

Smart Growth: State Strategies in Managing Sprawl

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IN ORDER FOR SMART GROWTH PROGRAMS TO SUCCEED,¹ proactive state involvement in land use planning is needed. Smart growth policies and enforcement mechanisms can have measureable effects on sustainable growth management.² State oversight and enforcement in certain aspects of land use are critical to the success of any smart growth program. While some states have articulated smart growth goals in their land use regulations, few have successfully implemented those policies. Factors such as strong implementation methods, public participation, and coordinated legislation also contribute to the success of smart growth programs.

This paper addresses the need for reducing urban sprawl,³ examines the varying levels of state involvement in land use planning and

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1. In its *Policy Guide on Smart Growth* (2012) the American Planning Association states:

The American Planning Association identifies Smart Growth as that which supports choice and opportunity by promoting efficient and sustainable land development, incorporates redevelopment patterns that optimize prior infrastructure investments, and consumes less land that is otherwise available for agriculture, open space, natural systems, and rural lifestyles. Supporting the right of Americans to choose where and how they live, work, and play enables economic freedom for all Americans.

See *Policy Guide on Smart Growth*, America Planning Association, <http://www.planning.org/policy/guides/adopted/smartgrowth.htm> (last visited Mar. 11, 2013).

2. Sustainability is often associated with Smart Growth. The Environmental Protection Agency defines sustainability thus:

Sustainability is based on a simple principle: Everything that we need for our survival and well-being depends, either directly or indirectly, on our natural environment. Sustainability creates and maintains the conditions under which humans and nature can exist in productive harmony, that permit fulfilling the social, economic and other requirements of present and future generations.

Sustainability, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/sustainability/basicinfo.htm> (last visited Mar. 11, 2013).

3. See *infra* Part I.

impacts on smart growth,⁴ and provides a detailed look at the Oregon system as an example of a successful “smart growth” state.⁵ Lastly, the paper summarizes several crucial features of an effective smart growth program.⁶

I. Sprawl and its Problems

The population of the United States is growing. Between 2000 and 2010, the population grew from 281.4 million to 308.7 million people.⁷ Although there is a projected decline in growth rates over the next decade,⁸ this figure still represents an average net growth of 2.73 million people per year. In many states, land use systems have not accounted for this amount of growth, even where the population has not risen greatly, resulting in a pattern of inefficient, sprawling, poorly designed cities to accommodate the growth.⁹

While not universally defined, sprawl is characterized by scattered, low-density development, great distances between homes, shops, and workplaces, a lack of thriving downtowns or activity centers, and a disconnected street network that concentrates automobile traffic, hampering alternative modes of transportation.¹⁰

Sprawl’s uncoordinated pattern of development contributes to environmental degradation. Where there are great distances placed between destination points, residents are likely to drive those distances, increasing automobile emissions, including greenhouse gas (GHG) emissions, and reducing air quality.¹¹ Increases in GHGs have been associated with climate change, decreased water quality, erosion in coastal areas, and stress on regional ecosystems.¹²

4. See *infra* Part III.

5. See *infra* Part IV.

6. See *infra* Part V.

7. U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

8. Haya El Nesser & Paul Overberg, *U.S. growth slows, still envied*, USA TODAY, Jan. 7, 2011, at 1A.

9. SIERRA CLUB, STOP SPRAWL, available at <http://www.sierraclub.org/sprawl/population.asp> (last visited Mar. 11, 2013).

10. REID EWING ET AL., SMART GROWTH AMERICA, MEASURING SPRAWL AND ITS IMPACT, 9-12 (2002), available at <http://www.smartgrowthamerica.org/documents/MeasuringSprawl.PDF>.

11. *Id.* at 18; Michael M. Maya, *Transportation Planning and the Prevention of Sprawl*, 83 N.Y.U.L. REV. 879, 883 (2008).

12. See Maya, *supra* note 11, at 884; OREGON TRANSPORTATION AND GROWTH MANAGEMENT PROGRAM, COOL PLANNING: A HANDBOOK ON LOCAL STRATEGIES TO SLOW CLIMATE CHANGE 8 (2010) [hereinafter OREGON TGMP].

Economic consequences include greater infrastructure, energy, and utility costs placed upon taxpayers. In certain regions, climate change may indirectly (and negatively) impact agricultural and tourism industries.¹³ Sprawl's social costs include traffic congestion, more money and time spent on gas and commuting, and additional wear and tear on vehicles.¹⁴

It is undisputed that community design affects travel behavior.¹⁵ A 2002 report noted that "land-use patterns . . . were found to be a greater predictor" of the conditions discussed above "than numerous demographic control variables that were also tested."¹⁶ Smart growth programs are intended to mitigate the problems addressed above, in light of growth and sprawled development patterns.

II. Identifying Smart Growth Characteristics

Smart growth has been described as a mechanism of related policies and land use controls for containing growth and minimizing the effects of growth. Generally, smart growth development is characterized by compact and mixed-use development, and the promotion of a variety of transportation options for a reduction in vehicle-miles traveled (VMT), with the goal of preserving green space and environmentally sensitive areas.¹⁷ Accounting for the increased need for affordable housing in addition to these goals is also an indication of the success of smart growth planning.

A. Compact and Mixed-Use Development

One attribute of smart growth critical to reducing GHGs is dense, compact development.¹⁸ Density is often inversely related to VMTs, as bigger lot sizes increase the distance between residential and

13. See OREGON TGMP, *supra* note 12, at 9 (explaining that if droughts occurred more frequently due to climate change, farmers could be affected and Mt. Hood could receive less snow as a result of climate change); see also Patricia E. Salkin & Paul Bray, *Compact Planning Offers a Fresh Approach for Regional Planning and Smart Growth*, 30 REAL EST. L.J. 121, 129 (2001).

14. See Maya, *supra* note 11, at 884-85; see also GREGORY K. INGRAM ET AL., LINCOLN INST. OF LAND POLICY, SMART GROWTH POLICIES: AN EVALUATION OF PROGRAMS AND OUTCOMES, Executive Summary (2009), available at <http://www.lincolnst.edu/pubs/smart-growth-policies-executive-summary.pdf> (evaluating the success of smart growth factors for states with mandatory smart growth programs and those without such programs).

15. See OREGON TGMP, *supra* note 12, at 15.

16. EWING ET AL., *supra* note 10, at 5.

17. See generally INGRAM ET AL., *supra* note 14, Executive Summary.

18. E.g., OREGON TGMP, *supra* note 12, at 25.

work spaces, requiring residents to travel further.¹⁹ Mixing land uses as opposed to separating them (as is typical under traditional Euclidian zoning²⁰) complements high-density development. A range of uses, such as residential and commercial, available within one neighborhood allows residents to access these amenities conveniently and without the use of a vehicle.²¹

Similarly, by maximizing the number of dwelling units or buildable area of a footprint, distances between destination points are reduced, minimizing VMT and GHG emissions because of the shorter distance residents are required to travel, while walking, biking, and public transit become more feasible. Further, mixed-use development in a compact pattern helps preserve open space and reduce sprawl, resulting in cost-savings for the public by reducing the need for publicly funded infrastructure.²²

B. *Promote a Variety of Transportation Options*

Street design and layout are integral to smart growth and preventing sprawl. Streets, often improperly regarded as merely a way to move cars, are characterized by “high speed limits, long distances between intersections. . . [and] no sidewalks or bike lanes,” which in turn “compels people to drive. . . .”²³ In fact, “complete streets” are identified as multi-function thoroughfares, “designed to serve all modes of travel equally well,” including walking, bicycling, and taking transit.²⁴ Reducing the speed limit, landscaping curb extensions, designating bike lanes, and building shelters for transit users are all ways to maximize the number of people a complete street serves.²⁵ When used, non-vehicular travel becomes easier and safer, helping to combat high VMTs and excess energy consumption.²⁶

However, the benefits of complete streets cannot be realized if streets are connected poorly. Often, transportation planning is done “one project at a time,” resulting in inadequate networks of over-

19. *Id.* at 26.

20. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

21. OREGON TGMP, *supra* note 12, at 45–46.

22. KEVIN NELSON ET AL., U.S. ENVTL. PROT. AGENCY, EPA 231-K-09-003, ESSENTIAL SMART GROWTH FIXES FOR URBAN AND SUBURBAN ZONING CODES 5 (2009), http://www.epa.gov/smartgrowth/pdf/2009_essential_fixes.pdf.

23. OREGON TGMP, *supra* note 12, at 57.

24. *Id.* at 58; NELSON, U.S. ENVTL. PROT. AGENCY, *supra* note 22, at 23.

25. OREGON TGMP, *supra* note 13, at 57–58.

26. See National Complete Streets Coalition, *Fundamentals*, SMART GROWTH AMERICA, <http://www.smartgrowthamerica.org/complete-streets/complete-streets-fundamentals> (last visited Mar. 11, 2013).

crowded streets.²⁷ Smart growth emphasizes consideration of “macro-scale characteristics” and regional needs in roadway planning.²⁸ Lastly, to promote transit-oriented development (TOD), smart growth proponents recommend coordination between transit and land use agencies, so that transit riders are located near transit centers, street parking is limited, and the investment in public transit does not go to waste.²⁹

C. *Protect Environmentally Sensitive Areas*

The protection of environmentally sensitive areas is a key component of smart growth, helping to maintain a sustainable community, and preventing habitat loss to unique ecological species.³⁰ Protection often includes an assessment of which areas constitute natural resource lands, and devising a preservation plan.³¹ In certain states, this skepticism about growth helps protect valuable resources that are valuable to both the community and economy,³² helping to avoid costs associated with dispersed infrastructure.³³ Thus, protecting natural resources ensures a higher quality of life for both residents and wildlife, and can even benefit the local economy.³⁴

D. *Account for Affordable Housing*

Ideally, successful smart growth programs will lead to the provision of affordable housing.³⁵ The idea that economic and social exclusionary zoning is prohibited and municipalities have a duty to make housing realistically available to everyone, regardless of income, was first promulgated in New Jersey’s *Mt. Laurel* decision.³⁶ Today, legislation requiring a housing element in local plans is in place in about 25 states.³⁷

Certain types of growth management regimes can have the effect of exclusionary zoning and displacing low-income persons, especially

27. NELSON, U.S. ENVTL. PROT. AGENCY, *supra* note 22, at 22.

28. *Id.* at 22; See also OREGON TGMP, *supra* note 12, at 57-58.

29. See OREGON TGMP, *supra* note 12, at 93-94.

30. See NELSON, U.S. ENVTL. PROT. AGENCY, *supra* note 22, at 2; *Smart Growth Protects Natural Habitat*, SMART GROWTH AMERICA, <http://www.smartgrowthamerica.org/issues/environment/smart-growth-protects-natural-habitat/> (last visited Mar. 11, 2013).

31. See discussion *infra* Part III.C.iv.3.c.

32. See discussion *infra* Part IV.B.ii.1.

33. NELSON, U.S. ENVTL. PROT. AGENCY, *supra* note 22, at 5.

34. See *Policy on Smart Growth*, *supra* note 2.

35. INGRAM ET AL., *supra* note 14, at 2.

36. *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (Mt. Laurel I)*, 336 A.2d 713 (1975) (appeal dismissed & cert. denied). While the use of race in zoning has been prohibited in *Buchanan v. Warley*, 245 U.S. 60 (1917), the modern cases involving exclusionary zoning appear to equate economics and race.

37. See DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 480 (LexisNexis ed., 8th ed. 2011).

where a legislative body does not ensure that the housing market is responsive to the needs of the regional population.³⁸ This may result from growth management development restrictions that drive up property values.³⁹ However, the impact on housing prices depends on the type of growth management regulations adopted, the land use system, and housing demand.⁴⁰ Thus, while growth management programs in certain states may have the effect of making affordable housing less available, successful programs ensure that affordable housing is provided and commensurate with need.

While smart growth goals remain idealistic for a number of states, several states have attempted to implement the policies above. Many have failed to set goals sufficient to evaluate the effect of their growth management programs. Much of this failure can be attributed to the method of implementing those policies and the characteristics of a state's particular land use system. Below, several systems are examined to demonstrate why certain states have failed or succeeded in obtaining smart growth results.

III. Types of Land Use Systems

Today, many states delegate land use planning authority to their local governments or municipalities. Depending on the jurisdiction, state land use policies may be binding on local governments. Further, a comprehensive plan—a plan stating the local government's policies and guidelines relating to infrastructure, housing, the environment, development, and employment—may or may not be required.⁴¹ As illustrated below, the existence of a comprehensive plan and the role it plays in land use decisions may be determinative of the success of each program.

A. *States without Oversight of the Land Use Planning Process*

Most states do not oversee the land use planning process, instead delegating planning authority to local governments with few checks or

38. ARTHUR C. NELSON ET AL., *THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE*, Executive Summary (Discussion Paper for the Brookings Institution Center on Urban and Metropolitan Policy, 2002), available at <http://www.brookings.edu/es/urban/publications/growthmang.pdf> (last visited Mar. 11, 2013).

39. *Id.* at 18.

40. *Id.* at 19.

41. See Lesley R. Attkisson, *Putting a Stop to Sprawl: State Intervention as a Tool for Growth Management*, 62 *VAND. L. REV.* 979, 989–90 (2009).

guidelines on processes or outcomes.⁴² Additionally, some states do not require local governments to have comprehensive plans, or do not require those plans to be binding.⁴³ Where local comprehensive plans are merely “advisory” rather than controlling, land use decisions are not required to conform to the plan.⁴⁴ Under these regimes, implementing smart growth policies is difficult, even if local plans contain smart growth aims, for there are no requirements to implement those objectives. Colorado and Virginia are examples of states where as a result of inconsistent requirements for a comprehensive plan and a lack of enforceable “sticks” or enticing “carrots”, smart growth policies are ineffective.

1. COLORADO

Colorado has no statewide growth management system. Its land use system is characterized by delegation to local governments, which engage in planning with minimal standards. The few obligations the state imposes reflect federal requirements, and are entrusted to local governments to meet.⁴⁵ There is virtually no state enforcement, and the state relies on voluntary regional collaboration to manage growth.⁴⁶ While there are regulations in place relating to environmental conservation programs, these have largely been the result of local initiative, not state legislation.⁴⁷

Further, long-range transportation planning is carried out at the regional level with little state review. The state requires regional planning only in areas of “critical state interest” and cross-regional planning is voluntary.⁴⁸ Counties with a certain population level or growth rate must prepare and adopt a master (comprehensive) plan, which is reviewed and commented on by a state agency.⁴⁹ However,

42. The Lincoln Institute’s report points specifically to Colorado, Indiana, Texas, and Virginia which this type of range of land management approaches. INGRAM ET AL., *supra* note 14, Preface and Acknowledgments.

43. See Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 40 URB. LAW. 549, 550 (2008); See generally 44 URB. LAW. 615 (2012); 43 URB. LAW. 823 (2011); 42 URB. LAW. 665 (2010); 41 URB. LAW. 547 (2009) (providing an overview of recent developments in comprehensive planning).

44. *Contra* 83 AM. JUR. 2D *Zoning and Planning* § 9 (2013) (Explaining that when a city creates a comprehensive plan required by state statute, a state commission may be created to review the plan to determine if it complies with statewide goals).

45. See INGRAM ET AL., *supra* note 14, at 205.

46. *Id.*

47. *Id.* at 206 (noting that “[l]ocal governments primarily use these powers to protect a land use permitted by an adjacent jurisdiction that would have a negative impact on their own Jurisdictions.”).

48. COLO. REV. STAT. § 24-65.1-101 (2012); INGRAM ET AL., *supra* note 15, at 206.

49. § 30-28-106; INGRAM ET AL., *supra* note 15, at 206.

the agency's recommendations are not binding, and Colorado does not require local land use decisions to be consistent with the master plan.⁵⁰ As a result, mandatory comprehensive plans for population-dense areas exist, but may not guide land use decisions.

Despite the lack of state-mandated smart growth policies, Colorado has successfully managed its growth in some respects. According to the Lincoln Institute's report, Colorado had one of the lowest rates of resource land converted to urban use.⁵¹ It also had a large increase in *private* conservation land, but had the largest decrease in farmland of the states surveyed.⁵² It ranked third highest in traffic congestion growth,⁵³ suggesting that the lack of state review for transportation planning is problematic. This may also result from the absence of state level coordination between land use and transportation planning agencies.

For a "bottom-up" planning state, Colorado performs well in a few, but not all, smart growth factors. For example, Denver has done relatively well in promoting non-vehicular travel, but does poorly in terms of green space preservation.⁵⁴ It is unlikely its success in these factors stems from its regulatory system, but rather from other market factors.⁵⁵ Activism in resource preservation is partially due to the inherent necessity of regional collaboration when dealing with scarce resources, such as water in a semi-arid region.⁵⁶ In addition, the fact that federal lands comprise 38% of the state has helped restrict development beyond existing urban areas.⁵⁷

2. VIRGINIA

Virginia is another state that did not possess a state smart growth program at the time of the Lincoln Institute's study. There, as with many

50. § 30-28-106; INGRAM ET AL., *supra* note 15, at 206.

51. INGRAM ET AL., *supra* note 15, at 206.

52. *Id.*

53. *Id.* at 206–07 (Colorado ranked third of the seven states studied in the Lincoln Institute's report).

54. See ECONOMIC INTELLIGENCE UNIT, US AND CANADA GREEN CITY INDEX 60–61 (2011) (stating that the city has strong policies and mechanisms in place to reduce driving, and low population density, despite city-wide efforts to contain sprawl, such as subsidizing brownfield regeneration).

