup>82</sup> The authority to regulate and restrict land is derived from the state’s police power to protect the public health, safety, and general welfare. Since state governments delegated their police power and authority to plan to municipalities and counties through state enabling legislation,<sup>83</sup> local governments determined the restrictions and regulations on land uses within their boundaries.<sup>84</sup> State legislatures have criticized the abdication of zoning power to local governments and either adopted SZE with modifications or have amended their state enabling ordinance through trial and error.<sup>85</sup> The most recent trends in land use regulations are “Growth Management” and “Smart Growth.”

#### A. Traditional Land Use Planning — Standard Zoning Enabling Act

For most of the twentieth century, regulation of land use was limited to local ordinances set forth by local governments that

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78. Paul J. Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement*, 14 TUL. ENVTL. L.J. 171, 182-83 (2000) (elaborating on the point of views that are both pro and anti sprawl).

79. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987) (holding that regulation that does not advance a legitimate state interest is a taking).

80. *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1020 (1992).

81. *Dolan v. City of Tigard*, 512 U.S. 374, 390-91 (1994).

82. See *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926). For a history of the development of land use controls, see Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245 (1965).

83. Amanda Siek, Comment, *Smart Cities: A Detailed Look at Land Use Planning Techniques that are Aimed at Promoting Both Energy and Environmental Conservation*, 7 ALB. L. ENVTL. OUTLOOK 45, 47-48 (2002).

84. ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 3 (ABA 1999) [hereinafter FREILICH, SMART GROWTH].

85. *Id.*

restricted the type of land use and density on a particular parcel.<sup>86</sup> Municipalities would delineate land as residential, commercial, and industrial zones to control the development of specific regions within the city boundaries. However, variances to change the original zoning of land uses were common and generally simple to acquire. Local governments regulated density “through requirements such as minimum lot sizes, building heights, and building setbacks from lot lines.”<sup>87</sup>

The United States Department of Commerce promulgated the SZEa in the 1920s and the states rapidly adopted it.<sup>88</sup> The SZEa envisioned and set forth guidelines for the grant of power to the legislative body of local governments, the division of districts and standards, the procedural method for adopting regulations and restrictions, and processes for amendment and appeals.<sup>89</sup> Regulations and restrictions of land are to be made in accordance with a comprehensive plan and designed to:

[L]essen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.<sup>90</sup>

The zoning ordinance envisioned by SZEa includes a blueprint for the organization of a local government to regulate and restrict the land within its boundaries.<sup>91</sup> The SZEa includes a legislative body that establishes a procedure for adopting regulations, restrictions, and boundaries of districts.<sup>92</sup> Districts are divisions of the municipality in which the local legislative body can regulate construction, alterations, and use of the land.<sup>93</sup> The legislative body shall appoint (1) a commission to recommend boundaries,

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86. Oliver A. Pollard III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 254 (2000).

87. *Id.*

88. CALLIES, *supra* note 25, at 39. The Act was drafted in 1922 and finalized in 1926. *Id.*

89. U.S. Department of Commerce, A State Zoning Enabling Act (1926) [hereinafter “SZEa”].

90. *Id.* at § 3.

91. *Id.* at § 4.

92. *Id.*

93. *Id.* at § 2.



regulations, and restrictions<sup>94</sup> and (2) a board of adjustment to make exceptions to the terms of the ordinance.<sup>95</sup>

Problems with the SZEAs structure include its failure not to define a comprehensive plan and the process for developing a successful one.<sup>96</sup> Due to this vagueness, some jurisdictions have held that a comprehensive plan existed by the presence of a zoning ordinance itself.<sup>97</sup> Therefore, in some jurisdictions, local governments have the ability to regulate land use and circumvent the comprehensive plan requirement.<sup>98</sup> A typical comprehensive plan includes a statement of goals, needs, and objectives; detailed planning supported by studies and information; and plan implementation.<sup>99</sup>

94. *Id.* at § 6.

95. *Id.* at § 7.

96. See *id.* For detailed discussion of the weaknesses of SZEAs, see Michael Lewyn, *Twenty-First Century Planning and the Constitution*, 74 U. COLO. L. REV. 651, 659-61 (2003).

[T]hese 1920s model statutes:

1. Fail to discuss the states' role in land use regulation because at that time land use planning was generally a local, rather than a state, activity. By contrast, state legislatures now take an active role in land use regulation in order to ensure uniformity and to address issues spilling across jurisdictional boundaries;
2. Do not address environmental issues such as the value of preserving vacant, developable land or the environmental consequences of the form and relative compactness of metropolitan areas;
3. Provide inadequate opportunities for citizen participation in the zoning process; and
4. Fail to consider the courts' increased scrutiny of land use regulation in recent decades. The Guidebook contains fifteen chapters, covering the topics addressed in the earlier editions and adding detailed discussion of zoning, subdivision regulation, smart growth legislation, state biodiversity conservation plans, environmental protection, procedures for siting controversial state facilities, development oriented towards public transit, development moratoria, judicial review, public records of plans and regulations, and a wide variety of other issues. Accompanying the Guidebook is a User Manual that, by means of checklists and case studies, seeks to help government officials use the Guidebook and in particular, "to tailor a program of statutory reform that will meet the unique needs of their state." The User Manual also instructs readers that each chapter in the Guidebook follows the following format: first a chapter outline identifying the major topics in the chapter, then an introduction setting forth a general discussion of the subject matter covering and summarizing its contents, then commentary to individual model statutes, and finally draft statutory language and alternatives.

*Id.*

97. *E.g.*, *Iowa Coal Mining Co. v. Monroe County*, 494 N.W.2d 664, 669-70 (Iowa 1993) (holding that planning may be evidenced by the ordinance itself); *Kozesnik v. Township of Montgomery*, 131 A.2d 1, 7 (N.J. 1957) ("A plan may readily be revealed in an end-product[—]and no more is required by statute."). For more background information, see Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

98. See *Iowa Coal Mining Co.*, 494 N.W.2d at 669-70.

99. RUTHERFORD H. PLATT, *LAND USE AND SOCIETY* 234 (Island Press 1996).

State enabling legislation does not require local governments to adopt zoning; however, it does require local governments who choose zoning to follow the state procedures.<sup>100</sup> Since local processes must abide by the state established procedures, the resulting zoning is dependent upon the specificity delegated by the state government.<sup>101</sup> Furthermore, by delegating zoning power to the local level, local governments are able to develop their community in their own self-interest, which creates regional problems.<sup>102</sup> Problems include balkanization, incompatible uses on municipal borders, and duplication of public facilities.<sup>103</sup> Once problems are created, the system allows local governments to attempt to solve their problems without regard to the general wants and needs of the region.<sup>104</sup> Unless Adam Smith's invisible hand theory<sup>105</sup> resolves the conflict, the situation will perpetuate indefinitely until the doors of communication between local governments, regions, and state level are opened effectively.

### *B. Growth Management*

Growth management is "a commitment to plan carefully for growth that comes to an area so as to achieve a responsible balance between the protection of natural systems — land, air, and water — and the development required to support growth in the residential, commercial and retail areas."<sup>106</sup> Growth management was initially associated with slow growth or no-growth by a series of state initiatives in the 1980s and 1990s associated growth management with a commitment to plan carefully for growth.

The movement began in the 1970s as environmentalists reached their peak strength and demanded natural-systems orientation programming. Some states developed comprehensive programs that applied uniformly across the state (Oregon) and others enacted programs that were limited to certain kinds of development or geographic areas (Florida). All programs shared a common

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100. *Id.*

101. *Id.*

102. FREILICH, SMART GROWTH, *supra* note 84, at n. 3.

103. NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 19 (1968).

104. FREILICH, SMART GROWTH, *supra* 84, at 3.

105. The theory is used to explain the process by which the desired outcome is produced in a decentralized method by the acting agents only intending to better themselves. In the sprawling-land-use-decision-making context, this would mean that each local government would make individual decisions to better their own communities and the byproduct would be a non-sprawling nation. For an example of the theory that the market is self-correcting, see STALEY, *supra* note 71, at 14-17.

106. JOHN M. DEGROVE, PLANNING AND GROWTH MANAGEMENT IN THE STATES 1 (1992). The series of states include: Florida, New Jersey, Maine, Vermont, and Rhode Island. *Id.* at 1-2.

characteristic: transfer of some land use authority from the local government and some responsibilities therefore applied at the state level.<sup>107</sup> Goals of comprehensive growth management efforts include:

[B]alanc[ing] economic development and limit[ing] sprawl by channeling growth to areas that have already been developed; to revitalize and prevent the decline of existing urban and suburban areas; to promote more compact urban form; to protect open space, farmland, forests, and environmentally sensitive areas from suburban encroachment; to reduce the public cost of providing infrastructure and services to new development by making more efficient use of existing resources; to protect the natural environment; and to provide affordable housing.<sup>108</sup>

The growth management movement expanded in the 1980s to encompass broader concerns and "quality of life values." Concerns include: protecting the environment, farmland, forests, green space, open spaces, keeping abreast of infrastructure needs, balancing environmental protection and development, promoting economic development, affordable housing, mandated plans, and urban growth patterns. Although each state's legislative plan is different, six substantive requirements have been identified as composing a growth management plan: (1) concurrency (specified infrastructure is constructed at the time the impact of development occurs); (2) compact urban growth patterns (strategies that discourage urban sprawl and encourage infill, redevelopment, and revitalization of central cities); (3) affordable housing; (4) economic development; (5) policies to protect rural areas, environmentally sensitive areas, and open space; and (6) urban form requirements (requirements that aim to foster aesthetically pleasant urban areas that combine moderate densities with people and environmentally-friendly places).<sup>109</sup>

In order for the legislation to successfully impact local governments, the states mandated comprehensive growth management plans. To assist in effectuating the development and implementation of enacting local plans, states developed incentive zoning, cluster zoning, exactions, and transferable development

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107. *Id.* at 2 (describing the growth management movement in the late 1970s and 1980s).

