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Ten Years Later

*An Assessment of Smart Growth
in Maryland*

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**TEN YEARS LATER:
AN ASSESSMENT OF
SMART GROWTH IN MARYLAND**

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I. INTRODUCTION

Spring of 2007 marked the 10th anniversary of the passage of Maryland's Smart Growth and Neighborhood Conservation Initiative; an effort designed to discourage sprawl development, foster more compact communities, protect the best remaining farms and open space in the state, and save taxpayers from the growing cost of providing services and infrastructure to serve far-flung development.¹ Almost before its various provisions took effect in 1997 and 1998, the Maryland initiative generated interest and acclaim across the country. It received numerous awards and became the principal legacy of the program's primary architect, former Governor Parris N. Glendening. Governors in other states, such as New Jersey, Colorado and Massachusetts, instituted their own "smart growth" proposals, often modeled after portions of the Maryland program.² Even the popularity and wide usage of the now omnipresent phrase "smart growth" can be attributed in large part to the Maryland program.

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

II. BRIEF HISTORY OF THE MARYLAND SMART GROWTH PROGRAM

Maryland's Smart Growth and Neighborhood Conservation Initiative was built on the foundation of more than sixty years of land use law, regulation, and state planning assistance in Maryland. The state planning law, first enacted in the 1930s, was designed to strengthen central-

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

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

The following year, Governor William Donald Schaefer proposed, and the legislature passed, a scaled back version of the 1991 proposal.⁴ Perhaps the most important provision of the Economic Growth, Resource Protection and Planning Act of 1992 ('92 Growth Act) was the formal establishment of seven “visions” for development in Maryland and a requirement that lo-

cal governments revise their comprehensive plans in accordance with these visions to guide policymakers in deciding where and how future development should occur.⁵ These visions, plus an eighth that was added later, were phrased as broad statements of principle:

1. Development is concentrated in suitable areas.
2. Sensitive areas are protected.
3. In rural areas, growth is directed to existing population centers and resource areas are protected.
4. Stewardship of the Chesapeake Bay and the land is a universal ethic.
5. Conservation of resources, including a reduction in resource consumption, is practiced.
6. To assure the achievement of items (1) through (5) [above], economic growth is encouraged and regulatory mechanisms are streamlined.
7. Adequate public facilities and infrastructure under the control of the county or municipal corporation are available or planned in areas where growth is to occur.
8. Funding mechanisms are addressed to achieve these visions.⁶

The '92 Growth Act also specifically identified four types of “sensitive areas” for special protection: streams and stream buffers, 100-year floodplains, habitats for endangered species, and steep slopes. But it was left to local governments to draft plans to protect these and other sensitive areas.⁷ While the '92 Growth Act did not accomplish nearly as much as proponents of stronger state authority over land use had hoped, it did serve as the foundation for a bigger, broader land use reform five years later to assure that state spending was consistent with land use policies established in the 1997 legislation—the Smart Growth and Neighborhood Conservation Initiative.⁸

Sprawl development has been a constant concern among most Maryland governors for at least

the past 35 years. In a State-of-the-State address to the Maryland General Assembly in 1973, for example, Governor Marvin Mandel said: “One of the great issues facing Maryland today is the proper and wisest use of our rapidly diminishing land reserves. Orderly and balanced growth are no longer desirable goals. They are essential requirements if Maryland is to remain fit for human habitation.” Those remarks predated the Smart Growth initiative by 24 years, yet sounded like words Parris Glendening might easily have uttered.

“I do not join with those who would pave over our State, those who would overdevelop and bury us under rows of drive-in restaurants and service stations at the sacrifice of openness and beauty, those whose fetish for asphalt and brick would deny us a blade of grass,” said Mandel, a Baltimore legislator who might not have been expected to express such a personal connection with the natural beauty of rural Maryland.

After an obligatory statement professing that the state had no interest in usurping local government authority over land use decisions, Mandel nonetheless said, “I am convinced the State has a legitimate interest to protect... I believe the State has every right to be concerned with – and a part of – decisions involving large developments that affect the State.”

“Finally,” he said, “I believe the State should take the lead in defining critical areas of Maryland – areas that should be preserved against encroachment, areas that would be damaged by improper development, over-development, and greater density of population. Yet we must plan with the thought in mind that we do not limit the availability of land so greatly that we inflate its price beyond the reach of those who would make good use of it.”⁹

Maryland’s Smart Growth program was developed between spring and early winter 1996 and introduced as legislative and budgetary initiatives in the 1997 session of the Maryland General Assembly. It was driven, in part, by Glendening’s concerns over the state’s inability to have a say in a large residential development along the Potomac River in Charles County called Chapman’s Landing; by growing interest by Maryland businesses for liability protection when cleaning up and redeveloping contaminated “brownfields” sites; and, by interest in helping Chesertown officials fend off efforts by Wal-Mart to build a large store on the outskirts of that 18th century Eastern Shore town.