55. See INGRAM ET AL., *supra* note 14, at 207.

56. *Id.* (noting that the Front Range is an arid area where population is concentrated and water is limited so that the investment associated with retrieving water necessitates cooperation and collaboration).

57. *Id.* (stating that federal lands provided a "protected backdrop" and restrict development to the West).

states without “home rule,” local governments possess only the powers specifically granted to them by statute.⁵⁸ Comprehensive planning is mandatory,⁵⁹ but plans are advisory and do not directly regulate land use.⁶⁰ However, Virginians have granted local governments substantial power to adopt smart growth policies through the initiative process.⁶¹ Given the lack of state oversight, there is little incentive for localities to utilize those tools. With the very recent exception of transportation and Urban Development Areas (UDAs) addressed below, the state has provided little direction as to which tools local governments should adopt or how to use them.⁶² The state is slowly reforming its land use system to accommodate growth.

In the Lincoln Institute’s study, conducted before this legislation was enacted, Virginia posted the second largest increase in developed land per person between 1982 and 1997.⁶³ This may be attributed to the lack of incentive the state provided to localities to adopt smart growth tools,⁶⁴ and the absence of state agency review for consistency with comprehensive plans and state policies.⁶⁵ One area in which Virginia was successful was its density—the state posted the highest average density between 1990 and 2000, when the state was still largely delegating growth management to localities.⁶⁶ However, this could be attributed to the influx of residents between 1994 and 2004, and state-wide density incentives for developers.⁶⁷

Despite the density increase, the state posted large decreases in the number of citizens who commute by walking, biking, and public

58. See VA. CODE ANN. § 15.2-2210 (2012); INGRAM ET AL., *supra* note 14, at 234.
59. § 15.2-2223.

60. INGRAM ET AL., *supra* note 14, at 235; THE VA. CHAPTER OF THE AM. PLANNING ASS’N, MANAGING GROWTH AND DEVELOPMENT IN VIRGINIA: A REVIEW OF THE TOOLS AVAILABLE TO LOCALITIES 35 (2012), <http://apavirginia.org/documents/legislation/Toolbox.pdf> [hereinafter THE VIRGINIA CHAPTER OF THE APA].

61. § 15.2-2329; INGRAM ET AL., *supra* note 14, at 234, 236 (Initiatives have enabled local governments to use tools such as impact fees, transfer of development rights (TDRs), and designated urban development areas).

62. See INGRAM ET AL., *supra* note 14, at 234, 236.

63. *Id.* at 236.

64. See generally VA. CODE ANN. § 15.2-2200 (2012) (encouraging localities to plan for future development but does not provide any incentive to do so in the declaration of legislative intent); INGRAM ET AL., *supra* note 14, at 234, 236 (stating that there are no incentives for encouraging adoption of smart growth tools).

65. See § 15.2-2211(2012); INGRAM ET AL. *supra* note 14, at 236. Compare § 15.2-2211, with § 15.2-2222.1 (requiring the locality to submit a comprehensive plan on local transportation planning to Department of Transportation).

66. See INGRAM ET AL., *supra* note 14, at 237.

67. See generally § 15.2-2201; THE VIRGINIA CHAPTER OF THE APA, *supra* note 60, at 37.

transit.⁶⁸ Since these results do not reflect the 2006 legislation linking transportation and land use planning,⁶⁹ these results may be attributed to the lack of inter-agency coordination during the study period of 1990 through 2000, and the resulting network of non-complete, or poorly connected streets.

Virginia also posted the highest rate of conversion from rural to urban land, despite the authority given to local governments to purchase conservation easements and provide special tax incentives for preservation.⁷⁰ This may be attributed to Virginia's lack of oversight, and its land use system, which has resulted in a "patchwork of conservation land areas."⁷¹ All too frequently, areas that *should* be developed (due to proximity, access to infrastructure, etc.) are not, and development instead pushes growth to more "far-flung" locations, resulting in an uncoordinated development pattern.⁷²

In 2007, Virginia required localities with certain density criteria⁷³ to establish UDAs within their comprehensive plans by 2011 and 2012.⁷⁴ UDAs will dictate where development can occur, based on proximity to facilities and accommodation of growth for the next ten to twenty years.⁷⁵ The legislation calls for high-density development, complete streets, and preservation of natural areas in UDAs.⁷⁶ Localities subject to establishing an UDA must send relevant documents to the Commission on Local Government (a five member Governor-appointed agency).⁷⁷ The Commission then reports the locality's overall compliance to the Governor.⁷⁸ UDAs are required to be reexamined and if needed, revised every five years.⁷⁹

68. See INGRAM ET AL., *supra* note 14, at 62 Tbl.5.1, 63 Tbl.5.2 (posting a 19% decrease in ridership of public transit for medium density counties and a 25% decrease in commute by walking or biking for medium density counties).

69. See § 15.2-2222.1; INGRAM ET AL., *supra* note 14, at 237.

70. See generally § 15.2-2286; INGRAM ET AL., *supra* note 14, at 237.

71. INGRAM ET AL., *supra* note 14, at 237.

72. *Id.*

73. See THE VIRGINIA CHAPTER OF THE APA, *supra* note 60, at 11-12 (requiring counties with a certain population or growth rate to establish Urban Development Areas).

74. See § 15.2223.1; INGRAM ET AL., *supra* note 14, at 235.

75. See § 15.2223.1; THE VIRGINIA CHAPTER OF THE APA, *supra* note 60, at 12.

76. See § 15.2223.1; Daniel Naim, *Slow and steady creates Virginia's Urban Development Areas*, GREATER GREATER WASHINGTON, Jan. 22, 2010, 12:56 PM, <http://greatergreaterwashington.org/post/4669/slow-and-steady-creates-virginias-urban-development-areas/>.

77. See § 15.2-2903 (6), (8).

78. § 15.2-2225; see generally VIRGINIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, *About the Commission on Local Government*, <http://www.dhcd.virginia.gov/CommissiononLocalGovernment/> (last visited Mar. 11, 2013); THE VIRGINIA CHAPTER OF THE APA, *supra* note 60, at 31.

79. § 15.2-2230; THE VIRGINIA CHAPTER OF THE APA, *supra* note 60, at 12.

Because they are a part of comprehensive plans, critics argue that UDAs have no regulatory power in and of themselves.⁸⁰ However, the state has begun to incentivize the process through “carrots” in the form of more lenient environmental compliance regulations, as well as funding for infrastructure.⁸¹ Since this program has only recently been initiated, data on its effectiveness is unavailable. However, the fact that Virginia has reformed this aspect of its land use system suggests the importance of state oversight and physical growth boundaries.

In 2006, upon recognizing that land use was linked to sprawl and increased infrastructure costs, legislation was enacted requiring the state department of transportation (VDOT) to review local plans resulting in an additional 5,000 trips per day.⁸² More recently, a 2012 bill arms VDOT with “sticks,” giving them power to force transportation projects into local plans by withholding funding from local governments that do not support those projects.⁸³ Localities are also required to submit local road plans to VDOT for approval.⁸⁴

The state recognizes the need for state review of local plans, especially in the context of transportation planning, which is largely funded by the state. Critics argue the 2012 legislation removes too much local autonomy in land use planning, as it appears to centralize power in a state agency unlike any other with regards to transportation planning.⁸⁵ However, this degree of control is likely to discourage sprawl if VDOT’s planning is done in conjunction with local land use planners, as local governments will no longer be able to place roads wherever they choose, resulting in a better-planned pattern of transportation infrastructure.

Virginia does not have a statewide affordable housing policy, but in 2003 required local governments, for the first time, to include an affordable housing element in their comprehensive plans.⁸⁶ During the

80. Naim, *supra* note 76.

81. H.R. 1248, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); *See also* Naim, *supra* note 76 (stating that stormwater requirements would be more lenient in UDAs than rural areas).

82. VA. CODE ANN. § 15.2-2222.1; THE VIRGINIA CHAPTER OF THE APA, *supra* note 60, at 11.

83. H.R. 1248, *supra* note 81; *Report: VDOT gains unprecedented power*, AUGUSTA FREE PRESS, Mar. 15, 2012, <http://augustafreepress.com/2012/03/15/report-vdot-gains-unprecedented-power>.

84. § 15.2-2222.1(A)(1); *A Note to Legislators: Read it First*, THE NEWS & ADVANCE, Mar. 15, 2012, <http://www.newsadvance.com/opinion/editorials/98bd52d6-bf78-58e0-b4d0-dbde24fae122.html>.

85. *Report: VDOT gains unprecedented power*, *supra* note 83.

86. § 15.2-2223(D); INGRAM ET AL., *supra* note 14, at 238.

1990s, the state posted a 31% increase in the median value of a home.⁸⁷ Between 2000 and 2003, Virginia posted a 28.8% increase in the sales price of homes in metropolitan areas of Virginia Beach, largely outpacing the increase in incomes.⁸⁸ However, in 2004, median prices in the metropolitan areas were lower than the national median.⁸⁹

Whether this discrepancy can be attributed to the 2003 amendment is unknown, though it seems unlikely given the proximity in time of the study and the date of the amendment. As a result, it will be important to pay attention to shifts in affordable housing over the next few years to see whether the amendment improves the availability of affordable housing. In the Lincoln Institute's study, states with smart growth programs resulted in a higher percent of cost-burdened owners.⁹⁰ The data suggests that states with smart growth programs may hinder housing affordability, but as a practical matter, those states have higher market demand and average income than states in the study without smart growth programs.⁹¹

Colorado and Virginia demonstrate that a lack of consistency requirements for comprehensive plans render those that actually include smart growth policies virtually ineffective without enforceable "sticks" or particularly enticing "carrots." In these states smart growth occurs, if at all, from bottom-up planning.⁹² Colorado illustrates that a regime relying primarily on voluntary adoption of smart growth principles is unlikely to yield success in *all* smart growth factors.⁹³ Also, Colorado relies on market forces, such as the scarcity of common resources, which may help dictate a city's willingness to collaborate and "grow smart," but it should not be the primary motivation of resource conservation.

Virginia demonstrates that allowing, as opposed to requiring, the use of smart growth tools without providing guidance on how they should be used does little to incentivize implementation. However, Virginia's recent land use reform indicates acknowledgment that transportation and land use planning are inextricably linked, so that

87. INGRAM ET AL., *supra* note 14, at 77 Tbl.6.1.

88. C. THEODORE KOEBEL ET AL., CENTER FOR HOUSING RESEARCH VIRGINIA TECH, VIRGINIA BEACH HOUSING NEEDS ASSESSMENT AND MARKET ANALYSIS 2000–2020 6 (2005), available at <http://www.vchr.vt.edu/pdfreports/VBfinalhousingreport.pdf>.

89. *Id.*

90. INGRAM ET AL., *supra* note 14, at 78 Tbl.6.4.

91. *Id.* at 78.

92. *Id.* at 205.

93. Salkin & Bray, *supra* note 13, at 123 ("What is missing are regional plans and appropriate entity to prepare regional plans and oversee their implementation.").

inter-agency coordination is necessary in laying out infrastructure; the best way to contain growth may be via a physical boundary (UDA); and at the very least, there should be some state oversight in these contexts. Requiring regional collaboration and inter-agency coordination ensures development occurs in locations that maximize resource efficiency.

In sum, a lack of state enforcement or oversight of implementation and land use planning will not yield success in each of the smart growth factors and relying primarily on local governments or private parties to implement smart growth policies is problematic because it often hinges on geographic factors and the economic climate. Where planning authority is delegated to local governments, without checks on those plans or decisions, each may act in its own self-interest.⁹⁴ States should ensure land use decisions affecting neighboring cities are coordinated regionally, so local governments do not ignore spillover effects generated by their own decisions.⁹⁵ This is relevant where a region shares finite fiscal or natural resources with limited carrying capacity.

B. *State-Based Land Use Systems:*

Florida and New Jersey

An integrated state planning system stands in stark contrast to the type discussed above and is used by a minority of states—the most notable being Florida’s former land use system.⁹⁶ There are two relevant distinctions between the programs described above, and Florida’s former system. For one, smart growth was a rigorously enforced state program in Florida.⁹⁷ Secondly, the state possessed stringent consistency requirements.⁹⁸

1. ATTRIBUTES OF FLORIDA’S FORMER LAND USE SYSTEM

In 1985, Florida enacted its Growth Management Act (GMA), giving the state a large amount of oversight in land use planning.⁹⁹ Under the GMA,

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

95. *Id.*

96. See Wendell Cox, *Florida Repeals Smart Growth Law*, NEW GEOGRAPHY, Oct. 7, 2011, <http://www.newgeography.com/content/002471-florida-repeals-smart-growth-law>.

97. See INGRAM ET AL., *supra* note 14, at 153.

98. See *id.* at 154; see also Sullivan, *supra* note 43, at 556–57 (stating that Florida requires land use decisions to be consistent with local comprehensive plans and local plans to be consistent with a state comprehensive plan).

99. See FLA. STAT. § 186.508 (2010); INGRAM ET AL., *supra* note 14, at 154; Thomas G. Pelham, *Transportation Concurrency, Mobility Fees, and Urban Sprawl in Florida*, 42/43 URB. LAW. 105 (Fall 2010/Winter 2011).

Florida's state comprehensive plan addressed 267 statewide goals,¹⁰⁰ and was intended to guide all other planning efforts, including those made at the regional and local level.¹⁰¹ Florida's state land use agency, the Department of Community Affairs (DCA), established minimum criteria for the content of local plans, and assessed whether sufficient vertical consistency existed.¹⁰² In 2011, Florida largely repealed the state's role in its system, shifting much of its planning authority back to local governments.¹⁰³ The former system's success in smart growth factors will first be discussed, and an examination of the new system will follow.

Under Florida's former system, local governments were required to address smart growth factors such as conservation, adequate infrastructure, and affordable housing in their comprehensive plans.¹⁰⁴ The state set out an adoption schedule for plans, and barred amendments to the land use map until plans or plan amendments required by the Evaluation and Appraisal Reports were adopted.¹⁰⁵ A plan had to be in place before any development permits could be issued so that effectually, the future land use map could not be amended until it met state requirements.¹⁰⁶ The DCA and other state agencies, including the Department of Transportation (DOT) and Environmental Protection, reviewed and commented upon any plan amendments.¹⁰⁷ The DCA had authority to influence local plans and any plan amendments; it outlined objections, recommendations, and comments (ORC Report) that most local governments followed, because if they did not, they could be subject to an administrative hearing.¹⁰⁸ As such, the DCA's influence started out fairly strong under the pre-2011 planning legislation. Under the most recent amendment, the ORC Report is no longer required in examining most plan amendments.¹⁰⁹

100. See § 186.007 (goals include promoting growth in areas including public safety, housing and community development, and transportation).

101. INGRAM ET AL., *supra* note 14, at 155; Attkisson, *supra* note 41, at 1005.

102. INGRAM ET AL., *supra* note 14, at 155.

103. §§ 163.2511 *et seq.* (2012) (Much of Chapter 163 (Intergovernmental Programs) reflects the changes made to it by H.B. 7207, 22nd Leg., Reg. Sess. (Fl. 2011)).

104. See § 186.007 (2010).

105. See *id.*

106. See *id.*; see also INGRAM ET AL., *supra* note 14, at 158 (The Lincoln Institute's report terms this practice a "moratorium"; however, permits consistent with existing plans and land use regulations continued to be issued).

107. See § 186.007.

108. See *id.*; INGRAM ET AL., *supra* note 14; E-mail from Nancy E. Stroud, Partner at Lewis Stroud & Deutsch, PL (May 22, 2012, 3:54 PM) (on file with the authors).

109. See § 186.007; see also Stroud, *supra* note 108 (full review, including an ORC Report, was required to sector plans, areas of critical state concern and other important amendments).

Florida also maintained stringent consistency requirements. The state required vertical, horizontal, and internal plan consistency:¹¹⁰

“[P]lans are vertically consistent if they reflect the goals, objectives, and policies laid out in regional policy plans and articulated in the State comprehensive Plan. Plans are horizontally consistent if they reflect land policies and future land use designations of neighboring jurisdictions. Internal consistency rests upon a close connection between a local comprehensive plan and the . . . regulations that are to implement that plan.”¹¹¹

Additionally, consistency between and among planning elements and between the plan and land use regulations was required.¹¹² The consistency requirements were an aggressive attempt at coordinated development. To ensure vertical consistency, the DCA could recommend withholding access to state funding or tax revenues from local governments whose plans were inconsistent with the state’s planning mandates. However, the DCA discretion was not unfettered because Administration Commission approval was required.¹¹³

Florida also required local plans to include concurrency requirements.¹¹⁴ Plans were to establish standards to ensure there were adequate public facilities (APF), urban services, and infrastructure in place to support anticipated growth before development could move forward.¹¹⁵ Developers were required to wait for government-led expansion of public facilities, or pay to expand the facilities themselves, commonly providing roads, parks, and utilities.¹¹⁶ In the transportation context, the legislature established concurrency requirements¹¹⁷ and the local government was required to demonstrate that facilities or funding would be available to maintain the level of service (LOS) the local government adopted.¹¹⁸

110. See § 186.007; Stroud, *supra* note 108.

111. Stroud, *supra* note 108.

112. See § 186.508; Stroud, *supra* note 108.

113. See § 186.508; INGRAM ET AL., *supra* note 14, at 158; Gerritt Knaap & Rebecca Lewis, *A Primer on State Development Plans* (Lincoln Inst. of Land Policy, Working Paper, 2009), available at http://law.wustl.edu/landuselaw/Articles/1691_903_Knaap%20Lewis%20Working%20Final.pdf; Stroud, *supra* note 108 (stating that the Governor and 3 cabinet members had to vote for withholding funds). Under former Chapter 9J-5 of the Florida Administrative Code, there were rules against sprawl, which were effectively repealed in 2011.

