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## **Squaring the Circle on Sprawl: What More Can We Do?: Progress Towards Sustainable Land Use in the States**

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## Symposium

### SQUARING THE CIRCLE ON SPRAWL: WHAT MORE CAN WE DO? PROGRESS TOWARD SUSTAINABLE LAND USE IN THE STATES

Patricia E. Salkin\*

#### I. INTRODUCTION

*"If you're wondering where American governance is headed, don't  
look to Washington—look to the states."*<sup>1</sup>

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\* Patricia E. Salkin is Associate Dean and Director of the Government Law Center of Albany Law School. She is grateful to her research assistant, Albany Law School student Amy Lavine '07, for her considerable contributions to the review of state smart growth programs.

<sup>1</sup> Neal Peirce, Editorial, *Look to the States, America*, THE SEATTLE TIMES, Feb. 26, 2007. This statement is a truism for the smart growth movement. With no national land use policy, and no current national leadership on smart growth, the task has been left to state governments to provide the necessary vision and stewardship to ensure sustainable land use and sustainable communities. See Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381, 383 (2002). However, the author points out that federal funding can be an effective incentive to guide desired state and local land use planning and control actions. *Id.* See also DENNY JOHNSON ET AL., PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES 9-10 (American Planning Association 2002) (discussing how federal funding can facilitate smart growth).

Perhaps it will be recorded as the second *Quiet Revolution*<sup>2</sup> in land use and environmental law. Beginning in the late 1990s, states across the country embarked on efforts to modernize outdated planning and zoning enabling acts, recognizing that traditional Euclidean Zoning<sup>3</sup> was simply inadequate to meet the demands of twenty-first century challenges in achieving sustainable communities.<sup>4</sup> Leadership provided by the American Planning Association (“APA”) through their Growing Smart initiative,<sup>5</sup> combined with advocacy first from the business community and later from the environmental community, followed by the faith-based community and other interest groups, prompted state legislatures to re-examine the effectiveness of what has proven to be an arcane, inflexible legal framework for regulating the use of land. Rather than producing environmentally sustainable communities that could flourish from a mix of economic, health, and welfare factors, Euclidean Zoning produced sprawling communities that lacked efficiencies and economies of scale in housing, transportation, agriculture, energy, and public health. A new paradigm was sought to offer balance between the demand for

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<sup>2</sup> Quiet Revolution refers to the seminal report by FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (Council of Environmental Quality 1971) prepared for the Commission on Environmental Quality, which reported on the growth management movement that at the time was thought to have swept the country.

<sup>3</sup> The phrase “Euclidean Zoning,” named for the landmark case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379-83 (1926), refers to zoning enabling acts and ordinances designed to simply separate incompatible land uses. As a result, residential uses are often separated from business and commercial uses, as compared to more modern neo-traditional planning or “New Urbanist” concepts which advocate for mixed-use districts.

<sup>4</sup> See PATRICIA E. SALKIN, *GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL, SMART GROWTH AT CENTURY’S END: THE STATE OF THE STATES 1-2* (1999), available at [http://www.governmentlaw.org/files/smart\\_growth\\_centurys\\_end.pdf](http://www.governmentlaw.org/files/smart_growth_centurys_end.pdf); 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, 272 (2002).

<sup>5</sup> See Patricia E. Salkin, *Zoning and Land Use Planning, Implementation of the APA Growing Smart Legislative Guidebook: Beginning to Benchmark Success*, 33 REAL EST. L.J. 339 (2004) (discussing Growing Smart and the early impact this had on land use reform efforts).

land development and the desire for sustainability, including conservation.

According to the APA, the phrase “smart growth” means:

[U]sing comprehensive planning to guide, design, develop, revitalize and build communities for all that:

- have a unique sense of community and place;
- preserve and enhance valuable natural and cultural resources;
- equitably distribute the costs and benefits of development;
- expand the range of transportation, employment and housing choices in a fiscally responsible manner;
- value long-range, regional considerations of sustainability over short term incremental geographically isolated actions; and
- promote public health and healthy communities.<sup>6</sup>

The APA adopted thirteen core principles of smart growth that include the following:

- Recognition that all levels of government, and the non-profit and private sectors, play an important role in creating and implementing policies that support smart growth.
- State and federal policies and programs that support urban investment, compact development, and land conservation.
- Planning processes and regulations at multiple levels that promote diversity, equity and smart growth principles.
- Increased citizen participation in all aspects of the planning process and at every level of government.
- A balanced, multi-modal transportation system that plans for increased transportation choice.
- A regional view of community.

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<sup>6</sup> See AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON SMART GROWTH 1-2 (2002), *available at* <http://www.planning.org/policyguides/pdf/SmartGrowth.pdf>.

- One size doesn't fit all—a wide variety of approaches to accomplish smart growth.
- Efficient use of land and infrastructure.
- Central city vitality.
- Vital small towns and rural areas.
- A greater mix of uses and housing choices in neighborhoods and communities focused around human-scale, mixed-use centers accessible by multiple transportation modes.
- Conservation and enhancement of environmental and cultural resources.
- Creation or preservation of a “sense of place.”<sup>7</sup>

With almost ten years of nationwide dialogue and experimentation with smart growth concepts at the state and local levels, it is time to pause to consider whether and to what extent success has been realized. Trends can be identified, discernable “lessons learned” articulated, and opportunities to adopt and implement new strategies abound. The one certainty in this dynamic intersection of land development and conservation is that there is no one best model adaptable to all fifty states. Rather, to accommodate national diversity in local government structure, cultural relationships of people to the land, and differences in geography and a sense of place, the best lesson learned is that advocates and lawmakers alike must shape and adopt politically palatable policies, programs, and regulations to best fit their unique jurisdictional sustainability needs.

## II. STATE SMART GROWTH STRATEGIES

Between 1991 and 2001, seventeen governors passed nineteen executive orders on planning and smart growth.<sup>8</sup> Also in this timeframe, more than 2000 land use or planning law bills were introduced in statehouses across the country, with approximately

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<sup>7</sup> AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON SMART GROWTH, *supra* note 6, at 2-4.

<sup>8</sup> INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, GETTING TO SMART GROWTH II: 100 MORE POLICIES FOR IMPLEMENTATION ii (2003), available at <http://www.smartgrowth.org/pdf/gettosg2.pdf>.

twenty percent being enacted into law.<sup>9</sup> While in 2001, twenty-seven governors made specific planning and smart growth proposals,<sup>10</sup> a review of the various gubernatorial 2007 state of the state addresses reveals that smart growth remains on the action agenda for many governors.<sup>11</sup> What follows is a discussion of more

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<sup>9</sup> JOHNSON ET AL., *supra* note 1, at 6.

<sup>10</sup> *Id.*

<sup>11</sup> See Ruth Ann Minner, Governor, Delaware State of the State Address (Jan. 18, 2007) (reviewing her smart growth legacy and promising to continue to work on curbing sprawl), *available at* <http://stateline.org/live/printable/speech?contentId=172664>; Sonny Perdue, Governor, Georgia State of the State Address (Jan. 10, 2007) (announcing his continuing commitment to fund land conservation programs), *available at* <http://stateline.org/live/printable/speech?contentId=169993>; Ernie Fletcher, Governor, Kentucky State of the Commonwealth Address (Feb. 6, 2007) (speaking of preserving landscapes and emphasizing more regional planning and cooperation), *available at* <http://stateline.org/live/printable/speech?contentId=178568>; Martin O'Malley, Governor, Maryland State of the State Address (Jan. 31, 2007) (announcing that he has directed the secretary of planning to re-establish the Office of Smart Growth within the agency), *available at* <http://stateline.org/live/printable/speech?contentId=176310>; Deval L. Patrick, Governor, Massachusetts State of the State Address (Jan. 4, 2007) (announcing that he would seek new partnerships between municipal and state governments to, among other things, better plan across regions and to rebuild city and town cores), *available at* <http://stateline.org/live/printable/speech?contentId=168726>; Bill Richardson, Governor, New Mexico State of the State Address (Jan. 16, 2007) (proposing a land conservation fund), *available at* <http://stateline.org/live/printable/speech?contentId=171378>; Eliot Spitzer, Governor, New York State of the State Address (Jan. 3, 2007) (calling for reform of local zoning laws to allow for increased construction of affordable housing, as well as programs that balance land preservation while allowing for growth), *available at* <http://stateline.org/live/printable/speech?contentId=168384>; James Douglas, Governor, Vermont State of the State Address (Jan. 4, 2007) (introducing the Vermont Way Forward, a four-part strategy including environmental leadership and reaffirmation of the importance of the natural environment and the state's commitment to a balanced approach), *available at* <http://stateline.org/live/printable/speech?contentId=168724>; Tim Kaine, Governor, Virginia State of the Commonwealth Address (Jan. 10, 2007) (focusing on the challenges of inadequate transportation infrastructure and calling upon the state to take the next steps toward smart growth management), *available at* <http://stateline.org/live/printable/speech?contentId=170449>; and Jim Doyle, Governor, Wisconsin State of the State Address (Jan. 30, 2007) (calling upon the legislature to reauthorize the Land Stewardship Program), *available at* <http://stateline.org/live/printable/speech?contentId=176810>.

recent smart growth initiatives championed in select states. It is not intended as a comprehensive review of every existing state smart growth program, but rather as a snapshot of current programs indicating newer trends and programmatic techniques.<sup>12</sup>

*A. Arizona: Growing Smarter and Growing Smarter Plus*

Arizona's comprehensive smart growth program is a product of the state's long record of growth management<sup>13</sup> and was developed in response to dramatic increases in the state's rate of growth in the 1990s.<sup>14</sup> The 1998 Growing Smarter Act ("Act") enforced the already mandatory comprehensive planning process by requiring local governments to add four new elements to their plans: open space, growth areas, environmental planning, and cost of development. The Act was accompanied by a ballot question which passed by a margin of 53% and provided \$20 million annually for eleven years to preserve State Trust Lands.<sup>15</sup> Additionally, it authorized the creation of the Growing Smarter Commission to study other approaches to growth management.<sup>16</sup>

The Commission's findings led to the passage of the Growing Smarter Plus Act in 2000 ("2000 Act"). The 2000 Act greatly expanded upon the original Growing Smarter program: it required

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<sup>12</sup> A number of publications appeared from 2000-2002 that reviewed states' smart growth and land use reform initiatives. See JOHN DEGROVE, STUDY OF STATE AND REGIONAL GROWTH MANAGEMENT (Lincoln Institute of Land Policy 2002); JOHNSON ET AL., *supra* note 1, at 6; Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, *supra* note 4.

<sup>13</sup> Most municipalities have been required to create comprehensive plans since the early 1970s. See GROWING SMARTER OVERSIGHT COUNCIL, GROWING SMARTER IN ARIZONA: THE SECOND ANNUAL REPORT OF THE GROWING SMARTER OVERSIGHT COUNCIL 1 (2002), available at <http://www.azcommerce.com/doclib/COMMASST/Originals/ANNUAL%20REPORT%202002.pdf> [hereinafter ARIZONA SECOND ANNUAL REPORT].

<sup>14</sup> JOHNSON ET AL., *supra* note 1, at 35.

<sup>15</sup> See ARIZONA SECOND ANNUAL REPORT, *supra* note 13. The 1998 Growing Smarter Act followed the 1996 Arizona Preserve Initiative, which was intended to protect State Trust Lands located near urban areas. See Arizona State Land Department, Arizona Preserve Initiative Program, <http://www.land.state.az.us/programs/operations/api.htm> (last visited Apr. 18, 2007).

<sup>16</sup> The Commission was disbanded after reporting its findings to Governor Jane Dee Hull and the legislature. ARIZONA SECOND ANNUAL REPORT, *supra* note 13.



voter approval of comprehensive plans every ten years and required regional and intergovernmental planning; it authorized local governments to designate service area limits; it gave counties the same authority as municipalities to impose development fees; it gave cities the option to create infill incentive districts; and it created a TDR program.<sup>17</sup>

The Growing Smarter Oversight Council was established by an executive order issued by Governor Jane Dee Hull in 2001.<sup>18</sup> The Council's responsibilities include monitoring the implementation of the Growing Smarter Acts, identifying problems and suggesting legislative responses, and developing methods to measure the success of the programs.<sup>19</sup> The Council also operates an extensive media and communications campaign, which includes educating legislators and administrative officials.<sup>20</sup>

Governor Janet Napolitano has continued the smart growth efforts of Governor Hull. She asked the Growing Smarter Oversight Council in 2004 to establish a list of "Guiding Principles." Released in 2006, these principles reflect visions for

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<sup>17</sup> ARIZONA SECOND ANNUAL REPORT, *supra* note 13, at 1-2. TDRs were originally authorized in 1998. JOHNSON ET AL., *supra* note 1, at 35. In 2002, the Growing Smarter legislation was amended by House Bill 2601 to refine procedural aspects of the program. ARIZONA SECOND ANNUAL REPORT, *supra* note 13, at 2.

<sup>18</sup> Exec. Order No. 2001-2, 7 Ariz. Admin. Reg. 932 (Feb. 16, 2001), *as amended in* 8 Semi-Annual Index, Ariz. Admin. Reg. 8 (June 30, 2002) available at <http://www.azcommerce.com/doclib/commasst/gsoc/gsoc%20executive%20order.pdf>; ARIZONA SECOND ANNUAL REPORT, *supra* note 13.

<sup>19</sup> ARIZONA SECOND ANNUAL REPORT, *supra* note 13, at 2. Evaluating the success of the Growing Smarter Acts is one of the key functions of the Oversight Council. Since 2002, it has compiled statistics and local government feedback relating to technical implementation of the Acts. It has also begun to develop methods to measure the success of the Acts' objectives. GROWING SMARTER OVERSIGHT COUNCIL, THIRD ANNUAL REPORT OF THE GROWING SMART OVERSIGHT COUNCIL 8-10 (2003), available at <http://www.azcommerce.com/doclib/commasst/gsoc/annual%20reports/gsoc%202003%20annual%20report.pdf> [hereinafter ARIZONA THIRD ANNUAL REPORT].