108. Pollard, *supra* note 86, at 255-56.

109. DEGROVE, *supra* note 106, at 2-4.

rights.<sup>110</sup> These programs supplemented funding and discouraged undesired growth patterns because success of early plans was dependent upon adequate funding.<sup>111</sup>

Problems with the growth management strategy are voluminous. The techniques to supplement statewide finances are controversial and have limited success in curbing inefficient, scattered development and encouraging desired growth patterns.<sup>112</sup> For example, the effectiveness of local growth management approaches are limited because sprawling development extends across multiple political boundaries, but a particular planning and zoning scheme typically applies only within the boundaries of a single locality. Even if a local government successfully controls the rate of growth within its boundaries, it may foster sprawling growth in neighboring communities, thereby worsening regional sprawl.<sup>113</sup> Regardless, many local governments lack the expertise to respond to the effects of major new construction in their own jurisdiction and / or neighboring localities.<sup>114</sup> Another shortcoming of local zoning controls is that localities often overzone land for suburban development because local governments compete to entice new development in pursuit of a larger tax base.<sup>115</sup> Since the supply of land that is zoned suburban exceeds the future anticipated demand, the pace and development of location is forfeited to developers.<sup>116</sup> Also, many growth management plans inadequately address "the impact of land use planning on transportation," and only analyze "the impact of projects on automobile congestion."<sup>117</sup>

### C. Smart Growth

The impetuses for smart growth were a combination of societal, economic, and political factors. Since the 1920s, the intergovernmental dimension of planning has become more complex and involved various governmental levels because high growth rates prompted concerns over costs of services, adverse environmental

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110. *Id.* at 5-6. Ortiz, *supra* note 22, at 177-81 (describing the listed zoning techniques).

111. Pollard, *supra* note 86, at 257.

112. *Id.* at 255.

113. See James A. Kushner, *Growth Management and the City*, 12 YALE L. & POL'Y REV. 68, 73 (1994) (discussing reasons that local government attempts to control sprawl are ineffective).

114. See James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL L. REV. 489, 503 (1994).

115. See, e.g., MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (1997).

116. *Id.* For a discussion of political impediments and government fragmentation, see Savitch, *supra* note 70, at 345.

117. Pollard, *supra* note 86, at n. 32.

and quality of life impacts. Also, the balance between housing and jobs created a need for a different structure of land use planning. Some state governments seized an active role managing land use planning to ensure uniformity, fairness, and direction of the state growth patterns. Additionally, people now view land as a resource instead of a commodity, and have attached competing social values to it: development or protection of the environment. With the general rise of citizen participation in government planning, citizens elevated the expectations of planning. Now, consultants draft plans for citizens who participate in the community planning process and expect to see fruition. Lastly, the focus of land use planning has shifted from protecting the public from nuisances (1920s) to securing public benefits, such as environmental protection, maintaining open space, exactions for public infrastructure, and school improvements. The shift of land use planning has created a more complex legal environment, and courts now require governments to compensate for taking of private property, whether temporary or permanent, and for regulations that exceed protecting the public, health, safety, and welfare.<sup>118</sup>

Smart growth is a product of growth management, or managed growth, combined with good marketing; "everything else . . . must be dumb growth."<sup>119</sup> Smart growth is an approach to development that focuses on managing how growth occurs to promote economic development, environmental protection, and a better quality of life.<sup>120</sup> The fundamental idea is that growth itself is not inherently harmful, rather uncontrolled, haphazard development causes adverse side-effects; smart growth seeks to accommodate positive growth. Smart growth focuses less on the need to regulate land development and more on incentives. Planners, governments, and politicians realize that "public investments, regulatory policies, and tax policies influence the pace, scale and location of development."<sup>121</sup>

Smart growth is a planning and environmentalist movement that is based on the goals of environmental protection and sustainable development.<sup>122</sup> Specifically, the objectives of smart growth include:

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118. American Planning Ass'n, *Background on Growing Smart*, at <http://www.planning.org/growingsmart/background.htm> (last visited Feb. 1, 2004). Previously, in some jurisdictions, consultants drafted plans for groups who did not necessarily desire to implement the plans but were only seeking to maintain political peace. See *id.*

119. Robert I. McMurry, *Update: Smart Growth — Is it Working?*, 2 ALI-ABA (2000).

120. Ohm, *supra* note 14, at 189.

121. Pollard, *supra* note 86, at 258.

122. Norman B. Rice, *Smart Growth: A Catalyst for Public-Interest Investment*, 26 FORDHAM URB. L.J. 1417, 1417-18 (1999).

(1) mix[ed] land uses; (2) tak[ing] advantage of compact building design; (3) creat[ing] housing opportunities and choices; (4) creat[ing] walkable communities; (5) foster[ing] distinctive, attractive communities with a strong sense of place; (6) preserve[ing] open space, farmland, natural beauty, and critical environmental areas; (7) strengthen[ing] and direct[ing] development toward existing communities; (8) provid[ing] a variety of transportation choices; (9) mak[ing] development decisions predictable, fair, and cost-effective; and (10) encourage[ing] community and stakeholder collaboration in development decisions.<sup>123</sup>

There is not a one-size-fits-all solution to each state's problems. State and local governments utilize various techniques to attempt to achieve these objectives.<sup>124</sup>

Although smart growth does not have a precise definition, it is a general acknowledgement that current programs have not disentangled sprawl and its associated calamities.<sup>125</sup> Smart growth obtained national recognition in 1994 with an initiative called "Growing Smart"<sup>126</sup> by the American Planning Association (hereinafter "APA") with participation from public organizations and private sponsors.<sup>127</sup> The APA determined that the current land use tools were outdated and did not meet contemporary needs.<sup>128</sup> The model planning statutes from which most state statutes were derived were drafted in the 1920s by an advisory committee of the U.S. Department of Commerce.<sup>129</sup>

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123. Ohm, *supra* note 14, at 191.

124. Some of the techniques include: creation of super agencies that are not hampered by government bureaucracy, money incentives or disincentives, redevelopment of older urban areas, imposing different clean-up standards of brownfields depending on the site's future use, abandoning typical zoning models, Tradeable Development Rights, and the Habitat Transaction Method. See Ortiz, *supra* note 22, at 177-81. For background information regarding the previously mentioned techniques of smart growth, see *id.* See also Patricia E. Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, 21 ST. LOUIS U. PUB. L. REV. 271, 273-310 (summarizing the smart growth activities in thirty-six states).

125. Ohm, *supra* note 14, at 190-91 (describing smart growth in overview, general terms).

126. American Planning Ass'n, *Growing Smart*, at <http://www.planning.org/growingsmart> (last visited Feb. 1, 2004).

127. McMurry, *supra* note 119.

128. American Planning Ass'n, *Background on Growing Smart*, at <http://www.planning.org/growingsmart/background.htm> (last visited Feb. 1, 2004) (summarizing the APA's evaluation of current growth management techniques).

129. *Id.* The two model acts are SZEa and SPEa (SZEa, *supra* note 89; U.S. Department of Commerce, A Standard City Planning Enabling Act (1926)).

## IV. FLORIDA

Florida is one of eleven growth management states<sup>130</sup> and is second only to Oregon in length of experience with a comprehensive growth management system.<sup>131</sup> The goal of Florida's system is to balance protection of the state's natural resource systems (land, air, and water) with the demand to provide for the influx of populace relocating into the state. In the 1950s economic prosperity flourished and the negative impacts of unplanned and haphazard growth were ignored. Florida's love affair with growth began to end in the 1960s with realized negative impacts of unplanned growth such as the destruction of wetland, beach, dune and drinking water systems. Although land use is generally local, Florida legislature found that certain areas affect the state as a whole.<sup>132</sup> The current plan addresses such regional problems as the restoration of the Everglades, Florida's future water supply, loss of agricultural lands, and the need to preserve and restore Florida's environmental systems.<sup>133</sup>

*A. Evolution of Florida's Growth Management System**1. Phase One*

Through the Environmental Land Management Study Commission (hereinafter "ELMS I"), Florida promulgated its first major legislation to address negative growth issues in 1972. The legislation included the Environmental Land and Water Management Act (hereinafter "ELWMA"),<sup>134</sup> the Water Resources Act,<sup>135</sup> the State Comprehensive Planning Act,<sup>136</sup> and the Land Conservation Act.<sup>137</sup> These Acts required that state and regional issues be taken into account in matters involving the use and development of Florida's land.

ELWMA established the Area of Critical State Concern (hereinafter "ACSC") and the Development of Regional Impact

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130. A.C. Nelson & Terry Moore, *Assessing Growth Management Policy Implementation: Case Study of the United States' Leading Growth Management State*, 12 LAND USE POL'Y 241-59 (1996).

131. DEGROVE, *supra* note 106, at 7. For a detailed overview of Florida's growth management history, see Reid Ewing, *Florida's Growth Management Curve*, 19 VA. ENVTL. L.J. 375 (2000).

132. ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH* 113 (1994).

133. Freilich, *supra* note 1, at 236.

134. FLA. STAT. ch. 380 (1972).

135. *Id.* at ch. 373 (1972).

136. *Id.* at ch. 23 (1972).

137. *Id.* at ch. 259 (1972).