The initial Smart Growth package included five bills and one budgetary proposal. The bills were the Smart Growth Areas Act,¹⁰ the Rural Legacy Program,¹¹ the Brownfields Voluntary Cleanup and Revitalization Program,¹² the Job Creation Tax Credit Act of 1997,¹³ and the Maryland Right-to-Farm Bill.¹⁴ A sixth component was introduced as a budget program: a pilot Live Near Your Work program in which the state, local governments, and participating employers would provide stipends of \$1,000 each (\$3,000 total) to homebuyers who purchased homes in certain designated revitalization areas.¹⁵

Although there were five pieces of legislation in that initial package, the thrust of Maryland's new growth management effort was really embodied in only two – the Smart Growth Areas Act¹⁶ and the Rural Legacy Program.¹⁷ Together, they represented Governor Glendening's "inside/outside" strategy to encourage growth and revitalization *inside* existing cities and towns where development was already present; and, simultaneously, to identify and protect the best farmland, forests and other natural areas *outside* the urban envelope that should be protected from encroaching development. All the other programs that were introduced during the first year were grouped under the state's Smart Growth banner, as well as those that were added in succeeding years, were harnessed in one way or another to support those two principal approaches.

Clearly the centerpiece of Maryland's Smart Growth initiative was the Smart Growth Areas Act.¹⁸ It was through this legislation that Maryland restricted where the state government could spend money in support of growth to certain geographic areas. Glendening's theory was that the state could influence development decisions by restricting state spending on growth to certain areas of Maryland and generally prohibiting it outside of those areas. The Smart Growth law created geographic areas called "Priority Funding Areas" (PFAs) to which state funding for growth would be restricted.¹⁹ These areas included all of the state's incorporated municipalities (154 municipalities at the time; 157 today), the already heavily developed areas inside the circumferential highways around Baltimore and the Maryland suburbs of Washington, D.C., and other areas designated by the state's 23 counties that met specific criteria set by the state. The counties

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

A long list of other state programs, some that predated Smart Growth and others that were created in subsequent years as a result of the Smart Growth initiative, were grouped together to support the PFA concept by making it easier and more profitable, or less costly, to develop inside a PFA than outside. Glendening felt that this less regulatory approach—carrots rather than sticks—would be more politically appealing, and undoubtedly was one of the reasons the Maryland initiative gained so much attention from outside the state. He also felt the state could lead by example by discontinuing the subsidization of sprawl development. The goal was to use the power of the state budget as an incentive for smarter growth. State programs were geared either to support development within the PFAs or to protect undeveloped land outside the PFAs.

Throughout his two terms in office, Glendening did what he could to institutionalize the state's Smart Growth agenda. He issued executive orders establishing a Smart Growth policy for his administration, the Smart Growth legislation was codified in state law, and, to the extent possible, he changed the way state agencies routinely responded to issues related to growth and development. His administration even attempted to influence thinking on growth issues with young people, holding environmental summits for high school students and developing a series of Smart Growth lesson plans that high school teachers could use.²⁰

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

ing for Rural Legacy declined to about one-fifth of its former levels; Program Open Space funds were diverted to balance the state's general treasury budget; and GreenPrint,²¹ a program based on an inventory of the state's most important ecological areas, was zeroed out. Other programs, such as a popular "streetscaping" program of the Department of Transportation called Neighborhood Conservation and a separate housing-assistance program called Live Near Your Work were simply eliminated in the budget.

Governor Ehrlich also dismantled the Governor's Office of Smart Growth, the first gubernatorial-level office of its kind in the nation. Finally, unlike Governor Glendening, Governor Ehrlich never used the "bully pulpit" of his office to encourage smarter growth at the local level, philosophically believing that the state should not involve itself in local land use decisions. For example, it was not until one day prior to his stand for re-election in November 2006 that Governor Ehrlich's administration finally stepped in to purchase two-thirds of a Dorchester county farm, which had been chosen as the site of a highly controversial, 1,080-acre residential development adjacent to the pristine Blackwater National Wildlife Refuge.

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

To "set a goal of preserving more land each year than is consumed by development."²²

To fully fund each year the state's parkland acquisition program, Program Open Space.²³

To "re-establish the Office of Smart Growth, with a new emphasis on creating a genuine partnership with municipalities and counties on how best to plan for and manage the growth that is coming to Maryland. And bring a stronger focus to encouraging growth in older communities—where we have infrastructure and public support for redevelopment."²⁴

To "increase technical and financial assistance to local governments to help them plan for

growth.”²⁵

To “invest in transit and telecommuting.”²⁶

Since taking office, the new governor has installed a number of Cabinet secretaries with experience and interest in growth and development issues and has tasked them with developing a program that would blend the state’s responses to problems related to the health of the Chesapeake Bay, sea level rise and climate change, and sprawling development patterns.