<sup>20</sup> *Id.* at 7. The Community and Education Subcommittee oversees a number of projects; it manages the Growing Smarter website, develops media and speaking kits, creates K-12 educational materials, organizes an e-mail list to communicate news with interested parties, and encourages the press to cover smart growth issues. *Id.*



managing community development in relation to preserving community character, encouraging stewardship, promoting housing, employment and educational opportunities, planning for the long-term provision of infrastructure, promoting appropriate economic development, and increasing the responsibility and accountability of government officials in the long-term planning process.<sup>21</sup> In her 2007 State of the State Address, Governor Janet Napolitano continued to emphasize the importance of smart development to Arizona. She directed the Department of Transportation to explore mass transit options, such as commuter and light rail, and encouraged the legislature to pass laws to enable local governments to include more water planning into their development decisions. The governor expressed the need to preserve open space and encouraged new legislation concerning state trust land reform, and she emphasized the continuing need to provide affordable housing.<sup>22</sup>

Energy programs have recently become a focus in Arizona as well. In 2006, Governor Napolitano signed legislation providing a state income tax credit for businesses that install solar energy devices.<sup>23</sup> The Commerce and Economic Development Commission released a 2007 report on solar energy in the state, in which it recommended the increased use of solar technologies in order to promote energy self-reliance and environmental protection and identified market opportunities for solar energy development.<sup>24</sup>

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<sup>21</sup> GOVERNOR'S GROWING SMARTER OVERSIGHT COUNCIL, GROWING SMARTER, GUIDING PRINCIPLES FOR ARIZONA 1, 2 (2006), *available at* [http://www.azcommerce.com/doclib/commasst/guiding%20principles%20%20results/final/principles%204.06.06\\_final%20draft.pdf](http://www.azcommerce.com/doclib/commasst/guiding%20principles%20%20results/final/principles%204.06.06_final%20draft.pdf) [hereinafter GUIDING PRINCIPLES FOR ARIZONA].

<sup>22</sup> *Id.* at 7.

<sup>23</sup> See H.B. 2429, 47th Leg., 2d Reg. Sess. (Ariz. 2006); ARIZONA DEPARTMENT OF COMMERCE, COMMERCIAL SOLAR ENERGY TAX CREDIT PROGRAM, *available at* <http://www.azcommerce.com/BusAsst/Incentives/Solar+Energy+Tax+Incentives+Program.htm> (last visited Apr. 18, 2007). Similar tax incentives for individual residents are also available. ARIZ. REV. STAT. ANN. § 43-1083 (2006).

<sup>24</sup> See ARIZ. DEP'T OF COMMERCE, ARIZONA SOLAR ELECTRIC ROADMAP STUDY, EXECUTIVE SUMMARY 3 (2007), *available at* [http://www.azcommerce.com/doclib/energy/az\\_solar\\_electric\\_roadmap\\_study\\_executive\\_summary.pdf](http://www.azcommerce.com/doclib/energy/az_solar_electric_roadmap_study_executive_summary.pdf). The Commission specifically recommended: "[e]stablishing a marketing and

*B. Colorado: Intergovernmental Planning and Cooperation*

Smart growth was an important policy issue under Governor Bill Owen's administration, beginning with the 1999 Smart Growth: Colorado's Future Initiative<sup>25</sup> and continuing with the creation of the Office of Smart Growth ("OSG") in 2000. The OSG is charged with the mission "to provide direct technical and financial assistance to local governments in the areas of land use planning and growth management."<sup>26</sup> Among its activities, the OSG provides free training workshops and offers handbooks, manuals and model land use ordinances.<sup>27</sup> It also advises the Governor and legislature and serves as a smart growth information clearinghouse.<sup>28</sup>

As part of its activities, the OSG oversees the Colorado Heritage Planning Grant program, which provides funds for cooperative planning involving at least two local governments.<sup>29</sup> In

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outreach program; [e]stablishing a solar zone; [d]eveloping a solar center of excellence; [e]stablishing 'sustainable partners'; and [b]uilding large central solar plants." ARIZ. DEP'T OF COMMERCE, *supra*, at 14.

<sup>25</sup> Press Release, Office of the Governor, Owens Announces "Smart Growth: Colorado's Future": Agenda to Protect Colorado's Special Way of Life While Prospering (Nov. 29, 1999), *available at* [http://www.state.co.us/gov\\_dir/govnr\\_dir/11-29-99a.htm](http://www.state.co.us/gov_dir/govnr_dir/11-29-99a.htm). The program was composed of four parts dealing with preserving natural landscapes, encouraging strong neighborhoods, transportation issues, and increasing economic development. *Id.*

<sup>26</sup> Colorado Division of Local Government, Office of Smart Growth Overview, <http://www.dola.state.co.us/dlg/osg/index.htm> (last visited Apr. 18, 2007). Governor Owens also signed into law four other pieces of smart growth legislation in 2000. *See* H.B. 1001, 59th Gen. Assemb., Reg. Sess. (Colo. 2000) (providing additional comprehensive plan elements); H.B. 1306, 59th Gen. Assemb., Reg. Sess. (Colo. 2000) (providing a state income tax for brownfields redevelopers); H.B. 1302, 59th Gen. Assemb., Reg. Sess. (Colo. 2000) (providing a state income tax credit to affordable housing developers); H.B. 1348, 59th Gen. Assemb., Reg. Sess. (Colo. 2000) (establishing a state tax refund for the donation of conservation easements); Salkin, *The Smart Growth Agenda, A Snapshot of State Activity at the Turn of the Century*, *supra* note 4, at 277-78.

<sup>27</sup> Colorado Division of Local Government, Office of Smart Growth Resources and Publications, <http://www.dola.state.co.us/dlg/osg/resources.htm> (last visited Apr. 18, 2007).

<sup>28</sup> Salkin, *The Smart Growth Agenda, A Snapshot of State Activity at the Turn of the Century*, *supra* note 4, at 278.

<sup>29</sup> *Id.* at 277-78.

the program's first three years, more than \$1.6 million was distributed through a competitive selection process to over one hundred local governments.<sup>30</sup>

Colorado's emphasis on intermunicipal planning is well complemented by its Intergovernmental Land Use Dispute Resolution Program, which "was created with the express purpose of providing local officials with the tools necessary to resolve land use conflicts with neighboring jurisdictions."<sup>31</sup> As part of the program, the OSG maintains a list of qualified professionals to handle dispute resolutions; these professionals have experience in both alternative dispute resolution processes and land use planning issues. This referral network is all the more important given the fact that local governments involved in certain planning disputes are required to use alternative dispute resolution techniques before resorting to litigation.<sup>32</sup>

The recently elected Governor of Colorado, Bill Ritter, has pledged to support smart growth policies as well, stating that he "look[s] forward to working with Colorado cities, towns, counties and regional agencies to identify better ways for us to grow in the future. [He] will encourage greater cooperation among jurisdictions and urge a careful balancing of our commercial, residential and transportation needs against protecting our natural resources."<sup>33</sup> He has also promised to create a New Energy Economy and "will lead Colorado toward self-sufficiency by promoting alternative energy, encouraging cleaner ways of extracting and using fossil fuels, and rewarding efficiency and conservation."<sup>34</sup> As part of the New Energy Economy plan, Governor Ritter has promised to establish the Colorado Clean

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<sup>30</sup> See COLO. DEP'T OF LOCAL AFFAIRS, COLORADO HERITAGE PLANNING GRANT PROGRAM GUIDELINES AND APPLICATION 3, *available at* <http://www.dola.state.co.us/dlg/osg/docs/CHPG%202006%20App%20Packet.pdf> (last visited Apr. 18, 2007).

<sup>31</sup> Colorado Division of Local Government, Office of Smart Growth Introduction and Overview, [http://www.dola.state.co.us/dlg/osg/adr\\_introduction.htm](http://www.dola.state.co.us/dlg/osg/adr_introduction.htm) (last visited Apr. 18, 2007).

<sup>32</sup> *Id.*

<sup>33</sup> See BILL RITTER, BILL RITTER FOR GOVERNOR: THE COLORADO PROMISE 30 (2006), *available at* [http://www.colorado.gov/governor/press/pdf/ritter\\_policy\\_book.pdf](http://www.colorado.gov/governor/press/pdf/ritter_policy_book.pdf).

<sup>34</sup> *Id.* at 23.

Energy Coalition to advise the administration as to how to advance energy technologies, promote best practices, and guide energy investments.<sup>35</sup> He also plans to require state buildings and facilities to meet stricter energy standards and to “put in place programs to reduce substantially the type of carbon emissions that cause global warming.”<sup>36</sup> The Governor has also promised to support water conservation, efficiency, and reuse through land use policies and better planning.<sup>37</sup>

### *C. Connecticut: Responsible Growth*

Smart growth principles began to increasingly influence Connecticut’s planning strategies in 2001. In response to the efforts of Governor John Rowland, the legislature created the Transportation Strategy Board in order to develop and implement transportation planning.<sup>38</sup> Governor Rowland also pushed various smart growth policies, such as brownfield redevelopment, open space preservation, economic development incentives, improving public transportation options, and encouraging housing rehabilitation.<sup>39</sup> And he created an urban homeownership program that offered rehabilitation grants and extended low-interest mortgage rates for homebuyers in several designated urban areas.<sup>40</sup>

Smart growth programs have also been emphasized during Governor M. Jodi Rell’s tenure. In 2005, Connecticut passed the Community Investment Act in order to facilitate farmland, open space, and historic site preservation.<sup>41</sup> Affordable housing was also

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<sup>35</sup> RITTER, *supra* note 33, at 25.

<sup>36</sup> *Id.* at 26-27.

<sup>37</sup> *Id.* at 31.

<sup>38</sup> American Planning Association, *Growing Smart: Connecticut* (2002), <http://www.planning.org/growingsmart/States/connecticut.htm> [hereinafter *Growing Smart: Connecticut*]; Connecticut Transportation Strategy Board, <http://www.opm.state.ct.us/igp/TSB/tsbinfo.htm> (last visited Apr. 18, 2007).

<sup>39</sup> *Growing Smart: Connecticut*, *supra* note 38.

<sup>40</sup> *Id.*; Press Release, The Executive Office of the Governor, Governor Rowland Announces Urban Homeownership Program (May 29, 2001), *available at* <http://www.ct.gov/governorowland/cwp/view.asp?A=1334&Q=256502>.

<sup>41</sup> 1000 FRIENDS OF CONN., *THE LEADERS’ GUIDE TO GROWING SMART CONNECTICUT 5* (2006), *available at* <http://www.1000friends-ct.org/policy/briefingbook.pdf>; Connecticut Department of Agriculture, Community Investment Act—Public Act 05-228, <http://www.ct.gov/doag/cwp/view.asp?a=1366&q=320>

addressed in 2005 with the enactment of the Housing Trust Fund Program, which offers loans and grants for the creation of affordable housing.<sup>42</sup> In 2006, Governor Rell established the Office of Responsible Growth and charged it with the tasks of initiating interagency and regional planning dialogues, developing support and incentives for communities to engage in planning efforts, updating Connecticut's Green Plan in order to guide environmental efforts, reviewing transportation policies, encouraging business opportunities, and creating educational materials.<sup>43</sup> She emphasized her intention to encourage these smart growth policies in her 2007 State of the State address, especially focusing on increasing mass transportation funding and availability.

#### *D. Delaware: Livable Delaware*

Delaware's Livable Delaware program was initiated in 2001 by Governor Ruth Ann Minner.<sup>44</sup> As she explained in her 2001 State of the State address,

We need to pursue a strategy that will keep sprawl in check, reduce traffic congestion, strengthen our towns and cities, and protect our huge investment in roads, schools and other infrastructure . . . "Livable Delaware" is not anti-growth. It will offer carrots, not sticks, to channel development to growth zones that already have been designated by state, county and local governments.<sup>45</sup>

During the same year, several pieces of smart growth-related legislation were passed: Senate Bill 183 provided funding for brownfield cleanups; House Bill 235 provided the framework for a

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938 (last visited Apr. 18, 2007).

<sup>42</sup> 1000 FRIENDS OF CONN., *supra* note 41, at 5; CONN. DEP'T OF ECON. AND CMTY. DEV., THE HOUSING TRUST FUND PROGRAM, <http://www.ct.gov/ecd/cwp/view.asp?a=1098&Q=310890&PM=1> (last visited Apr. 22, 2007).

<sup>43</sup> Exec. Order No. 15 (Conn. 2006), *available at* <http://www.ct.gov/governorrell/cwp/view.asp?A=1719&Q=320908>.

<sup>44</sup> Exec. Order No. 14 (Del. 2001), *available at* [http://www.state.de.us/governor/orders/eo\\_14.shtml](http://www.state.de.us/governor/orders/eo_14.shtml).

<sup>45</sup> Ruth Ann Minner, Governor, Delaware State of the State Address (2001), *available at* <http://www.state.de.us/governor/speeches/state%20of%20the%20state%202001.shtml#TopOfPage>.



graduated impact fee framework that increases the costs of development in areas where growth is not desired; House Bill 255 required municipalities to have service plans for annexations and provided a related dispute resolution process; and other legislation created the Livable Delaware Advisory Council and increased funding for open space preservation.<sup>46</sup>

Governor Minner has steadfastly continued to further smart growth initiatives in her state. In 2003, at her encouragement, Delaware's Land Use Planning Act was substantially amended to improve the land use planning decision-making process.<sup>47</sup> And in 2004, the Governor ordered the preparation of the "Livable Delaware: Strategies for State Policies and Spending" document, a comprehensive report covering Delaware's smart growth policies and programs. The state policies are listed as: limiting sprawl, preserving farmland and open space, encouraging infill and redevelopment, providing affordable housing, and encouraging sustainable development.<sup>48</sup> Other state initiatives have encouraged brownfield redevelopment, altered the school site selection process to avoid encouraging sprawl, and increased permanent funding for farmland preservation.<sup>49</sup> Governor Minner reiterated her support for Livable Delaware in her 2007 State of the State address, remarking that "Livable Delaware is not just a 'feel-good'

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<sup>46</sup> Press Release, Governor Ruth Ann Minner Takes Steps to Fight Sprawl, Signing Livable Delaware into Law (July 13, 2001), <http://www.state.de.us/governor/news/2001/07july/07132001%20-%20ld%20bill%20signing.shtml>.

<sup>47</sup> Ruth Ann Minner, Governor, Delaware State of the State Address (2003), *available at* <http://www.state.de.us/governor/speeches/enstate.shtml#TopOfPage>.

<sup>48</sup> DEL. OFFICE OF STATE PLANNING, STRATEGIES FOR STATE POLICIES AND SPENDING UPDATE: INTRODUCTION 5 (2004), *available at* [http://www.state.de.us/planning/strategies/document\\_04/01\\_intro.pdf](http://www.state.de.us/planning/strategies/document_04/01_intro.pdf) [herein-after DEL. STRATEGIES INTRODUCTION]. Other sections of the Strategies for State Policies and Spending Update can be accessed at <http://www.state.de.us/planning/strategies/strategies.shtml> (last visited Apr. 17, 2007).