(hereinafter "DRI").<sup>138</sup> The core of both designations is that the "[s]tates must take specific action in order to modify local government authority over land development within their jurisdictions."<sup>139</sup> An ACSC is an area designated by the state administration that requires special regulatory awareness and consideration because the areas were not receiving *any* attention.<sup>140</sup> The purpose of the ACSC designation was to foster the types of developmental regulations required to provide the desired protections.<sup>141</sup> A DRI is "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county."<sup>142</sup> The DRI concept contained provisions that guided design and allowed for adequate infrastructure for projects that qualified as developments of regional impact.<sup>143</sup> Certain developments can also be presumed to be DRIs based solely on their magnitude, i.e. total developed square footage, acreage, or dwelling units.<sup>144</sup> Other highlights of the ELWMA legislation included advanced, forward thinking water resource law and the nation's most extensive public land acquisition program.<sup>145</sup>

## 2. Phase Two

ELMS I conducted in-depth research that led to the drafting of the Local Government Comprehensive Planning Act (hereinafter "LGCPA") in 1975.<sup>146</sup> The LGCPA required all local governments to plan for future growth by adopting and implementing comprehensive plans.<sup>147</sup> Additionally, the LGCPA provided a definition for a comprehensive plan and procedures for adoption and implementation.<sup>148</sup> Land development regulation remained in the jurisdiction of the local government, except for ACSCs and DRIs.<sup>149</sup> The "purpose of this act [is] to utilize and strengthen the existing

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138. *Id.* § 380.0651 (2003).

139. James C. Nicholas, *The Ups and Downs of Growth Management in Florida*, 12 J. LAW & PUB. POL'Y 213, 214 (2000) (discussing the progression of growth management laws in Florida).

140. *See* FLA. STAT. § 380.05 (2003).

141. *Id.*

142. FLA. STAT. § 380.06(1) (2003).

143. *See id.*; DeGrove, *supra* note 106, at 10 (providing an overview of the DRI and ACSC programs).

144. FLA. ADMIN. CODE R. 9J-2.025 (2003).

145. DEGROVE, *supra* note 106, at 10.

146. The act is set forth in FLA. STAT. § 163.3161 (2003). Nicholas, *supra* note 139, at 215-16.

147. FLA. STAT. § 163.3167(1) (2003).

148. *Id.* § 163.3164(4).

149. *See id.* § 163.2511 et seq.



role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development."<sup>150</sup>

The legislation was regarded as "toothless"<sup>151</sup> and seen as "too little, too late."<sup>152</sup> The major shortcomings were inadequate funding and a lack of accountability. Although the law required each local government to enact a comprehensive plan, the state failed to abide by its commitment to fund plan preparation by local governments. Thus, commissions altered plans frequently and allowed zoning to drive the plan versus the plan to frame zoning and other implementation mechanisms. Moreover, the state and regional levels had a duty only to review plans;<sup>153</sup> therefore, the approval process was left to the individual determinations of local jurisdictions that would overlook the greater needs of the state comprehensive plan.

### 3. *Phase Three*

Governor Bob Graham appointed a resource management task force in the late 1970s to strengthen and correct inadequacies of the previous legislation. Modifications were adopted to improve some areas of previous legislation. The final report called for legislatively approved goals and policies at the state level, strong comprehensive regional policy plans to further articulate state goals and policies at the regional level, and a much stronger local government comprehensive planning system with state and regional review and approval to assure quality programs sufficient to meet the needs of the state.<sup>154</sup> The report led the legislature to appoint ELMS II, which found that many local jurisdictions exploited loopholes of the LGCPA, including frequent plan amendments caused by requests for development approval, adoption of loosely worded "policy" plans that provided little to no direction for decision making, and a lack of consideration of state and regional planning concerns.<sup>155</sup>

ELMS II's final report led to Phase III of Florida's growth management system including the State and Regional Planning Act of 1984 (hereinafter "SRPA," Chapter 186), Comprehensive State

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150. *Id.* § 163.3161(2).

151. Nicholas, *supra* note 139, at 216.

152. DEGROVE, *supra* note 106, at 9.

153. FLA. STAT. § 380.06(10) (2003).

154. *Id.* (summarizing report of resource management task force).

155. See Daniel W. O'Connell, New Directions in State Legislation: The Florida Growth Management Act and State Comprehensive Plan, in *Perspectives on Florida's Growth Management Act of 1985*, at 26-27 (John M. DeGrove and Julian Conrad Juergensmeyer eds., 1986).

Plan (Chapter 187), and the Omnibus Growth Management Act of 1985 (hereinafter "OGMA") which amended Chapters 163, 161, and 380. The policy framework involved vertical integration of goals, policies, and implementation strategies, and horizontal compatibility with and among plans at the state, regional, and local levels. The system was structured to protect important state resources while retaining local government control.<sup>156</sup>

Chapter 186 required the governor's office to prepare a state plan and present it to the 1985 legislature, reasserted a mandate for regional planning councils, and allocated funds to support preparation of the plans. The 1984 legislative session also allocated funds to strengthen the State Land Planning Agency of the Department of Community Affairs. The OGMA aimed at strengthening the growth management system by requiring local governments to prepare or revise their comprehensive plans to ensure consistency with the state and regional comprehensive plans.<sup>157</sup>

The state plan mandates local comprehensive planning,<sup>158</sup> consistency,<sup>159</sup> county membership in a Regional Planning Council,<sup>160</sup> and an adequate public facilities provision that is concurrent with development.<sup>161</sup> The State plan not only mandates that local governments adopt comprehensive plans but that they also adopt specific elements within said plans.<sup>162</sup> The elements must be in agreement with the state plan, regional plans, and internally consistent to ensure a lack of conflict between elements locally, regionally, and statewide. The main growth management techniques include concurrency management for adequate public facilities, impact analysis for developments of regional impact, and projects proposed in areas of critical state concern.<sup>163</sup>

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156. Nicholas, *supra* note 139, at 217.

157. DEGROVE, *supra* note 106, at 12.

158. FLA. STAT. § 163.3167(2) (2003).

159. *Id.* § 163.3177.

160. *Id.* § 186.504(2)(a).

161. *Id.* § 163.3202(2)(g).

162. These elements include: capital improvements; land use; traffic circulation; sanitary sewer; solid waste, drainage, potable water, and natural ground aquifer recharge; conservation; recreation and open space; housing; implementation; and intergovernmental coordination. *Id.* § 163.3177.

163. FREILICH, SMART GROWTH, *supra* note 84, at 236.

## *B. Transportation Concurrency: Cause or Cure for Sprawl*

### *1. General Overview*

Florida is purported to be the nation's leader in developing and implementing concurrency,<sup>164</sup> which is the requirement that every comprehensive plan include the availability of adequate public facilities when a development order is issued, and that the requirement be enforced at the development order stage.<sup>165</sup> The purpose of the requirement is to ensure that public infrastructure is available at the time of occupancy and as such, timelines for development can be modulated to meet population growth. Concurrency is labeled as the "teeth" of the growth management act<sup>166</sup> and transportation concurrency is the eyetooth.<sup>167</sup> Concurrency is deemed satisfied if "public facilities and services for a development are phased, or the development is phased, so that the public facilities and those related services which are deemed necessary by the local government to operate the facilities necessitated by that development are available concurrent with the impacts of the development."<sup>168</sup> In theory, local governments can control the timing and location of development to ensure the availability of adequate public facilities.<sup>169</sup>

The appearance of concurrency as simple is illusory. The concept is that "the public facilities and services to support growth should be [available] concurrently with the impact of development."<sup>170</sup> Florida's legislature envisioned that concurrency would be an aspect of the local comprehensive plans.<sup>171</sup> It also sought that local government comprehensive plans would be consistent with and cognizant of state and regional comprehensive plans.<sup>172</sup> Where the statute leaves off, Rule 9J-5 of the Florida Administrative Code commences.<sup>173</sup> Rule 9J-5 requires each local government to adopt a "concurrency management" system, which is "the procedures and/or processes that the local government will utilize to assure that development orders and permits are not issued

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164. DEGROVE, *supra* note 106, at 7.

165. FLA. STAT. § 163.3180 (2003); see also H. Glenn Boggs & Robert C. Apgar, *Concurrency and Growth Management: Lawyer's Primer*, 7 J. LAND USE & ENVTL. L. 1, 1 (1991).

166. Boggs & Apgar, *supra* note 165, at 1; Nicolas & Steiner, *supra* note 4, at 662.

167. Nicolas & Steiner, *supra* note 4, at 662.

168. FLA. STAT. § 163.3177(10)(h) (2003).

169. Thomas G. Pelham, *Restructuring Florida's Growth Management System: Alternative Approaches to Plan Implementation and Concurrency*, 12 J. LAW & PUB. POLY. 299, 299-300 (2001).