Maryland faces daunting challenges in the decades to come. Already the fifth most densely populated state in the nation, Maryland’s population is projected to increase from “approximately 5.5 million to 7 million by 2030.”²⁷ “That increase of 1.5 million residents would mean another 580,000 households and 810,000 new jobs locating in the state by 2030.”²⁸ Residential development in the three southern Maryland counties of Calvert, Charles and St. Mary’s is expected to explode by 80% by 2030. The population of the nine counties on Maryland’s historically rural, farm-laden Eastern Shore grew by greater than 16% between 1990 and 2004 and is projected to grow by another 19.5% by 2030.²⁹ Government officials on the upper Eastern Shore and in central Maryland are bracing for a projected influx of 28,000 households and more than 45,000 high salary jobs as a result of a shift in military jobs to Maryland under the federal Base Realignment and Closure (BRAC) program.³⁰

With the Smart Growth program now 10 years old, with a new Governor and newly elected General Assembly having just taken office, and with growth and development escalating in almost every part of the state, it seems a propitious time to assess the program and discuss what could be done to set it on a productive new course for the future. To do this, we will discuss what we see as five major challenges facing the current Smart Growth initiative as it moves into its second decade.

III. FIVE MAJOR CHALLENGES

Maryland’s Smart Growth program has won numerous awards. In 2000, for example, Harvard University, the Ford Foundation, and the Center for Excellence in Government jointly pro-

claimed Maryland's anti-sprawl program to be one of the 10 most innovative new government programs in the nation.³¹ Other awards—from the American Society of Landscape Architects, from the Congress for the New Urbanism, and from the World Wildlife Fund, among others—drew national attention to the Maryland experiment. These awards were bestowed even before Maryland officials had much time to implement its provisions. This string of accolades was, in part, testament to the pent up desire among environmentalists, urban planners and others for state governments to step up their involvement in local land use decisions and growing concern about the detrimental effects of sprawl development. It also recognized Maryland's effort to shift the debate from "no growth" to "smart growth," that is, from opposing growth to trying to find a way to accommodate it; and, to Maryland's novel notion that growth could somehow be managed by state government using its financial support for development in certain specified areas, but not in others—an incentive-based approach rather than a more traditional regulatory approach.

Now, however, 10 years have elapsed since the Smart Growth initiative was enacted and the results, or the lack thereof, are becoming increasingly clear. A visitor to Maryland who had not been in the state since before the Smart Growth laws were enacted would be hard-pressed to observe substantial change on the ground. There are many anecdotal examples of urban redevelopment projects that might not have occurred without the financial and rhetorical support of the state's Smart Growth effort; and there are thousands of acres of farmland and other undeveloped natural areas in the state that have been permanently protected as a result of the Rural Legacy Program or its sister conservation programs. However, most local governments throughout the state continue to approve development outside of the Priority Funding Areas designated as a result of the Smart Growth law,³² and even the successful attempts to purchase development rights on rural lands have not substantially decreased the threat of sprawling development on Maryland's remaining open space.

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

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

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

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

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

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

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

A. Programmatic Balance

Marylanders appear to be increasingly anti-growth, or at least in favor of efforts to slow the rate of growth. This has become evident in the rejection by voters of pro-growth candidates and the proliferation of NIMBY (“Not in My Back Yard”) organizations. Consequently, land preservation programs have proven to be much more popular than programs that encourage development and redevelopment within existing communities. Land preservation programs generally in-

volve a straightforward process in which funds are made available to purchase land or development rights on land. Parcels meeting stipulated criteria are then targeted, landowners willing to participate are identified, and the transactions are executed. In most cases in Maryland, when development rights are purchased, they are then extinguished rather than traded or sold for use elsewhere in the state as a commodity of value, although there are some functioning Transferable Development Rights (TDR) programs. After such a process, land trusts or other sponsoring organizations are happy, environmental groups are happy, often agricultural or other resource based industries, such as forestry, are happy, and usually neighboring communities are happy that valuable and scenic land has been protected forever from future development.

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

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

The "inside" components of the Maryland approach are expressed in Vision 6, which states that "economic growth is encouraged and regulatory mechanisms are streamlined,"³³ and was supported by a number of additional incentive-based instruments. These include the Brownfields Voluntary Cleanup and Redevelopment Act,³⁴ the Live Near Your Work program,³⁵ the

Neighborhood Conservation program, the Historic Preservation Tax Credit, the Job Creation Tax Credit,³⁶ and most recently under Governor Ehrlich, the Priority Places program. Each of these programs has symbolic value but never had large budgets. Hence, their impact was always small at best.