<sup>49</sup> DEL. OFFICE OF STATE PLANNING, LIVABLE DELAWARE PROGRESS SINCE 2001, *available at* <http://www.stateplanning.delaware.gov/> (follow "Livable Delaware" hyperlink; then follow "State Strategies" hyperlink) (last visited Apr. 22, 2007).



program. By growing in an orderly, planned manner, we ensure that taxpayer dollars are spent more effectively.”<sup>50</sup>

As the centerpiece of the Livable Delaware program, the State Planning Office has used complex spatial data analysis to develop detailed “Strategy Maps.”<sup>51</sup> The statewide maps designate lands according to the policies favoring or disfavoring development. Based on these designations, the maps also identify lands as being at one of four “Investment Levels.”<sup>52</sup> The characteristics of lands at each Investment Level and the development strategies that should be applied to them are described in detail. The strategies concern such topics as development patterns and designs, transportation, community character, public facilities and services, open space, agricultural and natural land preservation, housing, economic development, and employment strategies, and through them planners have been provided with an incredibly rich collection of smart growth tools.<sup>53</sup> Investments in GIS technology have also led to the creation of detailed maps combining various layers of land use information. These maps are available to the public and to planners.<sup>54</sup>

The Delaware State Housing Authority also plays an important role in the Livable Delaware program. It provides grants, training, and technical assistance to affordable housing providers through the Housing Development Fund.<sup>55</sup> Additionally, the Authority operates a Live Near Your Work program that provides grants to eligible employees to purchase homes within three miles of their workplaces, thereby decreasing commuting needs and

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<sup>50</sup> Ruth Ann Minner, Governor, Delaware State of the State Address (Jan. 18, 2007), *available at* <http://www.state.de.us/governor/speeches/2007%20state%20of%20the%20state.shtml#TopOfPage>.

<sup>51</sup> DEL. OFFICE OF STATE PLANNING, STRATEGIES FOR STATE POLICIES AND SPENDING UPDATE: STRATEGY MAPS (2004), *available at* [http://www.state.de.us/planning/strategies/document\\_04/03\\_directing.pdf](http://www.state.de.us/planning/strategies/document_04/03_directing.pdf).

<sup>52</sup> *Id.* at 32.

<sup>53</sup> *See, e.g., id.* at 31-37.

<sup>54</sup> DEL. STRATEGIES INTRODUCTION, *supra* note 48, at 7.

<sup>55</sup> Delaware State Housing Authority, Services for Developers, [http://www.destatehousing.com/services/dv\\_hdf.shtml](http://www.destatehousing.com/services/dv_hdf.shtml) (last visited Apr. 18, 2007).

helping to revitalize urban areas.<sup>56</sup> And the Neighborhood Revitalization Fund provides low-interest loans to homeowners and landlords in approved neighborhoods for housing repairs.<sup>57</sup> The Delaware Economic Development Office is also involved with land use planning through coordination with the Center of Infrastructure and Intergovernmental Relations; its objective is to guide development to appropriate growth areas and to encourage infill and the reuse of sites with existing infrastructure.<sup>58</sup>

#### *E. Maryland: Priority Funding Areas*

Home of the country's first state planning law,<sup>59</sup> it is not surprising that Maryland has been a leader in the smart growth movement. A 1992 planning act required local governments to incorporate the state's growth policy into their comprehensive plans,<sup>60</sup> and the Growth Commission, also created by that act, recommended further measures to ensure strategic development. These suggestions led to Governor Parris Glendening's proposal of a package of smart growth legislation that was passed in 1997.<sup>61</sup>

The 1997 smart growth legislation included five separate programs:<sup>62</sup> the Priority Funding Areas ("PFA") program,<sup>63</sup> the Rural Legacy Act;<sup>64</sup> a brownfield rehabilitation program;<sup>65</sup> the

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<sup>56</sup> Delaware State Housing Authority, Services for Homebuyers, [http://www.destatehousing.com/services/hb\\_inyw.shtml](http://www.destatehousing.com/services/hb_inyw.shtml) (last visited Apr. 18, 2007).

<sup>57</sup> Delaware State Housing Authority, Services for Others, [http://www.destatehousing.com/services/ot\\_nrf.shtml](http://www.destatehousing.com/services/ot_nrf.shtml) (last visited Apr. 18, 2007).

<sup>58</sup> DEL. OFFICE OF STATE PLANNING, *available at* [http://www.state.de.us/planning/strategies/document\\_04/08\\_jobs.pdf](http://www.state.de.us/planning/strategies/document_04/08_jobs.pdf) (last visited Apr. 18, 2007).

<sup>59</sup> Gerrit-Jan Knaap & John W. Frece, *Smart Growth in Maryland: Looking Forward and Looking Back*, 43 IDAHO L. REV. 1, 2 (forthcoming 2007).

<sup>60</sup> 1992-437 Md. Code Ann. Adv. Legis. Serv. (LexisNexis).

<sup>61</sup> Gerrit-Jan Knaap & Dru Schmidt-Perkins, *Smart Growth in Maryland: Facing a New Reality*, 18 LAND LINES (July 2006), *available at* <http://www.lincolnst.edu/pubs/PubDetail.aspx?pubid=1139>.

<sup>62</sup> Maryland Department of Planning, Smart Growth Background, <http://www.mdp.state.md.us/smartintro.htm> (last visited Apr. 18, 2007).

<sup>63</sup> MD. CODE ANN., STATE FIN. & PROC. §§ 5-7B-01 to 5-7B-10; 1997 Md. Code Ann. Adv. Legis. Serv. 7 (LexisNexis).

<sup>64</sup> MD. CODE ANN., NAT. RES. § 5-9A-01 (West 2007).

<sup>65</sup> MD. CODE ANN., ENVIR. § 7-501 (West 2007); 1997 Md. Code Ann. Adv. Legis. Serv. 1 (LexisNexis). The Voluntary Cleanup Program was

Live Near Your Work program;<sup>66</sup> and the Job Creation Tax Credit Act.<sup>67</sup> These programs were mainly designed to be incentive-based—giving local governments reason to alter their growth patterns but not prohibiting them from doing otherwise.<sup>68</sup> Although highly praised at their inception for their innovation, with ten years of hindsight, commentators have begun to question whether these incentive-based programs have truly been effective.

The Priority Funding Areas Act (“PFA Act”), the centerpiece of Maryland’s smart growth program, designated certain already developed areas of the state as “priority funding areas,” and limited the amount of state funding that could be provided for growth-related projects outside of them.<sup>69</sup> However, rather than limiting local governments’ authority to approve development beyond certain areas, as is the case with urban growth boundaries, the PFA legislation provided an important incentive for local governments to encourage development to take place within the designated areas.<sup>70</sup> The PFA Act, which thus encouraged growth inside of urban areas, found its complement in the Rural Legacy program, which was intended to preserve land outside of the PFAs through funding for the acquisition of property, conservation easements, and TDRs.<sup>71</sup>

While the Rural Legacy program has been generally successful at preserving natural space and rural lands,<sup>72</sup> the success

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amended in 2004 by the Brownfields Redevelopment Reform Act, 2004 Md. Code Ann. Adv. Legis. Serv. 72 (LexisNexis), in order to expand eligibility, increase public notification, provide a more predictable process, and clarify liability.

<sup>66</sup> Live Near Your Work, Smart Growth and Neighborhood Conservation in Maryland, <http://www.dnr.state.md.us/education/growfromhere/LESSON15/MDP/LNYW.HTM> (last visited Apr. 18, 2007).

<sup>67</sup> MD. ANN. CODE art. 83A, § 5-1101 (2007); 1997 Md. Code Ann. Adv. Legis. Serv. 5 (LexisNexis).

<sup>68</sup> See Knaap & Frece, *supra* note 59, at 5-6.

<sup>69</sup> MD. CODE ANN., STATE FIN. & PROC. § 5-7B-02, -03, -04, -05 (West 2007).

<sup>70</sup> See Knaap & Frece, *supra* note 59, at 5-6.

<sup>71</sup> 1997 Md. Code Ann. Adv. Legis. Serv. 757 (LexisNexis); MD. CODE ANN., NAT. RES. § 5-9A-01 (West 2007).

<sup>72</sup> By 2003, the program had resulted in the protection of more than 40,000 acres of land through more than \$100 million in grants. See MD. DEP’T OF NATURAL RES., MARYLAND’S LAND CONSERVATION PROGRAMS: PROTECTING

of the PFA program has been less clear, as reports have shown that local governments continue to approve developments outside of the PFAs. Several problems with the legislation have been pointed out. First, the definition of PFAs in the 1997 legislation led to the creation of PFA boundaries that were in many cases too large or inconsistent with actual development patterns.<sup>73</sup> Second, PFAs were not required to be in any way linked to local comprehensive plans, greatly limiting their importance in relation to local land use regulations and decisions.<sup>74</sup> Third, while the legislation placed a density limit on new developments occurring outside of the PFAs, it did not include any monitoring or penalty provisions.<sup>75</sup> Finally, the state funding incentives upon which the program was based may simply have not been strong enough to alter local governments' development patterns. This is made all the more likely given the extent to which the strength of these incentives is determined by the Governor, making the issue one that depends on the current administration.<sup>76</sup>

Although the incentive-based nature of Maryland's smart growth program was innovative and helped it to gain broad public and political support, it seems that the lack of more specific goals and requirements have been one of the major problems with the legislation. Furthermore, Maryland has not developed any method of measuring the success of the legislation; it has relied on no indicators or benchmarks to assess the legislation's effectiveness, regardless of criticisms that the program has not achieved its main purposes.<sup>77</sup>

The importance of gubernatorial support for Maryland's smart growth strategies has been well illustrated since the enactment of the original smart growth legislation in 1997. Parris Glendening,

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THE CHESAPEAKE BAY WATERSHED (2003), *available at* <http://www.dnr.state.md.us/download/mdlandconprog.pdf>. The Rural Legacy Act is complemented by several other Maryland programs intended to protect natural areas and preserve open and agricultural space. *See generally* Knaap & Frece, *supra* note 59 (discussing laws that complement the Rural Legacy Act).

<sup>73</sup> Knaap & Frece, *supra* note 59, at 15-18.

<sup>74</sup> *Id.* at 19.

<sup>75</sup> *Id.* at 20.

<sup>76</sup> *Id.* at 19-20.

<sup>77</sup> *Id.* at 24-25.

one of the nation's leading proponents of smart growth, contributed to the creation of a variety of initiatives during his tenure as governor. He signed legislation in 2001 creating the Office of Smart Growth in order "to establish a centralized office in the state in a manner such that the policy of smart growth can be better articulated, coordinated, and implemented . . . ."<sup>78</sup> And in the same year, he also created the Commission of Environmental Justice and Sustainable Communities.<sup>79</sup> The Glendening administration also oversaw the creation of the GreenPrint Program and the Community Legacy Program.<sup>80</sup>

Yet Governor Ehrlich's contributions to Maryland's smart growth program were mixed, and were often viewed as negatively affecting the policies and programs enacted by Governor

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<sup>78</sup> 2001 Md. Code Ann. Adv. Legis. Serv. 566 (LexisNexis).

<sup>79</sup> The Commission was "tasked to examine environmental justice and sustainable communities' issues that may be associated with creating healthy, safe, economically vibrant, environmentally sound communities for all Marylanders in a manner that allows for democratic processes and community involvement." Maryland Department of the Environment, Maryland State Commission on Environmental Justice and Sustainable Communities, [http://www.mde.state.md.us/Programs/MultimediaPrograms/Environmental\\_Justice/implementation/cejsc.asp](http://www.mde.state.md.us/Programs/MultimediaPrograms/Environmental_Justice/implementation/cejsc.asp) (last visited Apr. 18, 2007). The Commission was later given statutory authority during Governor Ehrlich's administration. It was tasked with the duties of advising state agencies on issues relating to environmental justice; reviewing the effects of current state laws, policies on environmental justice and sustainable communities issues, and assessing the adequacy of these laws; working with the Children's Environmental Health and Protection Advisory Council to develop recommendations concerning environmental justice, establishing criteria to determine whether communities face environmental justice problems; and making pertinent recommendations to the Governor. MD. CODE ANN., ENVIR. § 1-701 (West 2003); 2003 Md. Laws 460. The Commission has recently been working to develop a system of community, health, and environmental indicators in order to benchmark communities' responses to environmental justice issues. See MD. DEP'T OF THE ENV'T, MARYLAND STATE COMMISSION ON ENVIRONMENTAL JUSTICE AND SUSTAINABLE COMMUNITIES, 2004 ANNUAL REPORT, available at [http://www.mde.state.md.us/assets/document/environmental\\_justice/ej\\_2004\\_Annual\\_Report.pdf](http://www.mde.state.md.us/assets/document/environmental_justice/ej_2004_Annual_Report.pdf). The 2004 annual report is the latest annual report available on the website.

<sup>80</sup> Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, *supra* note 4.



Glendening.<sup>81</sup> Governor Ehrlich, for example, reduced the Office of Smart Growth's responsibilities in 2003 and moved it to the Department of Planning;<sup>82</sup> he was also responsible for increasing the distance limit under the Live Near Your Work program to twenty-five miles, a change seen by many as negating the program's primary goal.<sup>83</sup> At the same time though, Governor Ehrlich's 2003 Priority Places Strategy Executive Order included several positive changes to the state's smart growth framework.<sup>84</sup> The Priority Places initiative directs increased state assistance to areas designated as Priority Places and "support[s] promising projects and planning proposals that have the greatest potential to spark broad-based development trends and land-use patterns that are good for the economy, quality of life and the environment."<sup>85</sup> The initiative is intended to work in tandem with the PFA program, targeting specific areas and projects within PFAs.<sup>86</sup> The Development Capacity Task Force, also created by the executive order, issued its final report in 2004, which provided an analysis of Maryland's residential development capacity and made recommendations concerning the need for including development capacity analyses in planning efforts.<sup>87</sup> A guidebook for local governments based on the report was released in 2005.<sup>88</sup>

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<sup>81</sup> See Kristen Wyatt, *O'Malley to Revive Smart Growth*, THE BALTIMORE SUN, Jan. 8, 2007.

<sup>82</sup> Wyatt, *supra* note 83. See Maryland State Archives, Office of Smart Growth, <http://www.msa.md.gov/msa/mdmanual/08conoff/coord/defunct/20sm.html> (last visited Apr. 18, 2007).

<sup>83</sup> Timothy B. Wheeler, *State Aid for Home Purchase is Revived; Some Say Changes Distort Intent of Anti-sprawl Effort*, THE BALTIMORE SUN, Sept. 18, 2006, at 1A.

<sup>84</sup> See Press Release, Office of the Governor, Governor Ehrlich Establishes Priority Places Strategy Executive Order (Oct. 9, 2003), *available at* [http://www.mdp.state.md.us/pdf/priority\\_places.pdf](http://www.mdp.state.md.us/pdf/priority_places.pdf).

<sup>85</sup> Priority Places, An Overview of Priority Places, <http://www.priorityplaces.com/> (last visited Apr. 18, 2007).

<sup>86</sup> Maryland Department of Planning Office of Smart Growth, Priority Places, What is the Priority Places Strategy?, <http://www.priorityplaces.com/priority.htm> (last visited Apr. 18, 2007).