170. Nicolas & Steiner, *supra* note 4, at 666.

171. FLA. STAT. § 163.3177(10)(h) (2003).

172. See *id.* § 163.

173. See FLA. ADMIN. CODE R. 9J-5 (2003).

unless the necessary facilities and services are available concurrent with the impacts of development.”<sup>174</sup> Furthermore, Rule 9J-5 also stipulates that “[e]ach local government shall establish a level of service standard for each public facility located within the boundary for which the local government has authority to issue development orders or development permits.”<sup>175</sup> The level of service criterion (hereinafter “LOS”), which must be maintained in its entirety, reflects “the capacity per unit of demand for each public facility.”<sup>176</sup>

The LOS requirements are developed and detailed within each appropriate plan element.<sup>177</sup>

Rule 9J-5.0055 sets forth the standards to satisfy the concurrency requirement.<sup>178</sup> A local government shall have the necessary facilities and services in place or under construction at the time a development order or permit is issued; be a condition to the issuance of a development order or permit and must be in place or under construction within three years of certificate of occupancy; be the subject of a binding executed agreement in place or under construction within three years of certificate of occupancy; or be guaranteed in an enforceable development agreement or an agreement or development order and be in place or under construction within three years of certificate of occupancy.<sup>179</sup>

## 2. Difficulties and Hindrances Regarding Implementation

The State has failed to provide sustained leadership in directing, supporting, or addressing Florida’s growth problems.<sup>180</sup> Since the State Plan was a “compromised product” that failed to provide adequate and specific guidance, the Department of Community Affairs (hereinafter “DCA”), the State Land Planning Agency, has decreased its emphasis upon the State Plan in reviewing local plans for compliance.<sup>181</sup> The statutory requirement that contains annual evaluations and recommended changes by the Executive Office of the Governor has been disregarded. The result of this action leaves the original comprehensive plan substantially unaltered since its inception in 1985.<sup>182</sup> As a result of the inattention to the State Plan, neither the Florida Legislature nor the Office of the Governor utilize

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174. *Id.* at 9J-5.003(20).

175. *Id.* at 9J-5.005(3).

176. *Id.* at 9J-5.003(45).

177. *Id.* at 9J-5.008; *see, e.g., id.* at 9J-003(45).

178. *Id.* at 9J-5.0055(3)(c).

179. *Id.*

180. Pelham, *supra* note 169, at 303-04.

181. *Id.*; FLA. STAT. ANN. § 186.505(21) (2003).

182. Pelham, *supra* note 169, at 304; FLA. STAT. ANN. § 186.007 (2003).

the State Plan as it was designed and base their decisions relating to growth on more modern, yet inconsistent standards.<sup>183</sup> Additionally, the Regional Planning Councils' intent to draft and enact Regional Plans was "defanged" by the legislature in 1993 pursuant to a recommendation of the ELMS III Committee.<sup>184</sup> Lastly, the State lacks an effective review process concerning local comprehensive plan amendments. Over ninety percent of local comprehensive plan amendments are approved by the DCA; this suggests that the State may be failing to effectively monitor and enforce implementation of the State's growth policies.<sup>185</sup>

Implementation of the concurrency requirement raised issues of concern even before the legislation was promulgated. The State failed to provide adequate state or local funding sources on a consistent basis.<sup>186</sup> For example, efforts by the State to effectuate a sales tax on services was enacted and almost immediately repealed.<sup>187</sup> Concerns surfaced regarding: the establishment of LOS standards on state highways, standards used for roadway concurrency, the long lead time for road construction, the backlog of transportation projects, vagueness within the verbiage, such as the meaning of "facilities [must] be 'available concurrent with development'," how to measure roadway concurrency, and the perception that transportation was causing sprawl.<sup>188</sup> Providing transportation in tandem with growth requires various assumptions about the interaction between new development with its supporting services and facilities.<sup>189</sup> The assumptions include "sufficient funding for the planned transportation improvements to support new development"; and that "development commitments can be tracked to specific roadway segments and to specific transportation projects."<sup>190</sup>

### 3. Softening the Rigidity of Transportation Concurrency

Certain specific projects and geographical areas (projects within an Existing Urban Service Area (hereinafter "EUSA"), *de minimis*

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183. Pelham, *supra* note 169, at 306.

184. *Id.* at 305. The Comprehensive Regional Policy Plans were replaced with Regional Strategic Policy Plans that addressed narrower issues. The DCA was absolved of its power to find a local plan amendment not in compliance with the State Plan on the basis of inconsistency with the Regional Plan. Lastly, RPCs were stripped of their authority to adopt binding LOS standards for facilities provided or regulated by local governments. *Id.*

185. *Id.* at 306.

186. *Id.*

187. FLA. STAT. ANN. § 212.059 (repealed 1987).

188. Nicholas & Steiner, *supra* note 4, at 662.

189. *Id.* at 666.

190. *Id.*

impact projects, Long Term Concurrency Management Systems (hereinafter "LTCMS"), and Transportation Concurrency Exemption Areas (hereinafter "TCEA")), may be exempt from transportation concurrency or have extended deadlines beyond the issuance of a certificate of occupancy or functional equivalent. Exceptions are made to the straight line rule to promote other policies of the GMA.<sup>191</sup> A project located within an EUSA is exempt "for up to 110 percent of the transportation impact generated by previously existing development."<sup>192</sup> A project that has a *de minimis* impact, as defined by Florida Statutes section 163.3164(29), is exempt from concurrency requirements.<sup>193</sup> Local governments are authorized to adopt LTCMS with a planning period up to ten years to "set priorities for reducing the backlog on transportation facilities."<sup>194</sup> Local governments may also designate Transportation Concurrency Management Areas (hereinafter "TCMA") "to promote infill development or redevelopment . . . in a manner that supports the provision of more efficient mobility alternatives, including public transit."<sup>195</sup> Lastly, local governments may designate TCEAs "to reduce the adverse impact transportation concurrency may have on urban infill development and redevelopment and the achievement of other goals and policies of the state comprehensive plan."<sup>196</sup> TCEAs were created because urban cores already had congested roadways and since transportation concurrency could not be met within the urban core, developers relocated to less developed areas and fostered sprawl.<sup>197</sup>

The effect of softening the rigidity of transportation concurrency is to sacrifice traffic congestion for policies preferred by the current local government. Exemptions and reductions in timelines by which the development must have transportation infrastructure in place create increased traffic on the roadway and decreased quality of the existing roads. Instead of enforcing the original strict GMA and requiring public infrastructure, the legislature created exemptions and exceptions that allow local governments to either procrastinate or avoid expanding and improving roadways.

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191. FLA. ADMIN. CODE R. 9J-5.0055(6) (2003).

192. *Id.* at 9J-5.0055(3)(c).

193. *Id.*

194. *Id.* at 9J-5.0055(4).

195. *Id.* at 9J-5.0055(5).

196. *Id.* at 9J-5.0055(6).

197. Debbie M. Orshesky, *Florida's Current Efforts to Redevelop its Urban Core*, 1997 LAND USE INST. 345, 351 (1997).

#### 4. Case Study: Orlando, Florida

The Orlando Metropolitan Area<sup>198</sup> is well known for its traffic congestion or, more appropriately, traffic stagnation. If traveling in or even through the area, it is best to stay off the main highways during peak traffic flow times. The solution set forth by the local governments, and approved by the state, was essentially for state government to abdicate its oversight role and to allow traffic to fester and worsen. Most of Orlando is designated as a TCEA, which means that development within the TCEA is not subject to transportation concurrency requirements. Since developers can proceed with construction without regard to the impacts of increased population on the transportation system, roads are progressively becoming more crowded and their condition is deteriorating.

The Orlando area was first settled in the mid-1800s with an economy based primarily on agriculture. In 1950, technology entered the arena in the form of the Martin Co.<sup>199</sup> and constructed a missile research facility in southwest Orange County. With the introduction of a different economic system, both population and highway systems began to swell, which led to Walt Disney's attraction in the 1960s. Within the past 30 years, Orlando has grown to be a major city in the State of Florida, consisting of both major tourist attractions and full-fledged professional industries.<sup>200</sup>

Transportation statistics indicate that the primary mode of transportation in the Orlando Metropolitan area is the single occupant vehicle (hereinafter "SOV").<sup>201</sup> Florida Interstate Four (hereinafter "I-4"), the main commuting route in the area, has been operating over its capacity design limits for a number of years. The average daily number of trips on I-4 increased from 120,600 in 1996 to 134,600 in 2000, an increase of nearly twelve percent.<sup>202</sup> Traffic volumes on the toll expressways<sup>203</sup> has increased at a more rapid rate than I-4: traffic volume increased from 30,460 to 43,870, an increase of forty-four percent.<sup>204</sup> Further evidence of increased traffic includes a fifteen percent increase in registered vehicles from

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198. The Orlando Metropolitan Area consists of Orange, Seminole, and Osceola counties.

199. Martin Co. is now Lockheed Martin.

200. Keith Caskey, *Impacts of Rapid Growth on the Orlando Area Transportation System*, 72 ITE J. 36 (Aug. 2002).

201. *Id.*

202. Florida Department of Transportation. District Five 2000 Average Annual Daily Traffic. DeLand, FL, USA, 2001.

203. SR 528/Bee Line Expressway, SR 408/ East-West Expressway, SR 417/Eastern Beltway, Florida's Turnpike, and Osceola Parkway.

204. For more information on traffic volume on the Orlando area toll roads, see <http://www.oceao.com> under Traffic Statistics.

1996-2000, the same increase in population for the time period;<sup>205</sup> an increase in vehicle miles traveled (hereinafter "VMT") of nineteen percent;<sup>206</sup> and a gasoline consumption increase of eighteen percent.<sup>207</sup> These statistics evidence the reality that growth is causing not only farther commutes, but also an increase in population as new development draws people into the sprawl areas.<sup>208</sup> The Texas Transportation Institute at Texas A&M University developed a congestion index to evaluate whether a roadway system is carrying more traffic than its capacity.<sup>209</sup> If the index is greater than one, that roadway is over capacity. Conversely, an index less than one indicates it is under capacity.<sup>210</sup> The Orlando area's congestion index increased from 0.86 in 1994 to 1.05 in 2001, an increase of twenty-two percent.<sup>211</sup> This statistic shows that in order to keep traffic flow moving fluidly, the network will require additional road improvements and alternative modes of transportation.<sup>212</sup> The institute concluded that 190 additional miles of roadway are needed each year to keep pace with population increases.<sup>213</sup> However, based on historical construction data, only ninety-seven miles are added each year to supplement growth.<sup>214</sup> The cost of needed highway improvements greatly exceeds the amount of available local, state, and federal funds.<sup>215</sup>

Although transit is becoming increasingly more important in the Orlando Metropolitan Area, people are opposed to public transportation. The vast majority of regular transit riders only utilize the system out of necessity; commuters consider the transit system inconvenient. LYNX, the local transportation provider, has seen some increased use of its services; however, less than one percent of commuters currently use the transit service.<sup>216</sup> Recommendations to increase operations include an expansion of

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205. Florida Department of Highway Safety and Motor Vehicles. *Revenue Report*, July 1, 1999-June 30, 2002. Tallahassee, FL, USA 2001; Caskey, *supra* note 200, at 36.