114. See generally § 186.507 (stating the rules for strategic regional policy plans); see also MANDELKER ET AL., *supra* note 37, at 804; Attkisson, *supra* note 41, at 1006 (noting that “the state comprehensive plan includes a mandate to all local governments to adopt a growth management system that includes a concurrency requirement.”).

115. Attkisson, *supra* note 41, at 1006; INGRAM ET AL., *supra* note 14, at 156.

116. Attkisson, *supra* note 41, at 1006; Stroud, *supra*, note 108.

117. INGRAM ET AL., *supra* note 14, at 156.

118. See generally FLA. STAT. § 186.507 (2010) (stating rules for strategic regional policy plans); MANDELKER ET AL., *supra* note 37, at 805.

In theory, Florida's former top-down planning model gave the state substantial control over planning and the success of its goals. However, due in part to the state's failure to articulate a clear strategy to limit development at the fringe, its system failed to effectively contain sprawl.¹¹⁹ Other factors that contributed to its shortfall were the state's rapid growth rate, its limited infrastructure funding, and uneven political commitment to the administration of the GMA.¹²⁰

a. Evaluating Florida's Success "Before the Fall"

1. *Compact Development and Protection of Natural Resources*

Despite active state involvement in policy making and planning, Florida was not successful in dealing with all smart growth factors. While the former system commanded consistency with state goals, including compact development, the state failed to put forth a clear strategy for realizing that goal as much of the state is largely characterized by sprawled development.¹²¹ Nor was there a full commitment to a coordinated infrastructure management system.¹²²

Between 1982 and 1997 the state lost more than 2.3 million acres of resource lands and nearly 780,000 acres of farmland between 1987 and 2002, as they were converted to urban uses.¹²³ As the Lincoln Institute's study notes:

[T]he state has not effectively limited growth to its urban centers, much . . . has become developed and sprawl has spread to many of the interior counties. . . . [F]ailure to articulate a coherent. . . rural policy has hampered efforts to link the state's growth management system to farmland preservation and the conservation of environmentally sensitive [areas].¹²⁴

The ecological characteristics of the Everglades and Florida Keys attract both tourists and retirees, providing the state with a significant source of income, and its agricultural industry is "another primary economic engine for the state," so that protection of environmental and

119. INGRAM ET AL., *supra* note 14, at 159-60.

120. Stroud, *supra* note 108.

121. INGRAM ET AL., *supra* note 14, at 159-60 (stating that "Roughly 70 percent of incremental population growth occurred in new urban and rural areas," and other studies have "found that Florida's system actually increased the spatial extent of development." Further, the state has not articulated a method of achieving compact growth, such as funneling resources into urban sources, nor commitment to an investment in urban infrastructure or urban growth boundaries); ECONOMIC INTELLIGENCE UNIT, *supra* note 54, at 93. (stating that Orlando is largely characterized by urban sprawl). It may be that aggressive enforcement of anti-sprawl policies in Florida may have contributed to the later downfall of the state land use program.

122. INGRAM ET AL., *supra* note 14, at 160.

123. *Id.*

124. *Id.* at 160-61.

agricultural lands is a priority for both state and local governments.¹²⁵ Yet, because the state's "economy is so closely tied to real estate development, there has been uneven commitment . . ." to a statewide growth management plan.¹²⁶ While the state set forth an aggressive land management program that included the purchase of sensitive lands, the tension between creating revenue and protecting natural resources, resulted in their loss.¹²⁷ As later addressed, Florida's new system prioritizes revenue generation over preservation.

The state's former reliance on concurrency requirements to adequately fund road infrastructure has not proven successful.¹²⁸ Often, the cost of maintaining LOS standards is beyond existing funding mechanisms.¹²⁹ In theory, concurrency requirements should contain sprawl by encouraging development to occur in areas with APFs, due to delays and costs developers face by building outward.¹³⁰ However, concurrency requirements actually penalize infill when capacity is more available and cheaper to build at the edge of urban areas than expanding or working around existing, but poorly planned infrastructure.¹³¹ Lastly, local governments are given a large amount of discretion in deciding how to implement concurrency systems.¹³² Florida required APFs as a precondition for development, but did not specify *where* roads or facilities must be located.¹³³ This is problematic because requiring APFs to be near existing infrastructure helps to reduce sprawl.¹³⁴ Plans that rely on LOS, but do not consider location are also

125. *Id.*

126. *Id.*

127. See FLA. STAT. § 186.007(3) (2010).

128. See INGRAM ET AL., *supra* note 14, at 160.

129. MANDELKER ET AL., *supra* note 37, at 805.

130. See § 187.201(16)(b)(7) (2010); Attkisson, *supra* note 41, at 1006.

131. Ruth L. Steiner, *Florida's Transportation Concurrency: Are the Current Tools Adequate to Meet the Need for Coordinated Land Use and Transportation Planning?*, 12 U. FLA. J.L. & PUB. POL'Y. 269, 288 (2001) (stating that "excess capacity is more frequently found and is less expensive to build at the urban fringe" where "[m]any urban areas in the state of Florida do not have a sufficient grid to provide alternative routes with similar functional classifications, as required in the [Transportation Concurrency Management Area].").

132. See § 187.201(16)(b)(7) (2010); Steiner, *supra* note 131, at 277; see also J. Celeste Sakowicz, *Urban Sprawl: Florida's and Maryland's Approaches*, 19 J. LAND USE & ENVTL. L. 377, 405 (2004) (stating that "The effect of softening the rigidity of transportation concurrency is to sacrifice traffic congestion for policies preferred by the current local government.").

133. See § 186.507(14) (2010); Maya, *supra* note 11, at 902.

134. Maya, *supra* note 11, at 899-900 (noting that bicycle and pedestrian routes must be considered, but transportation plans do not need to explicitly cover mass transit, and that the absence of substantive public transportation requirements permits local governments to locate roads wherever they please).

problematic.¹³⁵ As the basis for concurrency requirements, locally established LOS for a particular area do not contribute to an integrated and coordinated transportation network, as they do not provide for regional needs.¹³⁶

2. *Promoting a Variety of Transportation Options*

The concurrency mandate has not helped adequately fund mass transit, or complete streets, as the state has failed to provide an adequate means, in the form of a local option sales tax, for localities to fund for transit infrastructure.¹³⁷ Additionally, while comprehensive plans addressed the provision of public transit services, only areas located within designated public transit corridors were required to ensure development “supports the use of public transit,” while the *establishment* of transit corridors remained optional.¹³⁸ Local governments had no affirmative obligation to encourage non-vehicular travel.¹³⁹ Thus, while Florida outperformed states *without* smart growth programs in its mass transit ridership, its public transit network remains largely underdeveloped.¹⁴⁰

Florida’s bike/walk commute rate remained below the national average, despite the state’s “year-round sunshine and a climate conducive to walking and biking.”¹⁴¹ The state has lacked funding for the establishment and operation of mass transit to accommodate its sprawled pattern.¹⁴² Since Florida has not required or emphasized the provision of complete streets in transportation planning, roadways are an unsafe and undesirable travel option for many residents.¹⁴³ By focusing largely on LOS standards, as opposed to street design, roadways often become congested, and do not cater to non-vehicular traffic.¹⁴⁴ Lastly, the state has been unable to force adjacent jurisdic-

135. *Id.* at 891.

136. Steiner, *supra* note 131, at 288 (stating that the LOS doesn’t distinguish between a poorly designed transportation system and a lack of coordinated planning).

137. INGRAM ET AL., *supra* note 14, at 161; Stroud, *supra* note 108.

138. See FLA. STAT. § 186.506 (12) (2010); Maya, *supra* note 11, at 900.

139. Maya, *supra* note 11, at 900.

140. ECONOMIC INTELLIGENCE UNIT, *supra* note 54, at 94 (noting that Orlando has the shortest public transport network in the study sponsored by Siemens).

141. INGRAM ET AL., *supra* note 14, at 161.

142. Stroud, *supra* note 108.

143. *Id.* (noting that Florida ranks near the top of all states on the National Highway Traffic Safety Administration’s list of pedestrian and cyclist fatality rates per capita); ECONOMIC INTELLIGENCE UNIT, *supra* note 54, at 94 (stating that “[o]nly around 3% of workers use public transit, bicycles, or go by foot in Orlando, which is well below the Index average of 13%.”).

144. MANDELKER ET AL., *supra* note 37, at 806.

tions to coordinate with one another and it is difficult to link required improvements to specific development projects.¹⁴⁵

3. *Affordable Housing*

Florida requires affordable housing to be addressed in all comprehensive plans.¹⁴⁶ The state also has a state-sponsored affordable housing fund, which is allocated amongst local governments.¹⁴⁷ Despite the program, Florida remained at the bottom of the list in the Lincoln Institute's study in the production of multifamily and rental units, and affordability of housing in the state has declined.¹⁴⁸ This may be attributed to the state's population growth and the lack of success the DCA has had it in its review of comprehensive plans.¹⁴⁹ The state's lack of sufficient funding, further contributes to the lack of affordable housing.

4. *Coherency*

Florida's former land use system set out a number of smart growth goals, but critics contended that the consistency requirements did little to achieve those goals, as they are largely viewed as bureaucratic and administrative.¹⁵⁰ Further, the study notes:

[S]tate-level planning activity is not sufficient to achieve the objectives pursued by smart growth . . . While Florida's emphasis on process has led to robust and technically sound comprehensive plans, land use decisions are ultimately made at the local level. Although . . . state support . . . [is] important, there is no substitute for the commitment of local elected officials and citizens to smart growth plans and outcomes. . . .

. . . [S]tate government can play an important role in directing . . . local planning efforts, but local commitment to good planning and implementation is also essential.¹⁵¹

While the state had a strong managerial role under its former system, it failed to update its state plan, and failed to maintain state over-

145. Sakowicz, *supra* note 132, at 404 (stating that assumptions about concurrency requirements include sufficient funding and development tracks can be tracked to specific roadway segments and transportation projects).

146. See FLA. STAT. § 186.507(1) (2010).

147. See FLA. STAT. §§ 420.907-420.9079 (2010) (Florida's State Housing Initiatives Partnership Act); INGRAM ET AL., *supra* note 14, at 162.

148. See INGRAM ET AL., *supra* note 14, at 162. Of course, since the advent of the current recession, there is more housing available at more affordable prices, but fewer takers.

149. See *id.*

150. *Id.* at 163. Time will tell if private enforcement of existing plans will fare any better than the role of the state under the former planning system.

151. *Id.* at 163-64.

sight over implementation of the state plan.¹⁵² While the plan was coherent, it was too general to meet the diverse needs of the state.¹⁵³ The DCA approved about 90% of local plan amendments, suggesting the state “fail[ed] to effectively monitor and enforce . . . the [s]tate’s growth policies.”¹⁵⁴ The absence of inter-agency communication has resulted in a patchwork of infrastructure, and a pattern of sprawled development.¹⁵⁵ Additionally, uneven political commitment and undefined implementation measures for preservation have resulted in a loss of environmentally sensitive areas.¹⁵⁶ For these reasons, Florida’s success in achieving smart growth under its former system failed to live up to its high expectations.

b. House Bill 7207 and its Effect on Florida’s Land Use System

In 2011, Florida greatly scaled back the state’s role in its land use system.¹⁵⁷ Denounced by critics as “an environmental disaster,” House Bill 7207 repealed the many provisions of the GMA, making substantial changes to its former land use system.¹⁵⁸ Motivated in part by his own “research” contending that growth management programs had slower economic growth, Governor Rick Scott urged repeal of the GMA, declaring his intent to blast “job killing” development regulations.¹⁵⁹ The new law eliminates a number of development fees and costs associated with expanding facilities to expedite development.¹⁶⁰ One sponsor of the bill stated that permitting costs increased from “thousands to millions” over the past few years, helping to draft a

152. *Id.* at 163 (stating that “[t]he governor and legislature [. . . offer] almost no direction as to what constitutes desirable development outcomes.”); Sakowicz, *supra* note 132, at 380 (noting that the TCMS system had not been updated for 17 years).

153. Stroud, *supra* note 108.

154. Sakowicz, *supra* note 131, at 404.

155. INGRAM ET AL., *supra* note 14, at 153.

156. See Steiner, *supra* note 131, at 289.

157. H.R. 7207, 22nd Leg., Reg. Sess. (Fla. 2011) (subsequently codified Chapter 163); see Edward J. Sullivan & Carrie A. Richter, *Florida takes giant step back in land-use planning*, DAILY JOURNAL OF COMMERCE, Jun. 9, 2011, <http://djcoregon.com/news/2011/06/09/florida-takes-giant-step-backward-in-land-use-planning/> (hereinafter “*Florida takes giant step back*”).

158. FLA. STAT. §§ 163.2511 *et seq.* (2012) (much of Chapter 163 (Intergovernmental Programs) reflects changes made to it by H.B. 7207, 22nd Leg., Reg. Sess. (Fl. 2011)); Zac Anderson, *Growth rules rollback goes to Scott*, HERALD-TRIBUNE, May 6, 2011, <http://www.heraldtribune.com/article/20110506/ARTICLE/110509628/-1/news?Title=Growth-rules-rollback-goes-to-Scott>.

159. Anderson, *supra* note 158; Cox, *supra* note 96.

160. See FLA. STAT. § 163.2520 (2012) (a local government may exercise their powers for community redevelopment which includes the authority to levy special assessments); Anderson, *supra* note 158.

bill that largely ends state oversight.¹⁶¹ Other supporters view HB 7207 as “streamlining” development processes and state agencies.¹⁶²

Notably, the bill eliminates language from its land use statute requiring conformity with state criteria. Specifically eliminated is the intent to “prevent the overcrowding of land and avoid undue concentration of population.”¹⁶³ The act adds the intent of protecting the “traditional economic base of this state, agriculture, tourism . . .” and encouraging “economic diversification, workforce development, and community planning.”¹⁶⁴ The bill highlights the tension between economic growth and preservation, indicating prioritization of the former.¹⁶⁵ Local governments will still be permitted to implement growth management programs, and will be required to have plans that comply with the statute, though effective state oversight will no longer be there,¹⁶⁶ and citizens and the courts will play a stronger role in ensuring that regulations actually implement local plans.¹⁶⁷

Comprehensive plans are still required, but HB 7207 removes language from its land use statute detailing monitoring and review by the state land agency.¹⁶⁸ Under the bill, the state now has a more “advisory role” with fewer opportunities to challenge plan amendments, largely leaving the enforcement role to the private sector.¹⁶⁹ The state land planning agency, formerly the DCA, has a limited role in overseeing local plans and has been “relegated to a division of the Department of Economic Opportunity, where it will provide primarily local planning grants.”¹⁷⁰

Because the changes have been motivated by assertions that growth management regimes increase real estate prices, critics feel the new law will eliminate the ability of state agencies to reject poorly planned development projects that could overwhelm roadways and water re-

161. Anderson, *supra* note 158.

162. *Id.*

163. Compare FLA. STAT. § 163.3161 (2010) (stating this exact intent), with § 163.3161 (2012) (where this language cannot be found).

164. FLA. STAT. § 163.3161(11) (2012).

165. See generally § 163.3161 (2012).

166. See § 163.3174 (2012) (detailing the responsibilities of the governing body of each local government including their responsibility to create, maintain, and oversee a comprehensive plan).

167. See, e.g., § 163.3167(10) (2012) (stating some avenues for judicial remedies); Stroud, *supra* note 108.

168. See FLA. STAT. § 163.3177 (2012); *Requirements for Florida’s comprehensive plans*, FLA. LAND DEV. REG. (June 6, 2011) <http://floridaldrs.com/2011/06/06/requirements-for-florida-comprehensive-plans/>.

169. Sullivan & Richter, *Florida takes giant step back*, *supra* note 157.

170. *Id.*

sources.¹⁷¹ Additionally, there is concern that there will be no checks on where and how growth occurs, which may lead to more sprawl.¹⁷² Lawmakers expect the existing amount of excess housing in the state to act as a “control” on development.¹⁷³ However, increased development on farmland and environmentally sensitive areas is likely to occur as the demand for development rises.¹⁷⁴ Still, given the state’s poor performance in managing growth *with* state oversight and the DCA’s acceptance of most plan amendments in the past, the removal of DCA’s oversight and ORC Report is unlikely to help the situation. Additionally, as Colorado illustrates, relying on market demand is a risky way to manage growth.

HB 7207 also eliminates the number of annual amendments (formerly two) that can be made to comprehensive plans, and substantially limits state agencies’ ability to comment on amendments.¹⁷⁵ Further, the public will no longer be able to challenge plan amendments through the initiative or referendum process, regardless of how many parcels will be affected (formerly referendums could be used for amendments affecting five or more parcels).¹⁷⁶ Thus, HB 7207 grants nearly unfettered discretion to local governments to engage in planning that is inconsistent with smart growth aims, especially in light of the state’s emphasis on economic development.

Plans must now be a seemingly more fluid set of guidelines, principles, and strategies for orderly development.¹⁷⁷ Concurrency requirements for transportation, schools, and parks and recreation are “optional,” a substantial deviation from the former system.¹⁷⁸ Further, existing concurrency requirements may be rescinded by plan amend-

171. *See id.*

172. *See* David Fleshler & Andy Reid, *New growth rules could have big impact in South Florida*, SUNSENTINEL.COM, May 8, 2011, http://articles.sun-sentinel.com/2011-05-08/news/fl-development-limits-20110503_1_new-growth-rules-urban-development-boundary-big-impact.