<sup>87</sup> See MD. DEP'T OF PLANNING, FINAL REPORT OF THE DEVELOPMENT CAPACITY TASK FORCE (2004), *available at* <http://www.mdp.state.md.us/pdf/dctf/DCTF-Final.pdf>. The Task Force conducted a pilot study to "provide[ ] a



Governor Martin O'Malley, whose term began in 2007, has directed the Secretary of Planning to reestablish the Office of Smart Growth and has pledged to support open space preservation, improvements to water and wastewater systems, and sustainable farming efforts. He has also called for the state to "accept our responsibility in the fight against global warming by supporting stricter pollution emission standards for cars," and he has announced plans to encourage the development of renewable and alternative energy technologies.<sup>89</sup>

*F. Massachusetts: Fix-It-First and Transit-Oriented Development*

Building on the community development and preservation efforts of the Cellucci administration,<sup>90</sup> Governor Mitt Romney created the Massachusetts Office of Commonwealth Development ("OCD") in 2003.<sup>91</sup> The OCD oversees and coordinates the Office of Environmental Affairs, the Department of Housing and Community Development, the Office of Transportation, and certain programs within the Division of Energy Resources.<sup>92</sup>

The Massachusetts smart growth program places a heavy emphasis on transportation. In 2006, the Office of Transportation released a new highway design manual, hoped to be "the most progressive in the country[.]"<sup>93</sup> The guidebook, which covers streets and roads in addition to highways, contains sections on

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reasonable methodology for estimating residential development capacity within and across jurisdictions." MD. DEP'T OF PLANNING, *supra*, at 8.

<sup>88</sup> See Maryland Department of Planning, Development Capacity Task Force, [http://www.mdp.state.md.us/develop\\_cap.htm](http://www.mdp.state.md.us/develop_cap.htm) (last visited Apr. 18, 2007).

<sup>89</sup> Martin O'Malley, Governor, Maryland State of the State Address (Jan. 31, 2007), available at <http://www.gov.state.md.us/speeches/070131-StateOfState.html>.

<sup>90</sup> See Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, *supra* note 4.

<sup>91</sup> Massachusetts Executive Office of Environment Affairs, Smart Growth Toolkit, [www.mass.gov/envir/smart\\_growth\\_toolkit/pages/state-policy.html](http://www.mass.gov/envir/smart_growth_toolkit/pages/state-policy.html) (last visited Apr. 18, 2007) [hereinafter Smart Growth Toolkit].

<sup>92</sup> Massachusetts Office for Commonwealth Development, About Us, <http://www.mass.gov/?pageID=ocdhomepage=1&L0=Home&sid=Eocd> (follow "About Us" hyperlink) (last visited Apr. 18, 2007).

<sup>93</sup> Smart Growth Toolkit, *supra* note 91.

drainage and erosion control, shared use paths and greenways, landscaping and aesthetics, and traffic calming and management.<sup>94</sup> The Romney administration also oversaw the creation of the Long-Range Transportation Plan in 2006, a more than four-hundred page document that outlines the state's transportation objectives for the next twenty years.<sup>95</sup> The plan is based on several policies, among them preserving existing infrastructure and enhancing sustainability.<sup>96</sup> The plan stresses an important Massachusetts smart growth policy, Fix-It-First, which, incidentally, applies to various areas other than transportation.<sup>97</sup> According to this policy, transportation projects that preserve existing facilities will be prioritized. In addition to saving money by rehabilitating existing structures, "*Fix-It-First* can also be a way to enhance older communities . . . rather than encouraging new growth in open and undeveloped areas."<sup>98</sup>

The transportation plan also emphasizes the concept of transit-oriented development ("TOD"), which "seeks to promote increased [mass] transit ridership by creating development around transit centers, thereby reducing automobile dependence."<sup>99</sup> Suggestions included in the plan include encouraging mixed-use development around transit centers and making these areas more walkable.<sup>100</sup> The Transit-Oriented Development Infrastructure and Housing Support Program, passed in 2004, provides one method through which these goals can be promoted; it provides funding for such projects as sidewalk improvements, bicycle facilities, housing facilities, and parking areas located near mass transit stations.<sup>101</sup> Chapter 40R, adopted in 2004, is another important tool used to

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<sup>94</sup> MASS. HIGHWAY DEP'T, PROJECT DEV. & DESIGN GUIDE, TABLE OF CONTENTS, [http://www.vhb.com/mhdGuide/pdf/Table\\_of\\_Contents\\_a.pdf](http://www.vhb.com/mhdGuide/pdf/Table_of_Contents_a.pdf). (last visited Apr. 18, 2007).

<sup>95</sup> MASS. EXECUTIVE OFFICE OF TRANSP., THE COMMONWEALTH OF MASSACHUSETTS LONG-RANGE TRANSPORTATION PLAN, *available at* <http://www.eot.state.ma.us/downloads/longrangeplan/EOTFINAL011107.pdf> (last visited Apr. 18, 2007).

<sup>96</sup> *Id.* at 2.

<sup>97</sup> *Id.* at iv.

<sup>98</sup> *Id.* at 70, 73.

<sup>99</sup> *Id.* at 189.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 190.

promote transit-oriented development: it encourages municipalities to make zoning changes in order to encourage denser development around transit stations, especially in suburban towns with commuter rail stations.<sup>102</sup>

The Massachusetts smart growth program also emphasizes affordable housing. The Commercial Area Transit Node Housing Program provides funds for housing developments in which at least half of the units are affordable and which are located in commercial areas or near transit stations.<sup>103</sup> The MassHousing Priority Development Fund has also allocated \$25 million for transit-oriented-design or smart growth developments and \$22 million for mixed-income housing developments located near transit stations.<sup>104</sup>

Other smart growth programs in Massachusetts include the Governor's Smart Growth Leadership Award program, the Priority Development Fund, the Smart Growth Technical Assistance Grant Program, regional "Smart Growth Seminars," and an affordable housing tax credit.<sup>105</sup>

It should be noted that the recently elected Governor, Deval Patrick, is also a supporter of smart growth. In his campaign materials, he pledged that his administration

will make transportation policy a centerpiece of "smart growth," and will work with local governments and developers on incentives to redevelop under-used parcels of land near public transportation. [His administration] will work closely with local and regional land trusts and other partners to protect and manage natural areas and open space . . . .<sup>106</sup>

He reiterated this position in his 2007 State of the State Address.

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<sup>102</sup> MASS. EXECUTIVE OFFICE OF TRANSP., *supra* note 95, at 190-91.

<sup>103</sup> Smart Growth Toolkit, *supra* note 91.

<sup>104</sup> MASS. HOUS. FIN. AGENCY, PRIORITY DEVELOPMENT FUND, *available at* [http://www.masshousing.com/portal/server.pt/gateway/PTARGS\\_0\\_210\\_410\\_0\\_0\\_18/PDF\\_Brochure.pdf](http://www.masshousing.com/portal/server.pt/gateway/PTARGS_0_210_410_0_0_18/PDF_Brochure.pdf) (last visited Apr. 18, 2007).

<sup>105</sup> Smart Growth Toolkit, *supra* note 91.

<sup>106</sup> Deval Patrick on the Issues, Deval Patrick on Environment, [http://www.ontheissues.org/Governor/Deval\\_Patrick\\_Environment.htm](http://www.ontheissues.org/Governor/Deval_Patrick_Environment.htm) (last visited Apr. 24, 2007).

*G. Mississippi: Rebuilding After Katrina*

Shortly after hurricanes Katrina and Rita hit the gulf coast in 2005, Mississippi Governor Haley Barbour established the Commission on Recovery, Rebuilding and Renewal. As he noted, “[t]his is a once-in-a-lifetime opportunity to rebuild the right way . . . .”<sup>107</sup>

The Commission organized a weeklong planning workshop called the Mississippi Renewal Forum.<sup>108</sup> The charrette-style planning event attracted local government officials, architects, planners and other professionals, and community and non-profit representatives.<sup>109</sup> The result of these meetings was a series of reports designed to guide the region’s redevelopment.<sup>110</sup> The reports address issues related to architecture, economic strategies, regional and environmental planning, social problems, and transportation.<sup>111</sup>

One of the more distinctive aspects of the Mississippi Renewal Forum was that it adopted plans based on the SmartCode, a form-based model zoning code “that incorporates Smart Growth and New Urbanism principles.”<sup>112</sup> The SmartCode requires land to be

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<sup>107</sup> Governor Haley Barbour, *The Mississippi Renewal Forum: From Tragedy to Opportunity*, Oct. 11, 2005, available at <http://www.mississippirenewal.com/info/governor.html>.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*; Mississippi Renewal Forum, Governor’s Commission on Recovery, Rebuilding and Renewal, <http://www.mississippirenewal.com/info/people.html> (last visited Apr. 18, 2007). “Charrette” is a term used by architects and new urbanists to describe a planning process that encourages creativity and brainstorming by joining professionals with the public and other diverse interests in workshops and open houses. The National Charrette Institute suggests that charrettes should be at least four days long, include any interested parties, and encourage collaboration by using feedback loops. See National Charrette Institute, What is a Charrette?, <http://www.charretteinstitute.org/charrette.html> (last visited Apr. 18, 2007).

<sup>110</sup> Mississippi Renewal Forum, Current Ideas: Final Team Reports, <http://www.mississippirenewal.com/info/plansReports.html> (last visited Apr. 18, 2007).

<sup>111</sup> *Id.* Specific reports were also created for eleven individual gulf coast communities. *Id.*

<sup>112</sup> MISS. RENEWAL FORUM, GOVERNOR’S COMMISSION: RECOVERY, REBUILDING, RENEWAL: CODES 2, available at [http://www.mississippirenewal.com/documents/Rep\\_Codes.pdf](http://www.mississippirenewal.com/documents/Rep_Codes.pdf) (last visited Apr. 18, 2007) [hereinafter

mapped and divided into transects based on its character (natural, rural, suburban, urban, urban center, or urban core). Planning guidelines based on the building forms that are appropriate within each transect are then shaped so as to guide development that will preserve and enhance each transect's character.<sup>113</sup> Participants in the Mississippi Renewal Forum felt that using a zoning code based on building forms and land attributes, rather than a more traditional system based on permitted uses and densities, would best encourage the rebuilding of gulf coast communities in a manner that would preserve their unique character:

Before the 2005 hurricane, the local character of coastal Mississippi had already been compromised by "the long hurricane"—the destructive development pattern known as sprawl. Katrina wiped out much of the commercial sprawl . . . , allowing towns to plan for better form, higher quality, and more green space this time around . . . . The best way to do this is to code future development according to the Transect.<sup>114</sup>

Communities that participated in the Mississippi Renewal Forum have taken several approaches to implementing the SmartCode. In Long Beach and Pass Christian, for example, the SmartCode will be established as a parallel zoning ordinance, leaving the underlying use-based zoning in place and allowing developers to choose between the two systems.<sup>115</sup> Other cities have adopted SmartCode provisions that apply only to certain areas,

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RENEWAL CODES]. *See also* MISS. RENEWAL FORUM, MODEL SMART GROWTH DEVELOPMENT CODE FOR MISSISSIPPI GULF COAST CITIES AND COUNTIES, available at [http://www.mississippirenewal.com/documents/Rep\\_MSModelCode.pdf](http://www.mississippirenewal.com/documents/Rep_MSModelCode.pdf) (providing more detailed codes) [hereinafter MODEL SMART GROWTH DEVELOPMENT CODE].

<sup>113</sup> RENEWAL CODES, *supra* note 112, at 3-4. The *Mississippi Renewal Forum Code Report* also contains proposed statutory amendments to explicitly authorize form-based and transect-based zoning. *Id.* at 23-25. Were they to pass, Mississippi would become the second state (after California) to authorize this type of planning.

<sup>114</sup> MODEL SMART GROWTH DEVELOPMENT CODE, *supra* note 112.

<sup>115</sup> Michael Newsom, *L.B. Is Closer to SmartCode: Developers May be Able to Choose*, THE SUN HERALD (Biloxi, Miss.), Feb. 28, 2007; Michael A. Bell, *O.S. Holds SmartCode Workshop: Hearing to be Held Before Adoption*, THE SUN HERALD (Biloxi, Miss.), Feb. 1, 2007.

such as downtowns and urban centers.<sup>116</sup> In still other areas, skepticism and inaction has delayed the adoption of any SmartCode regulations.<sup>117</sup>

While supporting the new urbanist ideals of the Mississippi Renewal Forum, the Governor's Commission on Recovery, Rebuilding and Renewal has also issued its own reports.<sup>118</sup> As part of its policy recommendations, the Commission created a list of "Guiding Principles for Rebuilding the Mississippi Gulf Coast." The list emphasizes the importance of economic vitality, environmental protection, the promotion of social and intergenerational equity, high quality of life standards, institutionalizing hazard resilience, preserving aesthetic and historical resources, and encouraging public participation.<sup>119</sup>

Governor Barbour has also created a Comprehensive Plan for Gulf Coast Housing,<sup>120</sup> and the Mississippi Department of Transportation has developed a Gulf Coast Transportation Recovery internet site to communicate transportation updates.<sup>121</sup>

#### *H. New Jersey: Emphasizing Building Rehabilitation*

New Jersey's smart growth program is coordinated by the Office of Smart Growth, which promotes mixed-use development in town centers, open space preservation, locating new facilities in

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<sup>116</sup> Joshua Norman, *Two Towns, One Bounds: SmartCode Consultant Helping Gulfport, Pass Adopt System*, THE SUN HERALD (Biloxi, Miss.) Jan. 29, 2007 (noting that Moss Point's SmartCode applies only to its downtown area).

<sup>117</sup> Tom Wilemon, *Mayor Pushing Rebuilding Plan: Wants City to be Eligible for Grants*, THE SUN HERALD (Biloxi, Miss.), Dec. 16, 2006; Ryan Lafontaine, *Residents Fired up About Designs: City Leaders Are No-Shows at Meetings*, THE SUN HERALD (Biloxi, Miss.) June 28, 2006 (Waveland).

<sup>118</sup> THE GOVERNOR'S COMM'N ON RECOVERY, REBUILDING AND RENEWAL, AFTER KATRINA: BUILDING BACK BETTER THAN EVER, available at <http://www.governorscommission.com/> (last visited Apr. 18, 2007) [hereinafter AFTER KATRINA].

<sup>119</sup> *Id.* at 154.

<sup>120</sup> Governor's Office, Governor Barbour's Comprehensive Plan for Gulf Coast Housing (Sept. 21, 2006), <http://www.governorbarbour.com/Recovery/news/2006/sep/GHBcomprehensivehousingplan.htm>.