206. Florida Department of Transportation. *Public Road Mileage and Miles Traveled, 2000*. Tallahassee, FL, USA, 2001.

207. Florida Department of Community Affairs. *2000 Motor Gasoline and Diesel Fuel Report*. Tallahassee, FL, USA, 2001.

208. Caskey, *supra* note 200, at 36.

209. Texas Transportation Institute. *2001 Mobility Report*. College Station, TX, USA 2001. The index is defined as the ration of the area-wide estimates of VMT to the number of lane-miles of roadway in each urban area. *Id.*

210. Caskey, *supra* note 200, at 36.

211. *Id.*

212. *Id.*

213. Press Release, Metroplan Orlando, Study Confirms What We Already Know: Traffic in Central Florida is Bad, and Getting Worse (Jan. 25, 2000).

214. *Id.*

215. Caskey, *supra* note 200, at 36.

216. *See id.*



the bus fleet and route system to augment convenience and accessibility of service. However, for the expansion to become a reality, there are two main requirements: (1) funding from the state level, and (2) the establishment of high density land uses within the range of proposed transit system to increase the efficiency of the network. Extensive funding is required for the actual expansion costs, such as engineering and construction, but possibly more importantly, marketing public awareness of alternative transportation and benefits.<sup>217</sup>

Metroplan Orlando's solutions to traffic congestion thus far include the use of intelligent transportation systems (hereinafter "ITS") and automated toll-collection systems. ITS is a passive traffic control system that was implemented to "improve traffic flow on existing roadways without adding lanes or building new highways."<sup>218</sup> Examples of ITS technologies include surveillance cameras and messaging signs to alert drivers of traffic incidents and alternative routes, computerized signal systems, and an automated transit vehicle location system.<sup>219</sup>

The TCEA's effect on Orlando area residents is unfortunate. Each year, drivers lose forty-one hours due to extensive traffic delays as driving at peak times takes twenty percent longer than the same trip at non-peak times. As those drivers sit idling in traffic, nearly fifty million gallons of fuel are wasted each year. This waste begins to add quickly in the pocketbooks of the Orlando driver, as the annual cost due to traffic delays is approximately \$670.<sup>220</sup>

## V. MARYLAND

The crux of Maryland's gubernatorial administration's 1997 legislation package was the Smart Growth and Neighborhood Conservation Initiative (hereinafter "Maryland Smart Growth"). The government's intent is to curb destructive growth patterns by limiting public investment to projects which are consistent with sound growth management. The underlying theme is that the remedy to stay the progress of urban sprawl is to influence development decisions with economic incentives, rather than regulations. The goals of Maryland Smart Growth are: to preserve the state's natural resources, to direct resources to support existing

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217. *Id.*

218. *Id.*

219. For full description of each ITS technology, see *id.*

220. *Id.*

communities and neighborhoods, and to save taxpayers money by avoiding unnecessary costs of building duplicate infrastructure.<sup>221</sup>

*A. The Historical Context of Maryland's Smart Growth*

Preceding Maryland's 1997 Smart Growth Initiatives were a sequence of three decades of land use laws.<sup>222</sup> Maryland's anti-sprawl programs are primarily contoured to three factors: a pervasive desire to preserve the health of the Chesapeake Bay, resistance to State intervention in local land use planning, and political tension between densely and less populated jurisdictions.<sup>223</sup>

The State's first legislation was promulgated by the General Assembly in 1974<sup>224</sup> after Governor Marvin Mandel called for land use reform in his State of the State speech. According to Mandel, "[t]he character of Maryland will be shaped by what we do with our human resources as well as with our natural resources" and the State should curb improper and excessive development.<sup>225</sup> Since 1973, land use reforms have become a prominent issue for politicians and concerned citizens.<sup>226</sup>

The Maryland Economic Growth, Resource Protection and Planning Act of 1992 (hereinafter "1992 Planning Act") followed an alarming report on the declining health and ecology of the Chesapeake Bay published by the U.S. Environmental Protection Agency (hereinafter "EPA") in 1983.<sup>227</sup> Thereafter, Maryland, Virginia, Pennsylvania, the District of Columbia, and the EPA signed the Chesapeake Bay Agreement, which charged a panel of experts (hereinafter "2020 Commission") with the task of reporting upon "growth management regulations, environmental programs, and infrastructure requirements necessary to protect the [Chesapeake] Bay while still accommodating projected population growth in the Bay region through the year 2020."<sup>228</sup> Governor William Donald Schaefer appointed the Governor's Commission of Growth in the Chesapeake Bay Region in 1989 to review the

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221. Glendening, *Smart Growth*, *supra* note 10, at 421.

222. James R. Cohen, *Maryland's "Smart Growth": Using Incentives to Combat Sprawl*, in URBAN SPRAWL: CAUSES, CONSEQUENCES, AND POLICY RESPONSES 3 (Urban Institute Press 2002).

223. *Id.*

224. MD.ANN. CODE art. 88C, repealed by Acts 1985, ch. 11, §1 (1985).

225. Glendening, *Smart Growth*, *supra* note 10, at 419.

226. For an overview of major land use and environmental legislation in Maryland since 1969, see Cohen, *supra* note 222, at 4.

227. The Chesapeake Bay is North America's largest and most productive estuary, 195 miles long and from four to thirty miles wide, bordered on either side by Maryland and Virginia, and its watershed encompasses parts of Maryland, Virginia, New York, Pennsylvania, Delaware, and West Virginia. *Id.*

228. *Id.* at 4 (providing further detail of 2020 commission's origination and responsibilities).

findings of the 2020 Commission, analyze their application to Maryland, and identify growth issues particular to Maryland by the year 2020.<sup>229</sup> Finally, eight years after the EPA's initial findings, the Maryland legislature responded with the 1992 Planning Act.

The 1992 Planning Act requires local governments to adopt comprehensive plans consistent with seven "visions":

1. [D]evelopment is concentrated in suitable areas;
2. [S]ensitive areas are protected;
3. [I]n rural areas, growth is to be directed to existing population centers and resource areas are protected;
4. [S]tewardship of the Chesapeake Bay and the land is a universal ethic;
5. [C]onservation of resources, including a reduction in resource consumption, is practiced; . . .
6. [F]unding mechanisms are addressed to achieve these visions; [and]
7. [E]ncouraging economic growth and streamlining regulatory mechanisms . . .<sup>230</sup>

To assist local governments with preparing comprehensive plans and implementing programs to achieve the "visions," the Maryland Department of Planning (hereinafter "MDP") publishes models and guidelines. Additionally, local governments submit their sensitive area elements to the MDP. Although the MDP's critical commentary must be considered, there is no legislative requirement that the State's recommendations are incorporated into the final plan. Also of importance, the 1992 Planning Act established the Economic Growth, Resource Protection and Planning Commission (hereinafter "Growth Commission") to evaluate and advise the governor regarding the progress of the visions and policies.<sup>231</sup>

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229. *Id.* at 5 (describing the historical context of Maryland Smart Growth).

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

231. Cohen, *supra* note 222, at 6 (describing general information regarding 1992 Planning Act).

In 1996, the Growth Commission reported concerns that the terms in the visions were not adequately defined, visions were disparately and inconsistently applied, growth was not being adequately directed, and older neighborhoods were not being sufficiently revitalized. Governor Parris Glendening responded to widespread concerns regarding the inadequacies of the 1992 Planning Act by implementing the “[w]e listened, you recommended campaign” to solicit citizen and stakeholder group participation. The product of the campaign was the Smart Growth and Neighborhood Conservation Initiative of 1997.<sup>232</sup>

*B. Overview of Smart Growth and Neighborhood Conservation Initiative of 1997*

Governor Glendening proposed to utilize the gubernatorial powers over the State’s budget as an incentive to alter growth patterns and to utilize fiscal and programmatic initiatives to reverse the sprawl development pattern.<sup>233</sup> The approach is incentive, rather than regulatory, based.<sup>234</sup> Governor Glendening stated that the solution to sprawl is to control the areas where development occurs with a “carrot and a stick.”<sup>235</sup> The State’s budget (\$21 billion in 2002) is an incentive for growth within locally designated areas.<sup>236</sup> Maryland’s Smart Growth Initiative and Neighborhood Conservation Initiative of 1997 is designed to encourage compact development and direct capital facilities financing to local governments.<sup>237</sup> The purpose of Smart Growth is to create “flourishing cities and towns where families and children thrive, downtowns that are alive with activity; preserved parks, farmlands, and forests for all to enjoy; and clean air and water for our children and our grandchildren.”<sup>238</sup> The program is intended to discourage development outside the designated growth areas.<sup>239</sup>

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232. *Id.* at 7.

233. Glendening, *Smart Growth*, *supra* note 10, at 420.

234. Parris N. Glendening, *New Urbanism & Smart Growth: Maryland’s Smart Growth Initiative: The Next Steps*, 29 FORDHAM URB. L.J. 1493, 1494 (2002) [hereinafter Glendening, *Next Steps*].