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

In short, state government in Maryland has delegated to local governments authority over land use decisions, but local governments are either incapable or unwilling to respond to larger statewide or even regional development needs. There is no mechanism in place to require local governments in Maryland to meet the challenges of providing housing for citizens of all income levels or to assure that sufficient housing of all kinds is produced to meet their projected population growth. Nor is there any requirement for them to try to better plan residential development in proximity to jobs or vice versa.

B. Urban Containment

Unlike some other states that have adopted significant land use reforms, Maryland does not employ urban growth boundaries (UGBs).³⁷ Instead it has created “Priority Funding Areas” (PFAs).³⁸ The concept of PFAs is simple: PFAs are a way for the state to target state spending toward existing communities or other locally designated areas. Local governments, in turn, must identify where they intend urban development to take place, or where it has already taken place, and where it wants the state to provide financial support for such development in the future.³⁹ Such an incentive approach to urban containment does not force local governments to restrict development inside PFAs, but if they choose to allow development outside of PFAs, any required infrastructure would have to be financed entirely with federal, private or local government funds.⁴⁰

The concept of PFAs has considerable political appeal and can be credited for many of the accolades the Smart Growth program received when it was created. PFAs represent only a minimal intrusion into the land use powers of local governments. Local governments must identify PFAs in accordance with state guidelines, but PFAs need not constrict local planning or urban development. The presumption is that the state can use its power of the purse to encourage development in specifically defined areas and, conversely, by withholding such funding, discourage it elsewhere.⁴¹

PFAs automatically include (a) the state’s 157 incorporated municipalities; (b) areas designated by the Department of Housing and Community Development (DHCD) for revitalization; (c) an enterprise zone as designated under the state or by the federal government; and (d) areas of the state located between Interstate 495 and Washington, D.C., or between Interstate 695 and Baltimore City.⁴² County governments could designate additional areas as PFAs if they met specific criteria regarding density, sewer and water service, or development capacity.⁴³

During the debate over the rules that govern PFAs there was considerable concern about the density threshold.⁴⁴ The original version of the PFA bill as introduced would have set the density threshold at 5 units per acre, but was amended to 3.5 units per acre.⁴⁵ This lower level of density was essentially the same as the average density of the “new town” of Columbia, Maryland, a

standard pushed by the Maryland Association of Counties, which had strongly opposed the higher 5 units per acre minimum. The smart growth advocacy organization 1000 Friends of Maryland argued that the 3.5 units per acre threshold was too low, especially since actual densities are often far below zoned densities, but to no avail.⁴⁶

Also within the original legislation was a provision that would have required county governments to submit their Priority Funding Area plans to the state's Office of Planning to determine if they were consistent with the requirements and goals of the legislation. Implicit was the perception that Office of Planning approval of local PFA plans would be required. That clearly represented more authority than the counties wanted the state to have. Again, the county lobbyists worked to whittle back the state's authority. By the time they were through, the legislation allowed the Office of Planning to "comment" on PFA plans, but denied the state veto authority.⁴⁷

The law required local governments to submit to the Maryland Department of Planning (MDP) maps of PFAs, in digital or paper form, by October 1, 1998 – a full year after the Smart Growth Areas Act was enacted. After that deadline, the state was precluded from spending money from a short list of specified state program accounts on growth projects outside of designated PFAs.⁴⁸ County PFA plans were subsequently reviewed as they were submitted and, if appropriate, MDP comments were made.⁴⁹

PFAs cover much of the already heavily developed Baltimore-Washington corridor, essentially tracking the beltways around the two cities, the Interstate 270 corridor from Montgomery County northwest toward Frederick, and the Interstate 95 corridor that extends from Washington, D.C., northeast through Maryland toward Wilmington, Delaware.⁵⁰ The other largest PFAs are around the cities of Frederick, Hagerstown, Salisbury and Waldorf.⁵¹ In addition, there are many smaller PFAs, starting with cities such as Easton, Cambridge, Westminster, the Solomons-Leonardtown area near the Patuxent Naval Air Station, and the Oakland-Deep Creek area.⁵² A closer inspection, however, shows tiny PFAs in all parts of the state, usually representing small municipalities or areas served by water and sewer designated as PFAs by counties.⁵³

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

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

2. Size and Configuration - Similarly, the way PFAs were defined in state law resulted in PFAs of widely ranging size and configuration. This twin effect detracts from the ability of PFAs to foster efficient patterns of urban growth. Instead, in some cases it facilitates what might be considered “urban sprawl.” In most cases PFAs follow municipal boundaries, the routes of roads or sewer and water lines, or pre-existing locations of rural communities and industrial lands. As a result their shapes often resemble splattered paint rather than a coherent pattern of growth. This is more than a matter of cartographic aesthetics; rather, it often signals an inefficient pattern for growth that renders the provision of public services or infrastructure that much harder or more costly.