<sup>121</sup> Mississippi Department of Transportation, Gulf Coast Transportation Recovery, <http://www.gomdot.com/newsapp/transrecovery.aspx> (last visited Apr. 18, 2007).



walkable areas, and redeveloping brownfield sites. The Office coordinates the operations of other state agencies and works with local governments and developers.<sup>122</sup>

Like Delaware, New Jersey's 2001 State Development and Redevelopment Plan<sup>123</sup> designates land as falling into one of five planning areas: metropolitan, suburban, fringe, rural, or environmentally sensitive.<sup>124</sup> These areas have been mapped,<sup>125</sup> and the growth policies associated with each area have been comprehensively described in order to guide municipal planning. Municipalities have further been instructed to include policy statements concerning the state plan into their comprehensive plans.<sup>126</sup>

A variety of state programs help to implement the state's smart growth policies, including the Main Street New Jersey community assistance program, the Neighborhood Preservation grant and loan program, the Neighborhood Revitalization Tax Credit Program, several affordable housing assistance and production programs, advisory programs on brownfields redevelopment, community design and TDRs, and the Smart Future Planning Grants program.<sup>127</sup> The smart growth policies and programs also receive support from New Jersey's recently elected governor, Jon Corzine.<sup>128</sup>

New Jersey's Rehabilitation Subcode also plays an important part in encouraging urban redevelopment and rehabilitating

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<sup>122</sup> Ben Spinelli, New Jersey Department of Community Affairs: Office of Smart Growth, A Message from the Acting Executive Director, <http://www.nj.gov/dca/osg/team/executivedirector.shtml> (last visited Apr. 18, 2007).

<sup>123</sup> Office of Smart Growth, New Jersey Department of Community Affairs, New Jersey State Development and Redevelopment Plan, <http://www.nj.gov/dca/osg/plan/stateplan.shtml> (last visited Apr. 18, 2007).

<sup>124</sup> *Id.*

<sup>125</sup> New Jersey State Planning Commission, Policy Map of the New Jersey State Development and Redevelopment Plan, <http://www.nj.gov/dca/osg/plan/stateplan/mapstateplan.shtml> (last visited Apr. 18, 2007).

<sup>126</sup> N.J. STAT. ANN. § 40:55D-28(b)(14)(d) (West Supp. 2006).

<sup>127</sup> N.J. DEP'T OF CMTY. AFFAIRS, PROGRAMS BOOK 17, 22, 24, 39-41 (2006), available at <http://www.nj.gov/dca/programsbook/06programsbook.pdf>.

<sup>128</sup> Interview by New Jersey Future with Jon Corzine, Governor-Elect of New Jersey (2005), available at <http://www.njfuture.org/index.cfm?ctn=9t45e1o30v9g&emn=5u92y86g2h42&fuseaction=user.item&ThisItem=516>.

housing stock. Many state building codes target new construction and require rehabilitation projects to bring older buildings up to current codes, which may discourage developers from investing in older properties which remain safe and viable. In many cases, technical requirements for new structures simply cannot be met by renovating older buildings.<sup>129</sup> Developers may also be hesitant to begin rehabilitation projects given the difficulty to predict the cost of bringing properties up to code, and developers may view requirements that do not affect safety as penalties. To address these problems, the Rehabilitation Subcode was developed to apply specifically to redevelopment properties and to remove building code impediments to their rehabilitation. Just a year after its implementation, construction indicators showed that rehabilitation rates had increased, especially within urban areas.<sup>130</sup> New Jersey received the Innovation in Government Award for its subcode in 1998, and several other states have since adopted similar codes, including Maryland, North Carolina, New York, Minnesota, and Rhode Island.<sup>131</sup>

### *I. Oregon: A Leader in Smart Growth*

Oregon has clearly been a leader in the development of statewide land use planning programs, beginning in 1973 with the creation of the Land Conservation and Development Commission and the adoption of statewide planning goals. The fourteenth goal, “[t]o provide for an orderly and efficient transition from rural to urban land use[,]” requires local governments to create urban growth boundaries (“UGBs”) to “identify and separate urbanizable land from rural land.”<sup>132</sup> Oregon’s UGBs generally function

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<sup>129</sup> N.J. ADMIN. CODE § 5:23-6 (2007), available at <http://www.nj.gov/dca/codes/rehab/index.shtml>.

<sup>130</sup> William M. Connolly, *Rules That Make Sense—New Jersey’s Rehabilitation Subcode*, available at <http://www.state.nj.us/dca/codes/rehab/pioneerart.shtml> (last visited Apr. 18, 2007).

<sup>131</sup> Raymond J. Burby et al., *Encouraging Residential Rehabilitation with Building Codes: New Jersey’s Experience*, 72 J. AM. PLANNING ASS’N 183, 185-86 (2006), available at <http://www.planning.org/japa/pdf/JAPABurby06.pdf>.

<sup>132</sup> OR. STATEWIDE PLANNING GOALS & GUIDELINES, GOAL 14: URBANIZATION (Apr. 28, 2006), available at <http://www.lcd.state.or.us/LCD/docs/goals/goal14.pdf> (Goal 14 was amended in 2005, but its basic requirements

through restrictive zoning, so that land beyond the boundaries will not be considered for development. The boundaries are drawn to accommodate for future growth and are updated regularly. In order for the boundary to be expanded or modified, a local government must demonstrate a need for additional urban areas that cannot be met by land already within the boundary.<sup>133</sup>

UGBs have since been adopted in other states and metropolitan areas, being seen as one of the most effective urban containment tools to have been developed.<sup>134</sup> However, as the experience in Oregon demonstrates, UGBs may be difficult to implement and maintain, as their establishment and expansion (or non-expansion) requires intense political cooperation between various governmental entities and community groups.<sup>135</sup> Retaining UGB systems may be just as difficult given the strong opposition to purely regulatory solutions to planning and development problems.<sup>136</sup> Indeed, Oregon's UGB system has been incessantly under attack since it was created.<sup>137</sup> UGBs have also been

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as related to this discussion remain the same.). *See* OR. STATEWIDE PLANNING GOALS & GUIDELINES, GOAL 14: URBANIZATION (Dec. 13, 2005), *available at* <http://www.lcd.state.or.us/LCD/docs/goals/oldgoal14.pdf>; 1000 Friends of Or. v. Land Conservation & Dev. Comm'n, 724 P.2d 268, 276 (Or. 1986).

<sup>133</sup> *See* Metro, Urban Growth Boundary, <http://www.metro-region.org/article.cfm?articleID=277> (last visited Apr. 18, 2007).

<sup>134</sup> *See* ROLF PENDALL & JONATHAN MARTIN, HOLDING THE LINE: URBAN CONTAINMENT IN THE UNITED STATES 20 (2002), *available at* <http://www.brookings.edu/es/urban/publications/pendallfultoncontainment.pdf>. UGBs are similar to urban service boundaries, which demarcate where urban services, such as water and sewer, will stop. Often accompanying urban service boundaries are Adequate Public Facilities Ordinances, which require developments to occur in areas where they will be supported by adequate public infrastructure and services. Also related to UGBs, greenbelts have been established in a number of cities, most notably in Boulder, Colorado. A greenbelt is an area of open or natural space encircling a metropolitan region in which development is effectively barred. *Id.* at 4-5. Beyond Oregon, UGBs are required in Washington State and have been enacted in a number of metropolitan regions across the country, especially in the mid-atlantic region and in California. *Id.* at 7, 8, 14. Minnesota, Florida, Tennessee, and Maryland all require some form of urban service areas to be designated. *Id.* at 7.

<sup>135</sup> JOHN M. DEGROVE, PLANNING POLICY AND POLITICS: SMART GROWTH AND THE STATES 20, 31-40 (Lincoln Institute of Land Planning 2003).

<sup>136</sup> *See id.*

<sup>137</sup> *See id.* at 14-15, 31-40.

criticized for leading to increased housing prices and gentrification, although the methodologies and results of these reports are highly debated.<sup>138</sup>

Unfortunately, the viability of Oregon's land use system, particularly its UGBs, has been placed in question due to the passage of Ballot Measure 37 in 2004. Imitating previous efforts to halt restrictive land use regulations, Measure 37 requires governments to either compensate property owners for decreases in the value of their land due to land use regulations or to waive the contested restrictions.<sup>139</sup> In effect, this means that if a property was down-zoned as a result of the drawing of a UGB, the owner could demand compensation or waiver of the ordinance. Since the state and local governments generally do not have the funds to compensate these types of claims, a more likely result would be the waiver of the zoning ordinance, effectively defeating the purpose of the UGB.<sup>140</sup>

Whatever may be the impacts of Measure 37, Oregon's planning program still incorporates a variety of innovative smart growth tools. The Transportation and Growth Management Program, for example, encourages the implementation of a variety of smart transportation planning techniques. In addition to providing a wealth of information, grants and consultants are available for transportation planning.<sup>141</sup> The TGM Code Assistance

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<sup>138</sup> PENDALL & MARTIN, *supra* note 134, at 29-31.

<sup>139</sup> See OR. REV. STAT. § 197.352 (2005).

<sup>140</sup> Measure 37, of course, inhibits Oregon's ability to plan for land use and development beyond the area of UGBs. Subdivision ordinances, zoning regulations not related to UGBs, and a host of other types of land use regulations are all susceptible to being the basis for Measure 37 claims. See Patricia E. Salkin & Amy Lavine, *Measure 37 and a Spoonful of Kelo: A Recipe for Property Rights Activists at the Ballot Box*, 38 THE URBAN LAW. 1065, 1066-67; see also Nick Budnick, *Measure 37 Hammers Portland: Some of City's Richest Make Land-Use Claims, Which Now Total \$250 Million*, THE PORTLAND TRIBUNE, Dec. 19, 2006, available at [http://www.portlandtribune.com/news/story.php?story\\_id=116649078192709100](http://www.portlandtribune.com/news/story.php?story_id=116649078192709100).

<sup>141</sup> Oregon Transportation and Growth Management, Oregon Department of Transportation and Oregon Department of Land Conservation and Development, About Us, [http://www.oregon.gov/LCD/TGM/about\\_us.shtml](http://www.oregon.gov/LCD/TGM/about_us.shtml) (last visited Apr. 18, 2007). Grants are available for projects related to integrated land use and transportation planning, bicycle and pedestrian improvements, and projects addressing safety issues related to children who walk or bicycle to

program has also created several model codes, including a smart development code, a model development code for small cities, an infill and redevelopment code, and the mixed-use development code. Code assistance has been provided to more than forty cities.<sup>142</sup> The Quick Response Program also provides local governments with practical assistance in applying smart growth principles; the program “[p]rovides free conceptual site planning, urban design, transportation planning, and economic and market feasibility analysis for developers and local governments to address short-range development issues requiring immediate attention[.]”<sup>143</sup> Oregon also offers programs related to affordable housing,<sup>144</sup> brownfield cleanups, enterprise zones, and other aspects of community development.<sup>145</sup>

*J. Pennsylvania: Growing Greener*

Pennsylvania’s Municipality Planning Code (“MPC”) was amended in 2003 to enhance Pennsylvania’s smart growth objectives.<sup>146</sup> One of the most striking additions of the 2003 MPC

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school. Additionally, Oregon offers an energy tax credit for those who invest in energy conservation and energy-efficient transportation projects. Oregon Transportation and Growth Management, Grants and Incentives, <http://www.oregon.gov/LCD/TGM/grants.shtml> (last visited Apr. 18, 2007).

<sup>142</sup> Oregon Transportation and Growth Management, Oregon Department of Transportation and Oregon Department of Land Conservation and Development, Code Assistance, <http://www.oregon.gov/LCD/TGM/codeassistance.shtml> (last visited Apr. 18, 2007).

<sup>143</sup> Oregon Transportation and Growth Management, Oregon Department of Transportation and Oregon Department of Land Conservation and Development, Quick Response, <http://www.oregon.gov/LCD/TGM/quickresponse.shtml> (last visited Apr. 18, 2007).

<sup>144</sup> Oregon Transportation and Growth Management, Oregon Department of Transportation and Oregon Department of Land Conservation and Development, OHCS Programs, [http://www.oregon.gov/OHCS/COM\\_OHCSProgramsOverview.shtml](http://www.oregon.gov/OHCS/COM_OHCSProgramsOverview.shtml) (last visited Apr. 18, 2007).

<sup>145</sup> Oregon Economic & Community Development Department, Financial Assistance Programs, <http://econ.oregon.gov/ECDD/finance.shtml> (last visited Apr. 18, 2007).

<sup>146</sup> The MPC now requires comprehensive plans to address planning for current and future development, current and expected housing needs, the protection of natural and historic areas, and the provision of transportation and community facilities and services. 53 PA. CONS. STAT. ANN. § 10604 (West



reform was the inclusion of the Traditional Neighborhood Development designation.<sup>147</sup> This new section is intended

to encourage innovations in residential and nonresidential development and renewal which makes use of a mixed-use form of development so that the growing demand for housing and other development may be met by greater variety in type, design, and layout of dwellings and other buildings and structures and by the conservation and more efficient use of open space . . . .<sup>148</sup>

The legislation lists the objectives of traditional neighborhood developments as establishing walkable communities complete with open and public spaces, minimizing traffic congestion and the reliance on cars, encouraging the location of shopping and entertainment within walking distance of residences, fostering community character, and providing a range of housing options.<sup>149</sup> Municipalities are also explicitly granted the authority to establish standards for renewable energy systems and energy-conserving building design within traditional neighborhood development areas.<sup>150</sup> The MPC amendments also included several important provisions related to intergovernmental cooperative planning.<sup>151</sup> These aspects of the Code encourage neighboring municipalities to ensure that their development is compatible and coordinated. Significantly, local governments are authorized to combine their resources in providing transportation and other public services,<sup>152</sup>

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1997). An energy conservation plan element is optional. County comprehensive plans must additionally consider important natural resources, developments with regional impacts, and the protection of agricultural and historic resources. Plans must describe the relationship between these planning elements and discuss strategies for their implementation and their compatibility with plans in neighboring areas. 53 PA. CONS. STAT. ANN. §§ 10704-A, 10706-A (West Supp. 2006). Local governments are also authorized to enact TDR programs and to assess impact fees on developers for certain offsite public transportation improvements. *Id.* § 10706-A.

<sup>147</sup> *Id.* § 10701-A.

<sup>148</sup> *Id.* § 10701-A(a)(2).

<sup>149</sup> *Id.* § 10701-A(b).

<sup>150</sup> *Id.* § 10706-A(g)(1).

<sup>151</sup> *Id.* § 10801-A(a).

<sup>152</sup> *Id.* § 10604.



which are often more efficiently administered in cooperation with neighboring municipalities.<sup>153</sup> Additionally, the MPC authorizes local governments to enter into formal implementation agreements concerning these cooperative efforts.<sup>154</sup>

Aside from these changes to the MPC, Pennsylvania has several other smart growth programs. The Growing Greener program, which was signed into law in 1999, provides funding for farm protection, open space preservation, state park maintenance, abandoned mine reclamations, watershed protection and restoration, community programs addressing land use, and upgrades and repairs to water and sewer systems.<sup>155</sup> Due to budget cuts that affected the program, Growing Greener II was established in 2005. The new program authorized the issuance of bonds which will provide \$625 million to be spent over six years for environmental protection and restoration, the development of advanced energy projects, and investments in housing and mixed-use redevelopment projects. Growing Greener II also includes an environmental block grant program allowing counties to designate up to \$90 million for local priorities, and it provides short-term funding for the financially troubled Land Recycling Program.<sup>156</sup>

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<sup>153</sup> PA. STATE PLANNING BD., 2006 REPORT 38 (2006).