235. Smart Growth in Maryland at <http://www.op.state.me.us/smartgrowth/> (last visited Aug. 1, 2003) (quoting Governor Parris Glendening).

236. Glendening, *Next Steps*, *supra* note 234.

237. See Hon. David L. Winstead, Secretary of Transportation — Maryland, *Smart Growth, Smart Transportation: A New Program to Manage Growth in Maryland*, Presentation to U.S. German-Marshall Workshop on Sustainable Transportation in Metropolitan Areas (Oct. 29-30, 1997) (providing an overview of general implementation problems in achieving smart growth visions).

238. Smart Growth Network, *Governors on Smart Growth – 2000*, at <http://www.smartgrowth.org/library/governors2000.html> (last visited Aug. 1, 2003).

239. See Glendening, *Next Steps*, *supra* note 234, at 1494.

Smart Growth consists of five core initiatives: 1997 Smart Growth Areas Act,<sup>240</sup> 1997 Rural Legacy Act,<sup>241</sup> Brownfields Voluntary Cleanup and Revitalization Incentive Programs,<sup>242</sup> Job Creation Tax Credit Program,<sup>243</sup> and Live Near Your Work Program.<sup>244</sup> The 1997 Smart Growth Areas Act is discussed in detail in the next section. Generally speaking, the Act's intent is to discourage sprawl by disallowing state subsidies for transportation, housing, economic development, and environmental projects for areas not designated as Smart Growth Areas.<sup>245</sup> The 1997 Rural Legacy Act established a grant program that enables local governments and private land trusts to purchase easements and development rights in designated areas "to protect regions with agriculture, forestry, natural and cultural resources to promote resource-based economies, provide greenbelts around developed areas and maintain the character of rural communities."<sup>246</sup> The Brownfields Voluntary Cleanup and Revitalization Incentive Programs is an effort to stimulate the use of contaminated properties by relieving current owners from retroactive liability, offering loans and grants for site cleanup, and providing a tax break on the increased assessment resulting from property improvements.<sup>247</sup> The Job Creation Tax Credit Program entices businesses to relocate or expand by providing tax credits for each new, full-time qualified job created.<sup>248</sup> Lastly, the Live Where You Work Program seeks to stabilize targeted neighborhoods by increasing homeownership and reducing employee-commuting time by creating incentives for employees to buy homes near their workplace.<sup>249</sup>

Smart Growth is a hybrid government approach, which weds local and state governments,<sup>250</sup> to effectively eliminate local governments solving their own problems without regard to the

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240. Cohen, *supra* note 222, at 2-3.

241. MD. ANN CODE, [NAT. RES.] § 5-9A-01 (2003).

242. *Id.* at art. 41, § 14-805.

243. *Id.* at art. 83, § 5-1101.

244. *Id.* at art 83A, § 5-1101. This program is implemented by the Maryland Housing and Community Development.

245. See Part V(C).

246. MD. CODE ANN., [NAT. RES.] § 5-9A-01 (2003). For a general overview of the program, see Cohen, *supra* note 222, at 11-13.

247. MD. ANN. CODE art. 83, § 5-1101 (2003). For a general overview of the program, see Cohen, *supra* note 222, at 13-16.

248. MD. ANN. CODE art. 83A, § 5-1101 (2003). For a general overview of the program, see Cohen, *supra* note 222, at 16-18.

249. MD. ANN. CODE art. 83A, § 5-1101 (2003). For a general overview of the program, see Cohen, *supra* note 222, at 18-19.

250. See MD. CODE ANN., [ST. FIN. & PROC.] § 5-7A02 (2003).

region's needs.<sup>251</sup> Smart Growth Areas will be designated, including existing towns and areas within the Urbanized Tier.<sup>252</sup> Smart Growth is unique in that it allows the state to make investments in efficient uses of land. If the state builds schools, roads, libraries, and sewage treatment plants, it is able to limit those plans to the "smartest" locations, which are areas capable of supporting growth.<sup>253</sup> The eight guidelines that guide Maryland's program are:

(1) Development shall be concentrated in suitable areas; (2) sensitive areas shall be protected; (3) in rural areas, growth shall be directed to existing population centers and resource areas shall be protected; (4) stewardship of the Chesapeake Bay and the land shall be a universal ethic; (5) conservation of resources, including a reduction in resource consumption, shall be practiced; (6) to encourage the achievement of paragraphs (1) through (5) of this subsection, economic growth shall be encouraged and regulatory mechanisms shall be streamlined; (7) adequate public facilities and infrastructure are available or planned in areas where growth is to occur; and (8) funding mechanisms shall be addressed to achieve this policy.<sup>254</sup>

### C. Priority Funding Areas

The cornerstone of the program is the Smart Growth Areas Act, which "targets state funding for growth-related projects to designated growth areas known as Priority Funding Areas" (hereinafter "PFA").<sup>255</sup> States shall only permit or fund projects that are within a designated PFA.<sup>256</sup> The areas include Baltimore, the state's 156 municipalities, and the heavily developed areas inside the Baltimore and Washington beltways.<sup>257</sup> Each county can designate additional areas that meet minimum state criteria for the provision of public water and sewer service, minimum residential

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251. Christopher M. Corchiarino, Comment, *Educating Smart Growth: One Size Fits All Growth Initiatives Are Lacking Sound Environmental Guidance*, 9 U. BALT. J. ENVTL. L. 1, 4 (2001).

252. See MD. CODE ANN., [ST. FIN. & PROC.] §§ 5-7BA-01 - 5-7B-03 (2003).

253. See Winstead *supra* note 237, at 540.

254. See MD. CODE ANN., [ST. FIN. & PROC.] § 5-7A-01 (2003).

255. 2000 Md. Laws 303. For an overview of the PFA structure, see John W. Frece, *Smart Growth Prioritizing State Investments*, 1 NAT'L RES. & ENV'T 236, 276 (2003).

256. MD. CODE ANN., [ST. FIN. & PROC.] § 5-7B-02 (2003). For an analysis of the smart growth initiative, see Cohen, *supra* note 222, at 2-3.

257. MD. CODE ANN., [ST. FIN. & PROC.] § 5-7B-02 (2003).

density, and consistency with twenty-year population growth projections.<sup>258</sup> The statute includes two caveats to allow flexibility when granting state funding where the area is not designated as a PFA: exemptions that the Board of Public Works (hereinafter "BPW") has to approve and exemptions that the BPW does not approve.<sup>259</sup> PFAs became more prominent when Governor Glendening issued an Executive Order in 1998 that both expanded the scope of Smart Growth and ordered state agencies to adhere to a statewide Smart Growth policy when making discretionary decisions that PFA law does not otherwise cover.<sup>260</sup>

In accordance with Smart Growth policy, state agencies conduct business according to a new process of analysis that is best explained through examples.<sup>261</sup> Smart Growth principles are utilized by the Maryland Department of Transportation (hereinafter "MDOT") to decide which projects receive construction funding.<sup>262</sup> MDOT works in conjunction with Maryland Department of Planning (hereinafter "MDOP") to determine "whether a proposed project is within a PFA or connects two PFAs."<sup>263</sup> If the answer to both questions is negative, MDOT "must determine whether there is a reasonable alternative for the project that is within a PFA, whether there is a demonstrated safety need for the project, or whether the project serves a commercial or industrial activity that by its nature must be located away from a PFA."<sup>264</sup>

"Think Beyond the Pavement" is the new philosophy of the State Highway Administration.<sup>265</sup> From 1995-2001, funding to support MDOT's Neighborhood Conservation Initiative increased from \$50 million to more than \$200 million.<sup>266</sup> The program utilizes funds traditionally allocated to highway construction for aesthetic uses that make older downtown business districts more attractive to live, work, or shop. Some of the uses include landscaping, sidewalk construction, ornamental lighting, and park benches.<sup>267</sup>

Also in an effort to reduce road congestion, the Governor's office set a goal of doubling transit usage in Maryland by 2020.<sup>268</sup> In 2000,

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258. *Id.* § 5-7B-03.

259. *See id.*

260. Exec. Order No. 01.01.1998.04, 1 MD. REGS. CODE (1998).

261. Glendening, *Smart Growth*, *supra* note 10, at 422.

262. *See* Md. Dep't of Transp. Strategic Plan, at <http://www.marylandtransportation.com/> (last visited Feb. 27, 2004).

263. Glendening, *Smart Growth*, *supra* note 10, at 422.

264. *Id.* at 422-23.

265. Lori Montgomery, *Maryland Going 'Beyond the Pavement'; State Shifting Focus From Roads to Pedestrians and Transit*, WASH. POST, Sept. 15, 2000, at A1.

266. *See* <http://www.sha.state.md.us>.