173. *Id.*

174. *Id.*

175. FLA. STAT. §§ 163.3184, 163.3187 (2012); *see Process for review and adoption of plan amendments*, FLA. LAND DEV. REG. (June 5, 2011) <http://floridaldrs.com/2011/06/05/process-for-review-and-adoption-of-plan-amendments/>.

176. FLA. STAT. § 163.3167(8) (2012).

177. *See* FLA. STAT. § 163.3177 (2012).

178. *See* FLA. STAT. § 163.3180(1) (2012); Amanda L. Brock, *Sweeping Changes to Florida’s Growth Management System are Here*, THE LEGAL SCOOP OF SOUTHWEST FLORIDA. REAL ESTATE (May 13, 2011), <http://www.legalscoopswfire.com/land-use/sweeping-changes-to-floridas-growth-management-system-are-here/>; *Summary of some major changes to the Florida growth management statutes*, FLA. LAND DEV. REG. (June 8, 2011), <http://floridaldrs.com/2011/06/08/summary-of-some-of-the-major-changes-to-the-florida-growth-management-statutes/>.

ment, with very limited state review.¹⁷⁹ However, plans must contain a capital improvements element to consider the need and location for APFs “to encourage efficient use of facilities.”¹⁸⁰ This is again problematic where “efficient use” of facilities is discretionary, and the state mentions nothing about the location of facilities.

Florida *encourages* future planning in light of environmental protection in § 163.3168.¹⁸¹ The newly added section encourages, but does not require, “innovation planning,” using tools such as “visioning, sector planning . . . urban service area designations, urban growth boundaries, and mixed-use, high density development in urban areas.”¹⁸² The DCA is required to help local governments in implementation “within available resources.”¹⁸³ While this language is helpful, it is optional and provides little incentive for local governments to engage in smart growth planning. Furthermore, the statute limits state aid to what it determines to be “feasible.”¹⁸⁴ Given the state’s emphasis on economic growth and its overhaul of the former system, it is unlikely to prioritize funding for smart growth.

Although HB 7207 encourages “planning innovation,” without state checks on how development occurs, Florida will likely face development pressure in natural resource areas once the supply of excess housing is eliminated.¹⁸⁵ Given Florida’s performance on smart growth factors under its old management regime, it will be critical to examine development patterns as local governments regain control of land use planning.¹⁸⁶ Seemingly, Florida has delegated too much authority and “smart growth” is no longer a priority. The lack of guidance on where to develop, removal of development fees, and lack of state review will likely exacerbate sprawl, especially if development is cheaper on the fringe than building around existing infrastructure. Thus, HB 7207 does not sound promising in terms of its ability to efficiently manage growth.

179. § 163.3180(1)(a) (2012); *Summary of some major changes to the Florida growth management statutes*, *supra* note 178.

180. § 163.3177(3)(a) (2012). *Requirements for Florida’s comprehensive plans*, *supra* note 168.

181. § 163.3168 (2012).

182. § 163.3168(2) (2012).

183. § 163.3168(3) (2012). (meaning state assistance is dependent on agency budgets).

184. *See id.* (limiting amendment plans to those that do not adversely impact important state resources).

185. *See* § 163.3168(1) (2012).

186. *See* § 163.3161 (2012).

2. A BRIEF LOOK AT NEW JERSEY'S LAND DEVELOPMENT LAW

a. Current System

In New Jersey, a non-binding state plan exists.¹⁸⁷ It is important to note, however, that in 2011 the state announced a program that would substantially depart from the current system. New Jersey's State Strategic Plan (SSP) has not yet been implemented, and is currently open to public comment.¹⁸⁸

Under its current system, New Jersey's State Planning Commission (SPC) prepares and updates a statewide planning document—an advisory document that outlines a number of planning goals.¹⁸⁹ The plan includes numerous goals and policies addressing smart growth factors such as transportation, housing, and natural resources.¹⁹⁰ The establishment of county planning boards is optional, so arguably planning at the county level is not mandatory.¹⁹¹ However, once a planning board is formed, planning is required, while zoning powers are given to the municipality, which create a master plan.¹⁹² Generally, counties adopt “master plans” which municipalities consider when drafting their own master plans and adopting zoning ordinances.¹⁹³

To ensure vertical consistency between local, county, and state plans, the state uses an optional “cross acceptance” procedure.¹⁹⁴ Local plans are reviewed to identify consistencies, encourage dialogue between government sectors during the planning process, and to provide guidance to local governments in drafting their plans.¹⁹⁵ After plans are “endorsed” by the Office of Smart Growth (OSG) (currently

187. See N.J. STATE PLANNING COMM'N, THE NEW JERSEY STATE DEVELOPMENT AND REDEVELOPMENT PLAN (Mar. 1, 2001), available at <http://www.nj.gov/state/planning/docs/stateplan030101.pdf>. The Plan states:

New Jersey's State Plan, including its State Plan Policy Map (Policy Map), is used to guide municipal, county and regional planning, state agency functional planning and infrastructure investment decisions. It is not appropriate to use the State Plan directly to formulate codes, ordinances, administrative rules or other regulations. Such regulations should be formulated to carry out the master and functional plans of the responsible agencies.

Id.

188. See *State Planning*, N.J. FUTURE, <http://www.njfuture.org/issues/planning-and-governance/state-planning/> (last visited Mar. 12, 2013).

189. Knaap & Lewis, *supra* note 113, at 22.

190. *Id.* at 21.

191. N.J. STAT. ANN. § 40:27-1 (West 2012).

192. See § 40:27-2; INGRAM ET AL., *supra* note 14, at 181.

193. See INGRAM ET AL., *supra* note 14, at 181-82 (explaining the linkage between master plans and zoning.)

194. *Id.* at 183; Knapp & Lewis, *supra* note 113, at 22.

195. Knapp & Lewis, *supra* note 113, at 22.

Office for Planning Advocacy (OPA)),¹⁹⁶ local governments must give a status report every two years and notify the SPC of any significant plan changes.¹⁹⁷

Endorsement by OSG is non-mandatory. Of 566 municipalities, only 17 have been endorsed.¹⁹⁸ However, the government incentivizes the process through a number of benefits including streamlined environmental permitting.¹⁹⁹ Thus, it is contended that the state's plan is a directional document that lacks regulatory teeth.²⁰⁰ Despite the lack of substantive enforcement of state goals and endorsement procedures, smart growth aims have been carried out, if at all, at the local level. This is likely due to the amount of authority given to state agencies in implementing the state's goals.

The state's DOT and transit agencies have partnered to redevelop communities around transit facilities, while its Department of Environmental Protection oversees development in certain areas.²⁰¹ As a result, redevelopment has taken place in mature municipalities, and transit-oriented development (TOD) occurs near existing transit stations, indicators that growth is occurring consistent with the state's plan and reducing sprawl.²⁰² Additionally, the state has had considerable success in partnering with municipalities to develop "smart growth" towns.

Three regional planning commissions in the state have been established to manage specific regional issues that local governments do not have the resources or authority to address, including oversight of development in an industrially abused area.²⁰³ Additionally, each region

196. The Office of Smart Growth is part of the State Department of Community Affairs and provides staff support to the state planning regime. Knapp & Lewis, *supra* note 15, at 23; see INGRAM ET AL., *supra* note 14, at 178.

197. See N.J. STAT. ANN. § 52:18A-199 (West 2012); INGRAM ET AL., *supra* note 14, at 183.

198. Lucy Vandenberg, Op-Ed, *New State Strategic Plan Starts off on the Right Foot*, N.J. SPOTLIGHT, Nov. 8, 2011, <http://www.njspotlight.com/stories/11/1108/1509/>.

199. § 13:20-18; Knaap & Lewis, *supra* note 113, at 24; see Ken Belson, *In Success of 'Smart Growth,' New Jersey Town Feels Strain*, N.Y. TIMES, Apr. 9, 2007, at B1 (noting that the state incentivizes with expediting state permits or other administrative requirements).

200. INGRAM ET AL., *supra* note 14, at 185.

201. *Id.* at 180 (stating that the New Jersey DEP issues permits for development on waterfronts, wetlands, and coastal areas, as well as approves water allocations and the boundaries of sewer services areas).

202. See INGRAM ET AL., *supra* note 14, at 185. Nevertheless, large lots (and thus sprawl) continue to be a major smart growth problem for New Jersey. See *Sprawl Continues to Consume New Jersey's Open Lands*, N.J. FUTURE, <http://www.njfuture.org/2008/08/06/compact-growth-regional-planning> (last visited Mar. 13, 2013).

203. INGRAM ET AL., *supra* note 14, at 185.

has set out comprehensive land use regimes that override local zoning.²⁰⁴ So far, the commissions have helped to preserve wetlands and prevent the spread of industrial waste.²⁰⁵ While the state has demonstrated success in some smart growth factors, results indicate that regional collaboration, inter-agency coordination, and state oversight are the basis of that success.

b. *Mt. Laurel* and Affordable Housing

New Jersey is well-known for its progressive affordable housing statements. In 1975, the New Jersey Supreme Court decided the case of *Southern Burlington County NAACP v. Mount Laurel Township (Mt. Laurel I)*, requiring that local governments use their zoning power to afford a “realistic opportunity for the construction of its fair share of the present and prospective regional need for low and moderate income housing.”²⁰⁶ Most experts agree that segregation played, and continues to play, an important role in *Mt. Laurel* doctrine.²⁰⁷

However, *Mt. Laurel I* did little to motivate local governments to redress the exclusionary zoning problems in the state. In *Mt. Laurel II*,²⁰⁸ the New Jersey Supreme Court promulgated a number of remedies that would be available where local governments continued to engage in exclusionary zoning.²⁰⁹ Subsequently, the New Jersey Fair Housing Act was enacted. The Act confirms the “fair share” concept

204. In addition to a state plan, three regional plans in New Jersey (for the Highlands, Pinelands and Hackensack Meadows) cover about 40% of the state. E-mail from Hon. Peter Buchsbaum, J., N.J. Super. Ct. App. Div., Hunterdon County (May 22, 2012) (on file with the authors).

205. INGRAM ET AL., *supra* note 14 at 185.

206. S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mt. Laurel II*), 456 A.2d 390, 413 (N.J. 1983) (citing *Mt. Laurel I*, 336 A.2d 713 (N.J. 1975)); MANDELKER ET AL., *supra* note 37, at 460.

207. While not addressed in the *Mt. Laurel* opinions, racial discrimination is “intimately related to housing discrimination,” especially in New Jersey. MANDELKER ET AL., *supra* note 37. At the time *Mt. Laurel* was decided, race was “an effect of the history of segregation between New Jersey’s cities and suburbs,” and although framed as an economic discrimination case, most of the plaintiffs were rural African-Americans. Daniel Meyler, *Is Growth Share Working for New Jersey?*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 219, 232 (2010). New Jersey is now characterized by a pattern of racially integrated cities and primarily white suburban areas, with large disparities in income. Karl de Vries, *Virtually all-white Margate, diverse Atlantic City illustrate racial divide*, NJ.COM, Jun. 5, 2011, http://www.nj.com/news/index.ssf/2011/06/difference_between_margate_atl.html (noting that part of Atlantic City is characterized by immigrant vendors and a few blocks south, lies an “overwhelmingly white” Margate City, and the median income of the latter is more than double that of the “diverse” neighborhood).

208. 456 A.2d 390 (N.J. 1983).

209. Remedies include builder’s remedies, mandatory set-asides, as well as instructions to lower courts to come up with “firm targets” for towns to reach. *Mt. Laurel II*, 456 A.2d at 408-91.

as legislative policy, and prescribes procedures for ensuring fair share measures are in place.²¹⁰ The Council on Affordable Housing (COAH) is responsible for administering the act, is charged with defining housing regions, estimates affordable housing needs, and reviews fair share numbers and contributions.²¹¹ As fair-share contributions are approved, municipalities have a degree of protection from *Mt. Laurel* type suits.²¹²

However, the COAH rules implementing the FHA have regularly been challenged as insufficient because they give a municipality too much discretion.²¹³ Specifically, the growth share rule enables municipalities to “avoid” the fair share housing obligations imposed by *Mt. Laurel*, by “simply deciding not to grow.”²¹⁴ Giving municipalities’ discretion “not to grow,” the rule provides a veil that exacerbates the problem of discrimination based on income, or race, depending on the particular municipality.

Upon challenges to the above rule, the COAH engaged in need-based projections that the municipalities were unable to manipulate, but these rules were challenged on the basis that the COAH’s “growth share” projections do not adequately address “regional share” needs required by *Mt. Laurel II*.²¹⁵

Ultimately, a number of municipalities comply with the COAH’s program to avoid *Mt. Laurel* claims despite their opposition to it. Even so, the state suffers from a shortage of affordable housing, which pushes development west, in lesser developed areas.²¹⁶ While the COAH has helped produce new units at a much higher rate than would exist without judicial intervention, it is not at a rate commensurate with needs.²¹⁷

In 2011, Governor Chris Christie called for the elimination of the COAH, relegating its “statutory duties, powers, and functions” to

210. MANDELKER ET AL., *supra* note 37, at 482.

211. INGRAM ET AL., *supra* note 14, at 179.

212. *Id.*

213. The COAH provided that municipalities were to provide growth projections based on how much they intended to grow and give the figures to the SPC. Meyler, *supra* note 207, at 236.

214. Brief for American Planning Association–New Jersey Chapter, et al., as Amici Curiae Supporting Respondents, at 3, *In re Adoption of N.J.A.C. 5:96 and 5:97*, 416 N.J. Super. Ct. App. Div.362 (2010).

215. COAH was aware of the problem and attempted to deal with it in formulating its “third round of administrative rules under N.J. Admin. C.” See Third Round Consultants Reports, Appendix F to N.J.A.C. 5:97, pp. 7, 12-15 and 21 (2008); Edward J. Boccher, *Base Affordable-Housing Obligation on Need and Supreme Court Directives*, 204 NEW JERSEY L. J. 23 (2011).

216. INGRAM ET AL., *supra* note 14, at 185; Buchsbaum, *supra* note 204.

217. INGRAM ET AL., *supra* note 14, at 185; Buchsbaum, *supra* note 204.

the DCA, and the legislature passed a bill to “revamp” the DCA.²¹⁸ Christie’s executive order would make the DCA responsible for addressing the needs of the providers and beneficiaries of affordable housing programs.²¹⁹ However, his executive order was overturned by an appellate court, which stated he had exceeded his authority in abolishing the agency.²²⁰ The Governor’s appeal to the state Supreme Court is pending. What this means for the state in terms of future housing planning is uncertain, as the elimination of the state agency that primarily oversees affordable housing may lead to another debate on the amount of discretion given to municipalities in addressing affordable housing.

c. New Jersey’s Proposed Land Use Oversight System

Despite New Jersey’s success in some smart growth factors, the state recently revealed that, for a “variety of reasons, the state plan has not been fully implemented by either state agencies or municipalities.”²²¹ In October 2011, the Governor released the proposal of a new plan dubbed the Strategic State Plan (SSP).²²² The amendment is intended to encourage “a balance of development and conservation objectives best suited to meet the needs of the state.”²²³ The SSP lays out “Garden State Values” intended to guide development, and consists of smart growth factors such as concentrated development, mixed-uses, utilizing infill and existing infrastructure, and providing transportation choices.²²⁴

The SSP mentions land use planning will no longer be a top-down approach to force compliance with a statewide plan, but will instead be a “blueprint” for statewide compliance goals involving coordinated and integrated actions, but with a less intrusive state role.²²⁵ The plan further commits to “sustainable development,” emphasizing efficient use of infrastructure, perseveration of natural resources areas,

218. Paul H. Schneider, *New Jersey Appellate Court Resurrects COAH*, THE NATIONAL LAW REVIEW, Mar. 9, 2012, <http://www.natlawreview.com/article/new-jersey-appellate-court-resurrects-coah-council-affordable-housing>.

219. *Fair Housing Act Administration*, N.J. DEP’T OF CMTY. AFFAIRS, <http://www.nj.gov/dca/services/lps/hss/> (last visited Mar. 13, 2013).

220. *Id.*

221. *State Planning*, *supra* note 187.

222. *Id.*

223. *APA-NJ Comments on State Strategic Plan*, AM. PLANNING ASS’N-N.J. CHAPTER, <http://njplanning.org/position-statements/new-jersey-state-strategic-plan-released/> (last visited Mar. 13, 2013).

224. N.J. STATE PLANNING COMM’N, *supra* note 187; see Rick Sinding, *State Officials: Redevelopment at the Heart of State Strategic Plan*, N.J. FUTURE NEWS, Mar. 28, 2012, <http://www.njfuture.org/2012/03/28/redevelopment-state-strategic-plan/>.

225. N.J. STATE PLANNING COMM’N, *supra* note 187, at 7.

and downplaying expanded development.²²⁶ In order to foster prompt, yet sustainable development, a number of systematic changes have been made.

Under the former plan, a lack of state agency coordination and unclear or inconsistent agency goals made it difficult to implement the state's goals.²²⁷ The SSP calls for horizontal integration among state agencies that regulate land use and infrastructure development.²²⁸ It requires shared information processes, and inter-agency coordination during transportation and energy planning, and implementation of TDR programs.²²⁹ Additionally, a steering committee has been created to align state investments and regulations with the SSP.²³⁰ The committee exists to ensure coordination between the local government and relevant state agencies occurs.²³¹

The OPA (formerly OSG) will no longer "endorse" local plans, and will play an active role in land use planning. OPA will be, "[b]ased on the Garden State Values, track progress through indicators and establish targets to test if progress is meeting expectations."²³² OPA will be responsible for identifying "Priority Industry Clusters"²³³ and finding optimal locations for those industries; partner with industry leaders, local government, regional planning entities, and educational institutions to spur growth in regions;²³⁴ and will create working groups to identify and prescribe development action.²³⁵ OPA must also review infrastructure plans in regional growth areas and recommend solutions.²³⁶ Additionally, to assist with TOD, OPA will participate in statewide partnerships and advocate for solutions to spur TOD.²³⁷ However, the appetite for enforcement is unknown at this point.