<sup>154</sup> 53 PA. CONS. STAT. ANN. § 10801-A (West 1997).

<sup>155</sup> The Growing Greener program was prompted by a 1998 report by the 21st Century Environmental Commission which "identified land use to be the most pressing environmental priority facing the Commonwealth." Ed Bolen, Kara Brown et al., *Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 145, 208-10 (2001-2002); Exec. Order No. 1999-1 (Pa. 1999), available at <http://www.oa.state.pa.us/oac/cwp/view.asp?A=351&Q=117638>.

<sup>156</sup> Growing Greener, Growing Our Communities, Growing Our Economy, <http://growinggreener2.com> (last visited Apr. 18, 2007); Kathleen A. McGinty, Secretary, Department of Environmental Protection, Before the House Environmental Resources and Energy Committee (Feb. 10, 2004), available at <http://www.depweb.state.pa.us/dep/cwp/view.asp?a=3&q=474631>. The Pennsylvania DEP's Land Recycling Program was established by three acts passed in 1995: the Land Recycling and Environmental Remediation Standards Act, the Economic Development Agency Fiduciary and Lender Environmental Liability Protection Act, and the Industrial Sites Environmental Assessment Act. The legislation was intended to encourage voluntary cleanups and redevelopment of contaminated commercial and industrial sites by creating uniform cleanup standards and provide financial assistance and liability protections to owners or

Although requiring further enabling legislation, the Act also authorizes a Historic Preservation Tax Credit and a Green Sales Tax Holiday.<sup>157</sup>

Pennsylvania has also created Keystone Opportunity Zones (“KOZ”) and Keystone Innovation Zones (“KIZ”) throughout the state. The KOZ program designated areas with poor economic and socioeconomic conditions and greatly reduced the taxes within these areas in order to spur investment and increased development.<sup>158</sup> The KIZ program, on the other hand, targets areas located near higher educational institutions and provides funding and assistance for research and development partnerships between such programs and local businesses. The program is intended to attract high-tech businesses and lead to job creation.

#### *K. Wisconsin: Smart Growth Areas*

Wisconsin’s smart growth program is based on changes made to comprehensive planning requirements between 1999 and 2001.<sup>159</sup> Like Maryland’s priority funding areas, Wisconsin requires local governments to identify “smart growth areas,” which are defined as areas “that will enable the development and redevelopment of lands with existing infrastructure and . . .

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purchasers of brownfield sites. See PA. DEP’T OF ENVTL. PROT., PENNSYLVANIA LAND RECYCLING PROGRAM ANNUAL REPORT FY 2003-2004 1-2 (2005).

<sup>157</sup> Pennsylvania Department of Environmental Protection, What is Growing Greener II?, <http://www.depweb.state.pa.us/growinggreener/cwp/view.asp?a=3&q=481288&growinggreenerNav=%7C> (last visited Apr. 18, 2007).

<sup>158</sup> Since 1999, the KOZ program has been responsible for the creation or retention of more than 22,000 jobs. Keystone Opportunity Zones, <http://koz.newpa.com> (last visited Apr. 18, 2007). However, critics have suggested that some of the zones may be too large, encompassing undeveloped land outside of urban areas and thereby giving developers a tax-free route to the development of these spaces. Other critics have claimed that the zones may be taken advantage of by wealthy developers without providing any real benefits to the residents most in need. James M. McElfish, Jr., *Taxation Effects on Land Development and Conservation*, 22 TEMP. ENVTL. L. & TECH. J. 139, 145 (2004); GOOD JOBS FIRST: SMART GROWTH FOR WORKING FAMILIES, SUBSIDIES AND SPRAWL, [http://www.goodjobsfirst.org/smart\\_growth/subsidies\\_sprawl.cfm](http://www.goodjobsfirst.org/smart_growth/subsidies_sprawl.cfm) (last visited Apr. 18, 2007).

<sup>159</sup> Wisconsin Department of Natural Resources, Smart Growth: Wisconsin’s Planning Law, <http://dnr.wi.gov/org/es/science/landuse/smart/SGlaw.htm> (last visited Apr. 18, 2007).

services . . . or that will encourage efficient development patterns that are both contiguous to existing development and at densities which have relatively low municipal, state, government, and utility costs.”<sup>160</sup> The legislation also required the state to develop model ordinances for traditional neighborhood developments and conservation design subdivisions.<sup>161</sup> Cities and villages with populations of more than 12,500 were directed to adopt ordinances similar to the state models before January 1, 2002.<sup>162</sup>

Smart growth areas are intended to encompass areas where development should be encouraged, and as part of this encouragement, the designation is taken into account in the award of grants. However, whereas Maryland planners have been criticized for their discretion in awarding development grants, which are supposed to be prioritized for PFAs, Wisconsin determines priority for projects through a point system, which adds an element of objectivity to the process. The point system measures a project’s effect on neighboring communities (30%), its coherency and consistency in furthering required comprehensive plan elements (25%), the project’s relation to smart growth areas (20%), whether the local government has implemented related ordinances (12%), the level of public participation in the planning process (12%), and how quickly the project is expected to be completed (1%).<sup>163</sup> Local governments that coordinate their land use planning efforts are also eligible for additional grant money.<sup>164</sup> By 2004, more than 600 local governments had received almost \$10 million in grants to help complete their comprehensive plans.<sup>165</sup>

Governor Jim Doyle noted in his 2007 State of the State Address that more than 160,000 acres of natural lands have been permanently preserved since 2003, and he urged the legislature to

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<sup>160</sup> WIS. STAT. § 16.965(1)(b) (2003).

<sup>161</sup> *Id.* § 66.1027(2)(a).

<sup>162</sup> *Id.* § 66.1027(3).

<sup>163</sup> LEGISLATIVE REFERENCE BUREAU, WISCONSIN BRIEFS 2 (2004), available at <http://www.legis.state.wi.us/lrb/pubs/wb/04wb7.pdf>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 2-3.

reauthorize the Stewardship Program. He also announced the creation of the Governor's Task Force on Global Warming.<sup>166</sup>

### III. STATE SMART GROWTH TRENDS AND OPPORTUNITIES

There are a number of trends evident from a review of the various state smart growth programs. For example, the "new" smart growth is framed in terms of sustainability. Economic development, natural environment protection and preservation, public health, affordable housing, social justice, public participation, energy, and quality of life are the cornerstones of most state programs. In 2007, in particular, a number of governors have specifically emphasized green development as a core value and priority of smart growth. What follows is a discussion of other cross-state observations regarding smart growth trends and opportunities.

#### *A. Benchmarking Smart Growth: Is It Working?*

Benchmarking refers to tools that help state and local governments measure the effects and success of smart growth programs. These measurements are necessary to ensure that smart growth policies adequately address the problems that they are intended to solve and to provide suggestions as to how to modify those policies if they are not successful.<sup>167</sup> However, deciding which factors to evaluate in order to measure the success of smart growth legislation may be difficult, given the breadth of issues included in these programs. Still, however, this process of establishing indicators may have other positive effects, as the debate over which factors are relevant often initiates invaluable

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<sup>166</sup> Press Release, Office of Governor Jim Doyle, State of the State Address, (2007), *available at* [http://www.wisgov.state.wi.us/journal\\_media\\_detail.asp?locid=19&prid=2508](http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=2508).

<sup>167</sup> The necessity of this type of benchmarking program is illustrated well by Maryland's smart growth programs, which did not include similar benchmarking procedures. Ten years after the program's inception the state has been criticized for failing to adapt the programs in response to their failures; had benchmarking been included in the original legislation, its shortfalls may have come to light earlier in the program's implementation. *See supra* notes 78-80 and accompanying text.

discussions concerning just what the objectives and values of smart growth programs should be.<sup>168</sup> Additionally, monitoring programs increase state and local governments' accountability.<sup>169</sup>

The Oregon Benchmarks program, established in 1989, is one of the oldest statewide benchmarking programs in the country.<sup>170</sup> Created as part of an economic planning initiative, the ninety indicators measure various aspects of economic development, education, civic engagement, social support, public safety, community development, and the environment.<sup>171</sup> Benchmarking reports have been relied upon by the governor and the legislators in developing and adapting state policies and budget priorities,<sup>172</sup> and the program has served as a model for other states and local governments.<sup>173</sup> Oregon's experience with benchmarking has suggested that the goals of the benchmarking system must be clearly defined, a formal and independent government entity should be established to oversee and monitor the indicators, indicators should be chosen for their ability to lead decision-making, and the indicators should be regularly evaluated for their effectiveness.<sup>174</sup> Benchmarking initiatives have been introduced in Arizona,<sup>175</sup> Minnesota,<sup>176</sup> and Maine.<sup>177</sup>

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<sup>168</sup> SUSTAINABLE SEATTLE, SUSTAINABLE SEATTLE AND INDICATORS, [http://www.sustainableseattle.org/Programs/RegionalIndicators/index\\_html](http://www.sustainableseattle.org/Programs/RegionalIndicators/index_html) (last visited Apr. 18, 2007).

<sup>169</sup> Geritt-Jan Knaap, Professor & Director, Nat'l Ctr. For Smart Growth Research & Educ., Univ. of Md., Presented at "Planning Reform in the New Century," Washington University Law School, A Requiem for Smart Growth? 30 (Dec. 3, 2004), available at [http://www.smartgrowth.umd.edu/research/pdf/Knaap\\_Requim\\_022305.pdf](http://www.smartgrowth.umd.edu/research/pdf/Knaap_Requim_022305.pdf).

<sup>170</sup> Richard D. Young, *An Overview: Oregon Shines II and Oregon Benchmarks 1*, available at <http://www.ipspr.sc.edu/scip/publications/Final%20Oregon%20Shines%20II%20and%20Oregon%20Benchmarks.pdf> (last visited Apr. 18, 2007).

<sup>171</sup> State of Oregon: Oregon Progress Board, 2005 Benchmark Performance Report, [http://www.oregon.gov/DAS/OPB/2005report/obm\\_list.shtml](http://www.oregon.gov/DAS/OPB/2005report/obm_list.shtml) (last visited Apr. 18, 2007).

<sup>172</sup> Young, *supra* note 170, at 1-3.

<sup>173</sup> *Id.* at 1.

<sup>174</sup> *Id.* at 7-10.

<sup>175</sup> Arizona's Growing Smarter Oversight Council has been tracking the success of its smart growth programs since 2002. The Performance Measures Subcommittee "establish[es] the potential criteria and process by which



Benchmarking programs have also been established in various cities and regional areas, often by nonprofit community organizations. The system used in Seattle has served as a model for many other cities and has received a number of awards and recognitions. Created in 1991, Sustainable Seattle<sup>178</sup> tracks forty long-term indicators, and reports from 1995 and 1998 helped the city to reassess its growth management programs.<sup>179</sup> The organization relied on experts to determine appropriate indicators and also solicited public input on indicators that reflect the community's values. As criteria for the indicators, Sustainable Seattle suggests that they should be chosen based on their relevancy, their reflection of public values, how attractive they are to the media, whether they are statistically measurable and scientifically defensible, and how reliable and leading they are.<sup>180</sup> Indicator programs to guide planning policies have also been

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Arizona's Growing Smarter Act will be monitored and measure[d] for successful implementation." ARIZONA SECOND ANNUAL REPORT, *supra* note 13, at 8. Most of the work of the Performance Measures Subcommittee has, until now, focused on measuring the success of implementing the programs. A 2003 presentation by the Oversight Council focused on these results, and offered suggestions for improving the implementation and planning process. ARIZONA THIRD ANNUAL REPORT, *supra* note 19, at 15-20.

<sup>176</sup> See Minnesota Department of Administration/Office of Geographic and Demographic Analysis, Minnesota Milestones Indicators List, <http://www.mnp.lan.state.mn.us/mm/goal.html> (last visited Apr. 18, 2007).

<sup>177</sup> See Maine Economic Growth Council, <http://mdf.org/megc/index.html> (last visited Apr. 18, 2007).

<sup>178</sup> Sustainable Seattle, Programs, <http://www.sustainableseattle.org/Programs/RegionalIndicators/1998IndicatorsRpt.pdf> (last visited Apr. 18, 2007).

<sup>179</sup> *Id.* Some of the indicators used by Sustainable Seattle include: solid waste generated and recycled, vehicle miles traveled, renewable and nonrenewable energy use, distribution of personal income, air quality, water consumption, unemployment, soil erosion, housing affordability, ethnic diversity of teachers, pedestrian and bike friendly streets, open space, community reinvestment, and perceived quality of life. Sustainable Seattle also uses several region-specific indicators based on wild salmon populations. *Id.*

<sup>180</sup> Sustainable Seattle, Sustainable Seattle and Indicators, [http://www.sustainableseattle.org/Programs/RegionalIndicators/index\\_html](http://www.sustainableseattle.org/Programs/RegionalIndicators/index_html) (last visited Apr. 18, 2007).



created in Boston;<sup>181</sup> the California Bay Area;<sup>182</sup> Cape Cod;<sup>183</sup> the Austin, Texas area;<sup>184</sup> and Pittsburgh.<sup>185</sup>

The United States Environmental Protection Agency has also provided a set of Smart Growth Scorecards, modeled on benchmarking programs from around the country.<sup>186</sup> The municipal level scorecards are questionnaires made up of sections on various smart growth issues. Answers to the multiple-choice questions are added together at the end to classify the subject community into different scoring ranges.<sup>187</sup> The scorecards are less comprehensive than the programs described above, and they do not provide local tailoring. However, they do provide the benefits of being easy and inexpensive to use, and the process of using the scorecards may spur the creation of more extensive benchmarking programs. The EPA also provides scorecards to evaluate specific projects. The results of these scorecards rate how smart proposed developments are, giving planners and developers an indication as to whether certain smart growth modifications should be made.<sup>188</sup>

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<sup>181</sup> See The Boston Indicators Project 2004, <http://www.tbf.org/indicatorsProject/index.asp>.

<sup>182</sup> See BAY AREA ALLIANCE FOR SUSTAINABLE CMTYS., STATE OF THE BAY AREA: A REGIONAL REPORT (2003), *available at* <http://www.bayareaalliance.org/indicators.pdf>.

<sup>183</sup> See SustainCapeCod.org, Indicators, <http://www.sustaincapecod.org/indicators2> (last visited Apr. 18, 2007).

<sup>184</sup> See SWPA Indicators, Regional Sustainability Indicators Report, <http://www.centex-indicators.org/> (last visited Apr. 18, 2007).

<sup>185</sup> See Southwestern Pennsylvania Regional Sustainability Indicators Report, <http://203.147.150.6/> (last visited Apr. 18, 2007).