267. *See id.*

268. Press Release, Office of the Governor of Maryland (Oct. 2, 1998), available at

Maryland increased funding for new construction and operating funds to improve the quality of mass transit to \$1.75 billion.<sup>269</sup> Governor Glendening's goal is to "develop a balanced transportation system that is concerned with moving people, not just moving cars."<sup>270</sup> Funding will be applied to new commuter bus routes, more neighborhood shuttles, new buses and rails, and universal "Smart Card" technology so riders can easily transfer networks.<sup>271</sup> The transportation system is additionally assisted by two new programs, an Office of Bicycle and Pedestrian Programs within MDOT<sup>272</sup> and a Transit-Oriented Development Task Force.<sup>273</sup>

The last major incentive of the PFA is the "Live Near Your Work Program."<sup>274</sup> Maryland partners with private and public employers and the local government to provide incentives for employees to buy homes within biking or walking distance of their place of employment. Homebuyers are offered up to \$3000 towards their down payment or closing costs.<sup>275</sup> The homeowner program attracted at least forty employers and more than 360 employees purchased homes by the end of 2000.<sup>276</sup> Along the same lines as the Live Near Your Work Program, the Department of Housing and Community Development offers low-interest mortgages to new teachers in the public school system that purchase within a PFA.<sup>277</sup>

#### *D. Limitations to Effectiveness of Priority Funding Areas*

There are four main limitations to the effectiveness of PFAs.<sup>278</sup> First, the legislation limits state funding but does not prevent sprawling development that is funded by the local government and/or private entities.<sup>279</sup> Second, critics contend that the density requirement is too low.<sup>280</sup> Third, smart growth's effectiveness is

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[www.gov.state.md.us/gov/press/1998](http://www.gov.state.md.us/gov/press/1998).

269. Press Release, Office of the Governor of Maryland (Dec. 7, 2000), available at [www.gov.state.md.us/gov/press/2000](http://www.gov.state.md.us/gov/press/2000); see also [www.mdot.state.md.us/news/TransitVision](http://www.mdot.state.md.us/news/TransitVision) (outlining mass transit initiatives and identifying funding sources).

270. Glendening, *Smart Growth*, *supra* note 10, at 423.

271. See Press Release, *supra* note 269.

272. MD. CODE. ANN., [TRANSP.] §2-603 (2003) (creating the Office and directing that it report to the Legislature measurable performance goals for bicycle and pedestrian transportation).

273. Exec. Order No. 01.01.2000.20, 1 MD. REGS. CODE (2000) (charging the Task Force with making recommendations to encourage development around the State's transit systems).

274. MD. REGS. CODE § 05.03.07.01 (2003).

275. Robert Nussgart, *Homeowner Program Gets More Popular*, BALT. SUN, Dec. 10, 2000, at L1.

276. *Id.*

277. MD. ANN. CODE art. 83B, § 2-201 (2003).

278. Cohen, *supra* note 222, at 9.

279. See *id.*

280. *Id.*



dependent upon the dedication and preferences of future governors and state agency directors.<sup>281</sup> Lastly, PFAs allow for exceptions that weaken the program.<sup>282</sup>

Even though the state refuses to subsidize developments outside PFAs, development will continue to sprawl and drain the state's resources.<sup>283</sup> Not all developers will seek to obtain the "carrot" (financial support) and will choose to privately fund their projects. Others will "piggyback" on projects within a PFA.<sup>284</sup> Wal-Mart is an example of an undeterred company.<sup>285</sup> In Kent County, Wal-Mart proposed a store to be built outside a PFA that requires state-funded expansion of the local water treatment plant.<sup>286</sup> The state will not discontinue the expansion because a development within the PFA is also served by the plant.<sup>287</sup>

The definition of a PFA and its criteria are controversial. PFA criteria and thresholds that focus on density were the "result of political compromise rather than concrete analysis of density and service efficiency."<sup>288</sup> Additionally, state funding in certain PFAs may not be as cost-efficient as anticipated or effective at discouraging sprawl because state funding of infrastructure is based on both actual and permitted uses.<sup>289</sup> 1000 Friends of Maryland, a coalition of environmental groups, observed that developments in many counties fail to reach the permitted densities.<sup>290</sup> Lastly, 1000 Friends of Maryland is also critical that the criteria are almost wholly directed on density and does little to address development quality, such as efficient land use, mixed uses, minimized dependency on the automobile, housing choices to provide socioeconomic diversity, or projects with regional impact.<sup>291</sup>

The last two limitations to the effectiveness of PFAs (discretion in designation and exceptions to the program) are interwoven.<sup>292</sup> Since the designation of a PFA is affixed by the State governor and agency officials, the decision to entitle an area a PFA will obviously be dependent upon the subjective judgment of those currently holding these high government positions.<sup>293</sup> To deter skewed

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281. *Id.* at 10.

282. *Id.*

283. Cohen, *supra* note 222, at 9.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. Cohen, *supra* note 222, at 9.

290. *Id.*

291. *Id.* at 10

292. *Id.*

293. *Id.*

interpretation and application of the act, when a request is made to the BPW for a project that is outside a PFA, the BPW may request an advisory opinion from the State Growth Commission, and if the BPW seeks advisory review, the public may request a public meeting.<sup>294</sup> Of course, the decision to seek review rests with the BPW and members of the State Growth Commission may have personal interpretations and slants.<sup>295</sup> Regardless of these downsides, the legislature attempted to protect against biases.

### *E. Evaluation of Smart Growth*<sup>296</sup>

The success of Smart Growth legislation is not empirically supported by studies conducted by the State of Maryland or any other known source.<sup>297</sup> In discussing the accomplishments of Smart Growth, academics and state employees refer to isolated decisions<sup>298</sup> but in reality MDOT is still in the process of developing the criteria that it will use to assess the impact.<sup>299</sup> Nonetheless, the legislation has earned accolades in the public sector from the director of a land use institute in Michigan and “was named as one of [the] ten winners [of] the annual ‘Innovations in American Government’ program sponsored by the Ford Foundation and Harvard’s John F. Kennedy School of Government.”<sup>300</sup> So why is an empirically unsupported new land use reform piece of legislation being discussed by academics across the world? John Frece, a special assistant for Smart Growth, Office of the Governor of Maryland, states:

Maryland’s Smart Growth efforts have received national acclaim for several reasons. It focuses on both urban and rural issues. From the outset, the

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294. *Id.* at 10.

295. Cohen, *supra* note 222, at 10.

296. For specific information regarding necessary factors for smart growth to succeed, see Cohen, *supra* note 222.

297. This statement is made after intensive research and confirmation by the Maryland State Department of Planning. The only available assessment is preliminary only and is intended to be the baseline quantification of indicators. The indicators for this report were developed by academics at the Maryland Institute for Policy Analysis Research, Royce Hanson, Jason Freihage, and Kevin Armstrong. Their report, *Is Maryland Growing Smart? A Growth Indicators and Reporting System for Measuring Achievement of the Goals of Maryland’s Smart Growth Policy*, is available at <http://www.umbc.edu/mipar>.

298. See generally Glendening, *Next Steps*, *supra* note 234; Frece, *supra* note 255, at 276.

299. For an explanation of the difficulties in quantifying the impact of smart growth, see Emily Talen, *Measurement Issues in Smart Growth Research*, paper presented at the Smart Growth and New Urbanism Conference at the University of Maryland (May 4, 2002), available at <http://www.smartgrowth.umd.edu/publications/talenpaper.pdf>.

300. Cohen, *supra* note 222, at 1.

program recognized the connection between the decline in many of our urban areas and the sprawl that spilled into our rural areas, and attempted to address both problems simultaneously. In addition, the Smart Growth initiative in general, and the Rural Legacy Program in particular, were designed to support rural lifestyles and rural economies as a balance to the program's urban incentives.<sup>301</sup>

Some of the isolated decisions include: removal of four highway bypass projects from the long-range MDOT plans because they would have promoted sprawl; construction of two new court buildings within the downtowns of both Easton and Hagerstown to help the downtown remain vibrant, reduce automotive dependence, support transit, and save virgin land from development; and the Governor's intervention in the decision of the Worcester County commissioner to build a new building on the outskirts of town by offering state financial assistance to build next to the existing downtown courthouse.<sup>302</sup>

## VI. APPLICATION OF A PFA TO THE ORLANDO METROPOLITAN AREA

The Orlando Metropolitan Area is a dire situation in need of desperate aid so, albeit empirical evidence of success of Maryland's Smart Growth Program is lacking, other options should be considered to reform land use legislation in the State of Florida. To reiterate the previous discussion regarding Orlando's status as a TCEA, there is neither state oversight of local government land use decisions in Orlando nor any concurrency requirements.

### *A. Effect of Applying the PFA System to Florida's Transportation Decisions*

#### *1. Background Similarities of Maryland and Florida*

To theoretically apply Maryland's PFA program to Orlando, certain similarities must exist between the government structure and state oversight of land use decisions. Comparable configurations must exist, otherwise the application of a potential new program to Florida's current scheme would be tenuous at best.

Both states are home-rule states, which means decision-making authority is delegated to the local governments. Typical of human nature and the propensity to protect one's own interests over

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301. Frece, *supra* note 255, at 276.

302. *Id.* at 273-74.

another person's, local governments tend to pass local rules and ordinances that focus on achieving their own goals without regard to external affects. For example, by Local Government "X" placing a landfill at a location most convenient for itself, the landfill may abut a multi-million dollar residential development across the county line in Local Government "Y." Although Florida attempts to resolve this situation with the DRI program, (discussed in Part IV(A)(1)) the program is ridden with loopholes.<sup>303</sup> Local governments and those involved in the development business tend to view state oversight as a "bumbling bureaucracy improperly interfering in local governments' decision-making . . . [S]ome local governments have done everything they can to sabotage or conduct end-runs of state requirements."<sup>304</sup> The sentiment is applicable to both states.<sup>305</sup>

They also have similar land use planning structures to shape their state's growth by statutorily requiring local governments to adopt both comprehensive plans with specified elements or visions and zoning ordinances.<sup>306</sup> This requirement empowers local governments with, what amounts in practice the sole authority of land use decisions. State governments are superficially involved with local decisions. Although Florida enacted a state comprehensive plan and the DCA allegedly reviews local government plans for compliance, the process has become one of 'rubberstamping,' as discussed in Part IV(B)(2). Maryland outright acknowledges that the power to make local decisions rests with the local governments.