Additionally, local governments lack the incentive to get their plans "endorsed." While local planning and zoning processes will remain largely the same, the SSP will incentivize participation in the SSP with capital for project development, discretionary funding, and an en-

226. *See id.*; Sinding, *supra* note 223.

227. *See* N.J. STATE PLANNING COMMISSION, *supra* note 187, at 6.

228. *Id.* at 5.

229. *Id.* at 34–35.

230. Vandenberg, *supra* note 198.

231. N.J. STATE PLANNING COMM'N, *supra* note 187, at 6.

232. *Id.* at 40.

233. "Priority industry clusters" are known as locations where targeted economic growth occurs. *Id.* at 22.

234. *Id.* at 25.

235. *Id.*

236. *Id.* at 30.

237. *Id.* at 31.

vironmental remediation fund by linking them to favorable development or land use controls consistent with the Garden State Values.²³⁸ Additionally, a criteria-based program to determine which areas should be preserved and which should be developed (priority growth investment areas), will be implemented to “effectively plan for vibrant regions.”²³⁹ The focus on criteria-based growth areas parallels that of Oregon’s urban growth boundary system, to be discussed below, and may have measurable changes on the pattern of development.

Overall, the notion of criteria-based prioritization of developable land, horizontal integration, and incentive-based planning is favorable, though some “sticks” should be in place to ensure smart growth occurs. New Jersey has expressly outlined smart growth goals in its SSP and has laid out general implementation measures in reaching those goals, so that success is possible with the right enforcement mechanisms, directives, state oversight, and guidance. Further, facilitating regional planning through county level involvement should help ensure local involvement, coordination, and efficiency in certain planning areas.²⁴⁰

IV. State Oversight and Coordination: Oregon

Oregon’s land use system has been heralded as one of the most effective smart growth programs in the country. Like Florida’s former system, the state plays an active role in land use planning. However, the implementation of state goals and policies is carried out much differently.

A. *A Brief History of Oregon’s Growth Management Legislation*

Prior to 1973, Oregon’s land use model looked like a traditional zoning regime, where zoning authority was delegated to local governments with little state involvement or oversight.²⁴¹ In response to widespread development in the 1960’s and a loss of productive farmland, which was a significant source of income for the state, Senate Bills 100 and 101 were proposed by Governor Tom McCall, and

238. N.J. STATE PLANNING COMM’N, *supra* note 187, at 30; *see* Vandenberg, *supra* note 198.

239. N.J. STATE PLANNING COMM’N, *supra* note 187, at 4.

240. *Id.* at 30.

241. Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. MARSHALL L. REV. 357, 360-63 (Winter 2012) [hereinafter *Quiet Revolution*].

passed in 1973.²⁴² Together, the bills “emphasized the need to protect Oregon’s agricultural and forestry lands by containing urban development.”²⁴³

More notably, SB 100 created a new state entity, the Land Conservation and Development Commission (LCDC), which was tasked with adopting binding state goals, reviewing plans for consistency with goals, and enforcing state planning requirements.²⁴⁴ The bill also required local comprehensive plans to incorporate state goals into their provisions.²⁴⁵ The same year SB 100 was enacted, *Fasano v. Board of County Commissioners* held that zoning regulations must be consistent with local comprehensive plans.²⁴⁶ Thus, SB 100 and *Fasano* created a “hierarchical relationship” among state goals, local plans, regulations, and land use decisions.²⁴⁷ Unlike Florida, there has not been an emphasis on consistency *across* jurisdictions, but rather coordination.

After Governor McCall left office, he helped found “1000 Friends of Oregon,” a public advocacy group intended to advocate and litigate on behalf of the land use program he helped to create.²⁴⁸ The environmental advocacy work of Governor McCall has helped make Oregon’s land use system one of the most aggressive growth management schemes in the country.

B. Oregon’s Land Use System Today

Today, Oregon’s land use system has evolved into a complex, tiered management scheme. Much like New Jersey and Florida, the state provides a list of general goals. However, unlike the former, the Oregon Administrative Rules provide substantial guidance on how local governments are to achieve these goals, and arm private citizens and public agencies with a host of tools to ensure local governments do not engage in arbitrary land use decisions.²⁴⁹

242. S. 100-01, 57th Gen. Assemb., Reg. Sess. (Or. 1973); Sullivan, *Quiet Revolution*, *supra* note 241, at 367 (noting that SBs 100 and 101 are related pieces of farmland preservation legislation); INGRAM ET AL., *supra* note 14, at 190.

243. INGRAM ET AL., *supra* note 14, at 190.

244. Or. S. 100-01; Attkisson, *supra* note 41, at 999.

245. Or. S. 100-01; Sullivan, *Quiet Revolution*, *supra* note 241, at 369–70.

246. *Fasano v. Bd. of Cnty. Comm’rs*, 489 P.2d 693 (Or. Ct. App. 1971); *see* Sullivan, *Quiet Revolution*, *supra* note 241, at 369.

247. Sullivan, *Quiet Revolution*, *supra* note 241, at 370.

248. *Id.* at 371; *see* Wickersham, *supra* note 94, at 523.

249. *See generally* Attkisson, *supra* note 41, at 999 (discussing the how the new administration set specific goals and criteria for both the state and municipal government).

1. STATE GOALS SET BY LCDC

As mentioned above, the LCDC is responsible for promulgating Oregon's state goals. Today, there are 19 state goals, related to a variety of planning issues, including transportation (Goal 12), energy conservation (Goal 13), urbanization (Goal 14), and natural resources preservation (Goals 5, 16–19).²⁵⁰ In addition to the day-to-day administration of the Oregon planning program, the Department of Land Conservation and Development (DLCD)²⁵¹ assists local governments in planning matters, and suggests a variety of implementation mechanisms.²⁵²

As mentioned above, local comprehensive plans must further the state goals. Upon review, LCDC has the authority to acknowledge (certify) that plans and regulations further those state goals, or order a municipality to bring its plans into compliance with those goals²⁵³ or appeal individual plan amendments or land use regulations to LUBA.²⁵⁴ Thus, Oregon leaves implementation of its state goals to the local governments and LCDC checks those plans to ensure furtherance of the state's goals.²⁵⁵

2. STATE ACKNOWLEDGMENT AND ENFORCEMENT

To incentivize compliance with state goals, Oregon provides grants and technical assistance to jurisdictions certified by LCDC.²⁵⁶ Local

250. OR. ADMIN. R. 660-015-0000 (2013) (listing Goals 1-14); OR. ADMIN. R. 660-015-0050 (2013) (listing Goal 15); OR. ADMIN. R. 660-015-0010 (2013) (listing Goals 16-19); *see also* OR. DEP'T OF LAND CONSERVATION AND DEV., OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES (Mar. 2, 2010), *available at* http://www.oregon.gov/LCD/docs/goals/compilation_of_statewide_planning_goals.pdf (a compilation of Oregon's Goals which have been adopted as administrative rules and guidelines accompanying the goals which are not mandatory but are suggestions about how a goal may be applied).

251. DLCD is the Department of Land Conservation and Development, the LCDC's administrative staff. Sullivan, *Quiet Revolution*, *supra* note 241, at 369.

252. For example, the Housing Goal (Goal 10) states that its objective is to "provide for the housing needs of the citizens of the state," noting that "plans shall encourage . . . the availability of adequate . . . housing . . . which are commensurate with the financial capabilities of Oregon . . ." To implement, the goal recommends continued review of housing need projections, a detailed planning management program for implementation roles, and expediting development proposals that are in accordance with zoning ordinances and plans. OR. DEP'T OF LAND CONSERVATION AND DEV. (Goal 10), *supra* note 250, at 1-2; OR. ADMIN. R. 660-008-0000 (2013).

253. Wickersham, *supra* note 94, at 524; OR. REV. STAT. § 197.251 (2012). In addition to affirmative acknowledgment of plans and land use regulations, there is the more numerous acknowledgment of individual plan and land use regulation amendments simply by the passage of 21 days without an appeal, in which case those amendments are "deemed" acknowledged. § 197.625(6).

254. § 197.090(2)-(4) (LUBA is the Land Use Board of Appeals.).

255. Attkisson, *supra* note 41, at 999.

256. INGRAM ET AL., *supra* note 14, at 193; Edward J. Sullivan, *Remarks to the Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 OR. L. REV. 813, 817-18 (2008) [hereinafter "*Remarks*"].

plans, regulations, and actions that continually fail to meet goals are subject to an “enforcement order.” Permits may be suspended, state funds withheld, or a localities’ authority to perform certain functions may be suspended.²⁵⁷ Historically, Oregon has not had to use enforcement mechanisms to order compliance.²⁵⁸

Initially, a two-step periodic review of plans was promulgated to ensure incremental modifications of plans would not be used to bypass consistency requirements.²⁵⁹ However, periodic review has not been widely used, due to the length and complexity of the process.²⁶⁰

3. LUBA AND THE ADJUDICATION OF LAND USE DECISIONS

Another means to ensure land use decisions²⁶¹ comply with goals and comprehensive plans, is review by the Land Use Board of Appeals (LUBA).²⁶² This state agency hears appeals to land use decisions, helping relieve judicial courts of their land use docket.²⁶³ Upon hearing appeals, LUBA must affirm, reverse, or remand land use decisions that violate the comprehensive plan or state planning goals.²⁶⁴

Compared to judicial standing requirements, standing requirements for appealing land use decisions to LUBA are fairly lax, allowing a number of citizens and public organizations to challenge land use decisions without being “adversely affected” in the traditional sense.²⁶⁵

257. §§ 197.835(6)–(7), 197.319–355; INGRAM ET AL., *supra* note 14, at 194; Sullivan, *Remarks*, *supra* note 256, at 818.)

258. INGRAM ET AL., *supra* note 14, at 194 (stating that, “between the initial program implementation and 1991, LCDC adopted . . . enforcement orders for only three counties and one city”).

259. Sullivan, *Quiet Revolution*, *supra* note 241, at 375; Sullivan, *Remarks*, *supra* note 256, at 818.

260. *See* Sullivan, *Quiet Revolution*, *supra* note 241, at 374–75.

261. LUBA’s review is limited to “land use decisions” and “limited land use decisions.” A “land use decision” is defined as “a final decision by a local government or special district that concerns the adoption, amendment or application of the state-wide planning goals, a comprehensive plan provision, or a land use regulation.” 197.015(10). Examples include zoning, subdivision ordinances, zone changes, conditional use permits, and variances. *Frequently Asked Questions*, LAND USE BD. OF APPEALS, OREGON.GOV, <http://www.oregon.gov/LUBA/FAQ.shtml#top> (last visited Mar. 10, 2013). Limited land use decisions are final decisions regarding site within an urban growth boundary, and relate to urban land division, or site and design review. § 197.015 (12).

262. *See* Sullivan, *Remarks*, *supra* note 256, at 818; § 197.835(6), (7).

263. Sullivan, *Quiet Revolution*, *supra* note 241, at 372.

264. INGRAM ET AL., *supra* note 14, at 194.

265. § 197.830(6); *Pacific W. Co. v. Lincoln Cnty.*, 32 Or. LUBA 317 (1997) (“ORS 197.830 eliminated the requirement that a petitioner be “adversely affected” or “aggrieved” to have standing to appeal a land use decision to LUBA”); *Lowrie v. Polk Cnty.*, 19 Or. LUBA 564 (1990) (stating that “Where the local code makes no distinction among “interested persons,” “disinterested witnesses,” and “parties,” any person

A broad range of citizens may contest a land use decision, even if interests are non-pecuniary.²⁶⁶

Pursuant to statute, local governments must support their decisions with adequate findings based on “substantial evidence in the whole record.”²⁶⁷ LUBA then reviews the written findings to determine whether they support the land use decision, often interpreting state goals and comprehensive plans when reviewing for consistency.²⁶⁸ Generally, LUBA defers to local governments interpreting their own land use plans.²⁶⁹ However, parties dissatisfied with a LUBA decision can seek judicial review from the Oregon Court of Appeals.²⁷⁰ Thus, LUBA provides a somewhat neutral avenue to challenge bureaucratic decisions where ordinarily, these challenges might not be brought.

4. (MOSTLY) VOLUNTARY REGIONAL PLANNING

Oregon does not explicitly mandate regional planning in the majority of its jurisdictions, but Senate Bill 100 provided that “counties would, in a fairly weak manner, coordinate land use planning activities within their borders.”²⁷¹ Portland Metro²⁷² was established several years after SB 100, consists of 25 cities and 3 counties, and is the most populous area in the state. It is responsible for establishing the shape of the Portland metropolitan urban growth boundary, and the adoption and implementation of regional functional plans and goals. With the exception of Portland Metro, metropolitan area transportation, and urban growth boundary planning, collaborative regional planning is largely voluntary, but is recognized by the state.²⁷³

Areas that feel the need to address regional implementation of plans, such as the provision of urban services, may form Councils of Government (COG).²⁷⁴ COGs are “usually non-profit [sic] organizations formed by participating cities, counties, and special districts . . .” that

who appears at a local hearing is recognized as an “interested person” who could be aggrieved by the local decision).

266. See, e.g., *Petersen v. Mayor and Council of Klamath Falls*, 566 P.2d 1193 (Or. banc 1977); *Weyerhaeuser Real Estate Dev. Co. v. Polk Cnty.*, 267 P.3d 855 (Or. Ct. App. 2011).

267. § 197.835(9)(C).

268. § 197.835.

269. § 197.829 (1).

270. § 197.850 (1).

271. Sullivan, *Quiet Revolution*, *supra* note 241, at 377.

272. Metro is the elected regional body with planning authority over the urban Portland metropolitan region. See Sullivan, *Quiet Revolution*, *supra* note 241, at 377-80.

273. INGRAM ET AL., *supra* note 14, at 192.

274. See *id.* at 191.

address governmental services, and provide a “regional forum” for issues.²⁷⁵ Generally, voluntary regional planning has worked for Oregon as a means of coordinating and addressing multi-jurisdictional concerns.²⁷⁶

Thus, while Oregon has responsibility for establishing state goals, it delegates implementation of those goals to local governments or, if desired, regional governments. To ensure state goals are furthered, the state requires top-down vertical consistency. While periodic review has not been successfully implemented as a check on plan amendments or to otherwise serve to keep plans current, LUBA provides a platform for citizens and organizations to challenge land use decisions and plan amendments.

C. Oregon’s Growth Management System

Oregon’s growth management system is comprised of several state goals, as well as progressive legislation enacted after SB 100. By nature, its land use system reflects the major premise behind SB 100 and 101, supporting the preservation of farm and forestland.²⁷⁷ The more significant tool in Oregon’s growth management program is its UGB requirement.

1. GOAL 14: THE URBAN GROWTH BOUNDARY

An urban growth boundary is a physical boundary that marks the limits of urban growth; urban development can occur within, but is not allowed outside, the boundary.²⁷⁸ The UGB is intended to shift the pattern of development from low-density sprawl to compact, high-density, mixed use development.²⁷⁹ The purpose of Goal 14 (Urbanization) is “[t]o provide for an orderly and efficient transition from rural to urban land use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land . . .”²⁸⁰ To further this goal, cities, counties, and regional gov-

275. OR. CHAPTER OF THE AM. PLANNING ASS’N, REGIONAL PLANNING FOR THE 21ST CENTURY 15 (Nov. 2010), available at http://centralpt.com/upload/342/Otherdocs2010/16593_OAPAFinalRegReportNov2010.pdf [hereinafter OR. CHAPTER OF THE APA].

276. See, e.g., Sullivan, *Quiet Revolution*, *supra* note 279, at 377, 386 (stating that Oregon requires “local plans be ‘coordinated’ so that the needs of each such government are accommodated to the maximum extent possible.”).

277. See INGRAM ET AL., *supra* note 14, at 193 (stating that as an enforcement mechanism, Oregon’s deferral of property taxes for farm and forestland have resulted in about \$4.8 billion in tax deferrals between 1974 and 2004).

278. MANDELKER ET AL., *supra* note 37, at 809.

279. Wickersham, *supra* note 94, at 547-48.

280. OR. DEP’T OF LAND CONSERVATION AND DEV. (Goal 14), *supra* note 250, at 1; OR. ADMIN. R. 660-014-0000 (2012).

ernments are required to establish UGBs in a “cooperative process,” intended to sustain the growth pattern in the area for twenty years.²⁸¹

To expand or establish the UGB, local governments must establish a need for the amount of land included according to goal and statutory requirements and determine appropriate locations for urban growth based on priorities set out by statute and in consideration of other specific factors.²⁸² The state legislature has specified the order in which land should be prioritized when expanding the UGB: land designated as urban reserve land by local plan, adjacent exception areas,²⁸³ non-resource land,²⁸⁴ land designated as marginal,²⁸⁵ and lastly, agricultural or forestry land, or both.²⁸⁶ By identifying and prioritizing developable land using objective standards, Goal 14 helps to ensure statewide growth occurs systematically and consistently across the state.