<sup>186</sup> U.S. ENVTL. PROT. AGENCY, SMART GROWTH SCORECARDS: INTRODUCTION, [www.epa.gov/smartgrowth/scorecards/index.htm](http://www.epa.gov/smartgrowth/scorecards/index.htm) (last visited Apr. 18, 2007).

<sup>187</sup> See THE VERMONT FORUM ON SPRAWL, THE VERMONT SMART GROWTH SCORECARD 1-3 (2000), *available at* <http://epa.gov/livability/scorecards/VTscorecardvtfonsprawl.pdf>; COLORADO CENTER FOR HEALTHY COMMUNITIES, COLORADO SMART GROWTH SCORECARD 5 (2003), *available at* [http://epa.gov/livability/scorecards/Colorado\\_Scorecard.pdf](http://epa.gov/livability/scorecards/Colorado_Scorecard.pdf). The Vermont and Colorado Scorecards, for example, classify communities as either "smart growth," "in transition," or "needs your attention."

<sup>188</sup> U.S. ENVTL. PROT. AGENCY, SMART GROWTH SCORECARDS: PROJECT SPECIFIC SCORECARDS, <http://epa.gov/livability/scorecards/project.htm> (last visited Apr. 18, 2007).

In benchmarking the state of smart growth programs across the country, the following may be positive indicators of success: it is apparent that fiscal resources are being invested in planning and certain public infrastructure; there are growing examples of state and local governments cooperating with each other to accomplish smart growth goals, and there has been an increase in intermunicipal cooperation as well; innovation and creativity is being challenged in positive ways with a variety of approaches being tested in various jurisdictions; and in general, more land is being bought for preservation. States should not be complacent, however, with this modest success, since much more remains to be done. For example, across the board, affordable housing or workforce housing has not been a big enough focus in state programs. In general, states' efforts remain inadequate in defining and discussing smart growth in an inter-jurisdictional and cross-disciplinary framework. Our laboratories of innovation at the state level have still not yielded emerging models for dealing with locally unwanted land uses; and social equity must be a bigger part of the smart growth discussion. States must also develop more effective strategies to encourage and even mandate intergovernmental cooperation, overcoming strong home rule cultures in many jurisdictions. All of these issues are critical pieces to the sustainability puzzle.

### *B. Statewide Coordination of Smart Growth Programs*

Enacted piece by piece and strengthened or weakened by particular administrations, smart growth programs have not tended to be especially consistent or coherent.<sup>189</sup> Rather, many states' smart growth programs and policies are scattered among executive orders and disconnected pieces of legislation and are implemented by various agencies. The result is that the goals, objectives, and provisions of many smart growth programs are less than clear. It is not surprising, then, that the coordination of smart growth initiatives under "umbrella" offices or departments has started to

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<sup>189</sup> Knaap, *supra* note 169, at 26.

emerge as a trend in recent years.<sup>190</sup> These have taken the form of new executive level state agencies, new offices or programs within an existing agency or department, or the re-naming of existing programs or offices to signal a shift in focus.

Making smart growth resources more easily accessible helps the public, developers, local governments, and state agencies to access the information that they need to pursue smart growth objectives. In addition to providing a “one-stop” source of information, consolidating smart growth programs under a single authority may allow the primary goals and objectives of particular programs to be more easily identified and supported. In this respect, many states have established statewide objectives and visions.<sup>191</sup>

### *C. Intermunicipal and Regional Planning*

Smart growth advocates have been encouraging coordinated planning efforts for some time, and the issue continues to be especially important for state smart growth programs. While states already provide some authority for local governments to engage in cooperative planning,<sup>192</sup> various new approaches have been developed to improve the consistency of plans among neighboring communities and to encourage cooperative planning.

A number of states have updated their planning laws over the past few years to require local comprehensive plans to address regional issues and intergovernmental planning.<sup>193</sup> Additionally, smaller states such as Delaware and New Jersey have created state planning maps that identify the growth policies that should be encouraged in specific areas.<sup>194</sup> In addition to these efforts, incentives for intergovernmental planning have played an

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<sup>190</sup> Arizona, Colorado, Connecticut, Maryland, Massachusetts, and Mississippi. *See supra* notes 18-20, 25-27, 38, 78-89, 91-92, 107 and accompanying text.

<sup>191</sup> New Jersey, Pennsylvania, Oregon, Wisconsin. *See supra* notes 123-29, 132, 155-57, 160 and accompanying text.

<sup>192</sup> Patricia E. Salkin, *Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail*, 6 VT. J. ENVTL. L. 48, 56 (2004).

<sup>193</sup> Pennsylvania, Wisconsin. *See supra* notes 146, 159 and accompanying text.

<sup>194</sup> *See supra* notes 51, 125 and accompanying text.

important role in encouraging regional cooperation. In some states, available grants and funding are increased for cooperative planning projects.<sup>195</sup> Colorado has taken an even stronger approach towards regional planning: the Heritage Communities Grant Program provides funding only for joint efforts.<sup>196</sup> Authorizing local governments to enter into tax sharing agreements has also provided incentives for municipalities to work together in planning for services and facilities.<sup>197</sup>

In addition to incentives and planning requirements, however, technical assistance to local governments engaged in joint planning has also proven to be especially useful. A few states have recognized that they can play an integral role in regional planning efforts by functioning as a sort of moderator. In Pennsylvania, for example, the Governor's Center for Local Government Services provides professional help to local governments involved in coordinated planning disputes.<sup>198</sup> And in Colorado, municipalities have access to a statewide list of alternative dispute resolution professionals to help with glitches in the cooperative planning process.<sup>199</sup> Only two or more municipalities planning and working cooperatively in New York have been eligible to receive state funding through the popular Quality Communities Program.<sup>200</sup>

#### *D. Energy Initiatives and Global Warming*

While not always explicitly linked to smart growth programs, energy initiatives focused on efficiency and alternative sources have become increasingly prevalent over the last several years.

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<sup>195</sup> See *supra* note 156 and accompanying text.

<sup>196</sup> Colorado. See *supra* notes 30-31 and accompanying text.

<sup>197</sup> Pennsylvania Department of Community and Economic Development, Assistance, <http://www.newpa.com/default.aspx?id=126> (last visited Apr. 18, 2007).

<sup>198</sup> *Id.*

<sup>199</sup> Colorado Office of Smart Growth, Intergovernmental Land Use Dispute Resolution Program, <http://www.dola.state.co.us/dlg/osg/adrintroduction.htm> (last visited Apr. 18, 2007).

<sup>200</sup> New York State Quality Communities Clearinghouse, The Quality Community Initiative, <http://www.qualitycommunities.org/index.asp> (last visited Apr. 18, 2006).

Nearly every state offers some form of tax incentive for renewable energy usage, and grants and loan programs are common as well.<sup>201</sup> Tax incentives for energy efficiency, however, are less prevalent than those related to renewable energy.<sup>202</sup> Twenty-three states and the District of Columbia have also enacted renewable energy portfolio standards, which require regulated utilities to generate a certain percentage of energy through renewable sources.<sup>203</sup> Although the earliest of these portfolio standards were enacted in the late 1990s, most of them were established over the past several years.<sup>204</sup>

Green building codes and energy efficiency requirements for government-funded buildings have also begun to make their way into the smart growth tool box.<sup>205</sup> Through executive orders, the

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<sup>201</sup> DSIRE: Summary Tables: Financial Incentives for Renewable Energy, <http://www.dsireusa.org> (follow "Summary Tables" hyperlink; then follow "Financial Incentives (Renewable Energy)" hyperlink) (last visited Apr. 18, 2007). There are more than one hundred state tax incentives for renewable energy usage. Additionally, California, Massachusetts, Minnesota, Nevada, New Jersey, Ohio, and Washington have state renewable energy production incentives. *Id.*

<sup>202</sup> Benefits are available in Arizona, California, Idaho, Maryland, Massachusetts, Montana, Nevada, New York, Oklahoma, Oregon, and the District of Columbia. Grants and loans for energy efficiency projects are also available in a number of states. DSIRE: Summary Tables: Financial Incentives for Energy Efficiency, <http://www.dsireusa.org> (follow "Summary Tables" hyperlink; then follow "Financial Incentives (Energy Efficiency)" hyperlink) (last visited Apr. 18, 2007); DSIRE: Summary Tables: Financial Incentives for Renewable Energy, *supra* note 201.

<sup>203</sup> Arizona, Colorado, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and Wisconsin. The renewable energy production requirements vary. Massachusetts, for example, has set a goal of 5% renewable energy by 2010, whereas California's goal for the same year is 20%. Presumably, the differences among states may be attributed in part to the availability of alternative energy sources such as sunlight, wind, and water. *See* DSIRE: Summary Tables: Rules, Regulations, & Policies for Renewable Energy, <http://www.dsireusa.org> (follow "Summary Tables" hyperlink; then follow "Rules, Regulations, and Policies (Renewable Energy)" hyperlink) (last visited Apr. 18, 2007).

<sup>204</sup> Only seven states had enacted portfolio standards before 2002. *Id.*

<sup>205</sup> Energy efficiency is generally determined according to the Leadership in Energy & Environmental Design ("LEED") standard. *See* United States



governors of several states have recently required the construction or renovation of state-funded buildings to comply with increased energy efficiency standards.<sup>206</sup> Some of these green building codes

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Green Building Council, Rating Systems, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222&> (last visited Apr. 18, 2007).

<sup>206</sup> Arizona (Exec. Order No. 2005-05 (Feb. 11, 2005), *available at* <http://www.dsireusa.org/documents/Incentives/AZ16R.pdf>); California (Exec. Order No. S-20-04, *available at* <http://www.dsireusa.org/documents/Incentives/CA49R.htm> (last visited Apr. 18, 2007)); Colorado (Exec. Order No. D 005 05 (July 15, 2006), *available at* <http://www.dsireusa.org/documents/Incentives/CO35R.pdf>); Iowa (Exec. Order No. 41 (Apr. 22, 2005), *available at* <http://www.dsireusa.org/documents/Incentives/IA09R.pdf>); Kentucky (Exec. Order No. 2005-122); Maine (Exec. Order No. 8 FY 04/05 (Jan. 24, 2003), *available at* <http://www.dsireusa.org/documents/Incentives/ME09R.pdf>); Maryland (Exec. Order No. 01.01.2001.02 (Mar. 13, 2001), *available at* <http://www.dsireusa.org/documents/Incentives/MD12R.pdf>); Michigan (Exec. Directive No. 2005-4 (Apr. 21, 2005), *available at* <http://www.dsireusa.org/documents/Incentives/MI05R.htm>); Minnesota (Exec. Order No. 05-16 (Nov. 10, 2005), *available at* <http://www.dsireusa.org/documents/Incentives/MN12R.pdf>); New Hampshire (Exec. Order No. 2005-04 (July 14, 2005), *available at* <http://www.dsireusa.org/documents/Incentives/NH06R.pdf>); New Jersey (Exec. Order No. 24 (July 29, 2002), *available at* <http://www.dsireusa.org/documents/Incentives/NJ14R.htm>); New Mexico (Exec. Order No. 2006-001 (Jan. 16, 2006), *available at* <http://www.dsireusa.org/documents/Incentives/NM11R.pdf>); Rhode Island (Exec. Order No. 05-14, *available at* <http://www.dsireusa.org/documents/Incentives/RI12R.htm> (last visited Apr. 18, 2007)); and Washington (Exec. Order No. 05-01 (Jan. 5, 2005), *available at* <http://www.dsireusa.org/documents/Incentives/WA14R.htm>). Similar provisions have been legislatively enacted in Arkansas (ARK. CODE ANN. § 22-3-1801 (2006), summary *available at* <http://www.dsireusa.org/library/includes/tabsrch.cfm?state=AR&type=Public&back=regeetab&Sector=S&CurrentPageID=7&EE=1&RE=1>); Connecticut (2006 Conn. Pub. Act No. 06-187, summary *available at* <http://www.dsireusa.org/library/includes/tabsrch.cfm?state=CT&type=Constr&back=regtab&Sector=S&CurrentPageID=7&EE=1&RE=1>); Delaware (DEL. CODE ANN. tit. 29, § 6939 (2007), summary *available at* <http://www.dsireusa.org/library/includes/tabsrch.cfm?state=DE&type=Public&back=regeetab&Sector=S&CurrentPageID=7&EE=1&RE=1>); Hawaii (HAW. REV. STAT. §§ 196-1 to 196-42, summary *available at* [http://www.dsireusa.org/library/includes/summtabsrch.cfm?Incentive\\_Code=HI10R&Back=regtab&state=HI&type=Constr&CurrentPageID=7&EE=1&RE=1](http://www.dsireusa.org/library/includes/summtabsrch.cfm?Incentive_Code=HI10R&Back=regtab&state=HI&type=Constr&CurrentPageID=7&EE=1&RE=1) (last visited Apr. 18, 2007)); Nevada (NEV. REV. STAT. § 702.215, summary *available at* [http://www.dsireusa.org/library/includes/summtabsrch.cfm?Incentive\\_Code=NV13R&Back=regtab&state=NV&type=Constr&CurrentPageID=7&EE=1&RE=1](http://www.dsireusa.org/library/includes/summtabsrch.cfm?Incentive_Code=NV13R&Back=regtab&state=NV&type=Constr&CurrentPageID=7&EE=1&RE=1) (last visited Apr. 18, 2007)); North Carolina (N.C. GEN. STAT. § 143-64.10, summary *available at* <http://www.dsireusa.org/library/includes/tabsrch.cfm?>



also include renewable energy usage requirements.<sup>207</sup> Nearly all of these initiatives were established after 2000.

Global warming has also been increasingly focused upon by governors, likely due to its ubiquitous coverage by the media. Governors from all over the country have conceded the need to reduce emissions, and many states not normally associated with the smart growth movement have joined in the effort.<sup>208</sup> While much of this may be political grandstanding, a few states have taken meaningful steps toward addressing global warming. At the urging of former Governor Romney, Massachusetts produced a Climate Protection Plan in 2004. The plan “presents a comprehensive set of near-term actions that will protect the climate, reduce pollution, cut energy demand, and nurture job growth through the development of sustainable energy resources and advanced technologies.”<sup>209</sup> Other states that have adopted comprehensive climate action plans include Maine,<sup>210</sup> Connecticut,<sup>211</sup> and California.<sup>212</sup> And in just the

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state=NC&type=Public&back=regeetab&Sector=S&CurrentPageID=7&EE=1&RE=1 (last visited Apr. 18, 2007)); Oregon (OR. REV. STAT. § 276.900 (2001), summary available at <http://www.dsireusa.org/library/includes/tabsrch.cfm?state=OR&type=Public&back=regeetab&Sector=S&CurrentPageID=7&EE=1&RE=1>); and Wisconsin (Exec. Order No. 145 (2006), summary available at <http://www.dsireusa.org/library/includes/tabsrch.cfm?state=WI&type=Constr&back=regtab&Sector=S&CurrentPageID=7&EE=1&RE=1>).

<sup>207</sup> See, e.g., Arizona, *supra* note 206.