The other striking feature about the shape of PFAs is their high degree of discontinuity, especially in the exurban and rural counties such as Frederick County.⁵⁴ Part of the reason for the splattered-paint configuration of the PFAs in Frederick County is the previous discontinuous development patterns in the exurbs of the city of Frederick and in rural hamlets. Another part of the reason is that PFAs were allowed to include existing “communities” with sewer and/or water service. A third reason is that the rules that govern the delineation of PFAs are silent with respect to urban form or the relationship between urban form and the efficient provision of infrastructure.⁵⁵ That is, there is no provision in the PFA requirements that local governments should consider the relationship between urban growth and the efficient provision of infrastructure.

The Maryland Department of Planning recommends that PFAs be large enough to accommodate a county’s 20-year growth projections, but the MDP could not veto plans that contained overly large PFAs.⁵⁶ The best state planners could do under the law was to “comment” on areas within PFA plans they felt exceeded this 20-year requirement. Upon submission of PFAs, MDP

performed analysis and either certified PFAs without comment, or provided comments on certain portions of county submitted PFAs. Some counties adjusted PFAs to address MDP's comments; other counties did not. Under Governor Glendening, state agencies were informally directed not to provide funding for growth projects within PFA "comment areas," treating them as if they were the restricted areas outside of PFAs. Agencies continued to make this subtle but important distinction after Glendening.⁵⁷

Subsequent studies provide some insight into the question of PFA size.⁵⁸ Not surprisingly, the results of these studies suggest that development capacity inside PFAs varies widely. According to Sohn, development capacity within PFAs varies from less than ten years to over thirty years of anticipated growth.⁵⁹ For the 15 counties in the Baltimore-Washington region, the National Center for Smart Growth estimated that there was enough development capacity inside PFAs for approximately 15 years, and enough development capacity outside PFAs indefinitely.⁶⁰

3. PFA Criteria – The essential criteria used to define PFAs were developed for reasons somewhat different than simply the desire to constrain all growth to certain areas. First and foremost, the PFA plan had to pass political muster, which meant the criteria had to be developed in a way that would preserve local decision-making authority. Second, the focus was primarily on where the state should restrict its funding for growth-related projects in an effort to influence development decisions. Municipalities and already heavily developed areas inside the two beltways were obvious starting points. But some Maryland counties have no municipalities and many have only a few.⁶¹ Therefore, counties had to be given other ways of designating PFAs, so the debate focused on areas already served (or planned to be served) by sewer and water and some standard for minimum residential densities. Again, the result was largely the result of political compromise.

A recent analysis of the performance of PFAs by the Maryland Department of Planning shows that over the 15-year period between 1990 and 2004, the average amount of land consumed for every new housing unit built was three-quarters of an acre.⁶² Under closer inspection, however, it becomes clear that the highest rate of land consumption is occurring outside of PFAs. According to MDP, "[a]pproximately one-fourth of all households are consuming three-

fourths of all the land, [and t]he average lot size outside of PFAs is over 8.5 times as large as the average lot size inside of PFAs.”⁶³ The analysis also concludes that “[t]he percent of residential parcels developed outside of PFAs tends to be highest in the more rural jurisdictions.”⁶⁴ MDP found, for example, that 92 percent of the land consumed in Cecil County over the past fifteen years was outside of PFAs; nearly 88 percent in both St. Mary’s County and Charles County; and 84 percent in Queen Anne’s County.⁶⁵

4. Relationship to Local Plans – As the PFA concept was created in state law, it was never explicitly linked to existing local comprehensive plans or zoning. As a result, implementation of the PFA statute has been more in parallel with other state planning requirements rather than integrated with them. Howard County, one of the first counties to designate its PFA, simply said the growth area in its comprehensive plan, which constitutes most of the eastern third of the county, would also be its PFA. Anticipating the passage of the Smart Growth Areas Act, Howard County was in close contact with MDP throughout the spring of 1997, seeking guidance on how to best revise its comprehensive plan to suit the anticipated legislation. Most other counties drew PFA boundaries that differed in some way from the growth areas designated in the comprehensive plans. Only one county, predominantly rural Caroline County on the Eastern Shore, decided not to designate any PFAs in addition to the county’s existing municipalities.