It is important to note that the UGB is not without its critics.²⁸⁷ A significant issue regarding the UGB is whether to accommodate growth by expanding the UGB, or increasing density within the UGB.²⁸⁸ Increasing density is of concern to residents within the UGB who want to retain large lot sizes and suburban lifestyles, while landowners outside the UGB may desire the same, or want to leave property undeveloped. While the obvious solution to contain sprawl is to increase density within the UGB, legitimate adequate pub-

281. See OR. REV. STAT. § 197.040 (2012).

282. § 197.298. In addition to prioritizing per § 197.298, boundaries shall be determined by considering the orderly and economic provision of public facilities and services; efficient accommodation of identified land needs; comparative environmental, social, and economic consequences; and compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forestland outside the UGB.

283. Exception areas are those lands which have good farm and forest soils and located outside urban growth boundaries, but are otherwise developed or committed to non-resource uses or, due to “compelling reasons and facts” may be devoted to non-resource uses. See Edward Sullivan & Ronald Eber, *The Long and Winding Road: Farmland Protection in Oregon 1961–2009*, 18 SAN JOAQUIN AGRIC. L. REV. 1, 45-46 (2009) [hereinafter *Long and Winding Road*] (discussing exception areas).

284. Non-resource lands are those lands located outside urban growth boundaries that do not have soils that meet state standards for preservation of farm or forest uses. See Edward J. Sullivan and Alexia Solomou, “*Preserving Forest Lands for Forest Uses*”—*Land Policies for Oregon Forest Lands*, 26 J. ENVTL. L. & LITIG. 179, 199-200 (2011) [hereinafter *Preserving Forest Lands*].

285. See Sullivan & Eber, *Long and Winding Road*, *supra* note 283, at 21-25.

286. § 197.298.

287. See discussion *infra*, Part IV.D.4.

288. Sullivan & Eber, *Long and Winding Road*, *supra* note 283, at 33; see also Hildebrand v. City of Adair Vill., 177 P. 3d 40 (Or. Ct. App. 2007) (holding that in deciding where to develop urban and residential use, the Village should prioritize per OR. REV. STAT. § 197.298, but the statute authorizes exceptions to prioritizing where circumstances such as the provision of public facilities or infrastructure exists).

lic facility concerns and overuse of resources can be a constraint on promoting compact development.²⁸⁹

2. GOAL 12 AND THE TRANSPORTATION PLANNING RULE

Goal 12 (Transportation) plays a large role in Oregon's growth management regime. The stated purpose of the goal is to "provide and encourage a safe, convenient and economic transportation system."²⁹⁰ More importantly, the goal requires transportation plans to "consider all modes of transportation."²⁹¹ Goal 12 explicitly encourages alternative modes of transportation and discourages sprawl, providing that "planning and development of transportation facilities in rural areas should discourage urban growth while providing transportation service necessary to sustain rural and recreational uses in those areas so designated in the comprehensive plan."²⁹²

To help implement Goal 12, the Transportation Planning Rule (TPR) was promulgated by LCDC.²⁹³ The TPR requires transportation and land use planning to be coordinated and mutually supportive, eliminating identified conflicts.²⁹⁴ To this end, the Oregon Department of Transportation (ODOT) has played a larger role in Oregon's growth management than most other state agencies. ODOT is able to comment on land use applications and appeal land use decisions to LUBA when determining the local government has not adequately addressed the necessary criteria or relied on incorrect data.²⁹⁵

Further, ODOT "exerts great influence" over land use decisions and planning, by having to permit and approve a number of development projects—including large commercial projects, street improvements

289. OR. DEP. OF LAND CONSERVATION AND DEV. (Goal 12), *supra* note 250, at 1 (stating that when establishing the UGB, consideration must be given to "orderly and economic provision of public facilities and services"); *id.* at 1 (Goal 11) (stating that Goal 11 requires "public facilities and services in urban areas should be provided at levels necessary and suitable for urban uses."); *see* OR. ADMIN. R. 660-011-0000 (2013).

290. OR. DEP. OF LAND CONSERVATION AND DEV., *supra* note 258, at 39; *see* OR. ADMIN. R. 660-012-0000.

291. OR. DEP. OF LAND CONSERVATION AND DEV., *supra* note 258, at 39; *see* OR. ADMIN. R. 660-012-0000.

292. OR. DEP. OF LAND CONSERVATION AND DEV., *supra* note 258, at 40; *see* OR. ADMIN. R. 660-012-0000.

293. Sullivan, *Quiet Revolution*, *supra* note 241, at 370 (discussing the history of the LCDC's goals); *see also* OR. ADMIN. R. 660-012-0060 (containing information about TPRs).

294. Timothy V. Ramis & Andrew H. Stamp; *Integrating Procedural Aspects of Transportation and Growth Management in Oregon*, 77 OR. L. REV. 845, 854 (1998); *see also* OR. ADMIN. R. 660-012-0015(7) (resolving conflicts between local governments and TPSs).

295. OR. ADMIN. R. 660-012-0060; Ramis & Stamp, *supra* note 294, at 855–56.

necessary for residential subdivision, as well as transit corridors and projects that affect state transportation facilities.²⁹⁶ Recognizing that a comprehensive transportation system must be planned in conjunction with land use to effectively manage growth, Goal 12 gives two state agencies a tremendous amount of control over the land use planning process.

3. LEGISLATION AND PROGRAMS PARTNERING ODOT AND LCDC

The Transportation and Growth Management (TGM) program is a non-regulatory program staffed by members of ODOT and DLCD.²⁹⁷ The TGM program incentivizes planning for non-vehicular travel, partnering with local governments to create transportation-efficient designs, and offering grants to fund those plans.²⁹⁸ Between 2009 and 2011, TGM program provided over \$6 million in funding to help plan for TODs, light rail systems, and bike and pedestrian plans.²⁹⁹

In addition to the goals addressed above, legislation enacted in 2009 and 2010 are relatively new pieces of Oregon's growth management regime. Oregon recognized that vehicular emissions account for a large portion of its carbon dioxide emissions.³⁰⁰ As part of the solution to this problem, HB 2186 established a GHG Emissions Task force to make planning process recommendations that would meet growth needs, while reducing GHGs for each Metropolitan Planning Organization (MPO) in 2009.³⁰¹ The task force was staffed with members from each MPO, LCDC, and ODOT.³⁰² Thus, roadway planning is the result

296. Ramis & Stamp, *supra* note 294, at 857; *see also* OR. ADMIN. R. 660-012-0060 (requiring consultation with ODOT regarding TPSs).

297. Ramis & Stamp, *supra* note 294, at 857.

298. *Id.*; TRANSPORTATION AND GROWTH MANAGEMENT PROGRAM, OREGON.GOV, <http://www.oregon.gov/LCD/TGM/> (last visited Mar. 13, 2013).

299. ERIK KVARSTEN ET AL., OR. TRANSP. & GROWTH MANAGEMENT PROGRAM, OR. TRANSP. & GROWTH MANAGEMENT BIENNIAL REPORT 2009-2011 (Jan. 2011), *available at* <http://www.oregon.gov/LCD/TGM/docs/biennialreport2011web12511.pdf?ga=>.

300. GOVERNOR'S ADVISORY GRP. ON GLOBAL WARMING, OREGON STRATEGY FOR GREENHOUSE GAS REDUCTIONS B-5 (2004), *available at* <http://www.oregon.gov/ENERGY/GBLWRM/docs/gwreport-final.pdf> (stating that gasoline and diesel fuel comprised about 38% of the state's carbon dioxide emissions in 2000).

301. H.R. 2186, 75th Leg., Reg. Sess. (Or. 2009). Pursuant to federal statute, Oregon is divided into six MPOs: Bend, Corvallis, Rogue Valley, Salem-Keizer, Central Lane, and Portland Metro. MPO GREENHOUSE GAS TASK FORCE, BUILDING SHARED UNDERSTANDING: METROPOLITAN PLANNING ORGANIZATIONS (MPOS) IN OREGON 4 (2009), *available at* <http://www.oregon.gov/ODOT/TD/OSTI/docs/HB2186/MPOGreenhouseGas.pdf>. An MPO is a regional organization responsible for comprehensive transportation planning in urban areas with populations over 50,000. Federal-Aid Highway Act of 1962, 23 U.S.C. § 134 (c)(1), (d)(1) (2012).

302. S. 1059, 75th Leg., Spec. Sess. (Or. 2010).

of a continuing, coordinated planning process, involving state, regional, and local land use and transportation planning departments.

SB 1059 was enacted in 2010, and requires ODOT and LCDC to establish “guidelines for developing and evaluating alternative land use and transportation scenarios that may reduce greenhouse gas emissions.”³⁰³ The agencies must develop administrative rules to direct the six MPOs in the state to help meet state GHG goals.³⁰⁴ Further, the Oregon Transportation Commission is required to adopt a statewide GHG reduction strategy and the DLCD was required to recommend GHG targets for each MPO.³⁰⁵ The bill expressly recognizes that land use planning and transportation planning are not mutually exclusive, and coordination is required to efficiently manage resources.

D. *Evaluating Oregon’s Success in Smart Growth Factors*

As discussed above, Oregon’s growth management program is largely based on growth containment, or its UGB. Inter-agency coordination and vertical consistency are integral to its land use system, as are its state goals.

1. COMPACT AND MIXED-USE DEVELOPMENT

According to the Lincoln Institute’s study, Oregon was “considerably more successful” than other states in the study at promoting denser development in the 1990s:

“Oregon is the only state in the study . . . where the population became more concentrated. . . . [t]he share of population growth in urban areas was higher than any other. . . while the share of population growth in rural areas was the second lowest [in the study]. . . . [e]mployment and population remain more centralized in Portland’s urban core than in most other metropolitan areas.”³⁰⁶

Thus, where population correlates with development, Oregon has been largely successful in preventing sprawl and containing development.

An integral part of Oregon’s success at preventing sprawl has been its UGB requirement. First set in 1979, Portland Metro’s density grew by 50% over the next decade.³⁰⁷ Further, average VMT increased by just 2%, and commute times decreased by 9%.³⁰⁸ Thus, as a result of an increase in density, there was a reduction in VMT. Aside from the

303. *Id.*

304. *Id.*; Chris Smith, *Focus on SB 1059*, PORTLAND TRANSPORT, (Feb. 2, 2010, 12:03 AM), http://portlandtransport.com/archives/2010/02/focus_on_sb_105.html.

305. OR. REV. STAT. § 184.899 (2012); OR. CHAPTER OF THE APA, *supra* note 275, at 8.

306. INGRAM ET AL., *supra* note 14, at 195.

307. ECONOMIC INTELLIGENCE UNIT, *supra* note 54, at 27.

308. Attkisson, *supra* note 41, at 1002-03.

UGB, this may be attributed to state requirements that zoning be guided by minimum residential density requirements and proximity to mass transit, so that development occurs in the right places.³⁰⁹

Goal 14 has helped to ensure the UGB grows in a manner that is consistent with the legislative aims of SB 100 and 101. UGBs are not allowed to include more land than the locality needs for future growth.³¹⁰ However, the success Oregon has had in containing sprawl is not merely the result of a well-articulated goal. Vertical consistency requirements give teeth to the UGB and local plans, and the requirement for regional coordination to establish the UGB minimized spill-over effects that would have occurred without such coordination.

Non-regulatory programs such as the TGM have helped aid local governments in “growing smart.”³¹¹ Additionally, interested persons and agencies may challenge the expansion of the UGB or appeal certain development projects to LUBA. Thus, Oregon’s success in containing growth is the result of Goal 14, density requirements, and entities who have an interest in ensuring development occurs where it “should,” and are also provided a forum to do so.

2. ENCOURAGING A VARIETY OF TRANSPORTATION OPTIONS

As discussed earlier, both ODOT and LCDC play a role in land use planning. The Portland region stands out as a model for complementary land use and transportation policies.³¹² Oregon’s focus on the partnership of ODOT and LCDC and on the reduction of GHG emissions has helped encourage multi-modal, non-vehicular travel, particularly in this region. In the Lincoln Institute study, Oregon outperformed other states in the context of alternate modes of transportation:

“Oregon had the largest share of commuting trips by public transportation and by biking or walking in 2000. . . . [W]hile counties in every density category in every other state showed outright declines, Multnomah County had more than a 10 percent increase in the share of bike/walk commutes.”³¹³

Portland has the highest share of bicycle commuters of any large U.S. city, with 324 miles of bike lanes and approximately 22,000 peo-

309. ECONOMIC INTELLIGENCE UNIT, *supra* note 54, at 27; *see generally* § 197.296 (establishing the factors to determine the sufficiency of buildable lands).

310. Attkisson, *supra* note 41, at 1001.

311. *See* OREGON TGMP, *supra* note 12.

312. Rachel Rawlins & Robert Paterson, *Sustainable Buildings and Communities: Climate Change and the Case for Federal Standards*, 19 CORNELL J.L. & PUB. POL’Y 335, 369 (2010).

313. INGRAM ET AL., *supra* note 14, at 195.

ple commuting to work each day by bicycle.³¹⁴ Unsurprisingly, three of Oregon's major cities were in the nation's top 20 "most bikeable cities" in 2010, taking into account segregated bike lanes, availability of bike racks, and number of cyclists.³¹⁵

In terms of public transit, the city of Portland is ranked as one of the "nation's leaders in public transit,"³¹⁶ based on ridership, safety, and government spending.³¹⁷ Portland provides residents with a variety of transit options, including buses, light rail (the "MAX"), commuter rail, streetcars, and an aerial tram.³¹⁸ TriMet (the Portland Region's public transit provider), serves 83.5% of the region and boasts a relatively high service frequency of 7.4 minutes.³¹⁹

MAX, the light rail system in the Portland Metro area, is the product of regional coordination. This 52 mile network serves three counties and has 85 stations, providing 40% of weekday transit trips.³²⁰ For a period, MAX included a "free zone" in which there was no fare, all day every day. It included well-traveled areas where many work and free parking is limited, such as downtown Portland and the business district in Northeast Portland.³²¹ However, the free zone is in the process of being phased out due to budget shortfalls faced by TriMet, that resulted from a lack of state funding.³²² Funding for TriMet

314. ECONOMIC INTELLIGENCE UNIT, *supra* note 54, at 27.

315. In this ranking, Portland ranked second; Salem ranked nineteenth, and Eugene ranked fifth. *20 Most Bike-Friendly Cities in America: Bicycling.com Ranks the Best Cities to Ride In*, THE HUFFINGTON POST ONLINE (June 8, 2010, 5:12 AM), http://www.huffingtonpost.com/2010/04/08/20-most-bike-friendly-city_n_530186.html#s79426&title=20_Scottsdale_Arizona.

316. In the 2011 rankings, Portland, Oregon ranked fifth in the nation. Danielle Kurtzleben, *The Ten Best Cities for Public Transportation*, U.S. NEWS AND WORLD REP., Feb. 8, 2011, <http://www.usnews.com/news/articles/2011/02/08/10-best-cities-for-public-transportation>.

317. Tyler Falk, *Top 10 U.S. cities for public transportation*, SMARTPLANET, Feb. 10, 2011, 8:52 AM, <http://www.smartplanet.com/blog/cities/top-10-us-cities-for-public-transportation/126>.

318. Kurtzleben, *supra* note 316.

319. Charles B. Stockdale, *The best cities to live car-free in America*, NBCNEWS.COM, Nov. 6, 2011, http://www.msnbc.msn.com/id/45125849/ns/business-going_green/t/best-cities-live-car-free-america/?Tyoe2-NWqHs.

320. *Facts about TriMet*, TRIMET (May 2012), <http://trimet.org/pdfs/publications/factsheet.pdf>.

321. Eliminating free parking is a tactic used in "smart growth" planning, and encourages non-vehicular travel. See OREGON TGMP, *supra* note 12, at 85.

322. David Krough, *Trimet Could Raise Fares, and end Free Zone*, KGW.COM, Feb. 8, 2012, <http://www.kgw.com/home/TriMet-budget-would-cut-services-change-to-flat-fares-138952519.html>; *TriMet considers raising fares, cutting service, dropping free rail to balance budget*, EL HISPANIC NEWS, Mar. 1, 2012, <http://www.elhpanicnews.com/2012/03/01/trimet-considers-raising-fares-cutting-service-dropping-free-rail-to-balance-budget/>.

comes from a number of municipal governments, ODOT, and larger businesses whose employees frequently use TriMet's services.³²³ It is evident that Portland's residents are reliant on the transit system, as some riders are willing to support fee increases, so that fewer routes will be eliminated.³²⁴ TriMet demonstrates that sustainability is highly important in providing public transit services, especially from a fiscal standpoint.

While statistics on actual transit ridership are mixed, the number of persons driving alone to work has decreased by about 5% from 1997 to 2009.³²⁵ Other studies estimate that MAX eliminates 87,000 automobile trips from the road and 7% of the population commutes by bike.³²⁶ Regardless of ridership, what remains important is that residents have the *option* of not driving.

Another study, conducted by Wall Street 24/7 listed the Portland Metro region as the second best city to be in without a car.³²⁷ Many neighborhoods characterized by complete streets reflect Goal 12's focus on encouraging walking and biking.³²⁸ The availability of bike-only lanes and traffic lights further make traveling by bike safer and easier.³²⁹

Between 1990 and 2007, the national VMT per capita grew by 8%, while Portland's fell by between 8% and 10%.³³⁰ These statistics are not surprising where regulations require local governments within MPOs to adopt land use and transportation plans designed to reduce vehicular travel, and where ODOT exercises considerable discretion over project development and the location of roadways.³³¹ City and county comprehensive plans look at performance measures from both a land use and transportation perspective. Further, ODOT has commented on specific land use proposals, and opposed development projects that would otherwise go unchallenged.³³²

323. See Krough, *supra* note 322.

324. Krough, *supra* note 322.

325. Human Transit reports that 12-15% percent of commuters take public transit over a twelve-year period, but indicates that the number of cyclists has increased. TriMet reports that MAX carries about 26% of evening rush hour commuters and that "ridership has outpaced population growth and daily VMT for more than a decade." Jarrett Walker, *Portland: A Challenging Chart*, HUMAN TRANSIT (Jan. 9, 2010), <http://www.humantransit.org/2010/01/portland-a-challenging-chart.html>; TRIMET.ORG, *supra* note 320.