<sup>208</sup> See, e.g., Sarah Palin, Governor, Alaska State of the State Address (Jan. 17, 2007), available at <http://www.stateline.org/live/details/speech?contentId=172665>. Mid-western states have cited global warming and the need to reduce reliance on imported energy as supporting a new economic niche: bio-fuels made from agricultural products. See Jocelyn Janota, *Biofuel Incentive Program Improves Options for Ag Production*, TEXAS AG TODAY (2006), available at <http://www.agr.state.tx.us> (follow “News and Media” hyperlink; then follow “Texas Ag Today” hyperlink; then follow “Biofuel Incentive Programs Improves Options for Ag Production” hyperlink).

<sup>209</sup> MASS. OFFICE FOR COMMONWEALTH DEV., MASSACHUSETTS CLIMATE PROTECTION PLAN 5 (2004), available at <http://www.mass.gov/Eocd/docs/pdfs/fullcolorclimateplan.pdf>.

<sup>210</sup> ME. REV. STAT. ANN. tit. 38, § 577 (2006).

<sup>211</sup> Connecticut Climate Change, 2005 Connecticut Climate Change Action Plan, <http://www.ctclimatechange.com/StateActionPlan.html> (last visited Apr. 18, 2007).

first several months of 2007, the governors of New Jersey, Illinois, and Washington established reduced emissions targets.<sup>213</sup> Advisory commissions have also been created in a number of states.<sup>214</sup>

Regional plans to decrease greenhouse gas emissions have also become popular in the past several years, with initiatives covering New England, the Southwest, and western states. The latest of these agreements, the Western Regional Climate Action Initiative, was concluded in February 2007 by the governors of Arizona, California, New Mexico, Oregon, and Washington. The agreement specifies that the five states will create a market-based system to facilitate lowering greenhouse gas emissions by August 2008.<sup>215</sup>

### *E. New Urbanism*

“New Urbanism” generally refers to the constellation of smart growth and planning principles that seek to revitalize cities and other urban areas. New urbanism supports:

- walkability
- connectivity of transportation routes
- mixed-use and diversity in developments

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<sup>212</sup> Mandatory Greenhouse Gas Reporting, S. Bill No. 1771 (Cal. 2000) and S. Bill No. 527 (Cal. 2001); state-wide emissions cap, California Global Warming Solutions Act of 2006, Assemb. Bill No. 32 (Cal. 2006).

<sup>213</sup> Press Release, New Jersey Office of the Governor, Governor Corzine Calls for Sweeping Reduction of Greenhouse Gas Emissions in New Jersey (Feb. 13, 2007), *available at* <http://newjersey.gov/governor/news/news/approved/20070213a.html>; Press Release, Illinois Office of the Governor, Governor Blagojevich Sets Goals to Dramatically Reduce Greenhouse Gas Emissions in Illinois, Feb. 13, 2007, *available at* <http://illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=5715>; Press Release, Office of Governor Chris Gregoire, Governor Gregoire Takes Action on Climate Change, Announces “Washington Climate Change Challenge,” *available at* <http://www.governor.wa.gov/news/news-view.asp?pressRelease=479&newsType=1>.

<sup>214</sup> Pew Center on Global Climate Change, State Legislation, <http://www.pewclimate.org> (follow “State Action on Climate” hyperlink; then follow “State Legislation” hyperlink) (last visited Apr. 18, 2007).

<sup>215</sup> Pew Center on Global Climate Change, Regional Initiatives, *available at* <http://www.pewclimate.org> (follow “State Action on Climate” hyperlink; then follow “Regional Initiatives” hyperlink) (last visited Apr. 18, 2007).

- mixed housing options
- quality architecture and urban design
- traditional neighborhood structures
- compact development and increased density
- transportation options that include mass transit and pedestrian and bicycle friendly alternatives
- environmental sustainability of developments
- generally increased quality of life.<sup>216</sup>

These new urbanist ideals are not new to smart growth programs, which are based in part on the goal of increasing urban development. However, in recent years, states and local governments have been creating new approaches for implementing these principles.

A common method that states have used to encourage local governments to encourage new urbanist development has been to adopt model smart growth ordinances. While many of the new urbanist principles can be effected through zoning techniques such as clustering, overlay zones, and planned-unit developments, the smart growth model ordinances go farther than these flexible zoning tools—they provide municipalities with the guidance needed to effectively use flexible zoning techniques.

Two of the most common model ordinances involve traditional neighborhood development districts and conservation design subdivisions.<sup>217</sup> Traditional neighborhood development ordinances emphasize compact building, mixed uses, and the availability of transportation options, and they are generally intended to be used in established cities and towns and quickly growing suburbs.<sup>218</sup> Conservation design subdivision ordinances, on the other hand, are intended to provide guidance for settings

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<sup>216</sup> New Urbanism, New Urbanism Principles, <http://www.newurbanism.org/newurbanism/principles.html> (last visited Apr. 18, 2007).

<sup>217</sup> See *infra* note 218 and 219.

<sup>218</sup> See, e.g., BRIAN W. OHM ET AL., A MODEL ORDINANCE FOR A TRADITIONAL NEIGHBORHOOD DEVELOPMENT (2001), available at <http://www.wisc.edu/urpl/people/ohm/projects/tndord.pdf> (adopted by the Wisconsin Legislature in 2001). Also in Austin, Texas and Oak Ridge, Tennessee. Land Development Resources: Ordinances <http://www.smartgrowth.org/library/byldrtype.asp?typ=1> (last visited Apr. 18, 2007).

that provide a transition between urban and rural areas; they tend to emphasize compact residential lots and open space requirements rather than focusing on mixed uses and varied transportation options.<sup>219</sup> Transit-oriented development ordinances are also becoming increasingly popular. These ordinances seek to encourage mixed-use and medium to high density development within walking distance of transit stations in order to increase mass transit usage.<sup>220</sup> Other states provide model ordinances relating to infill development<sup>221</sup> and the provision of adequate public facilities.<sup>222</sup>

Although still a relatively new concept, another new urbanist technique, form-based zoning, seems to be gaining popularity among city planners.<sup>223</sup> Form-based zoning has been defined as:

A method of regulating development to achieve a specific urban form. Form-based codes create a predictable public realm by controlling physical form primarily, with a lesser focus on land use . . . . The regulations and standards in form-based codes . . . designate[] the appropriate form and scale (and therefore, character) of development rather than only distinctions in land use types. This is in contrast to conventional zoning's focus on the

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<sup>219</sup> See, e.g., BRIAN W. OHM, A MODEL ORDINANCE FOR A CONSERVATION SUBDIVISION (2001), available at [http://www.doa.state.wi.us/dir/documents/conserv\\_subdiv\\_Model\\_ordinance\\_Feb2001.pdf](http://www.doa.state.wi.us/dir/documents/conserv_subdiv_Model_ordinance_Feb2001.pdf).

<sup>220</sup> See, e.g., Smart Growth Toolkit, *supra* note 91.

<sup>221</sup> See MD. DEP'T OF PLANNING, MODELS AND GUIDELINES FOR INFILL DEVELOPMENT (2001), available at [http://www.mdp.state.md.us/order\\_publications.htm](http://www.mdp.state.md.us/order_publications.htm) (last visited Apr. 18, 2007); OR. TRANSP. & GROWTH MGMT. PROGRAM, THE INFILL DEVELOPMENT CODE HANDBOOK (1999), available at <http://www.lcd.state.or.us/LCD/docs/publications/infilldevcode.pdf>.

<sup>222</sup> See MD. DEP'T OF PLANNING, MANAGING MARYLAND'S GROWTH MODELS AND GUIDELINES #24: ADEQUATE PUBLIC FACILITIES ORDINANCES (AFPOS) (2006), available at <http://www.mdp.state.md.us/mgs/pdf/mg24.pdf>.

<sup>223</sup> New urbanists consider modern form-based zoning to have originated with the community of Seaside, Florida. Robert Steuteville, *The New Urbanism: An Alternative to Modern, Automobile-Oriented Planning and Development*, <http://www.newurbannews.com/AboutNewUrbanism.html> (last visited Apr. 19, 2007). It remains a fairly obscure technique, with most of the available form-based codes deriving from the work of Duany, Plater-Zyberk & Co., the architectural firm that designed Seaside. DPZ has also been involved in drafting some model ordinances for traditional neighborhood developments and conservation subdivisions.

control of development intensity through simple numerical parameters. . . .<sup>224</sup>

A form-based code may apply to just one area of a city, such as a downtown neighborhood. In more complex form-based codes, the municipality is divided into transects depending on the character of the land and appropriate forms are prescribed for each transect in order to preserve and enhance its particular characteristics.<sup>225</sup> Form-based zoning can also be adopted as a parallel development regulation, leaving the traditional zoning scheme in place and allowing developers to choose between the two.

While California is, as yet, the only state to expressly authorize form-based zoning, local governments around the country have begun to adopt form-based ordinances.<sup>226</sup> As

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<sup>224</sup> Form-Based Codes Institute, Definition of a Form-Based Code (2006) <http://www.formbasedcodes.org/definition.html>.

<sup>225</sup> LOCAL GOV'T COMM'N, FORM-BASED CODES: IMPLEMENTING SMART GROWTH 3, available at [http://www.lgc.org/freepub/PDF/Land\\_Use/fact\\_sheets/form\\_based\\_codes.pdf](http://www.lgc.org/freepub/PDF/Land_Use/fact_sheets/form_based_codes.pdf).

<sup>226</sup> Assem. B. No. 1268 (Cal. 2004). See LOCAL GOV'T COMM'N, *supra* note 225. Cities to have enacted form-based codes include Sonoma (CA), Petaluma (CA), Columbia Pike (VA), Albuquerque (NM), Tacoma (WA), Ketchum (ID), Chapel Hill (NC), Miami (FL), and Knoxville (TN). See Columbia Pike ZOA#2 (Feb. 7, 2004), [http://www.arlingtonva.us/DEPARTMENTS/CPHD/planning/zoning/pdfs/zoa\\_columbiapike.pdf](http://www.arlingtonva.us/DEPARTMENTS/CPHD/planning/zoning/pdfs/zoa_columbiapike.pdf); Ansley Hamen, *South Knox Form-Based Zoning Gets Final OK: Pilot Project Will Regulate Height, Façade, Street Scale and Distance From Water*, KNOXNEWS (Knoxville, Tenn.), Feb. 28, 2007, available at [http://www.knoxnews.com/kns/local\\_news/article/0,1406,KNS\\_347\\_5383164,00.htm](http://www.knoxnews.com/kns/local_news/article/0,1406,KNS_347_5383164,00.htm); National League of Cities Official Website, Zoning: Ready to be Rezoned, [http://www.nlc.org/newsroom/nation\\_s\\_cities\\_weekly\\_v2/weekly\\_ncw/2003/02/03\\_v5/4305.aspx](http://www.nlc.org/newsroom/nation_s_cities_weekly_v2/weekly_ncw/2003/02/03_v5/4305.aspx) (last visited Apr. 25, 2007); Rebecca Meany, *Ketchum Unveils Downtown Master Plan: Specific Codes and Regulations Still Being Developed*, IDAHO MOUNTAIN EXPRESS & GUIDE (Sun Valley, Idaho), July 19, 2006, available at <http://www.mtexpress.com/index2.php?ID=2005111411>; David Newton, *Plan May Pave Way for Street's Future*, THE DURHAM NEWS, Nov. 11, 2006, available at <http://www.thedurhamnews.com> (search "form-based zoning"); Jason Trenkle, *Heinrich Joins Effort to Revamp Zoning Codes*, N.M. BUS. WKLY., June 23, 2006, available at <http://albuquerque.bizjournals.com/albuquerque/stories/2006/06/26/story1.html>; Tania Valdemoro, *Miami Closer to New Zoning Code*, THE MIAMI HERALD, Apr. 18, 2007, available at <http://www.miamiherald.com/459/story/78887.html>.



awareness of form-based zoning grows and more planners become adept with these ordinances, smart growth approaches will likely include more transect and form-based provisions.

#### IV. THERE IS NO TIME TO REST

With the realization that a lot of innovation is taking place at the state level in furtherance of smart growth initiatives also comes the reality that if states fail to continue to promote and refine these programs, the United States will lose the war on sustainability. There are many lessons to be learned from the hundreds of program initiatives that have been implemented and tested. The following list of ideas only begins to scratch the surface of potential initiatives to further smart growth principles. States should encourage local governments to conduct local and regional smart growth audits, engage public support for improved intergovernmental coordination, develop programs for more effective review of local and regional comprehensive plans, provide incentives or funding to municipalities to update zoning ordinances, provide statutory authority for the use of more flexible land use regulatory tools, incentivize the adoption and implementation of local land preservation programs, and engage in public education programs about sustainable development and smart growth. Among the range of incentives states can offer municipalities to engage in smarter growth are: grant opportunities, the promise of indemnification by the state from certain legal challenges arising from appropriately adopted smart growth strategies, awarding of added points on existing competitive funding opportunities, state recognition of local plans adopted consistent with regional and/or state plans, and special revenue raising authority including tying of impact fees and other fiscal tools to smart growth strategies. Governors could also implement no-cost awards programs, recognizing local smart growth initiatives with media attention. And, most important, states should follow the Maryland lead and use the power of state budget

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Of particular note is the Mississippi Renewal Forum, which recommended that gulf coast cities damaged by hurricane Rita adopt form-based zoning. *See supra* note 107.



funding priorities to only invest in programs that promote the smart growth agenda.

States can also play a powerful supporting role in the provision of technical assistance. For example, existing departments of community affairs or offices of state planning can be used to organize technical assistance teams that could provide direct assistance to municipalities. In addition, these offices could publish handbooks or guides for local governments, and more importantly, develop model local laws and sample intermunicipal agreements. Annual training programs, including a local governance academy that provides advanced instruction for local officials, planners, and economic developers on smart growth strategies, could also prove highly effective. States should also use technology to their advantage to provide web-based clearinghouses on smart growth, and use their statewide geographic information systems to enable local governments to access needed and available data to better plan for future growth, development, and preservation. Lastly, more should be invested in the development of a network of town-gown relationships as a relatively inexpensive way to harness the knowledge, creativity, and human resources that are contained in community-based institutions of higher education.

## V. CONCLUSION

Smart growth and sustainability is not something that we can achieve and then say “we’re done.” Keeping up with the challenges presented through science, technology, and nature requires a constant commitment to maintaining core values of sustainability. This requires a commitment to excellence and leadership in the law and public policy of smart growth. It is only with this realization that society can effectively square the circle on sprawl. Fortunately, states are limited only by their own creativity in the development and testing of new initiatives. States must remain careful to provide local governments with a rich range of options to implement the most effective programs palatable in each diverse neighborhood and community. Sustainability begins at ground zero and requires 100% intergovernmental participation to

accomplish meaningful results. Much progress is being made, yet much more remains to be done.