Because PFAs are essentially instruments that guide state spending, there is no requirement that PFAs be included in local comprehensive plans.⁶⁶ Some ten years after they were constructed and submitted by every local government, the comprehensive plans of many cities and counties make no references to PFAs at all. Put another way, in some jurisdictions, PFAs have almost no bearing on local land use decision-making. Decisions on zoning and subdivisions must refer back to the basic local enabling legislation and the local comprehensive plan.

C. Infrastructure Finance

The seventh “Vision”, which was added in 2000 to the earlier “Visions” enacted as part of the ‘92 Growth Act, states that “[a]dequate public facilities and infrastructure under the control

of the county or municipal corporation are available or planned in areas where growth is to occur.”⁶⁷ This vision is supported by state legislation that enables local governments to establish Adequate Public Facilities Ordinances (APFOs). Such ordinances enable local governments to stop development from occurring in locations where public facilities are deemed inadequate. “Thirteen counties and twelve incorporated municipalities in Maryland have enacted ordinances designed to assure that infrastructure necessary to support proposed new development is built concurrently with, or prior to, that new development.”⁶⁸

The logic of APFOs is sound, but its implementation has been problematic. According to the National Center for Smart Growth, APFOs in Maryland have produced inconsistent standards, inappropriate use, and unintended consequences.⁶⁹ Specifically, the Center found that standards for adequacy varied extensively across jurisdictions and over time, that APFOs were not closely linked to capital improvement decision-making, and that moratoria under APFOs deflected an estimated ten percent of the growth from 1995 to 1997 in selected counties to areas outside of PFAs.⁷⁰ In general, APFOs were found to be useful tools for stopping growth where facilities were not deemed to be adequate, but they were not found to be successful at assuring that investments in infrastructure were forthcoming in places where growth was deemed to be desired. In short, while the concept behind APFOs makes sense, in practice the result has in some ways been counterproductive.

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

has an obligation to provide the funding necessary to build the infrastructure—roads, schools, sewers and water lines—that will be necessary to support well-planned, compact growth.”⁷¹

D. Land Conservation

Maryland has a long history of establishing programs to protect the state’s farms, forests, and other natural resources from the threat of development. Oldest among the land conservation efforts is Program Open Space, created in 1969 as the state’s parkland acquisition program.⁷² Program Open Space is funded by allocating “a percentage of the state real estate transfer tax . . . into a special fund” dedicated for exclusive use for parkland acquisition and development.⁷³ More than 5,000 parks and conservation areas have been set aside under this program since its inception.⁷⁴

The Maryland Agricultural Land Preservation Foundation (MALPF) was established in 1977 specifically to protect Maryland farms. Through “the end of the 2006 fiscal year, MALPF [had] helped landowners permanently protect from development more than 250,000 acres on approximately 2,000 farms” spread through all of Maryland’s twenty-three counties.⁷⁵ “[T]he Foundation manages a public investment of more than \$333 million in permanently preserved land.”⁷⁶

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

To remedy this shortcoming, the Rural Legacy Program was created as part of the Smart Growth initiative in 1997.⁷⁷ The overarching purpose was to create a program that targeted large, contiguous tracts of undeveloped or relatively undeveloped land that was threatened by development but amenable to state-funded protection efforts.⁷⁸ Willing landowners and local sponsors, either local governments or often local land trusts, were invited to assemble proposals for the

designation of certain areas as Rural Legacy Areas. Once so designated, the sponsors could then seek funding for the purchase of property or, more likely, the development rights on property within the Rural Legacy Area.⁷⁹ To be declared a Rural Legacy Area, an area had to be judged by an appointed citizen group called the Rural Legacy Board to offer multiple resources such as prime agricultural soils, wildlife habitats, wetlands or other environmental features, protection for water reservoirs or buffers along streams and rivers, or the presence of cultural or historic characteristics, such as Civil War battlefields.⁸⁰ To fund this effort, the state would sell bonds or otherwise appropriate funds that would then be doled out on an annual basis for specific purchases within designated Rural Legacy Areas.⁸¹

About three years after creation of the Rural Legacy Program, the state created yet another land preservation program based on a scientific inventory of the most ecologically significant lands in the state.⁸² This program, called GreenPrint, was designed to protect “hubs” of 300 acres or more of these environmentally sensitive lands as well as “corridors” that linked the hubs together. The governor and General Assembly appropriated funds specifically for this purpose.⁸³

The state also created an entity called the Maryland Environmental Trust, the primary purpose of which was to accept easements on Maryland lands voluntarily donated by their owners, usually for tax purposes.⁸⁴ It represented another avenue to meet the state’s broader land preservation goals.