326. Walker, *supra* note 325; TRIMET.ORG, *supra* note 320.

327. Stockdale, *supra* note 319.

328. See *id.*

329. See *id.*

330. Rawlins & Paterson, *supra* note 312, at 369.

331. *Id.* at 370; OR. ADMIN. R. 660-012-0000 to 0070 (2013).

332. Rawlins & Paterson, *supra* note 312, at 370.

The reduction in Oregon's VMTs is not purely the result of the TPR and Goal 12. Since travel behavior is intrinsically tied to land use patterns, the use of non-vehicular modes of travel would not have occurred, but for Oregon's emphasis on a pattern of compact, dense development encouraged by the UGB. Additionally, MPOs ensure that transportation is carried out in a coordinated fashion with defined performance measures.³³³ As exemplified by TriMet, regional transportation planning has helped ensure non-vehicular travel is available to residents.

3. PROTECTING ENVIRONMENTALLY SENSITIVE AREAS

The importance of preserving farmland, forestland, and other natural resources is emphasized in a number of Oregon's goals. While the results of actual conservation data are mixed, there is a general consensus among surveyors that Oregon's conservation program has been successful in preventing development on agricultural or natural resource areas.³³⁴

a. Goal 3: Farmland

Oregon is cited as having "one of the most comprehensive agricultural land preservation programs in the country."³³⁵ Goal 3 insists that agricultural lands "be preserved and maintained for farm use consistent with existing and future needs for agricultural products," requiring local governments to consider a number of factors before converting agricultural to developable land.³³⁶ To accomplish this goal, Exclusive Farm Use (EFU) zones are used to designate areas where non-farm uses are severely restricted.³³⁷ Further, "right to farm laws" are widely implemented.³³⁸

In the Lincoln Institute Study, Oregon ranked in the middle for the amount of land conserved.³³⁹ However, half of Oregon's land is federal land, and primarily open space and undeveloped, serving the same purposes as conservation land.³⁴⁰ Additionally, the UGB helped

333. See MPO GREENHOUSE GAS TASK FORCE, *supra* note 301, at 16.

334. INGRAM ET AL., *supra* note 14, at 196 (stating "it is reasonable to conclude that Oregon's policies did a good job of protecting farmland in the Willamette Valley."); Sullivan & Solomou, *Preserving Forest Lands*, *supra* note 292, at 240. (stating "the Oregon land use system has largely fulfilled the aspiration that 'forest lands shall be preserved for forest use.'").

335. MANDELKER ET AL., *supra* note 37, at 399.

336. *Id.*

337. *Id.*; Sullivan & Eber, *Long and Winding Road*, *supra* note 291, at 15.

338. Elizabeth Springsteen, *States' Right-To-Farm Statutes*, THE NAT'L AGRIC. L. CTR., <http://www.nationalaglawcenter.org/assets/righttofarm> (last visited Mar. 6, 2013).

339. INGRAM ET AL., *supra* note 14, at 195.

340. *Id.*

protect and even grow farmland in the Willamette Valley, an area where development pressure is “strongest.”³⁴¹ The state’s preferential tax treatment for farmland has resulted in approximately \$4.8 billion in tax deferral between 1974 and 2004.³⁴² Most farmland loss occurred in eastern Oregon, a low-density area with just 5% of the state’s population.³⁴³ Another study reveals that:

“Since 1987, only 33 percent of the land added to UGBs was zoned EFU (14, 840 acres), or less than one percent of all the land zoned EFU (15.5 million acres). The total acreage of all lands added to UGBs statewide over a 15 year period amounts to about a two-percent increase in the total land area within UGBs (782,000 acres).”³⁴⁴

Generally, there is agreement among practitioners that Oregon’s land use policies have been effective in preserving farmland and preventing conversion to urban use.³⁴⁵

In addition to Goal 3, the interplay of several other goals has helped to limit development on agricultural land:³⁴⁶

Statewide Goal 11, “Public Facilities and Services,” and Goal 12, “Transportation,” are underappreciated contributors to . . . farmland protection. These goals, and their implementing rules, require cities with populations exceeding 2500 to plan efficient extension of water and sewer systems and street networks, directing growth to appropriate urban areas. . . . [U]rban facilities such as sewer service and city streets are prohibited outside UGBs, reducing the growth-inducing influence of expensive public works projects on resource lands.³⁴⁷

Several state goals help promote the maintenance of farmland in Oregon, despite its growing population. Additionally, the goals’ “teeth,” agricultural landowners’ economic incentive to leave land undeveloped, and the fact that SB 100 and 101 were premised on the importance or preservation, have contributed to the success of Goal 3.

b. Goal 4: Forestland Preservation

Goal 4 established forestland preservation as a “principal land use policy objective of Oregon.”³⁴⁸ In addition to habitat preservation, part of the concern behind Goal 4 is pecuniary—Oregon is the nation’s leading producer of lumber and forest products, and the forestry industry is the second largest employer in the state.³⁴⁹ Accordingly, Goal 4

341. *See id.* at 196.

342. *Id.* at 193.

343. *Id.* at 195.

344. Sullivan & Eber, *Long and Winding Road*, *supra* note 283, at 45.

345. *See id.* (stating that “UGBs have protected farmland.”).

346. *Id.* at 44.

347. *Id.* at 45.

348. Sullivan & Solomou, *Preserving Forest Land*, *supra* note 284, at 188.

349. *Forest Land Protection Program*, OR. DEP’T OF LAND CONSERVATION AND DEV., <http://www.oregon.gov/LCD/forlandprot.shtml> (last visited Mar. 10, 2013).

stresses the importance of “making possible economically efficient forest practices” that assure sustainability.³⁵⁰ To reach this goal, local governments must inventory and designate forestland based on a number of factors, direct how those lands shall be used, and protect those lands via regulatory measures.³⁵¹

According to the Oregon Department of Forestry, Oregon has retained about 92% of the forest cover that was present in 1850.³⁵² Other studies reveal that 98% of forest, agricultural, and range land uses remained the same between 1974 and 2005.³⁵³ Further, the conversion of private forest, agriculture, and range land to more developed uses decreased, coinciding with the implementation of comprehensive land use plans.³⁵⁴

Oregon has successfully managed to preserve forestland, in accordance with the aims of Goal 4. The fact that land zoned low-density residential shifted to urban use at a high rate between 2000 and 2005 suggests that Oregon’s land use program encourages development in areas already urbanizing, and limits the development of rural, forest, and agriculture land, in accordance with its prioritization statute.³⁵⁵ Much like the other goals, the rate at which forestland is preserved is a result of the regulatory “teeth” the state goals have, the prescribed mechanism for implementing Goal 4, and the Goals’ relationships with one another.

The requirement that forestland be placed at the bottom of the list of land used to expand the UGB has been critical in Oregon’s success at converting forestland to other uses at a much slower rate than most other states.³⁵⁶ While the state’s economic interest in creating sustainable forestlands is subject to market demands, it has positively impacted the amount of forestland that has been conserved thus far.³⁵⁷

350. OR. DEP’T OF LAND CONSERVATION AND DEV. (Goal 5), *supra* note 250, at 1; OR. ADMIN. R.660-006-0000 (2013).

351. Sullivan & Solomou, *Preserving Forest Lands*, *supra* note 284, at 222-23.

352. OR. DEP’T OF LAND CONSERVATION AND DEV., *supra* note 349.

353. Sullivan & Solomou, *Preserving Forest Land*, *supra* note 284, at 244.

354. *Id.* at 244.

355. *Id.* at 244; *see* OR. REV. STAT. § 527.630 (2012); OR. ADMIN. R. 660-015-0000 (4)(B)(3) (forestation or reforestation should be encouraged on land suitable for such purposes); ANDREW A. HERSTROM ET AL., U.S. FOREST SERV. & OR. DEP’T OF FORESTRY, FORESTS, FARMS & PEOPLE: LAND USE CHANGE ON NON-FEDERAL LAND IN OREGON 1974-2005 (2011), available at http://www.oregon.gov/odf/state_forests/frp/docs/forest_farmspeople2009.pdf; *see also* *Forestry Report Chronicles Land-Use Changes in Oregon*, OREGONLIVE (Mar. 15, 2011, 8:30 AM), http://www.oregonlive.com/argus/index.ssf/2011/03/forestry_report_chronicles_lan.html.

356. Sullivan & Solomou, *Preserving Forest Lands*, *supra* note 284, at 245.

357. *Id.* at 183-85.

Lastly, because “forest land” encompasses forested lands needed for watershed protection, wildlife and fisheries habitat and recreation, Goal 4 helps to protect a broader range of uses (and thus acreage) than pure timber industry practices might.³⁵⁸

c. Goal 5: Natural Resources Conservation

Oregon has a number of state goals relating to the conservation of natural resources. In order to further Goal 5: “to protect natural resources and conserve scenic and historic areas and open spaces,”³⁵⁹ Oregon’s implementation rule requires local governments to:

“Inventory local occurrences of resources listed in Goal 5 and decide which ones are important; Identify potential land uses on or near each resource site and any conflicts that might; Analyze economic, social, environmental, and energy (ESEE) consequences of such conflicts; Decide whether the resource should be fully or partially protected, and justify the decision; Adopt measures such as zoning to put that policy into effect.”³⁶⁰

If there are no conflicts, resources must be “preserved in their original character.”³⁶¹

Goal 5 defines “natural resources” very broadly, including energy sources, fish and wildlife areas and habitats, outstanding scenic views and sites, water areas, wetlands, watersheds, groundwater, and historic resources within its definition of lands that must be inventoried.³⁶² It then establishes guidelines for the preservation of natural resources in light of development, requiring an evaluation of the physical limitations of the land to be used as “the basis for determining the quantity, quality, location, rate and type of growth in the planning area.”³⁶³ Local governments are encouraged to use “fee acquisition, easements, and cluster developments” to implement the goal.³⁶⁴

358. See OR. ADMIN. R. 660-006-0000.

359. OR. DEP’T OF LAND CONSERVATION & DEV. (Goal 5), *supra* note 250, at 1-3.

360. *Explanation of Goal 5*, OR. DEP’T OF LAND CONSERVATION & DEV., <http://www.oregon.gov/LCD/goal5explan.shtml> (last visited Mar. 113, 2013); see OR. ADMIN. R. 660-023-0030.

361. Averil Rothrock, *Oregon’s Goal Five: Is Ecologically Sustainable Development Reflected?*, 31 WILLAMETTE L. REV. 449, 461 (1995).

362. Goal 5 also requires the following resources to be inventoried: land needed or desirable for open spaces; mineral and aggregate resources; ecologically and scientifically significant natural areas; wilderness areas; historic areas, sites, and structures; cultural areas; potential and approved recreational trails; potential and approved federal and state wild and scenic waterways. OR. DEP’T OF LAND CONSERVATION & DEV. (Goal 5), *supra* note 250, at 1-3; see OR. ADMIN. R. 660-023-0220; 660-023-0180; 660-023-0160; 660-023-0170; 660-023-0200; 660-023-0120; 660-023-0130.

363. OR. DEP’T OF LAND CONSERVATION & DEV. (Goal 5), *supra* note 250, at 2.

364. *Id.*

Arguably, Goal 5 is largely procedural, and difficult to enforce.³⁶⁵ Much like the National Environmental Policy Act,³⁶⁶ Goal 5 involves a number of “hard look” provisions, directing local governments to “conserve” and “protect” natural resources, without providing substantive measures or minimum standards to use as benchmarks.³⁶⁷ Often, the merits of the decision to deem resources unprotected go unexamined or are given large deference.³⁶⁸ In one case, the court noted that Goal 5:

does not require a local government to provide ‘clear and objective standards’ by which it resolves ESEE conflicts. The rules simply require the government to present ‘reasons’ in its . . . plan that support its decisions about resources sites and conflicting uses.³⁶⁹

However, the procedural aspects of Goal 5 are given much weight. In fact, it has been used in a number of development contexts. In the current proposal to develop West Hayden Island, an island in the Columbia River, into a marine terminal, and annex it to Portland:

Metro completed the required process to comply with . . . Goal 5. . . . They first developed an inventory of . . . significant riparian corridors . . . and wildlife based on a scientific assessment. . . . Metro . . . assess[ed] the tradeoffs of protecting or not protecting the resources identified in the inventory. Based on this ESEE . . . Metro determined to allow and to limit some conflicting uses . . . thereby establishing different levels of protection for significant fish and wildlife habitat based on habitat quality and urban development potential.³⁷⁰

Thus, Goal 5 requirements are frequently addressed, especially where environmental stakeholders are involved.

Further, citizens with LUBA standing can challenge development decisions on the basis of non-compliance with these procedures.³⁷¹

365. Rothrock, *supra* note 361, at 488 (stating that “Goal Five lacks substance, as plan challengers are able to litigate only issues of procedural compliance.”).

366. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

367. Rothrock, *supra* note 361, at 464 (stating that Goal 5 does not specify what constitutes “need to LCDC.”).

368. *See id.* at 474.

369. *Williams v. Land Conservation & Dev. Comm’n*, 961 P.2d 269, 279 (Or. Ct. App. 1998).

370. Memorandum from Bureau of Planning and Sustainability to West Hayden Island Advisory Committee from Regulatory Requirements Project Team, at 15 (Sept. 13, 2011) (on file with author).

371. For example, in one instance, an environmental advocacy group successfully challenged comprehensive plan for Wells Island, a small island with excellent bird habitat. The Oregon Court of Appeals explained that “[t]he inventory of resource sites and the analysis of ESEE consequences which the rules require are not merely formal hurdles for the city to surmount; they are essential tools for the planning process.” Rothrock, *supra* note 361, at 473 (discussing and citing *Friends of the Columbia Gorge, Inc. v. Land Conservation & Dev. Comm’n*, 736 P.2d 575, 576 (Or. Ct. App.

Consequently, local and regional governments generally comply with the requirements set forth in Goal 5, so at the very least, natural resources are inventoried and considered. Decisions to mitigate impacts later become a part of the development and environmental review process.

d. Goals 16–19: Coastal Lands Conservation

Goals 16 through 19 deal with the conservation of ocean and coastal resources.³⁷² Much of the language in these goals parallels that of Goal 5, requiring the conservation of ecological and marine resources in lieu of ESEE consequences.³⁷³ In a 2008 study, the success of Goal 16 (estuarine resources) was evaluated.³⁷⁴ Goal 16 concerns itself with protecting “the unique environmental, economic, and social values of each estuary and wetland.”³⁷⁵ It was the first of the “coastal goals” adopted by LCDC.³⁷⁶ The remaining goals ensure Oregon’s participation in the federal Coastal Zone Management Act (CZMA), and establish the Oregon Coastal Management Program.³⁷⁷

Goal 16 requires an inventory of estuarine resources, identifying the “nature, location, and extent of physical, biological, social, and economic resources” so that identification of preservation and development areas is possible.³⁷⁸ In answering the question of whether Oregon’s land use program has “been effective in protecting and developing estuarine areas, consistent with Goal 16 requirements,” the study examined factors such as the net gain or loss of wetlands, streams meeting minimum flow requirements, and the percent of monitored freshwater species at risk.³⁷⁹ These “benchmarks” were chosen by the Oregon Progress Board, while some were deemed “key performance measures” by vari-

1987)); *Ramsey v. City of Portland*, 836 P. 2d 772 (Or. Ct. App. 1992); *Plotkin v. Washington Cnty*, 997 P.2d 226 (Or. Ct. App. 2000).

372. OR. ADMIN. R. 660-015-0000(16) to (19) (2013).

373. Goal 19 is to “conserve marine resources and ecological functions for the purpose of providing long-term ecological, economic, and social value and benefits.” OR. DEP’T OF LAND CONSERVATION & DEV. (Goal 19), *supra* note 250, at 1.

374. THE INST. FOR NATURAL RESOURCES OF OR. STATE UNIV., THE OREGON LAND USE PROGRAM: AN ASSESSMENT OF SELECTED GOALS (Aug. 2008), available at <http://ir.library.oregonstate.edu/xmlui/handle/1957/13920>.

375. OR. DEP’T OF LAND CONSERVATION & DEV. (Goal 16), *supra* note 250, at 1.

376. THE INST. FOR NATURAL RESOURCES OF OR. STATE UNIV., *supra* note 374, at 99.

377. *Id.* at 99. The Oregon Coastal Management Plan was developed in 1977 to ensure that coastal areas are managed, conserved, and developed consistent with statewide goals. OR. COASTAL MGMT. PROGRAM, OREGON.GOV, <http://www.oregon.gov/LCD/OCMP/> (last visited Mar. 5, 2012).

378. OR. ADMIN. R. 660-015-0010 (2013).

379. THE INST. FOR NATURAL RESOURCES OF OR. STATE UNIV., *supra* note 374, at 99.

ous state agencies, such as the Oregon Department of Environmental Quality or the Department of State Lands.³⁸⁰

Unlike Goal 5, Goal 16 includes “detailed inventory, planning, and implementation requirements.”³⁸¹ Estuary planning was initially done in 1969, when there was a “high visibility of coastal zone problems” at the national level.³⁸² LCDC was required to classify each estuary and “specify the most intensive level of development” that could occur there.³⁸³ As a result of early-on classification, Goal 16 has been effective at concentrating development in some estuaries, while preventing it in others. This suggests that identifying resources and target levels of development early on, is particularly effective in managing natural resources.