## 2. *Effect On Florida's Transportation Budget Distribution*

If Florida were to adopt a PFA-like system and only subsidize projects in designated areas, the state's entire budget would be altered. Florida's long-standing transportation policy promotes

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303. A developer can mitigate the proposed development's impact by paying for another improvement that the state desires. For example, if a developer's plans will increase the population, and therefore LOS on a road designated for hurricane evacuation beyond the established thresholds, the developer can mitigate by improving another road on the other side of town that is unaffected by the development. Additionally, only projects that exceed a certain threshold are DRIs and, therefore, a developer can avoid DRI review by maintaining calculations just below the threshold: one additional acre or one additional parking space saves the developer exorbitant amounts of money by avoiding review however the impact is essentially the same.

304. Doug Porter, *Rethinking Florida's Growth Management System: Prospects for Devolution*, at <http://www.realtor.org> (last visited Aug. 1, 2003). For a discussion of local governments in Maryland opposing state oversight, see *Maryland Smart Growth Laws Having Impact*, at <http://newurbannews.com/maryland.html> (last visited Aug. 1, 2003).

305. See *id.*

306. Winstead, *supra* note 237, at 539.

highway expansion over rail and other forms of transportation. In 2000, Governor Bush promoted Mobility 2000 and succeeded in convincing the legislature to approve a \$6 billion "smorgasbord of road widening projects."<sup>307</sup> The following year, during the economic downturn and agency budget cuts, the Governor proposed a package to stimulate the economy by expediting \$665 million worth of highway expansion projects and less than \$2 million worth of alternate modes of transportation, such as bicycle paths and pedestrian improvements, and \$0 to public transit.<sup>308</sup>

Public transit struggles to survive while the state highway system steadily adds lanes each year.<sup>309</sup> FDOT estimates approximately a \$9 billion deficit for the long-range plans of half the state transportation agencies.<sup>310</sup> Furthermore, funding streams may not even be able to maintain the existing LOS.<sup>311</sup> After passage of a constitutional amendment in 2000, the State finally committed to constructing a high-speed rail system.<sup>312</sup>

The application of a PFA to Orlando would refocus the state budget to transportation projects that promote "smart growth." Instead of closing its eyes and pouring state funds into highway expansion projects that hastily consume open space, Florida can reallocate its budget to research and implement "smarter" growth patterns and more efficient transportation systems. Neither expanding highways, improving road conditions, nor investing in public transportation can remedy the traffic congestion problems alone. In fact, public transportation is not necessarily the cure, per se, because residents will be reluctant to accept such an abrupt change in their life. The focus of the PFA program is to lure growth where the state government desires to expand. Therefore, Florida can lessen traffic congestion by focusing on the underlying problem of unrestrained, random growth. Instead of pockets of development haphazardly blossoming along the I-4 corridor, the State can influence and attract businesses to smart locations where Florida desires to promote growth.

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307. Tony Dutzik & Mark Ferrulo, *Sprawl in Florida: A Conversation with the Experts*, FLA. PIRG EDUC. FUND 23 (Feb. 2002).

308. *Id.*

309. *Id.* at 24.

310. *Id.*

311. *Id.*

312. *Id.* at 23.

*B. Impediments to Successful Implementation of PFAs to Reduce Transportation Congestion*

Wherever Maryland's Smart Growth principles are enacted, implementation challenges will arise. Some main challenges include: factors driving sprawl are slow to change; location specific transportation plans are necessary; transportation projects have downstream effects; local tendencies to redirect development proposals to the town outskirts until congestion is remedied; transportation investments single-handedly cannot overcome the economics of sprawl nor can individual agencies; balancing the need to accommodate through traffic and long distance trips; and cooperation between agencies.<sup>313</sup>

Factors driving sprawl, such as demands for housing choices, dispersion of employment, flight from older areas due to perception about crime and quality of schools, and conflicts among level of government regarding the development process, will require time to reverse.<sup>314</sup>

FDOT must integrate new planning ideas into its capital program development because a one-size-fits-all response is not sufficient.<sup>315</sup> Additional capacity alone cannot decrease road congestion and resolve Florida's long-term transportation needs and therefore FDOT would have to work closely with local governments to concentrate growth in designated areas.<sup>316</sup> Elected officials and citizens will be opposed to alternate forms of transportation beyond single occupant vehicles and waiting while FDOT and local officials and agencies develop appropriate plans per location.<sup>317</sup>

Increasing capacity is not the only answer to resolve congestion because transportation projects have a downstream effect. Since roadways form an interconnected network, improvements in one area can cause entire traffic patterns to shift and create problems in previously satisfactory locations, such as adjacent rural roads that become "back roads" and "shortcuts."

As a location gets closer to becoming a "smart town," traffic congestion will inevitably increase slightly to accommodate the new residents and employees. Local government and citizens may first

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313. Winstead, *supra* note 237, at 541-44 (describing impediments to successful implementation of smart growth from a transportation perspective).

314. *Id.* at 541. See Part II(B) and *supra* notes 29-48, and accompanying text.

315. See Winstead, *supra* note 237, at 543.

316. *Id.*

317. *Id.* at 541. MDOT publishes multiple reports each year to assess the progress towards achieving and developing future goals and develop future ones. *E.g.*, Md. Dep't of Transp., 2002 Maryland Transportation Plan, available at <http://www.smarttransportation.com>; Md. Dep't of Transp., Strategic Plan, available at <http://www.smarttransportation.com>.

react with a desire to build and expand more roads; however, if this is permitted the sprawl will begin anew.<sup>318</sup>

Although traffic congestion is a sprawl impact most readily observed by the typical American, recall from Part II(B) that transportation is only one factor that influences sprawl. A complex, powerful mixture of social and economic dynamics motivates sprawl.<sup>319</sup> Just as transportation cannot resolve sprawling development patterns, MDOT alone cannot achieve Smart Growth.<sup>320</sup> Agencies must collaborate in order to designate growth areas and provide all necessary services to the local development.<sup>321</sup>

State highways are generally oriented to through traffic, such as trips from North Carolina to Maryland or Daytona to Tampa. However local residents also utilize them. On the interstate highways in both Maryland and Orlando, a large number of trips originate and terminate outside the state and city borders, respectively, and improvements are, and will continue to be, necessary to accommodate these trips.<sup>322</sup> However, by improving roads for through trips, commuters can also sprawl further away from the city center.<sup>323</sup>

## VII. CONCLUSION

If the Governor and State Legislature do not acknowledge that unrestrained expansion of highways equates to increased sprawl and congestion, the condition of transportation, particularly in Orlando and other TCEAs in Florida, will only worsen. The State cannot abdicate its authority to mandate transportation concurrency in urban cores purely because the urban core is already congested and transportation concurrency cannot be met. Both transportation concurrency and infill development and redevelopment are important state concerns that must be addressed; one cannot be disregarded to correct the other but rather both must be balanced.

Maryland's innovative strategy may or may not be the solution. The concept, in a vacuum, appears promising: the state selects areas in which it wants to designate growth and only subsidizes projects within that area. Money is the motivation for many

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318. Winstead, *supra* note 237, at 542-43. This initial response is due partly to the social dependency on single occupancy vehicles.

319. *Id.* at 543; see Part II(B) and *supra* notes 29-48, and accompanying text.

320. *Id.* at 544.

321. *Id.* Recall that Maryland's Smart Growth Initiative consists of five programs that function concomitantly to achieve sprawl reduction.

322. See Winstead, *supra* note 237, at 543.

323. See *id.* at 543-44.

decisions, ranging from the brand of groceries that a person purchases to the source of their livelihood. Frequently developers are motivated to build on the outskirts of the metropolitan core because property costs are lower. Cheaper land comes with a cost: distance from one's target market. If the government is willing to subsidize a project which is built within the metropolitan, your target market, and the price to construct and operate your project in both locations is near even, why would one choose a remote location? Strategically, the answer is that the developer would seize the opportunity to be closer to his clientele.

Unlike previous land use planning techniques of the twentieth and twenty-first centuries,<sup>324</sup> Maryland's PFA system avoids controversy with the property rights activists that all too frequently allege that a taking without just compensation has occurred whenever the government attempts to manage growth. Government regulation is alleged to "take" one of the "sticks" from a landowner's bundle of property rights because the government restricts the permissible uses of land and defines what one can and cannot do with one's property. Regardless of the validity of this argument, a PFA does not restrict the uses of land or define what a landowner can construct on his or her land. Through a PFA, the government merely promotes growth in designated areas by enticing developers with a carrot. Essentially, the government is acting as a player in the market and not a regulator of the market. Developers are not restricted in where they choose to develop but can lessen their financial burden by selecting one location over another.

The PFA system would add a requisite layer of state persuasion to the land use and growth pattern decision-making process without regulating or restricting property uses. Recall that both Maryland and Florida are home rule states and have little actual state involvement in local land use decisions. Local governments are autonomous bodies and are only required to independently adopt a comprehensive plan with specific visions or elements. The PFA system could facilitate state involvement in decisions without creating a paternalistic, overpowering structure; the authority of local and state entities would remain balanced.

Theoretical enthusiasm and justification may be insufficient for Florida to allocate funds to research and explore the application of a PFA system to the state's transportation system. In the near future, MDOP will be publishing an evaluation of Maryland's Smart Growth initiatives, which will provide the empirical data necessary to evaluate the success or failure of the 1997 legislation. After

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324. See Part II, *supra* notes 82-129.



quantifiable evidence of the effects of Maryland's legislation are released, Florida legislators, planners, developers, and all other interested parties should further develop the PFA concept and consider its application to manage growth in Florida.