Together, these programs, coupled with local “purchase of development” or other land protection efforts, protected approximately 20% of Maryland’s 6.2 million acres. Despite the undisputed success of these programs, a recent study by the Maryland Department of Planning (MDP)⁸⁵ suggests that despite the expenditure of millions of dollars in public funds on these programs, many of these protected areas are still fragmented or otherwise adversely affected by sprawling development.

“A major reason is that key public policies and procedures are not mutually supportive,” the report states in its major conclusion, saying that the spread of subdivisions into rural areas combined with transportation improvements that, in turn, attract even more rural residential development have undercut the state’s land protection success.⁸⁶

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

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

“Where development pressure is high and zoning yields more than one residential lot per twenty-five acres, rural land is being heavily subdivided and developed, conservation expenditures notwithstanding. Public conservation goals for rural resources are being compromised and easement acquisition funds are insufficient to compete effectively with development, even when tens of millions of dollars have already been spent to preserve land in these locations,” the report states.⁸⁷

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

E. Statutory Framework

At the time the Smart Growth initiative was being developed in 1996, Governor Glendening and his staff were thoroughly convinced of the seriousness of the state’s development trends. The state planning office steadily rolled out a series of ominous numbers describing projections of new households in Maryland—the increase in lot sizes even as average household size was declining, the steady exodus from older developed areas, and so on.⁸⁸ Despite such a wealth of statistics, those who put the Smart Growth initiative together never tried to establish a set of specific goals for the program to reach. Few people asked, and fewer still suggested, how the state

would know whether the Smart Growth initiative was successful. There were no benchmarks, no goals, no plans for measuring change.

Even today, almost 10 years after the program's inception, no specific goals or specific measurable objectives exist and state agencies have taken only modest steps to try to determine if the Smart Growth instruments are having the desired effect or, in fact, any effect whatsoever. Moreover, the data required to make such measurements are often not centrally collected, are collected at various intervals, or are collected in different ways by different jurisdictions.

Nor were the new Smart Growth laws integrated into existing state planning law, either at their inception or subsequently. While Maryland has a long history of enacting land use law, these laws have tended to be added rather than integrated into a comprehensive or coherent structure. Such was the case with the Smart Growth initiative, which became part of the state code different from Article 66-B, which contains the bulk of the state's planning law.⁸⁹

IV. POLICY RECOMMENDATIONS

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

A. The Content and Role of Comprehensive Plans

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

ments to include the following elements in their comprehensive plans:

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

A land use plan element;

A transportation plan element;

A community facilities plan element;

A mineral resources plan element;

A water resources plan element (municipalities only);

An element that contains the planning commission's recommendations for land development regulations to implement the comprehensive plan;

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

A sensitive areas element;

A municipal growth element (municipalities only).⁹⁰

The Growing Smart Legislative Guidebook, produced by the American Planning Association,⁹¹ recommends elements to comprehensive plans that should be mandatory, mandatory with opt-out provisions, and optional, as follows:

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

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

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

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

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

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

B. Growth Areas

If the state is serious about containing growth, it should consider converting PFAs to Urban Growth Boundaries that clearly delineate areas where growth is allowed from those areas where it is allowed only by exception. Such UGBs should be drawn to contain capacity to accommodate fifteen to twenty-five years of anticipated residential and employment growth and reviewed at every plan re-submission cycle.⁹²

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

C. Land Preservation

Because “state conservation goals for rural land and resources cannot be achieved through public expenditures for easement purchase without supportive zoning,”⁹³ the state should require counties to impose more stringent agricultural and natural resource zoning outside of PFAs, especially in areas where the state has invested or intends to invest land preservation funds. Moreover, future expenditure of such funds should be made contingent upon such zoning protection being in place. Not all land outside PFAs, however, should be downzoned or designated for agricultural use. Some land immediately outside PFAs should be designated for future urban expansion and some should be designated for conservation, regardless of whether it is used for agriculture.

State transportation policy also must be revised to be more compatible with state land preservation goals and investment strategies; that is, transportation improvements should not be made that make lands protected under various state preservation programs more accessible to new development unless appropriate protection zoning is already in place. “Until that time, limit improvements to those necessary to ensure public safety and orderly traffic flow, without increasing capacity or design speeds.”⁹⁴ A logical and coherent approach to transportation policy would be easier if the state had a statewide transportation plan. Restricting state spending on transportation outside PFAs only if they connect PFAs is silly at best and potentially counterproductive. Simple rules are no substitute for sound planning when dealing with large complex networks.