Monitoring done on Oregon’s coastline reveals that “estuaries are “generally in good condition.”³⁸⁴ This success can further be attributed to compliance with federal environmental statutes. Water quality in estuary resources has been diligently monitored by DEQ, as required under the Clean Water Act, so state agencies are already responsible for collecting data on water quality and pollutants.³⁸⁵

Limiting the construction of single-purpose docks or piers to lessen the impacts of intrusion into coastal areas has also been a component of Goal 16.³⁸⁶ While there were no specific statistics available on these types of docks, only about 10% of development projects involve the use of docks or piers.³⁸⁷ This may be attributed to the presence of critical salmon habitat, which limits development in estuary resources,³⁸⁸ demonstrating that federal environmental statutes such as the Endangered Species Act of 1973³⁸⁹ help to reinforce the state’s objectives. Approximately 98% of intertidal and tidal marsh habitat has been zoned Natural or Conservation, so that near-full protection of those habitats are planned to occur.³⁹⁰

Lastly, the study notes that the requirement for state agency coordination in reviewing estuary plans for consistency with Goal 16 has

380. *Id.* at 106.

381. *Id.* at 108.

382. *Id.*

383. *Id.*

384. *Id.* at 120.

385. *Id.* at 123.

386. *Id.* at 125.

387. *Id.*

388. *Id.*

389. 16 U.S.C. § 1531 (2012).

390. THE INST. FOR NATURAL RESOURCES OF OR. STATE UNIV., *supra* note 374, at 131.

been highly successful.³⁹¹ State agencies with permitting authority must consider the factors set forth in Goal 16 prior to issuing permits. While Goal 16 has its shortcomings, such as a lack of systematic review, it has been successful in provoking stakeholders to think about the factors set forth in Goal 16 prior to development. Lastly, federally enforced statutes such as the ESA and CWA contain “overlapping” concerns, aiding in the achievement of Goal 16.

4. AFFORDABLE HOUSING AND GOAL 10

Goal 10 addresses the provision of affordable housing. The purpose of the goal is to “provide for the housing needs of citizens of the state.”³⁹² Goal 10 states that “buildable lands”³⁹³ for residential use shall be inventoried,³⁹⁴ and requires plans to “encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households. . . .”³⁹⁵ Oregon’s results in this area are mixed, as several critics assert that a tight UGB drives up the cost of housing.

The Lincoln Institute’s study notes that between 1990 and 2000, housing prices rose by 118% and the share of renters paying more than 30% of their household income increased more than any of the other eight states in the study.³⁹⁶ The study attributed this number to the lack of legislative emphasis placed on this goal in lieu of increasing density.³⁹⁷ However, the increase in pricing in the 1990’s may be due to the already low housing prices Portland experienced in the 1980’s due to Oregon’s recession.³⁹⁸

Critics attribute Portland’s UGB to the rise in housing prices, arguing that “a constrained land base should lead to more demand for land, and higher demand is expected to drive up housing costs.”³⁹⁹

However, the UGB is not the only land use control that affects housing affordability. Other factors include zoning controls and subdivision ordinances, which determine the density and type of residential

391. *Id.* at 129.

392. OR. DEP’T OF LAND CONSERVATION & DEV. (Goal 10), *supra* note 250, at 1; see OR. ADMIN. R. 660-008-0000 (2013).

393. The Goal defines “buildable lands” as urban(izable) areas that are suitable, available, and necessary for residential use. See OR. ADMIN. R. 660-008-0005(2).

394. OR. DEP’T OF LAND CONSERVATION & DEV. (Goal 10), *supra* note 250, at 1-2. 395. *Id.*

396. INGRAM ET AL., *supra* note 14, at 195–96.

397. *Id.* at 196.

398. *But see* NELSON ET AL., *supra* note 22, at 25–26.

399. THE INST. FOR NATURAL RESOURCES OF OR. STATE UNIV., *supra* note 374, at 88.

development allowed.⁴⁰⁰ That being said, other studies have noted that Portland has had a dramatic increase in the volume and proportion of smaller and more affordable developed, single-family lots.⁴⁰¹ They conclude there is no “statistically significant” association between the UGB and housing prices, and that Portland’s housing was approximately \$20,000 less than model predictions.⁴⁰²

Researchers favoring Portland’s success in providing affordable housing predict that while the UGB can reduce the supply of developable land, higher densities can offset the reduction.⁴⁰³ In a 2002 study looking at data between 1980 and 2000, Portland’s housing prices grew faster relative to other areas for a period of four years.⁴⁰⁴ The remainder of the time, housing prices rose less rapidly than many of Portland’s Western counterparts,⁴⁰⁵ supporting the assertion that there is no proven link between the UGB and housing prices.⁴⁰⁶

Regardless, some have deemed Oregon to be in an “affordable housing crisis.”⁴⁰⁷ One study notes that 25.4% of Oregonians spent more than 30% of their income on housing.⁴⁰⁸ This may be due to the “non-mandatory” nature of Goal 10. The administrative rules accompanying Goal 10 provide guidelines on how local governments can achieve compliance.⁴⁰⁹ While a housing element in comprehensive plans is necessary, and Goal 10 encourages a range of housing, it does not explicitly require affordable housing to be built.

The failure of the Department of Land Conservation and Development (DLCD), the agency that staffs LCDC, to examine factors beyond “buildable land” during the periodic review process,⁴¹⁰ a lack of funding for the state Housing Trust Fund, and a lack of inter-agency coordination may further contribute to the problem.⁴¹¹ Another factor

400. *Id.*

401. *Attkisson*, *supra* note 41, at 1002.

402. NELSON ET AL., *supra* note 22, at 26; THE INST. FOR NATURAL RESOURCES OF OR. STATE UNIV., *supra* note 374, at 89.

403. NELSON ET AL., *supra* note 22, at 26.

404. THE INST. FOR NATURAL RESOURCES OF OR. STATE UNIV., *supra* note 374, at 89.

405. *Id.*

406. For a review of the literature on the impact of growth management policies in the Portland, Oregon metropolitan area on housing prices, see NELSON ET AL., *supra* note 22.

407. SUSAN HOPKINS & AARON ABRAMS, OR. CHAPTER OF THE AM. PLANNING ASS’N, OREGON’S LAND USE PLANNING PROGRAM: HOUSING POLICY 1 (Spring 2005), available at http://centralpt.com/upload/342/2411_WP_housing.pdf.

408. *Id.* at 2.

409. See, e.g., OR. ADMIN. R. 660-008-0010, 660-008-0030 (2013)(defining how buildable land should be allocated and requiring regional coordination when planning for residential growth)

410. See HOPKINS & ABRAMS, *supra* note 407, at 10.

411. *Id.* at 11.

is the average income of the state, which has remained relatively low, as housing costs increase.⁴¹²

Goal 10 has not been widely successful. There are no specific “benchmarks” or implementing guidelines set by LCDC, like there were with Goal 16. Moreover, “Goal 10’s focus on land supply is narrow, and as such does not address many key factors necessary to promote housing affordability,” such as income, gentrification, and concentration of low-income neighborhoods.⁴¹³ Further, housing concerns are better implemented at the regional level, rather than the local level, to address social spillover. Economic development is also a key factor in housing affordability, and provides a strong argument for inter-agency coordination and oversight at the state level.⁴¹⁴

In sum, Oregon’s success in combating sprawl is a result of various parts of its land use system, and the interplay between them. SB 100 and 101 were a catalyst for the state’s goals, which reflect smart growth policies. The requirement for local governments’ plans to reflect those goals, and the state’s consistency requirements help to ensure a hierarchical system of planning. ODOT’s and LCDC’s participation in the planning process, further provide “checks” on local government land use decisions and help streamline processes. The ability of the public to challenge land use decisions that are inconsistent with state goals and slow down development processes in a single, specialized land use forum encourages developers and local government to comply with those goals. Overlapping aims of federal statutes also aid in the furtherance of certain state goals.

Recognizing that various aspects of land use planning, such as transportation and UGB expansion, require inter-agency coordination and regional collaboration, the state has been largely effective at reducing sprawl:

“The coordination requirement eliminates the ability of local governments to adopt a parochial outlook and to avoid communication with other municipalities Without coordination amongst communities, growth management efforts by individual local governments cannot effectively combat sprawl. . . . Without state guidance and mandates, local governments likely would continue to operate in isolation and attempt to address sprawl and its consequences unsuccessfully.”⁴¹⁵

412. *Id.* at 10.

413. *Id.* at 15.

414. For a compendium of Oregon law on affordable housing, see Bill Kloos, Presentation to Oregon Chapter of the American Planning Association, *Planning for Housing: Don’t Forget the Basics*, (May 15, 2008), available at http://cms.oregon.gov/LCD/docs/rulemaking/affordable_housing/kloos_article_on_goal_10.pdf.

415. Attkisson, *supra* note 41, at 1003.

While Oregon has demonstrated success in a host of smart growth factors, there is room for improvement in the way of benchmarking and mandating periodic review processes across its jurisdictions.⁴¹⁶ Critical to Oregon's ability to contain growth have been progressive legislation, active citizen participation, and the state's continued oversight and guidance. While it has much more to do in terms of affordable housing, Oregon suggests that a "shift in development patterns can meet the goals of environmental protection, while still fostering economic development."⁴¹⁷

V. Conclusion: Features of Effective Smart Growth Programs

A. Voluntary Smart Growth Programs are Ineffective

States employing voluntary smart growth programs are only as good as the local governments, citizens, and the time and resources they have to implement such programs. Without directive to do so, there is little incentive to ensure smart growth occurs, unless "carrots" given by the state are particularly enticing. Without state enforcement in the form of "sticks," local governments may ignore the spill over harms caused by their actions, such as traffic congestion, flooding, and air and water pollution, especially when it is cheaper and easier to do so.⁴¹⁸

While it is possible to succeed in some areas of smart growth, success in all factors is unlikely under a pure, bottom-up planning regime. Colorado and Virginia demonstrate that it is beneficial to have some type of state or regional check on decision making to guide planning at the local level, because without the presence of market factors or topographical characteristics that prevent sprawl, it is likely to occur. Virginia's recent legislation giving VDOT authority to review plans and requiring the establishment of urban development areas appears to be a step in the right direction.

Further, even when local governments are given authority to utilize smart growth tools, without any incentive or guidance on how to implement them, they are unlikely to use them.⁴¹⁹ Land use systems giving significant discretion to local governments without state checks on

416. For fiscal reasons, periodic review is less of a force in the Oregon program. See Sullivan, *Quiet Revolution*, *supra* note 241 at 392-93.

417. Wickersham, *supra* note 94, at 548.

418. *Id.* at 503.

419. See *supra*, discussion, Part III.A.

planning, are unlikely to yield success in smart growth factors. Relying on local governments to “voluntarily” engage in smart growth without much in the form of state oversight, enforcement, or guidance is a high-risk method of implementing smart growth policies.

B. *Successful State Planning Systems Include Several Critical Components*

The existence of a state planning system that articulates smart growth policies in its planning rules is not necessarily determinative of a successful program. Successful smart growth programs include specific implementation measures, regional collaboration, state agency oversight and coordination, classifying developable land, and prioritization of affordable housing.

1. DELEGATION AND SPECIFIC IMPLEMENTATION MEASURES

Oregon is an example of a state where specific state policies address many smart growth aims, and provide specific measures to ensure implementation. Critical to Oregon’s success has been its implementing regulations, which provide detailed mechanisms for reaching most of these goals. For example, in establishing the UGB, local governments are directed to provide “financial incentives . . . to assist in maintaining the . . . character of lands adjacent to urbanizable areas.”⁴²⁰

However, implementation measures must be drafted in a way so as to give local governments discretion in how to carry out those policies as such programs are not a “one size fits all” mechanism, and should give sufficient autonomy to local governments to plan for their own needs. Delegating planning to local governments, while providing guidelines, allows local plans to address specific needs of an area and helping to meet smart growth goals, may have led to the undoing of that state’s land use program.

On the other hand, Florida’s former land use system presents an example of a growth management system in which regulatory power was largely left to the state. The state’s numerous planning requirements yielded little success because it failed to articulate specific ways to implement its goals. Without implementation procedures that actually correlate with reducing sprawl, local governments lack the guidance needed to engage in smart growth planning.⁴²¹

420. OR. DEP’T OF LAND CONSERVATION & DEV. (Goal 14), *supra* note 250, at 3.

421. *See* Attkisson, *supra* note 41, at 1007.

2. STAGE AGENCY OVERSIGHT AND COORDINATION

State oversight dictates the success of smart growth programs. Oversight ensures that local governments do not engage in planning that contradicts smart growth policies. Further, enforcement mechanisms such as withholding funding or development permits have been highly successful in ensuring local government plans and land use decisions further smart growth policies. In Oregon, while the state delegates planning authority to local governments, state agency review by LCDC and ODOT and their authority to use “sticks”, ensures local plans meet both specific, local needs, as well as the state’s needs.

Where states have used purely incentive-based mechanisms, local governments and developers have been unresponsive, especially where it is cheaper to develop in an uncoordinated and sprawled fashion. However, linking specific funds to particular planning processes is likely to be recognized by local governments. Relevant to the oversight process is the requirement for land use decisions and regulations to be consistent with comprehensive plans.

Without a consistency requirement, local plans that include smart growth policies remain largely “advisory” and without effect, as land use decisions can be made in contravention of smart growth aims. It is equally important to review plan amendments for consistency with smart growth aims. Florida’s failure to continuously review local plans for consistency contributed to its demise as a smart growth state.

Partnering various state agencies in local government decisions and planning processes helps to streamline administrative procedures and encourages dialogue between key agencies. In particular, the partnership of transportation, land use planning, and adequate public facilities agencies help to ensure that development occurs in a harmonized fashion, in the correct location, and the efficient use of resources. Oregon demonstrates that partnering ODOT and LCDC with the common goal of reducing GHGs has made Portland one of the “easiest” cities to live in without a vehicle. New Jersey’s SSP further emphasizes inter-agency coordination, citing efficient use of state resources, streamlining various planning processes, and ensuring accurate information exchange as benefits.

3. REGIONAL COLLABORATION

Regional collaboration is critical in transportation planning. In large part, funding for transportation infrastructure comes from the state. Where resources must be split among local governments, cooperation

at the regional level helps to ensure the most efficient use of shared resources occurs, and spillover effects associated with transportation development are minimized. Further, requiring regional collaboration in the context of transportation planning helps to ensure long term growth is considered, that infrastructure is located in the “right” areas, and that resources are pooled, rather than imposing costs on one area, for solving common problems.

Virginia demonstrates that uncoordinated preservation efforts may result in sprawl, as developable areas are actually preserved, and vice versa. Regional collaboration can also ensure protection of critical resources where local governments may lack the resources to do so individually. New Jersey demonstrates that regional commissions benefit local governments lacking the resources to deal with various problems independently. Often where an affected resource is shared by multiple jurisdictions, and market factors do not command protection, only a mandatory regional or statewide planning system can help protect the resource from harm.⁴²²

4. IDENTIFYING AND PRIORITIZING DEVELOPABLE LAND

Establishing a physical boundary and prioritizing developable land using defined factors have proven successful in preventing sprawl. While drawing a “physical” boundary is not the only way to ensure compact development, it has proven successful in Oregon in the form of the UGB. Setting a “physical boundary” helps confine development and prevents sprawl. Virginia demonstrates recognition of Oregon’s success in its establishment of UDAs.

Further, using objective factors to classify and protect natural resources has proven successful in Oregon, as local governments are required and able to identify certain natural resources, consider any conflicting uses, and protect as necessary. Using objective factors such as proximity to public facilities and use compatibility to identify and prioritize land yields consistent procedures across the state, and leads to a more coordinated pattern of development.

5. PRIORITIZATION OF AFFORDABLE HOUSING

Nearly all of the states faced affordable housing shortages. While smart growth programs are said to drive up housing costs, this proposition has not been definitely proved. However, without adequate

422. Wickersham, *supra* note 94, at 504.

funding and prioritization for affordable housing, it becomes difficult to provide in any state. As such, adequate attention must be given to affordable housing in land use plans, as well as specific implementation measures for affordable housing, beyond just identifying the projected need. Lastly, as New Jersey demonstrates, the state must have some oversight over municipal planning in order to eradicate exclusionary zoning. Where too much discretion is given to local governments, at least in terms of meeting *Mt. Laurel* requirements, municipalities can ignore the Fair Housing Act and promote economically segregated communities.

A strong state role means little in the context of smart growth without the aforementioned factors. State or third party agency review of local government plans and amendments for compliance with smart goals is necessary. Incentive-based programs may also work to a degree, but should not be the primary basis of implementation, and enforcement-based compliance mechanisms have proven effective, especially in the form of state-permit or fund withholding. Coordination between state agencies and across local governments further helps streamline planning processes. Without stringent enforcement mechanisms by the state, or particularly enticing incentives, local governments are likely to engage in planning processes that are most beneficial to their own community, regardless of impacts to neighboring counties.

Oregon has pioneered an aggressive growth management system, and has worked to oversee the right aspects of the land use system, insisting on patterns of compact, higher-density, mixed-use development; and provides the means for local governments to implement those patterns.⁴²³ The degree of state agency oversight and public involvement in Oregon's system ensured that such "hard looks" have been taken, demonstrating that state governments play a crucial role in ensuring development occurs in the most efficient and environmentally responsible manner possible.

423. See Wickersham, *supra* note 94, at 547.