D. Infrastructure

The State of Maryland should create an infrastructure financing program for growth areas

that would be used for infrastructure improvements within PFAs. All projects financed through this fund, including schools, must be within a PFA and be identified in the local government's Capital Improvement Plan. Moreover, a match from the local government would be required. Specific priority from the fund would be given to projects that remove APFO restrictions or other moratoria that stop or retard development within PFAs; and, involve the renovation or rehabilitation of existing infrastructure. The fund would be used to reward jurisdictions for measurable achievements to control sprawl and encourage Smart Growth.⁹⁵

The General Assembly should consider amending APFO enabling legislation to add the following local government powers: a) Permit local governments to establish Special Tax Districts or TIF districts to raise funds for needed facilities; and b) Permit local governments to establish other mechanisms, such as infrastructure funding "banking" programs that accumulate developer contributions to be used to fund needed improvements.⁹⁶

The General Assembly should also consider requiring local governments to: a) limit delays in development proposals within a PFA; b) waive APFO requirements on certain affordable housing, infill or revitalization projects within PFAs; and c) "prepare and publish a report every two years identifying facilities within PFAs that do not meet local APFO standards, and any improvements to those facilities that have been scheduled and/or proposed in the jurisdiction's Capital Improvement Program."⁹⁷

The State needs to identify broad-base tax resources (e.g., property, sales or income tax revenue) to provide the fiscal resources necessary to fund adequate public facilities in growth areas. This will enable local governments to reduce their dependence on impact fees and the local property tax, thereby preventing new home buyers from bearing a disproportionate share of the costs of new infrastructure.⁹⁸

E. Enhancing Coherence

The state should seek to integrate Smart Growth with planning. Maryland's Smart Growth statutes place restrictions on state spending without embedding these restrictions in Maryland's existing planning laws. The state should establish a set of goals and procedures for local land use

plans. It should review those plans to ensure they conform further with other state goals. It should then restrict its own spending to be consistent with approved comprehensive plans.

The state should also establish a coherent set of goals and a statewide development plan. Progress towards those goals should be expressed through a quantifiable set of measures. Data on those measures should be accumulated and maintained on a regular basis by a non-partisan organization outside the control of the state administration. The National Center for Smart Growth Research and Education is a natural candidate for this task.

V. CONCLUSION

Maryland burst onto the land use scene in 1997 with a new set of initiatives and a catchy phrase. It garnered immediate accolades and was offered as a model for other states. To some extent this was well deserved. Maryland had found a way to promote a better form of development that imposed fewer regulations and hence was politically much more attractive than the approach taken previously by other states. The program has succeeded in raising the visibility of growth and development issues as an important element of the public dialogue. With the benefit of hindsight some 10 years later, however, some of the praise accorded Maryland's program seems a bit excessive. Maryland deserved credit for a bold new experiment, but not for solving the problems the experiment was designed to address.

While the idea that the state should not underwrite urban sprawl remains valid, the hope that the state budget could be used to curtail urban sprawl has not been fulfilled. The disappointment stems from a number of factors:

- First, many if not most of the funds that finance sprawl come from federal, local, and private sources. Further, only about five percent of the state budget is subject to PFA review. It is unlikely that the targeting or removal of state subsidies alone will ever have a significant effect on sprawl without complementary land use plans and regulations.

- Second, sprawl has many causes, and the only effective way to address sprawl is through a comprehensive approach that includes incentives, regulations, and plans. Unfortunately, Maryland’s Smart Growth laws were never integrated into its planning and zoning laws.
- Third, targeted state spending on growth-related programs makes good sense in theory but is much more difficult in practice. Given the systemic complexities of transportation and wastewater networks, the persistent problems of failing sewer systems in rural areas, and the need to support the rural economy, it is not always clear that funds in many “growth-related” programs should always be targeted to urban areas. Further, the state has not yet constructed a budgetary system that adequately serves to monitor and manage the spatial allocation of funds.
- Finally, the state budget remains largely under the control of the governor. If the control of sprawl is contingent on the administration of the state budget, then control of sprawl is overly contingent on support for this effort from whoever controls the state administration.

Fortunately, state land use policy is not a pass-fail proposition; there is always time and room for improvement. In fact the history of land use policy in most every state is a history of marginal and, occasionally, fundamental change. The question facing Maryland now is whether to work at the margins—that is, to revisit the size and location of PFAs, to address the process in which they are amended over time, to reexamine the set of programs subject to PFA review, to improve the accounting of state funds spent inside and outside PFAs, and to clarify the process through which exceptions to PFA restrictions are granted -- or to pursue more fundamental change in the state’s approach to land use planning and regulation (as specified in Sections IV A-E above). For a variety of reasons addressed above, we strongly favor the latter.

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

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

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

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

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

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9 State-of-the-State address by Governor Marvin Mandel, Journal of Proceedings of the Senate, Jan. 17, 1973, page 228.

10. *Id.*

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

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

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

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

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

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 39. *Id.* § 5-7B-03.
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